OPINION OF ADVOCATE GENERAL JACOBS

delivered on 3 October 2002 [1]

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Introduction

1. In this case the Commission seeks the annulment of Decision No 1999/726/EC of 7 October 1999 [2] by which the European Central Bank ('the ECB') established an anti-fraud committee responsible for the monitoring of the activities of the Directorate for Internal Audit of the ECB aimed at prevention of fraud and other illegal activities detrimental to the financial interests of the ECB. The Commission — supported by the Council, the European Parliament and the Netherlands Government — submits that that decision is contrary to Regulation No 1073/1999 of the European Parliament and of the Council of 25 May 1999 concerning investigations conducted by the European Anti-Fraud Office (OLAF). [3] The ECB replies that Decision No 1999/726/EC pursues the same aim as Regulation No 1073/1999 without being contrary to it and that the Regulation must be interpreted so as to be inapplicable to its activities. In the alternative, it asks the Court to declare the Regulation inapplicable pursuant to Article 241 EC for lack of legal basis, breach of an essential procedural requirement, and violation of the independence of the ECB and the principle of proportionality.

2. The case raises a number of important issues concerning, in particular, the scope of Community competence to adopt measures under Article 280 EC aimed at combating fraud and other illegal activities affecting the financial interests of the Community, the obligation of the Community institutions and the Member States to respect the independence of the ECB imposed by Article 108 EC and the duty to consult the ECB on proposed Community acts falling within its fields of competence laid down in Article 105 EC. It also falls to be considered whether the ECB, having failed to challenge a regulation within the time-limit laid down in the fifth paragraph of Article 230 EC, may plead its inapplicability pursuant to Article 241 EC.

2 — Decision of the European Central Bank of 7 October 1999 on fraud prevention (ECB/1999/5), OJ 1999 L 291, p. 36.

3 — OJ 1999 L 136, p. 1. Hereinafter 'Regulation No 1073/1999'.

Background

3. It is well known that substantial amounts of Community funds are lost each year as a result of fraud and other irregularities committed by natural and legal persons. In the year 2000 the Commission and the competent authorities of the Member States dealt with 6 915 new cases of fraud and other irregularities with an estimated budgetary impact of 2 030 million eur. [4] The Community institutions have responded to this problem by adopting a number of legislative measures aimed specifically at combating fraud. [5]

4. The founding treaties did not provide a specific legal basis for measures in the field of fraud prevention and protection of the financial interests of the Community. Article 209a of the EC Treaty (now, after amendment, Article 280 EC), which was inserted by the Treaty on European Union, obliged the Member States to take the same measures to counter fraud affecting the financial interests of the Community as they take to counter fraud affecting their own financial interests [6] and to coordinate their action aimed at protecting the financial interests of the Community against fraud, but did not grant the Community any new legislative powers. However, the Treaty of Amsterdam substantially amended that provision, granting the Community explicit competence to take 'the necessary measures in the fields of the prevention of and fight against fraud'.

5. Prior to the entry into force of the Treaty of Amsterdam, the Communities adopted various measures aimed at combating fraud committed by recipients of Community funds in the Member States on the basis of Article 308 EC. [7] In essence, those measures grant the Commission the right to carry out on-the-spot checks and inspections in the Member States, and oblige the Member States to lay down effective, proportionate and dissuasive penalties and to cooperate in cases involving cross-border fraud. [8]

6. Efforts have also been made to reduce the risk of fraud occurring within the Community institutions themselves. For present purposes, the initiatives taken by the Commission and the ECB are particularly relevant.

4 — See Commission Annual Report 2000 concerning the protection of the Communities' financial interests and the fight against fraud, COM(2001) 255 Final, p. 76.

5 — For an overview of the initiatives taken, see Protecting the Communities' financial interests, fight against fraud, Action Plan for 2001-2003, COM(2001) 254 Final.

6 — Article 209a of the EC Treaty thus enshrined in the Treaty the principles laid down in Case C-68/88 *Commission* v *Greece* [1989] ECR 2965, paragraphs 23 to 26 of the judgment.

7 — Council Regulation (EC, Euratom) No 2988/95 of 18 December 1995 on the protection of the European Communities financial interests, OJ 1995 L 312, p. 1, and the more detailed provisions contained in Council Regulation (Euratom, EC) No 2185/96 of 11 November 1996 concerning on-the-spot checks and inspections carried out by the Commission in order to protect the European Communities' financial interests against fraud and other irregularities, OJ 1996 L 292, p. 2.

8 — Those measures are complemented by, in particular, the Convention drawn up on the basis of Article K.3 of the Treaty on European Union, on the protection of the European Communities' financial interests, OJ 1995 C 316, p. 49.

7. The Commission first created a specific anti-fraud unit (*Unité de coordination de la lutte anti-fraude* (UCLAF)) in 1987. In 1995 that unit was given responsibility for all Commission anti-fraud activity, including investigation of fraud and other irregularities committed by Commission staff. In order to strengthen the protection of the Community's financial interests and, perhaps, in response to criticisms levelled at UCLAF [9] the Commission proposed in 1998 the establishment of a new and independent anti-fraud service to be known as the Anti-Fraud Office or *Office de Lutte Anti-Fraude* (OLAF). [10] While the Commission initially proposed to establish OLAF — and to lay down detailed provisions for its operation — by a regulation based on Article 308 EC, OLAF was eventually established by a decision. [11] General rules for its activities, which include 'external investigations' in the Member States and 'internal investigations' of fraud within the Community institutions and bodies, were laid down in Regulation No 1073/1999, which is the first measure based on the new Article 280(4) EC. [12] The Regulation envisages the adoption, by each of the institutions and bodies of the European Community, of a decision laying down more detailed rules for the procedures to be followed in internal investigations conducted by OLAF, and an interinstitutional agreement concluded in 1999 [13] provides a model for those decisions.

8. Within the ECB, two administrative structures share the task of combating fraud and other irregularities. Primary responsibility lies with Directorate for Internal Audit ('D-IA'). It appears from documents submitted to the Court in the present case that the role of D-IA is generally to assess the efficiency and relevance of the functioning of the services of the ECB, and to propose improvements. [14] D-IA carries out the task of detecting and preventing fraud as part of that role. D-IA has since November 1999 [15] shared that responsibility with an anti-fraud committee. The anti-fraud committee — which was established by the decision of the Governing Council challenged by the Commission in the present case — is responsible for the regular monitoring of the functions of D-IA. [16]

9 — See, in particular, Court of Auditors Special Report No 8/98 on the Commission's services specifically involved in the fight against fraud, notably the 'unité de coordination de la lutte anti-fraude' (UCLAF) together with the Commission's replies, OJ 1998 C 230, p. 1. For an account of the Commission's response and the genesis of OLAF, see L. Kuhl and H. Spitzer, 'Das Europäische Amt für Betrugsbekämpfung (OLAF)', *Europarecht* 2000, p. 671.

10 — Proposal for a Council regulation (EC, Euratom) establishing a European Fraud Investigation Office, COM(1998) 717 Final.

11 — Commission Decision of 28 April 1999 establishing the European Anti-fraud Office (OLAF), OJ 1999 L 136, p. 20.

12 — Regulation No 1073/1999, cited in note 3. Identical provisions were laid down with effect for the Euratom Community by Council Regulation (Euratom) No 1074/1999 of 25 May 1999 concerning investigations conducted by the European Anti-Fraud Office (O[L]AF), OJ 1999 L 136, p. 8.

13 — Interinstitutional agreement of 25 May 1999 between the European Parliament, the Council of the European Union and the Commission of the European Communities concerning internal investigations by the European Anti-fraud Office (OLAF), OJ 1999 L 136, p. 15.

14 — ECB Audit Charter, Administrative Circular 4/99 of 23 February 1999; replaced by ECB Audit Charter, Administrative Circular 8/99 of 12 October 1999

15 — The contested decision which created the anti-fraud committee entered into force when published in the Official Journal 13 November 1999, in accordance with Article 8.

16 — I will refer to D-IA and the anti-fraud committee as 'the ECB anti-fraud system'.

The relevant Community provisions

Provisions of the EC Treaty

9. Article 8 EC provides:

'A European System of Central Banks (hereinafter referred to as "ESCB") and a European Central Bank (hereinafter referred to as "ECB") shall be established in accordance with the procedures laid down in this Treaty; they shall act within the limits of the powers conferred upon them by this Treaty and by the Statute of the ESCB and of the ECB (hereinafter referred to as "Statute of the ESCB") annexed thereto.'

10. Article 105 EC, so far as is relevant, provides:

'1. The primary objective of the ESCB shall be to maintain price stability. Without prejudice to the objective of price stability, the ESCB shall support the general economic policies in the Community with a view to contributing to the achievement of the objectives of the Community as laid down in Article 2. The ESCB shall act in accordance with the principle of an open market economy with free competition, favouring an efficient allocation of resources, and in compliance with the principles set out in Article 4.

2. The basic tasks to be carried out through the ESCB shall be:

— to define and implement the monetary policy of the Community;

— to conduct foreign exchange operations consistent with the provisions of Article 111;

— to hold and manage the official foreign reserves of the Member States;

— to promote the smooth operation of payment systems.

...

4. [17] The ECB shall be consulted:

— on any proposed Community act in its fields of competence;

— by national authorities regarding any draft legislative provision in its fields of competence, but within the limits and under the conditions set out by the Council in accordance with the procedure laid down in Article 107(6).

The ECB may submit opinions to the appropriate Community institutions or bodies or to national authorities on matters in its fields of competence.

5. The ESCB shall contribute to the smooth conduct of policies pursued by the competent authorities relating to the prudential supervision of credit institutions and the stability of the financial system.

6. The Council may, acting unanimously on a proposal from the Commission and after consulting the ECB and after receiving the assent of the European Parliament, confer upon the ECB specific tasks concerning policies relating to the prudential supervision of credit institutions and other financial institutions with the exception of insurance undertakings.'

11. Article 106 EC, so far as is relevant, provides:

'1. The ECB shall have the exclusive right to authorise the issue of banknotes within the Community....

2. Member States may issue coins subject to approval by the ECB of the volume of the issue....'

17 — Article 4 of the Statute contains a provision identically worded to Article 105(4) EC.

12. Article 108 EC provides: [18]

'When exercising the powers and carrying out the tasks and duties conferred upon them by this Treaty and the Statute of the ESCB, neither the ECB, nor a national central bank, nor any member of their decision-making bodies shall seek or take instructions from Community institutions or bodies, from any government of a Member State or from any other body. The Community institutions and bodies and the governments of the Member States undertake to respect this principle and not to seek to influence the members of the decision-making bodies of the ECB or of the national central banks in the performance of their tasks.'

13. Article 280 EC provides, so far as is relevant:

'1. The Community and the Member States shall counter fraud and any other illegal activities affecting the financial interests of the Community through measures to be taken in accordance with this Article, which shall act as a deterrent and be such as to afford effective protection in the Member States.

2. Member States shall take the same measures to counter fraud affecting the financial interests of the Community as they take to counter fraud affecting their own financial interests.

3. Without prejudice to other provisions of this Treaty, the Member States shall coordinate their action aimed at protecting the financial interests of the Community against fraud. To this end they shall organise, together with the Commission, close and regular cooperation between the competent authorities.

4. The Council, acting in accordance with the procedure referred to in Article 251, after consulting the Court of Auditors, shall adopt the necessary measures in the fields of the prevention of and fight against fraud affecting the financial interests of the Community with a view to affording effective and equivalent protection in the Member States. These measures shall not concern the application of national criminal law or the national administration of justice.

...'

18 — Article 7 of the Statute contains an identically worded provision.

14. Article 287 EC provides:

'The members of the institutions of the Community, the members of committees, and the officials and other servants of the Community shall be required, even after their duties have ceased, not to disclose information of the kind covered by the obligation of professional secrecy, in particular information about undertakings, their business relations or their cost components.'

The decision establishing OLAF

15. OLAF was established by Commission Decision No 1999/352 of 28 April 1999 ('Decision No 1999/352'), [19] adopted on the basis of Article 162 of the EC Treaty (now Article 218 EC), Article 16 of the ECSC Treaty and Article 131 of the Euratom Treaty.

16. With regard to the 'Tasks of the Office', Article 2 of Decision No 1999/352 provides, in so far as relevant:

'1. The Office shall exercise the Commission's powers to carry out external administrative investigations for the purpose of strengthening the fight against fraud, corruption and any other illegal activity adversely affecting the Community's financial interests, as well as any other act or activity by operators in breach of Community provisions.

The Office shall be responsible for carrying out internal administrative investigations intended:

(a) to combat fraud, corruption and any other illegal activity adversely affecting the Community's financial interests,

(b) to investigate serious facts linked to the performance of professional activities which may constitute a breach of obligations by officials and servants of the Communities likely to lead to disciplinary and, in appropriate cases, criminal proceedings or an analogous breach of obligations by Members of the institutions and bodies, heads of the bodies or members of staff of the institutions and bodies not subject to the Staff Regulations of Officials of the European Communities and the Conditions of Employment of Other Servants of the Communities.

The Office shall exercise the Commission's powers as they are defined in the provisions

19 — Cited in note 11.

established in the framework of the Treaties, and subject to the limits and conditions laid down therein.

The Office may be entrusted with investigations in other areas by the Commission or by the other institutions or bodies.

...

7. The Office shall represent the Commission, at service level, in the forums concerned, in the fields covered by this Article.'

17. According to Article 4 of Decision No 1999/352:

'A Surveillance Committee shall be established, the composition and powers of which shall be laid down by the Community legislature. This Committee shall be responsible for the regular monitoring of the discharge by the Office of its investigative function.'

18. Article 6(4) of Decision No 1999/352 provides:

'Commission decisions concerning its internal organisation shall apply to the Office in so far as they are compatible with the provisions concerning the Office adopted by the Community legislator, with this Decision and with the detailed rules implementing it.'

19. Under Article 7, Decision No 1999/352 was to 'take effect on the date of the entry into force of the European Parliament and Council Regulation (EC) concerning investigations carried out by the European Anti-fraud Office'.

The regulation concerning investigations carried out by OLAF

20. Regulation No 1073/1999[20] was adopted on the basis of Article 280 EC.

21. Article 1 of Regulation No 1073/1999, entitled 'Objectives and task', provides:

'1. In order to step up the fight against fraud, corruption and any other illegal activity affecting the financial interests of

20 — Cited in note 3. Council Regulation (Euratom) No 1074/1999, cited in note 12, lays down with effect for the Euratom Treaty substantially identical provisions. However, that regulation is not at issue in the present case.

the European Community, the European Anti-Fraud Office established by Commission Decision 1999/352/EC, ECSC, Euratom (hereinafter "the Office") shall exercise the powers of investigation conferred on the Commission by the Community rules and Regulations and agreements in force in those areas.

2. The Office shall provide the Member States with assistance from the Commission in organising close and regular cooperation between their competent authorities in order to coordinate their activities for the purpose of protecting the European Community's financial interests against fraud. The Office shall contribute to the design and development of methods of fighting fraud and any other illegal activity affecting the financial interests of the European Community.

3. Within the institutions, bodies, offices and agencies established by, or on the basis of, the Treaties (hereinafter "the institutions, bodies, offices and agencies"), the Office shall conduct administrative investigations for the purpose of:

— fighting fraud, corruption and any other illegal activity affecting the financial interests of the European Community,

— investigating to that end serious matters relating to the discharge of professional duties such as to constitute a dereliction of the obligations of officials and other servants of the Communities liable to result in disciplinary or, as the case may be, criminal proceedings, or an equivalent failure to discharge obligations on the part of members of institutions and bodies, heads of offices and agencies or members of the staff of institutions, bodies, offices or agencies not subject to the Staff Regulations of officials and the Conditions of employment of other servants of the European Communities ("the Staff Regulations").'

22. Article 4 of Regulation No 1073/1999, entitled 'Internal investigations', so far as is relevant provides:

'1. In the areas referred to in Article 1, the Office shall carry out administrative investigations within the institutions, bodies, offices and agencies (hereinafter "internal investigations").

These internal investigations shall be carried out subject to the rules of the Treaties, in particular the Protocol on privileges and immunities of the European Communities, and with due regard for the Staff Regulations under the conditions and in accordance with the procedures provided for in this Regulation and in decisions adopted by each institution, body, office and agency. The institutions shall consult each other on the rules to be laid down by such decisions.

2. Provided that the provisions referred to in paragraph 1 are complied with:

— the Office shall have the right of immediate and unannounced access to any information held by the institutions, bodies, offices and agencies, and to their premises. The Office shall be empowered to inspect the accounts of the institutions, bodies, offices and agencies. The Office may take a copy of and obtain extracts from any document or the contents of any data medium held by the institutions, bodies, offices and agencies and, if necessary, assume custody of such documents or data to ensure that there is no danger of their disappearing,

— the Office may request oral information from members of the institutions and bodies, from managers of offices and agencies and from the staff of the institutions, bodies, offices and agencies.

...

4. The institutions, bodies, offices and agencies shall be informed whenever employees of the Office conduct an investigation on their premises or consult a document or request information held by such institutions, bodies, offices and agencies.

5. Where investigations reveal that a member, manager, official or other servant may be personally involved, the institution, body, office or agency to which he belongs shall be informed. In cases requiring absolute secrecy for the purposes of the investigation or requiring recourse to means of investigation falling within the competence of a national judicial authority, the provision of such information may be deferred.

6. Without prejudice to the rules laid down by the Treaties, in particular the Protocol on privileges and immunities of the European Communities, and to the provisions of the Staff Regulations, the decision to be adopted by each institution, body, office or agency as provided for in paragraph 1, shall in particular include rules concerning:

(a) a duty on the part of members, officials and other servants of the institutions and bodies, and managers, officials and servants of offices and agencies, to cooperate with and supply information to the Office's servants;

(b) the procedures to be observed by the Office's employees when conducting internal investigations and the guarantees of the rights of persons concerned by an internal investigation.'

23. According to Article 5 of Regulation No 1073/1999, 'internal investigations shall be opened by a decision of the Director of the Office, acting on his own initiative or following a request from the institution, body, office or agency within which the investigation is to be conducted'.

24. Article 6 of Regulation No 1073/1999, entitled 'Investigations procedure', provides:

'1. The Director of the Office shall direct the conduct of investigations.

2. The Office's employees shall carry out their tasks on production of a written authorisation showing their identity and their capacity.

3. The Office's employees shall be equipped for each intervention with a written authority issued by the Director indicating the subject matter of the investigation.

4. During on-the-spot inspections and checks, the Office's employees shall adopt an attitude in keeping with the rules and practices governing officials of the Member State concerned, with the Staff Regulations and with the decisions referred to in the second subparagraph of Article 4(1).

5. Investigations shall be conducted continuously over a period which must be proportionate to the circumstances and complexity of the case.

6. The Member States shall ensure that their competent authorities, in conformity with national provisions, give the necessary support to enable the Office's employees to fulfil their task. The institutions and bodies shall ensure that their members and staff afford the necessary assistance to enable the Office's agents to fulfil their task; the offices and agencies shall ensure that their managers and staff do likewise.'

25. Under Article 7 of Regulation No 1073/1999, entitled 'Duty to inform the Office':

'1. The institutions, bodies, offices and agencies shall forward to the Office without delay any information relating to possible cases of fraud or corruption or any other illegal activity.

2. The institutions, bodies, offices and agencies and, in so far as national law

allows, the Member States shall, at the request of the Office or on their own initiative, forward any document or information they hold which relates to a current internal investigation.

Member States shall forward the documents and information relating to external investigations in accordance with the relevant provisions.

3. The institutions, bodies, offices and agencies, and, in so far as national law allows, the Member States shall also send the Office any other document or information considered pertinent which they hold relating to the fight against fraud, corruption and any other illegal activity affecting the Communities' financial interests.'

26. Article 8 of Regulation No 1073/1999 lays down rules aimed at protecting the confidentiality of information and protection of data obtained in the course of investigations.

27. Article 9 of Regulation No 1073/1999, so far as is relevant, provides:

'1. On completion of an investigation carried out by the Office, the latter shall draw up a report, under the authority of the Director, specifying the facts established, the financial loss, if any, and the findings of the investigation, including the recommendations of the Director of the Office on the action that should be taken.

2. In drawing up such reports, account shall be taken of the procedural requirements laid down in the national law of the Member State concerned.

...

4. Reports drawn up following an internal investigation and any useful related documents shall be sent to the institution, body, office or agency concerned. The institution, body, office or agency shall take such action, in particular disciplinary or legal, on the internal investigations, as the results of those investigations warrant, and shall report thereon to the Director of the Office, within a deadline laid down by him in the findings of his report.'

28. Articles 11, 12 and 14 of Regulation No 1073/1999 lay down rules concerning the tasks of the Supervisory Committee, the tasks of the Director and the right to complain against acts adversely affecting officials or other servants of the Communities adopted by the Office in the course of internal investigations.

The Interinstitutional agreement concerning internal investigations by OLAF

29. On 25 May 1999 the European Parliament, the Council and the Commission concluded an interinstitutional agreement concerning internal investigations by OLAF[21] ('the Interinstitutional Agreement')

30. The parties agreed, in particular, to 'adopt common rules consisting of the implementing measures required to ensure the smooth operation of the investigations carried out by the Office within their institution' and to 'draw up such rules and make them immediately applicable by adopting an internal decision in accordance with the model attached to this Agreement and not to deviate from that model save where their own particular requirements make such deviation a technical necessity'.

31. The Agreement states moreover that '[t]he other institutions, and the bodies and offices and agencies established by or on the basis of the EC Treaty or the Euratom Treaty, are hereby invited to accede to this Agreement by forwarding a declaration addressed jointly to the Presidents of the signatory institutions'.

21 — Cited in note 13.

The contested decision

32. On 7 October 1999, the Governing Council of the ECB ('the Governing Council') adopted — on the basis of Article 12.3 of the Protocol on the Statute of the European System of Central Banks and of the European Central Bank ('the Statute')[22] — a decision on fraud prevention.[23]

33. The first and third recitals of the preamble to the contested decision state that the ECB attaches great importance to the protection of the Communities' financial interests and its own financial interests. According to the fourth and sixth recital of the preamble, the ECB aims to combat fraud and other illegal activities detrimental to its financial interests while maintaining the current distribution and balance of responsibilities between the ECB and the institutions of the European Communities and while taking account of the independence of the ECB and the fact that the ECB has its own budget and its own financial resources separate from those of the European Communities. The eighth recital of the preamble states that 'combating fraud and other illegal activities detrimental to the financial interests of the ECB is a core

22 — Protocol annexed to the EC Treaty.

23 — Decision No 1999/726/EC, cited in note 2. Hereinafter 'the contested decision'.

function of the Directorate for Internal Audit and... that Directorate is responsible for conducting administrative investigations within the ECB to this end'.

34. Article 1(1) and (2) of the contested decision, entitled 'ECB anti-fraud committee', provide:

'1. An anti-fraud committee shall be established in order to reinforce the independence of the Directorate for Internal Audit in its activities and reporting concerning all issues related to the prevention and detection of fraud and other illegal activities detrimental to the financial interests of the ECB and compliance with relevant internal standards and/or codes of conduct of the ECB. The composition and powers of the anti-fraud committee shall be laid down by this Article.

2. The anti-fraud committee shall be responsible for both the regular monitoring and the discharge of the activities referred to in paragraph 1 within the ECB by the Directorate for Internal Audit.'

35. According to Article 1(7), the anti-fraud committee may, where appropriate, instruct D-IA with regard to the performance of its activities.

36. According to Article 2 of the contested decision, entitled 'Responsibility for reporting on fraud issues':

'The Directorate for Internal Audit is, in accordance with this Decision and the procedures in force within the ECB, responsible for investigating and reporting on all issues related to the prevention and detection of fraud and other illegal activities detrimental to the financial interests of the ECB and on compliance with relevant internal standards and/or codes of conduct of the ECB.'

37. In order to ensure that the Directorate for Internal Audit is able to investigate and report on all issues relating to fraud prevention and detection effectively and with the required level of independence, Article 3 of the contested decision — entitled 'Independence' — provides that the Director of Internal Audit shall report to the anti-fraud committee referred to in Article 1 of the Decision on fraud issues. Under Article 1(7) of the contested provision the Director of Internal Audit is to forward a programme of its activities to the anti-fraud committee each year and D-IA is to keep the anti-fraud committee regularly informed, in particular of its investigations, the results thereof and the actions taken in that connection.

38. Under Article 1(3) to (5) of the contested decision, the anti-fraud committee is

composed of three outside independent persons, appointed by the Governing Council for a renewable term of three years, who in carrying out their duties must neither seek nor take instructions from the decision-making bodies of the ECB, from institutions or bodies of the European Communities, from any government or from any other institution or body.

39. According to Article 1(8) of the contested decision, the Anti-Fraud Committee must present reports on the results of the investigations carried out by D-IA and the action taken in their respect — as well as at least one general report a year on its activities — to the Governing Council, the external auditors of the ECB and the European Court of Auditors. Moreover, the anti-fraud committee may, pursuant to Article 1(10), inform the competent national judicial authority where reasonable evidence shows that there may have been a breach of national criminal law.

40. Articles 4 to 7 of the contested decision lay down a number of detailed rules applicable to investigations carried out by D-IA. They provide, in particular, that persons concerned by fraud investigations are to be informed and given the opportunity to express their views on all the facts which concern them; [24] that the activities of D-IA are to be carried out subject to both the rules of the Treaties, in particular Article 6 of the Treaty on European Union, and the Protocol on the privileges and immunities of the European Communities; [25] and that information obtained in the course of fraud investigations is to be subject to professional secrecy. [26]

41. Under the second paragraph of Article 5 and Article 6 of the contested decision, members of staff of the ECB 'shall... inform the anti-fraud committee or the Directorate for Internal Audit of any fraud or illegal activities detrimental to the financial interests of the ECB' and 'may submit to the Executive Board or the anti-fraud committee a complaint in respect of an act or omission having an adverse effect on him/her committed by the Directorate for Internal Audit'.

42. With regard to OLAF, Article 1(9) provides:

'The anti-fraud committee shall be responsible for the relations with the Supervisory Committee of the European Anti-Fraud Office (OLAF) referred to in Article 11 of Regulation (EC) No 1073/1999 of the European Parliament and of the Council. These relations shall follow the principles established by a decision of the ECB.'

24 — Article 4.

25 — Article 5(1).

26 — Article 7.

Procedure and claims of the parties

43. The Commission asks the Court, pursuant to Article 230 EC, to annul the contested decision and to order the ECB to pay the costs. Its essential submission is that the contested decision is contrary to, in particular, Article 4 of Regulation No 1073/1999.

44. The ECB asks the Court to dismiss the application as unfounded and order the Commission to bear the costs. It puts forward two pleas in law. Its first plea is that the contested decision is not contrary to Regulation No 1073/1999. The second plea is that Regulation No 1073/1999 does not apply to the ECB. In that regard, it submits, principally, that the Court should interpret the provisions of the Regulation so as to exclude the ECB from its scope since otherwise the Regulation (i) would be lacking legal basis owing to the fact that it was adopted on the basis of Article 280(4) EC, (ii) would have been adopted in breach of an essential procedural requirement since the ECB was not consulted pursuant to Article 105(4) EC, (iii) would be contrary to the principle of independence of the ECB laid down in Article 108 EC and (iv) would violate the principle of proportionality. In the alternative, the ECB submits that the Court should declare Regulation No 1073/1999 inapplicable to the ECB pursuant to Article 241 EC.

45. The European Parliament, the Council and the Netherlands Government have intervened in support of the Commission. They put forward arguments substantially similar to those of the Commission. I will mention their interventions only where relevant and, in particular, in so far as they differ from the Commission's arguments. It should also be noted that the parties in the present case have submitted highly detailed arguments and that those arguments will be set out only so far as is necessary for the consideration of the issues which arise.

Identification of the issues

46. In the light of the arguments of the parties and the interveners, the following main issues fall to be considered:

— Does Regulation No 1073/1999, properly interpreted, apply to the ECB?

— Is the contested decision contrary to Regulation No 1073/1999?

— Should Regulation No 1073/1999 be declared inapplicable pursuant to Article 241 EC?

Does Regulation No 1073/1999 apply to the ECB?

47. The ECB submits that the Court should interpret the provisions of the Regulation so as to exclude the ECB from its scope. It considers that Regulation No 1073/1999 does not define its scope *ratione personae* in very precise terms. Since the Regulation would, according to the ECB, be invalid for lack of legal basis, breach of an essential procedural requirement, and violation of the independence of the ECB and the principle of proportionality if it applied to the ECB, the Court should adopt an interpretation which would render the Regulation consistent with the Treaty. More specifically, the ECB argues that the term 'bodies' which appears in, *inter alia*, Article 1 of the Regulation must be interpreted as meaning bodies whose financial interests are — unlike those of the ECB — linked directly to the budget of the Community.

48. The Court has consistently held that 'where the wording of secondary Community law is open to more than one interpretation, preference should be given to the interpretation which renders the provision consistent with the Treaty rather than the interpretation which leads to its being incompatible with the Treaty'. [27]

49. The wording of Regulation No 1073/1999 is however entirely clear and, in my view, not open to the interpretation suggested by the ECB.

50. It is clear from Articles 1(3), 4(1) and (6), 5 (second paragraph), 6(6), 7(1), (2) and (3), 9(4), 10(3) and 14 (second paragraph) that the Regulation applies to 'the institutions, bodies, offices and agencies established by, or on the basis of, the Treaties'. The seventh recital of the preamble states that 'OLAF must be able to conduct internal investigations in *all* [28] the institutions, bodies, offices and agencies established by, or on the basis of, the EC and Euratom Treaties'.

51. It is difficult to see how the legislature could have defined the scope of the Regulation more broadly than this. If it had intended to exclude the ECB from the scope of the Regulation, it would surely have adopted a different formulation. Moreover, although the ECB is not one of the institutions of the Community mentioned in Article 7 EC, it was established by Article 8 of the EC Treaty. It therefore falls squarely within the natural meaning of the notion of 'bodies... established by, or on the basis of,' the EC Treaty referred to in the Regulation. There is no basis, in the

27 — Case 218/82 *Commission* v *Council* [1983] ECR 4063, paragraph 15 and, most recently, Case C-135/93 *Spain* v *Commission* [1995] I-1651, paragraph 37. See also, implicitly applying this principle, the judgment in Case 29/69 *Stauder* [1969] ECR 419.

28 — Emphasis added. The meaning is equally clear in all the language versions.

preamble or the provisions of the Regulation, for interpreting that notion as excluding those bodies whose finances are not linked directly or indirectly to the budget of the Community.

52. Since the wording is clear, it is in principle unnecessary and undesirable to go further. And, even so, in the present case the drafting history of the Regulation tends to support the view that it applies to the ECB. The preamble to the Commission's proposal for Regulation No 1073/1999 [29] stated that the OLAF 'must be able to conduct internal investigations in the Institutions and other bodies established by or on the basis of the EC and Euratom Treaties...'. [30] While the level and intensity of consultations which took place is not entirely clear from the file, it is common ground that members of the staff of the ECB argued against the application of the proposed regime to the ECB during meetings with representatives of the Council. The Parliament and the Council did not, however, change the Commission's proposal in accordance with the ECB's arguments. [31] On the contrary, the Council inserted in the seventh recital of the preamble the word 'all', thus reaffirming the broad scope *ratione personae* envisaged by the Commission's proposal

53. Finally, although the interpretation of Community measures cannot in general be determined by declarations made by the Community institutions after their adoption, it may be noted that the Council of Ministers has called upon the ECB to comply with Regulation No 1073/1999, [32] and that the Parliament has recently stressed the need for 'a comprehensive interinstitutional approach' in the context of the Regulation. [33]

54. I consider, for those reasons, that Regulation No 1073/1999 applies to the ECB.

55. The ECB contests that conclusion on the grounds that it cannot be considered to be a 'body' established by, or on the basis of, the EC Treaty within the meaning of the Regulation given the particular position it enjoys under the Treaty. While the ECB accepts that it does not 'exist in a legal world totally distinct from that of the Community', and that the Community legislature may adopt general measures applicable to the ECB, it draws attention, in particular, to the fact (i) that the ECB is

29 — COM(1999) 140 Final.

30 — The sixth recital of the preamble.

31 — The Parliament suggested the following formulation of the relevant recital in the preamble: 'in the Institutions, bodies *and organs* established by or on the basis of the EC and Euratom Treaties' (emphasis added). See Legislative resolution embodying Parliament's opinion on the amended proposal for a Council regulation concerning investigations conducted by the Fraud Prevention Office, OJ 1999 C 279, p. 280.

32 — Press release of 8 October 1999, annexed to the Commission's application.

33 — European Parliament resolution on the Commission annual report 2000 on the protection of the Communities' financial interests and the fight against fraud and on the Commission communication on protecting the Communities' financial interests, Fight against fraud, Action plan for 2001-2003, adopted on 29 November 2001, paragraph 4.

not a Community institution within the meaning of Article 7 EC; [34] (ii) that the EC Treaty has conferred upon the ECB legal personality distinct from the legal personality of the European Community; [35] (iii) that the ECB has its own internal decision-making bodies; [36] (iv) that those bodies have been granted original powers under the Treaty to adopt legally binding measures; [37] (v) that the accounts of the ECB are not to be examined by the Court of Auditors; [38] and (vi) that the ECB is to act independently of the Community institutions in the execution of its tasks. [39]

56. I am unconvinced by that argument for essentially three reasons.

57. First, while the Member States considered the possibility of establishing the provisions on monetary policy and the ESCB in a separate 'monetary pillar' under the Treaty on European Union, [40] they chose to integrate those matters in the EC Treaty. [41] The establishment of a monetary union was thus added to the tasks of the Community mentioned in Article 2 EC, the ECB was established by Article 8 of the EC Treaty, and all of the provisions governing its constitutional position were placed in the EC Treaty and in the Statute, which as a protocol to that Treaty forms part of primary Community law. [42]

58. Second, it may be recalled that Article 105(1) EC provides that '[w]ithout prejudice to the objective of price stability, the ESCB shall support the general economic policies in the Community with a view to contributing to the achievement of the objectives of the Community as laid down in Article 2'. That provision corresponds to Article 4 EC, placed in Part One of the Treaty ('Principles'), which provides that '[f]or the purposes set out in Article 2, the activities of the Member States and the Community shall include... the adoption of an economic policy' and that '[c]oncurrently with the foregoing...these activities shall include the... definition and conduct of a single monetary policy and exchange-rate policy the primary objective of both of which shall be to maintain price stability and, without prejudice to this objective, to support the general economic policies in the Community, in accordance with the principle of an open market economy with free competition'.

59. Third, the ECB is — in accordance with the principle of the rule of law enshrined in Article 6 of the Treaty on

34 — See also Articles 111(3), 232, 234 and 288 EC which distinguish between, on the one hand, the institutions of the Community and, on the other hand, the ECB.

35 — Article 107(2) EC and Article 9.1 of the Statute.

36 — The Governing Council and the Executive Board, see Article 112 EC and Articles 10, 11 and 12 of the Statute.

37 — See, in particular, Articles 105, 106 and 110 EC.

38 — Article 248 EC and Article 27.2 of the Statute.

39 — Article 108 EC.

40 — See C. Zilioli and M. Selmayer, *The Law of the European Central Bank* (2001), pp. 9 and 13.

41 — See J. Cloos *et al*, *Le Traité de Maastricht: genèse, analyse, commentaires* (2nd ed, 1994), p. 230.

42 — Article 311 EC.

European Union — bound by Community law and subject to the jurisdiction of the European Court of Justice.[43] Moreover, while the accounts of the ECB are audited by independent external auditors appointed by the ECB, subject to the approval of the Council,[44] the operational efficiency of its management falls within the remit of the Court of Auditors.[45]

60. It follows, as the Commission points out, from those considerations that the ECB forms an integral part of the Community framework. The particular position of the ECB *within* that framework — which distinguishes it from, on the one hand, the institutions and, on the other hand, the agencies and offices created by secondary Community law — cannot, in my view, lead to the conclusion that the ECB is not a body forming *part of* the Community.[46] The ECB is subject to the general principles of law which form part of Community law and promotes the goals of the Community set out in Article 2 EC through the implementation of the tasks and duties laid upon it.[47] It may therefore be described as the Central Bank *of the European Community*; it would be inaccurate to characterise it, as have some writers, as an organisation which is 'independent of the European Community', a 'Community within the Community', a 'new Community'[48] or, indeed, as something falling outside the notion of a body established by, or on the basis of, the EC Treaty in Regulation No 1073/1999.

61. It may be added that the ECB might have contended, as a subsidiary argument, that Regulation No 1073/1999 is to be interpreted as applying to the ECB, but only in so far as the ECB actually manages Community budget funds.[49] That argument could not however — as the Commission pointed out at the hearing — have succeeded in any event. Community funds account, according to the explanations of the parties, for only about 3-4% of the annual budget of the ECB and consist, essentially, of Community tax deducted by the ECB from the salaries of its staff. To limit the powers of OLAF to the control of those funds would be unrealistic and difficult to realise in practice. It would moreover entirely undermine the effectiveness of Regulation No 1073/1999 as regards the ECB. In the absence of firm support in the wording or the legislative history, that interpretation therefore cannot be accepted.

43 — Articles 230, 232, 234, 237, 241 and 235 EC in conjunction with Article 288 EC, and Articles 14.2, 35 and 36 of the Statute.

44 — Article 27.1 of the Statute.

45 — Article 248 EC and Article 27.2 of the Statute.

46 — See similarly R. Smits, *The European Central Bank* (1997), p. 93, describing the ESCB as an 'organ of the Community'.

47 — See similarly F. Amtenbrink and J. de Haan, 'The European Central Bank: an independent specialized organization of Community law — a comment', *Common Market Law Review* 2002, p. 65, at p. 68. The ECB itself has described its role as being that of contributing to the achievement of the objectives of the Community through its mandate to maintain price stability. See ECB Monthly Bulletin, October 2000, 'The ECB's relations with institutions and bodies of the European Community', pp. 49 to 64, at p. 52.

48 — See R. Torrent, 'Whom is the European Central Bank the central bank of?: Reaction to Zilioli and Selmayer', *Common Market Law Review* 1999, p. 1229, at p. 1231. Compare C. Zilioli and M. Selmayr, cited in note 40, p. 30; M. Selmayr, 'Die EZB als Neue Gemeinschaft: ein Fall für den EuGH?', *Europa-Blätter* 1999, p. 170.

49 — At a late stage in the proceedings, the ECB declared its willingness to submit itself, *motu proprio*, to the powers of OLAF — and to adopt a decision under Article 4 of the Regulation to that effect — with regard exclusively to such funds.

Is the contested decision contrary to Regulation No 1073/1999?

62. In the light of that conclusion, it must be considered whether the contested decision is contrary to Regulation No 1073/1999.

Summary of the arguments

63. According to the Commission, the contested decision is contrary to Regulation No 1073/1999 in two respects.

64. First, the Commission recalls that Article 4(1) of Regulation No 1073/93 provides that '[i]n the areas referred to in Article 1, the Office shall carry out administrative investigations within the institutions, bodies, offices and agencies'. [50] However, according to the eighth recital of the preamble to the contested decision, 'combating fraud and other illegal activities detrimental to the financial interests of the ECB is a core function of the Directorate for Internal Audit' which 'is responsible for conducting administrative investigations within the ECB to this end'. Moreover, under Article 2 of the contested decision D-IA is 'responsible for investigating and reporting on all issues related to the prevention and detection of fraud and other illegal activities detrimental to the financial interests of the ECB'. According to the Commission, those provisions constitute a denial of the powers of OLAF to carry out internal investigations and, in effect, prevent the application of Regulation No 1073/1999 to the ECB.

65. In that regard, the Commission points out that the preamble to the contested decision explicitly distinguishes between measures taken on the basis of Article 280 EC to combat fraud and other illegal activities detrimental to the Communities' financial interests and measures applicable to the ECB, stressing that the independence of the ECB is provided for by the Treaty and that the ECB has its own budget and its own financial resources separate from those of the European Communities. The contested decision thus formalises the opinion of the ECB, which it expressed on several occasions during the legislative process leading to the adoption of Regulation No 1073/1999, that only the ECB has the power to decide if, by whom and how investigations of the activities of its members of staff are to be conducted. The view that the system of investigations envisaged by the contested decision is intended as an alternative to investigations conducted by OLAF is furthermore, according to the Commission, borne out by the fact that the only provision for contact between the two systems is Article 1(9) of the contested decision under which the anti-fraud committee is to 'be responsible for the relations with the

50 — The Commission relies on the French version of the Regulation which refers to *'les* enquêtes' rather than simply 'investigations'.

Supervisory Committee of... OLAF' in accordance with 'principles [to be] established by a decision of the ECB'.

66. Second, the Commission states that Article 4(1) of Regulation No 1073/1999 obliges all institutions, bodies, offices and agencies established by or on the basis of the EC Treaty to adopt a decision which — according to Article 4(6) — is to include rules concerning the duty to cooperate with and supply information to OLAF, the procedures to be observed by OLAF when conducting internal investigations and the guarantees of the rights of persons concerned by such investigations. The contested decision does not, however, lay down the terms and conditions under which OLAF is to carry out internal investigations within the ECB. Indeed, it provides that staff of the ECB must inform the anti-fraud committee or D-IA of any fraud or illegal activities detrimental to the financial interests of the ECB, without laying down a parallel obligation to inform OLAF of such activities.

67. The ECB submits that the contested decision is not contrary to Regulation No 1073/1999. In reply to the Commission's first argument — according to which the eighth recital of the preamble to and Article 2 of the contested decision negates the powers of OLAF — the ECB states that the contested decision is essentially declaratory of the state of affairs which existed prior to its adoption, as is confirmed by the use of the indicative in the preamble and in Article 2. [51] The only new element in the contested decision is the creation of the anti-fraud committee, aimed at increasing the independence of D-IA and at strengthening its ability to combat fraud. In taking that particular step, the ECB did not violate Regulation No 1073/1999 since the Regulation cannot be interpreted as granting OLAF a monopoly on the investigation of fraudulent activities within the Community institutions and bodies.

68. To the Commission's second argument the ECB responds that Article 4 of Regulation No 1073/1999 does not oblige the institutions and bodies to adopt rules concerning the modalities of internal investigations to be conducted by OLAF. Article 4(1) does not explicitly provide that the institutions and bodies must adopt such rules; the second sentence of Article 4(1) merely envisages that the 'institutions shall consult each other on the rules to be laid down'. It thus appears from the wording of Article 4(1) that the institutions and bodies are free to abstain from adopting such a decision, and to take other appropriate measures to combat fraud. In its view, that argument is supported by the fact that the parties to the Interinstitutional Agreement considered it necessary to include therein a provision obliging the signatory institutions and bodies to adopt such a decision. The ECB adds that Article 4 does not lay down a time-limit for the adoption of a decision by the institutions and bodies.

51 — Combating fraud 'is' a core function of D-IA which 'is' responsible for conducting administrative investigations.

Admissibility

69. The ECB objects to the admissibility of the second of the Commission's arguments. It submits that the question whether it has failed to fulfil an obligation to act under Article 4 of Regulation No 1073/1999 cannot be raised in proceedings for annulment under Article 230 EC. In its view, that question could be raised only in an action for failure to act under Article 232 EC.

70. The Commission essentially submits that the contested decision is in substance a decision of the ECB not to cooperate with OLAF in accordance with the provisions of Regulation No 1073/1999 and, in particular, not to adopt the decision mentioned in Article 4(1) and (6) of the Regulation. Thus, the Commission seeks to demonstrate that the contested decision is a negative decision which may be reviewed in proceedings pursuant to Article 230 EC. [52] The admissibility of the Commission's second argument is thus inextricably linked with the substance of the case and I therefore propose to consider it in that context.

52 — See, in particular, Case 42/71 *Nordgetreide* v *Commission* [1972] ECR 105, paragraph 4 of the judgment and Joined Cases T-79/96, T-260/97 and T-117/98 *Camar* v *Commission and Council* [2000] ECR II-2193, paragraph 92 and the case-law cited there. See also T.C. Hartley, *The Foundations of European Community Law* (4th ed., 1998), pp. 335 to 337, 380 and 381.

Substance

71. It may be noted, first of all, as the Commission explicitly accepted at the hearing, that Regulation No 1073/1999 cannot be interpreted as granting OLAF a monopoly on the investigation of fraud within the Community institutions with the result that the creation of internal auditing or anti-fraud units by other institutions and bodies is *per se* unlawful. Such a result — which might have the effect of undermining the efforts to combat fraud if, in certain periods, OLAF were unable to investigate fully all allegations of fraud reported to it — would require a firm basis in the Regulation itself. The wording of the Regulation does not, however, provide clear support for that view.

72. It is true, as the Commission points out, that the French version of Regulation No 1073/1999 envisages that OLAF is to carry out '*les* enquêtes internes', [53] and that the Italian and Greek versions contain similar phrases which might, perhaps, be read as suggesting that OLAF is to be responsible for all internal investigations. However, the other language versions do not support that interpretation. For example, the English version merely states that OLAF shall 'carry out administrative investigations within the institutions,

53 — Article 4 and the seventh recital of the preamble, emphasis added.

bodies, offices and agencies'. Nor is there any indication in the travaux préparatoires to Regulation No 1073/1999 that the legislature intended to exclude the institutions and bodies of the Community from taking action to combat fraud by, for example, tightening internal auditing or establishing units specifically aimed at fraud prevention. [54]

73. In my view, the creation by the ECB of an internal system aimed at fighting fraud is therefore not *per se* contrary to Regulation No 1073/1999.

74. Secondly, it is clear, as the ECB points out, that the contested decision does not *explicitly* 'negate' the powers conferred upon OLAF by Regulation No 1073/1999. The contested decision provides that 'combating fraud... is a core function' of D-IA which 'is responsible for conducting administrative investigations within the ECB to this end'. Thus, the contested decision does not state that D-IA is 'solely' responsible for combating fraud, nor does it explicitly provide that OLAF may not investigate its staff or that members of ECB staff must not inform OLAF of suspicions of fraud. It is also true, as the ECB points out, that the contested decision does not *explicitly* exclude the possibility that the ECB might, at some point in the future, adopt a decision pursuant to Article 4.

75. However, the matter does not end there. The institutions and bodies of the Community are bound by Regulation No 1073/1999 and therefore obliged to abstain from action which would undermine its effectiveness. As the Council points out, the Regulation does not impose an obligation of result to be achieved by each institution or body by whatever means it might consider appropriate; it requires them to cooperate with OLAF in good faith so that OLAF may carry out the task laid upon it by the legislature.

76. The question, then, is whether the contested decision is liable to undermine the effectiveness of Regulation No 1073/1999. That question must, in my view, be answered in the affirmative. Even if the contested decision might not prevent OLAF entirely from investigating allegations of fraud within the ECB, it renders such investigations very difficult. I base that view on three considerations.

54 — Proposal for a Council regulation (EC, Euratom) establishing a European Fraud Investigation Office, COM(1998) 717 Final; Amended proposal for a Council regulation concerning investigations conducted by the Fraud Prevention Office, COM(1999) 140 Final; Latest version of a proposal for an European Parliament and Council Regulation (EC) concerning investigations by the European Fraud Prevention Office (OLAF), COM(1999) 225 Final; Opinion No 2/99 of the Court of Auditors on the amended proposal for a Council Regulation (EC, Euratom) concerning investigations conducted by the Fraud Office, OJ 1999 C 154, p. 1; Legislative resolution embodying Parliament's opinion on the amended proposal for a Council regulation concerning investigations conducted by the Fraud Prevention Office, OJ 1999 C 279, p. 280, and the Report of the Committee on Budgetary Control, rapporteur Herbert Bosch, of 23 April 1999, EP document A4-1999-0240.

77. First, Article 2 — according to which D-IA is 'responsible for investigating and reporting on *all* issues related to the prevention and detection of fraud and other illegal activities' [55] — appears to express the desire of the Governing Council of the ECB to ensure that investigations are carried out exclusively by the ECB anti-fraud system. It would be unrealistic to believe that members of staff — with the exception, perhaps, of a few courageous individuals — would cooperate with OLAF in defiance of such a managerial policy.

78. Secondly, according to Article 5 of the contested decision staff of the ECB (i) 'shall... inform the anti-fraud committee or the Directorate for Internal Audit of any fraud or illegal activities' and (ii) 'must in no way suffer inequitable or discriminatory treatment as a result of having contributed to the activities of the anti-fraud committee or the Directorate for Internal Audit referred to in this Decision'. By stating that ECB staff are obliged to inform the ECB anti-fraud system (and not OLAF) and, more importantly, by omitting to state that staff may not suffer adverse consequences as a result of contributing to the activities of OLAF, that provision is liable to discourage ECB staff from informing and cooperating with OLAF.

79. Above all, however, it is clear in my view from the contested decision itself — both from the preamble and from its text — that it is in substance a negative decision not to adopt the implementing decision envisaged in Article 4 of Regulation No 1073/1999.

80. Whilst the preamble to the contested decision acknowledges that 'all available means must be fully deployed' to combat fraud, [56] it also states that the deployment of those means must be subject to 'maintaining the current distribution and balance of responsibilities between the ECB and the institutions of the European Communities'. [57] As the ECB has explained to the Court, D-IA was responsible for fraud investigations within the ECB when the contested decision was adopted. The preamble may thus be seen to reflect the resolve of the ECB not to change the status quo by adopting a decision pursuant to Article 4 aimed at facilitating the conduct of investigations by OLAF.

81. The first recital of the preamble to the contested decision states that 'the ECB, together with the institutions of the European Communities and the Member States, attaches great importance to... efforts to combat fraud'. The second recital recalls that 'the Cologne European Council in June 1999 considered it eminently desirable that the ECB should join the institutions of the European Communities in efforts to com-

55 — Emphasis added.

56 — Fourth recital.

57 — Ibid.

bat fraud within the European Union'. In the fourth recital, the preamble refers to 'investigative duties devolving upon the ECB and the institutions of the European Communities'. In those recitals, a distinction is drawn between, on the one hand, the institutions of the EC and, on the other hand, the ECB. However, in the fifth recital the ECB refers to Regulation No 1073/1999 as 'action to combat fraud and other illegal activities detrimental to the Communities' financial interests' adopted by 'the institutions of the European Communities and the Member States' on the basis of Article 280 EC. In the light of the distinction drawn between the ECB and the Community institutions in the first, second and fourth recitals, the wording of the fifth recital implies that the ECB does not consider itself to be subject to the provisions of Regulation No 1073/1999, including the obligation to adopt a decision under Article 4.

82. That interpretation of the preamble is confirmed by the sixth recital which states that the ECB is independent from the institutions and has its own budget and financial resources separate from those of European Communities. It may, as the Commission points out, be inferred from that recital alone that the ECB considers its position within the Treaty system to differ from that of the other institutions and bodies to such an extent that it is not, and could not be, required to comply with Regulation No 1073/1999.

83. The distinction drawn by the ECB between, on the one hand, the rules of Regulation No 1073/1999 which are applicable to the institutions and the Member States and, on the other hand, the measures which may be taken to combat fraud within the ECB itself is also evident from the seventh and eighth recitals of the preamble read together. After stressing — in the sixth recital — the independence of the ECB conferred by the Treaty and the Statute, the seventh recital describes OLAF as an entity 'established [by the Commission] among its own departments'. The implication is, again, clear: A department of the Commission cannot be made responsible for investigating the activities of an independent body such as the ECB.

84. The view that the contested decision is in substance a decision not to comply with Article 4 of Regulation No 1073/1999 is also borne out by its substantive provisions.

85. It will be recalled that Article 1(9) of the contested decision provides that '[t]he anti-fraud committee shall be responsible for the relations with the [OLAF] Supervisory Committee'. No other provision is made for cooperation with OLAF in the contested decision. The only point of contact between the ECB system and OLAF is thus at a general level; the contested decision does not envisage cooperation at the operational level or the adoption of a decision laying down the modalities for investigations to be carried out by OLAF.

Moreover, under Article 1(8) the anti-fraud committee is obliged to report on its activities to the Governing Council of the ECB, the external auditors of the ECB and the European Court of Auditors; there is no obligation to report to OLAF.

86. Article 2 of the contested decision states that D-IA 'is, in accordance with this Decision and the procedures in force within the ECB', responsible for investigating and reporting on issues of fraud prevention within the ECB, and Article 5 states that '[t]he activities referred to in this Decision shall be carried out subject to both the rules of the Treaties, in particular Article 6 of the Treaty on European Union, and the Protocol on the privileges and immunities of the European Communities with due regard to the Conditions of employment for staff of the European Central Bank and the Conditions of short-term employment'. The absence of any reference in those provisions to Regulation No 1073/1999 suggests that the ECB considers itself to be outside the scope of the Regulation and thus not obliged to comply with its Article 4. It may also be noted that Article 1(9) states that the relations between the anti-fraud committee and the Supervisory Committee 'shall follow the principles established by a decision of the ECB'. Conversely, those relations are, it seems, not to follow the principles and rules laid down by Regulation No 1073/1999.

87. Finally, a comparison of the detailed provisions of Regulation No 1073/1999 and the contested decision reveals that the latter is modelled on, or similar to, the former. Both measures establish an independent supervisory committee, lay down procedural rules aimed at protecting the rights of affected individuals, envisage that national judicial authorities may be informed of instances of fraud, and insist on respect for the Staff Regulations. The establishment by the ECB of a parallel system, similar to that established by the Regulation, is — as the Commission points out — consonant with the ECB's view, defended vigorously before this Court, that the Regulation is not applicable to the ECB and that it is therefore not obliged to adopt a decision pursuant to Article 4.

88. I accordingly conclude that the contested decision is liable to undermine the effectiveness of Regulation No 1073/1999, and that it is therefore contrary to it.

89. That conclusion is not affected by the ECB's claim that Article 4 of Regulation No 1073/1999 is not mandatory, and that the institutions and bodies are obliged only to engage in consultations.

90. It will be recalled that according to Article 4(1) 'internal investigations shall be

carried out... under the conditions and in accordance with the procedures provided for... in decisions adopted by each institution, body, office and agency' and that according to Article 4(6) 'the decision to be adopted by each institution, body, office or agency as provided for in paragraph 1, shall in particular include rules concerning' the duty to cooperate with OLAF, the procedures to be observed by OLAF and the rights of persons concerned.

91. The natural meaning of 'in decisions adopted' and 'the decision to be adopted' is in my view clear — in English and in the other language versions of Article 4(1) and 4(6): those phrases are not permissive and must be understood as laying down an obligation to act. [58] That interpretation is, as the Commission points out, confirmed by the 10th recital of the preamble which states that 'the institutions, bodies, offices and agencies must lay down the terms and conditions under which... internal investigations are conducted'.

92. The view that Article 4 is mandatory is also consistent with the purpose and legislative history of Regulation No 1073/1999. As is apparent from the preamble, the Regulation aims, essentially, to combat fraud by granting OLAF powers to conduct investigations within the institutions and bodies of the Community whilst fully respecting the rights of the individuals affected. [59] In order to achieve that aim it will — as is also clear from the preamble [60] — be necessary to amend the Staff Regulations. [61] Acknowledging, however, that reform of the Staff Regulations is a lengthy process, the legislature provided for the adoption by the institutions and bodies of the Community of decisions laying down rules concerning the duty to cooperate with OLAF, the procedures to be observed by OLAF and the rights of persons concerned. If the adoption of those decisions were not obligatory, the aim of the regulation — effective fraud prevention with respect for individual rights — might be seriously jeopardised in the short or medium term.

93. As explained above, the Commission initially proposed to establish OLAF and to lay down the rules for its operations by a regulation based on Article 308 EC. [62] Article 3(2) of the proposed regulation provided that '[e]very institution or body *may* confer on [OLAF] the task of carrying out administrative investigations internal to

58 — See similarly U. Mager, 'Das Europaische Amt fur Betrugsbekampfung (OLAF): Rechtsgrundlagen seiner Errichtung und Grenzen seiner Befugnisse', *Zeitschrift fur europarechtliche Studien* 2000, p. 177 and 187.

59 — See, in particular, the 10th recital.

60 — 10th recital.

61 — Staff Regulations of Officials of the European Communities, introduced by Regulation (EEC, Euratom, ECSC) No 259/68 of the Council of 29 February 1968 laying down Staff Regulations of Officials and the Conditions of Employment of Other Servants of the European Communities and instituting special measures temporarily applicable to Officials of the Commission, OJ English Special Edition 1968(I), p. 30, since amended on numerous occasions.

62 — See above paragraph 7.

that institution or body... by way of a decision laying down the conditions and rules under which internal investigations are to be conducted'. [63] Thus, the proposal envisaged that the institutions and bodies could choose whether to adopt a decision which would enable OLAF to carry out internal investigations. [64] Since Regulation No 1073/1999 does not provide that the institutions 'may' adopt a decision pursuant to Article 4, it appears that the legislature intended Article 4 to be obligatory. That inference is borne out by the Explanatory Memorandum issued concomitantly with the proposal for Regulation No 1073/1999 in which the Commission stated that '[c]ontrary to the provisions of Article 3(2) of the original proposal, the institution and bodies can no longer choose whether or not to confer this task on [OLAF]'. [65]

94. The ECB seeks to meet those arguments by submitting that it follows from the last paragraph of Article 4(1) that the institutions and bodies are obliged only to consult each other. I disagree. By requiring consultations on 'the rules to be laid down', that paragraph in no way contradicts the view that the institutions and bodies are obliged to lay down rules by way of adopting a decision under Article 4. Nor am I convinced by the ECB's assertion that by concluding the Interinstitutional Agreement, the Commission, the Council and the Parliament implicitly acknowledged that Article 4 of the Regulation is not mandatory. It appears from the Explanatory Memorandum issued by the Commission that the purpose of the Interinstitutional Agreement was to 'prevent wide divergencies in the rules laid down by [the] decisions' [66] to be adopted under Article 4 of the Regulation, by providing a model decision to be adapted to the particular situation of each institution. That is moreover confirmed by the preamble to the agreement which states that internal 'investigations should be carried out under equivalent conditions in all the Community institutions, bodies and offices and agencies' [67] and that the parties have 'conferred for the purpose of drawing up common rules for that purpose'. [68]

Conclusion

95. In the light of those considerations, I conclude (i) that the contested decision is in substance a negative decision which may be reviewed under Article 230 EC and (ii) that it is contrary to Regulation No 1073/1999.

96. It may be added that that conclusion is not affected by the ECB's argument that

63 — Emphasis added.

64 — See also the explanatory memorandum issued by the Commission concomitantly with the proposal, COM(1998) 717 Final, at paragraph 12.

65 — COM(1999) 140 Final, at paragraph 7.

66 — See COM(1999) 140 Final, paragraph 5.

67 — Sixth recital.

68 — Sentence following the seventh and last recital in the preamble.

Article 4 does not lay down a time-limit within which the institutions and bodies must adopt a decision. As I have explained, the contested decision must be interpreted as a decision of principle not to adopt such a decision. Nor can it be objected that the contested decision is essentially declaratory. By establishing the anti-fraud committee, laying down procedural rules and providing for (strictly limited) relations with OLAF, the contested decision went beyond stating what was at the time of its adoption the role of D-IA within the ECB.

Should Regulation No 1073/1999 be declared inapplicable pursuant to Article 241 EC?

97. In the light of that conclusion, it is necessary to consider the ECB's submission that Regulation No 1073/1999 should be declared inapplicable pursuant to Article 241 EC. That Article lays down the following rule:

'Notwithstanding the expiry of the period laid down in the fifth paragraph of Article 230, any party may, in proceedings in which a regulation adopted jointly by the European Parliament and the Council, or a regulation of the Council, of the Commission, or of the ECB is at issue, plead the grounds specified in the second paragraph of Article 230 in order to invoke before the Court of Justice the inapplicability of that regulation.'

Admissibility

98. According to the Commission, that submission should be declared inadmissible. It considers that the ECB — which was aware that the Regulation was intended to apply to it — should have challenged Regulation No 1073/1999 pursuant to Article 230 EC. Under the third paragraph of that article, the ECB has standing to challenge a regulation for the purpose of protecting its prerogatives. The ECB denies that it was aware that the Regulation applied to it and recalls that according to the wording of Article 241 EC, 'any party' may challenge 'a regulation' 'notwithstanding the expiry of the time-limit laid down in the fifth paragraph of Article 230 EC'.

99. Those arguments raise the question whether an institution or body which has omitted to take action against a regulation within the time-limit laid down in the fifth paragraph of Article 230 EC, can rely on Article 241 EC as a defence in an action seeking the annulment of a measure adopted by that institution or body for violating the regulation in question.

100. That important question of principle has not been decided by the Court. Since very little attention has been devoted to it in the present case, I propose to consider first the substance of the ECB's arguments and then, for reasons which will become

apparent, to take only a tentative view on their admissibility under Article 241 EC.

Legal basis

101. The ECB submits that Regulation No 1073/1999 is invalid in so far as it was adopted on the basis of Article 280 EC. Its detailed arguments in that regard fall in two parts.

— The first submission: measures to combat fraud in the Member States

102. The ECB submits, first of all, that Article 280(4) EC grants the Community the power only to take measures aimed at enhancing the ability of the authorities of the Member States to combat fraud and other irregularities; that provision is not concerned with fraud and other irregularities occurring within the Community institutions themselves. Regulation No 1073/1999 is therefore invalid in so far as it extends the powers of OLAF to the institutions and bodies of the European Community. In that regard the ECB points out that Article 280(1) and (4) EC refers only to measures aimed at combating fraud 'in the Member States' and that according to Article 280(4) EC measures adopted by the Community must not concern 'national criminal law'. The absence of a reference to the institutions and bodies in Article 280 EC is, according to the ECB, particularly significant in the light of Article 286 EC which explicitly provides that 'Community acts on the protection of individuals with regard to the processing of personal data and the free movement of such data shall apply to the institutions and bodies set up by, or on the basis of, this Treaty'.

103. The Commission resists those arguments. It argues that Article 280 EC grants the Community legislature a broad power by providing for the adoption of all 'necessary measures' and that Article 280(4) must be read in the light of Article 280(1) EC which states that 'the Community and the Member States shall counter fraud... through measures to be taken in accordance with this Article'. To limit Article 280 EC to measures aimed at assisting fraud prevention might also undermine its effectiveness (*effet utile*) since, in order to obtain a complete picture of the activities of economic agents and authorities in the Member States in the course of external investigations, it may be necessary to investigate also the activities of members and staff of the Community institutions and bodies.

104. I cannot accept the ECB's submission.

105. It is true, as the Council stated in its intervention, that the wording of Article 280 EC appears at first sight to be concerned with measures aimed at strengthening the efforts of the Member States to combat fraud rather than with fraud occurring within the Community institutions themselves. Moreover, the fact that Article 280 EC envisages the adoption of 'necessary measures' is hardly relevant since, as the ECB points out, that phrase merely begs the question for what purpose those measures may be adopted — to combat fraud within the institutions or in the Member States?

106. A more careful analysis of the wording, structure and history of Article 280 EC leads, however, to the conclusion that the Community may adopt measures concerning fraud prevention within the institutions and bodies.

107. First, it will be recalled that according to Article 280(1), '[t]he Community and the Member States shall counter fraud... through measures to be taken in accordance with this Article'. There is, in my view, some force in the Commission's argument that by referring to the Community *and* the Member States, Article 280(1) EC appears to envisage the adoption of measures aimed at combating fraud within the Community institutions themselves. That argument is of relevance for the interpretation of Article 280(4) EC, which must be interpreted in the light of Article 280 EC as a whole.

108. Secondly, Article 280(4) EC provides that 'the Council... shall adopt... measures... with a view to affording effective and equivalent protection in the Member States'. The reference to 'equivalent protection in the Member States' is significant; it lays down a requirement which must be fulfilled by all measures aimed at combating fraud in the Member States. However, it is important to note that Article 280(4) EC does not provide that the Community may act 'only' with a view to affording equivalent protection in the Member States. Thus, the fact that Article 280 EC lays down a requirement (of equivalence) to be met by certain types of measures (applicable to fraud prevention in the Member States) cannot, in my view, be taken to mean that the legislature is precluded from adopting other measures (aimed at fighting fraud within the institutions and bodies). I consider, for the same reason, that the last sentence of Article 280(4) EC — which states that the measures adopted 'shall not concern the application of national criminal law' — must be understood as a requirement which applies when the Community adopts measures aimed at fighting fraud in the Member States; it is not to be inferred from that phrase that other measures cannot be adopted.

109. Thirdly, and more importantly, Article 280 EC explicitly provides that the measures adopted must grant 'effective' protection of the financial interests of the Community against fraud and other irregularities. It would be difficult for the legislature to meet that requirement if it were precluded from taking action aimed at combating fraud within the Community institutions and bodies. In order to obtain a complete picture of the activities of economic agents and authorities in the Member States it may, as the Commission points out, be necessary to investigate the activities of members and staff of the Community institutions and bodies. The fact that certain institutions and bodies might establish internal anti-fraud systems independently of measures adopted under Article 280 EC is not a convincing objection to that argument, since it is not certain that all institutions and bodies would establish such systems or that such systems would be as effective.

110. It would, moreover, be paradoxical in my view if the Community had the power to regulate a sensitive area of Member State competence — namely the investigation of potentially serious criminal offences — but were entirely precluded from laying down general rules for the investigation of acts of its own staff on the basis of Article 280 EC, and it seems implausible that the revision of Article 209a of the EC Treaty effected by the Treaty of Amsterdam — specifically the addition of the competence under Article 280(4) EC — was intended to exclude such measures.

111. I am encouraged in that view by the travaux préparatoires to the Treaty of Amsterdam. [69] It emerges from those documents that Article 280(4) EC was inserted into the Treaty amidst concerns over fraud and other misuse of Community funds in the Member States [70] as well as within the Community institutions. Thus, in its Opinion of 28 February 1996 entitled 'Reinforcing Political Union and Preparing for Enlargement', the Commission emphasised that '[f]raud against the Community's financial interests must be combated effectively. This cannot be done without a firm commitment by the Member States *as well as the institutions*. The Commission proposes that the Union give itself an appropriate legal basis'. [71] In 'A Strategy for Europe', Final report from the Chairman of the Reflection Group on the 1996 Intergovernmental Conference [72] it was stated that '[t]he Group wants the Community institutions to be more effective in combating fraud' and that *'[a]ll institutions and*

69 — Available at the 1996 IGC retrospective database, http://europa.eu.int/en/agenda/igc-home/key-doc.html.

70 — See, e.g., Report on the Operation of the Treaty on European Union Presented by the European Commission, 10 May 1995, paragraphs 66-68; Resolution on Parliament's opinion on the convening of the Intergovernmental Conference, paragraph 22; Resolution [of the European Parliament] on the functioning of the Treaty on European Union with a view to the 1996 Intergovernmental Conference — Implementation and development of the Union, paragraph 36.

71 — Paragraph 11, emphasis added.

72 — Reflection Group's Report, Messina 2 June 1995, Brussels 5 December 1995, Part Two: An Annotated Agenda.

bodies must be subject to proper control'.[73] A statement to the same effect is to be found in the Resolution on Parliament's opinion on the convening of the Intergovernmental Conference of 13 March 1996 which identified as one of the 'key priorities for the future of Europe' 'greater credibility for the European Union, to be achieved via effective action against the fraudulent use of Community financial resources *at all levels*, which presupposes... a democratic procedure to establish all the Community regulations required to protect the financial interests of the European Communities'.[74] It may also be noted that the Report by the Court of Auditors to the 'Reflection Group' on the Operation of the Treaty on European Union, adopted in May 1995, stressed that '[f]raud against Community funds is likely seriously to undermine the credibility of the Union. Fighting fraud is therefore a primordial task *for each of the Institutions* and Member States'.[75]

112. Finally, it must be borne in mind that the Court of Justice has not adopted a strict and literal approach to the interpretation of enabling provisions in the Treaty,[76] and it is well established that '[t]he Community acts... on the basis of specific powers which... are not necessarily the express consequence of specific provisions of the Treaty but may also be implied from them'.[77] Article 280 EC lays upon the Community legislature the task of 'counter[ing] fraud and any other illegal activities affecting the financial interests of the Community' and envisages the adoption of binding legal measures to that end. The view that those measures may extend to fraud prevention within the institutions and bodies of the Community is consistent with that case-law.[78]

— The second submission: the financial interests of the Community

113. According to the ECB, Regulation No 1073/1999 is invalid in so far as it applies to the ECB. In that regard, it points out that Article 280 EC is placed in Title II of Part Five of the EC Treaty which lays down rules governing the budget of the European Community. Since the Treaty must be given a systematic interpretation, the notion of 'the financial interests of the Community' in Article 280 EC cannot be different from that of 'the budget' of the European Community mentioned in Article 268 EC. It follows that Article 280 EC enables the Community to take measures aimed only at protecting the Commu-

73 — Paragraph 133, emphasis added.

74 — Key priority VII, emphasis added.

75 — Point 3.1, emphasis added. See also point 1.6 which emphasised 'the need to make the necessary efforts to combat fraud against the Community's financial interests through both the management methods of the Institutions, especially the Commission, and national administrations, and by all parties in the matter of strengthening controls designed to prevent fraud'.

76 — See, in particular, Case C-295/90 *Parliament* v *Council* [1992] ECR I-4193; Case C-426/93 *Germany* v *Council* [1995] ECR I-3723; Case C-268/94 *Portugal* v *Council* [1996] ECR I-6177; Case C-84/94 *United Kingdom* v *Council* [1996] ECR I-5755; Case C-377/98 *Netherlands* v *Parliament and Council* [2001] ECR I-7079, paragraph 15 of the judgment.

77 — Opinion 2/94 [1996] ECR I-1759, paragraph 25. See also Joined Cases 281/85, 283/85 to 285/85 and 287/85 *Germany and others* v *Commission* [1987] ECR 3203.

78 — See similarly U. Mager, cited in note 58, at p. 189.

nity against fraud and other illegal activities which entail a loss of revenue or an increase in expenses occurring on the budget of the Community. The ECB is however financially independent of the budget of the European Community. It has its own budget governed by Chapter IV of the Statute ('Financial provisions') [79] and the more detailed rules laid down by the Council of Governors pursuant to Article 12.3 of the Statute. [80] According to Article 26.2 of the Statute that budget is drawn up by the Executive Board in accordance with principles established by the Governing Council. [81] Moreover, the assets of the ECB do not derive from the budget of the Community, [82] and losses incurred by the ECB cannot under any circumstances constitute an item of expenditure on the budget of the Community. [83] While it is true that the ECB manages certain funds which constitute resources on the Community budget, those funds are of minor importance in relation to the tasks entrusted to the ECB, and they therefore do not justify the submission of all the activities of the ECB to the powers of OLAF.

114. The Commission retorts that the scope of Article 280(4) EC is not limited to protection of the budget of the Community since it explicitly refers to the 'financial interests of the Community'; an expression which covers all of the financial resources managed by Community institutions and bodies regardless of their origin. That view is consistent with Article 248 EC under which the powers of the Court of Auditors are not limited to items of revenue and expenditure on the budget of the Community. It is also supported by legislative practice. Thus, Regulation No 2988/95 on the protection of the European Communities' financial interests [84] defines 'irregularity' as 'any infringement of a provision of Community law resulting from an act or omission by an economic operator, which has, or would have, the effect of prejudicing the general budget of the Communities *or budgets managed by them*, either by reducing or losing revenue accruing from own resources collected directly on behalf of the Communities, or by an unjustified item of expenditure'. [85] That provision shows that the financial interests of the Community may be, and have been, understood as covering more than the budget of the Communities.

79 — Articles 26 to 33 of the Statute.

80 — Article 12.3 provides that '[t]he Governing Council shall adopt Rules of Procedure which determine the internal organisation of the ECB and its decision-making bodies'. Based on that provision, the ECB has adopted the Rules of procedure of the European Central Bank as amended on 22 April 1999, OJ 1999 L 125, p. 34, which lay down in Articles 15 and 16 provisions for the budgetary procedure and for reporting and annual accounts.

81 — Such principles were, according to the ECB, laid down by a decision of the Council of Governors of 1 December 1998 and amended by a further decision of the Council of Governors of 15 December 1999.

82 — The assets of the ECB are (i) its capital which is subscribed by the national central banks pursuant to Article 28 of the Statute, (ii) its foreign reserve assets provided by the national central banks under Article 30 of the Statute and (iii) monetary income resulting from the performance of the ESCB's monetary policy function by the ECB and the national central banks and allocated in accordance with Article 32 of the Statute.

83 — The ECB refers to Article 33.2 of the Statute which provides that '[i]n the event of a loss incurred by the ECB, the shortfall may be offset against the general reserve fund of the ECB and, if necessary, following a decision by the Governing Council, against the monetary income of the relevant financial year in proportion and up to the amounts allocated to the national central banks in accordance with Article 32.5'.

84 — Cited in note 7.

85 — Article 1(2), emphasis added.

115. In any event, the Commission argues that even if a distinction were to be drawn between, on the one hand, the budget of the Community and, on the other hand, the financial interests of the ECB, the ECB would fall within the scope of Article 280(4) EC and measures adopted pursuant to it. That is so because the ECB manages certain Community resources including, in particular, Community tax which it deducts from the salaries, wages and pensions of the members of the Governing Council, the General Council and the staff of the ECB. [86] The fact that those resources constitute a small part of the budget of the ECB is irrelevant since it is for the Community legislature to decide whether the fact that a body manages Community funds justifies the adoption of measures to combat fraud within that body.

116. I am unconvinced by the ECB's submissions.

117. While it is well established that the limits of the powers conferred on the Community by a specific provision of the Treaty must be determined, *inter alia*, in the light of its place in the scheme of the Treaty, [87] it does not follow from that case-law that different expressions utilised within the same Title of the Treaty must be given the same meaning. The fact that Article 280 EC is placed in Title II of Part Five of the EC Treaty is therefore, in my view, not a convincing argument for the ECB's claim that the notion of 'the financial interests of the Community' must be understood as equivalent to that of 'the budget of the Community'. On the contrary, the existence of two different expressions in different provisions of the same Title would appear to suggest that a different meaning was intended. Moreover, when Article 280(4) EC in that Title was introduced by the Treaty of Amsterdam — with a view to adoption of strengthened measures against fraud — it was entirely natural for that provision to be placed with the financial provisions in Title II of Part V. It cannot be inferred from the fact that it was placed there that the Treaty draftsmen intended it to be limited in scope to the budget of the Communities dealt with in the preceding provisions of that Title. Nor is there any suggestion in the travaux préparatoires to the Treaty of Amsterdam that the choice to place Article 280(4) EC in that Title was intended to limit the scope of Article 280(4) EC, or to shelter the ECB from measures against fraud.

118. I thus agree with the Commission that Article 280(4) EC confers upon the legislature the power to adopt measures aimed at preventing fraud and other illegal activities which, even if not directly related to the *budget* of the Community, are capable of harming *the financial interests* of the Community in a broad sense by adversely

86 — That deduction is carried out in accordance with the Protocol on the privileges and immunities of the European Communities, which applies to the ECB (Article 40 of the Statue) and Council Regulation (EC, ECSC, Euratom) No 1197/98 of 5 June 1998 amending Regulation (EEC, Euratom, ECSC) No 260/68 laying down the conditions and procedure for applying the tax for the benefit of the European Communities, OJ 1998 L 166, p. 1.

87 — See, in particular, Joined Cases 188/80 to 190/80 *France, Italy and United Kingdom* v *Commission* [1982] ECR 2545, paragraph 6 of the judgment.

affecting its assets. Moreover, the source of the assets in question is not decisive in my view; ensuring the proper use of all funds held by the institutions, bodies, offices or agencies of the Community must be regarded, in my view, as forming part of the financial interests of the Community and may thus be the subject of measures adopted on the basis of Article 280(4) EC.

119. The ECB considers that interpretation to be inconsistent with legislative practice. It argues that, contrary to what the Commission contends, the provisions of Regulation No 2988/95 show that the financial interests of the Community cannot extend beyond the budget of the Community and, perhaps, the budget of certain offices and agencies whose assets are derived from that budget and who have a loss guarantee linked to it. It also refers to the Convention drawn up on the basis of Article K.3 of the Treaty on European Union, on the protection of the European Communities' financial interests, [88] which provides that 'fraud affecting the European Communities' financial interests shall consist of... in respect of expenditure, any intentional act or omission... which has as its effect the misappropriation or wrongful retention of funds from the general budget of the European Communities or budgets managed by, or on behalf of, the European Communities'. [89]

120. I would not however give much weight, for the purpose of the present case, to the definitions laid down in those measures. While legislative practice may be relevant for determining the scope of Community competences, [90] it must be borne in mind that Regulation No 2988/95 was adopted on the basis of Article 235 of the EC Treaty (now Article 308 EC), not Article 280 EC. Moreover, that Regulation — and the Convention referred to by the ECB — were drafted at a time when the ECB had not been established. The fact that, at that point, the 'financial interests of the Community' were defined in terms which might be interpreted as excluding the financial interests of bodies, such as the ECB, whose capital and budget are either entirely or essentially separate from the budget of the Community cannot determine the interpretation to be given to Article 280 EC today.

121. The question, then, is whether Regulation No 1073/1999 may be regarded as a measure aimed at protecting the 'financial interests of the Community' in so far as it aims to prevent fraud and other illegalities from adversely affecting the budget and assets of the ECB.

122. I would answer that question in the affirmative. The fact that there is, as the

88 — Cited in note 8.
89 — Article 1.

90 — See my Opinion of 13 November 2001 in Case C-29/99 *Commission* v *Council*, Judgment of 10 December 2002, ECR I-11221, I-11225, paragraph 148.

ECB stresses, a degree of separation between the finances of the ECB and those of the rest of the Community institutions and bodies is not decisive in my view. The ECB is, as explained above, a body which forms an integral part of the Community framework.[91] Since it is a Community body, the financial interests of the ECB are part and parcel of the financial interests of the Community. The validity of Regulation No 1073/1999 is, therefore, not affected by the fact that it was adopted pursuant to Article 280(4) EC.

123. The ECB objects to that conclusion by pointing out that the provisions concerning the institutional position of the ECB are to be found in Article 8 EC, Title VII of Part Three of the Treaty and in the Statute. Part Five of the Treaty — Title I of which lays down institutional provisions for the five Community institutions, the Economic and Social Committee, the Committee of the Regions and the European Investment Bank and Title II of which contains financial provisions (including Article 280 EC) — does not contain a chapter on the ECB. According to the ECB, the structure of the Treaty reflects a deliberate choice by the Treaty draftsmen which the Court of Justice should respect when interpreting Article 280(4) EC.

124. I disagree. The structural interpretation of the Treaty favoured by the ECB cannot prevail over the clear wording of Article 280(4) EC which, by referring to the financial interests of 'the Community', suggests that measures may be adopted with effect for all of the institutions and bodies of the Community, including the ECB. It might moreover be difficult to achieve the 'effective protection' of the financial interests of the Community envisaged by Article 280 EC if a body such as the ECB, which has a substantial annual budget[92] and considerable assets,[93] fell outside its scope.

125. I accordingly conclude that Regulation No 1073/1999 was adopted on the correct legal basis.

Consultation pursuant to Article 105(4) EC

126. The ECB submits that if Regulation No 1073/1999 is to be interpreted as

91 — See paragraphs 55 to 60.

92 — It appears from the Annual Accounts of the ECB and Consolidated Balance Sheet of the Eurosystem 2001 that in the year ending 31 December 2001, the ECB had a total net income of EUR 2 124 963 526 and that it made a profit of EUR 1 821 819 922. The accounts were published in the Annual Report 2001 of the ECB, available at http://www.ecb.int.

93 — According to Article 28 of the Statute, the capital of the ECB is ECU 5 000 million and may be increased by decision of the Governing Council. According to Article 30.1 of the Statute, the ECB is to be provided by the national central banks with foreign reserve assets up to an amount equivalent to ECU 50 000 million. It appears from the Annual Accounts of the ECB and Consolidated Balance Sheet of the Eurosystem 2001, cited in note 92, that by the end of 2001 the total assets of the ECB were EUR 68 061 170 826.

applying to the ECB, it should have been consulted pursuant to Article 105(4) EC, which requires that the ECB shall be consulted on, among other things, 'any proposed Community act in its field of competence'. In the absence of a formal consultation of the ECB, the Regulation is invalid since consultation is an essential aspect of the institutional balance instituted by the Treaty and thus an essential procedural requirement.

127. More specifically, the ECB argues that Regulation No 1073/1999 falls within 'its fields of competence' because it directly affects the power of the ECB to organise its internal affairs which it has been granted by Article 12.3 of the Statute, [94] as complemented by the principle of implied powers, [95] and its power to 'lay down the conditions of employment of the staff of the ECB' under Article 36 of the Statute. In that context it points out that the Community legislature consulted the predecessor to the ECB (the European Monetary Institute, hereinafter the 'EMI') on the proposal for Regulation No 1197/98 [96] which extended the application of the tax regime applicable to Community staff [97] to the salaries, wages and emoluments of the members of the Governing Council and the General Council and the staff of the ECB.

128. The fact that members of the staff of the ECB participated in the preparatory work which took place within the Council is irrelevant since the failure formally to consult the ECB deprived the Governing Council of the opportunity to adopt an opinion in accordance with the relevant procedures [98] and to explain to the legislature, in words of its own choosing, why Regulation No 1073/1999 should not apply to the ECB.

129. The Commission resists those arguments. It asks whether the obligation to consult the ECB laid down in Article 105(4) EC is not limited to measures which concern the essential substantive matters for which the ECB is responsible, in particular the Community monetary policy. According to its wording, Article 105(4) EC does not apply to all measures which may have consequences for the ECB. The Commission considers moreover that the ECB has been consulted in so far as it was invited to and did take part in preparatory work carried out in the Council, where it expressed its views orally and in writing. The fact that Regulation No 1073/1999 does not refer explicitly to the views of the ECB expressed during the preparatory phase is a question of form which cannot affect the validity of the Regulation.

94 — Cited in note 80.

95 — In that regard, the ECB refers to *Germany* v *Commission*, cited in note 77.

96 — Cited in note 86.

97 — As laid down in Regulation No 260/68, OJ 1968 L 56, p. 8, subsequently amended on several occasions.

98 — The procedure for adoption of opinions of the ECB was, at the material time, laid down in ECB Administrative Circular 4/98, which has been supplied to the Court by the ECB.

130. Those arguments call for three preliminary remarks.

131. First, it is not contested by the Commission or the interveners that consultation under Article 105(4) EC constitutes an essential procedural requirement. I agree. The Court of Justice has consistently held that consultation requirements laid down in Treaty are to be regarded as essential. [99] Consultation of the ECB on proposed measures in its field of competence is a procedural step, required by a provision of the Treaty, which is clearly capable of affecting the content of the measures adopted. [100] Failure to comply with such requirement must, in my view, be capable of leading to the annulment of the measures adopted.

132. Second, there can be no doubt that the consultation envisaged by Article 105(4) EC is additional to the consultation requirements laid down in specific enabling provisions of the Treaty. The fact that Article 280(4) EC does not provide for consultation of the ECB is therefore, as the ECB stated in response to the submissions of the Netherlands Government, not relevant for determining whether consultation was required in the present case.

133. Third, the issue in the present case is not whether it would have been useful or desirable to consult the ECB on the proposal for Regulation No 1073/1999. The question is whether the Community legislature [101] was obliged to consult the ECB and, if so, whether that obligation was met.

134. In order to answer that question it is, as the ECB points out, not sufficient to observe that a measure may affect the ECB in some way without falling within the scope of Article 105(4) EC. It is necessary to interpret the wording of Article 105(4) EC, in the light of its context and purpose, in order to determine whether it applies to a measure — such as Regulation No 1073/1999 — which aims to combat fraud and other irregularities by, in particular, laying down rules for the conduct of internal investigations.

99 — See, with regard to the obligation to consult the European Parliament, Case 138/79 *Roquette Frères* [1980] ECR 3333; Case C-21/94 *Parliament* v *Council* [1995] ECR I-1827, paragraph 17 of the judgment. See, with regard to the obligation of the High Authority to consult the Council and the Consultative Committee under the ECSC Treaty, Case 1/54 *France* v *High Authority* [1954-56] ECR 1, at p. 15 and Case 2/54 *Italy* v *High Authority* [1954-56] ECR 37, at p. 52, confirmed by Case 6/54 *Netherlands* v *High Authority* [1954-56] ECR 103, at p. 112.

100 — See, in that regard, T. Hartley, *The Foundations of European Community Law* (4th ed., 1998), p. 412.

101 — It is not entirely clear whether it is for the Commission, the Council or, perhaps, the Parliament to consult the ECB under Article 105(4) EC. See R. Smits, cited in note 46, p. 212. Compare J. Cloos *et al.*, *Le Traité de Maastricht: genèse, analyse, commentaires* (2nd ed., 1994), p. 254, and J. Rideau, *Droit institutionnel de l'Union et des Communautés européennes* (3rd ed., 1999), p. 614, arguing that it is for the Council to consult.

135. It may be accepted that the phrase 'any proposed Community act in its fields of competence' in Article 105(4) EC is broad and that it might, at first sight, be understood as including all measures which fall within, or overlap with, the competences which the ECB has under the Treaty or under the Statute, including its competence to adopt measures of internal organisation and measures relating to the condition of employment of staff.

136. However, that reading of the text of Article 105(4) EC cannot, in my view, be reconciled with a systematic interpretation of the Treaty. Article 105 EC is placed in Chapter 2 (Monetary policy) of Title VII of Part Three of the Treaty. Article 105, the opening article of the Chapter, is divided into six paragraphs. After setting out, in the first paragraph, the objectives of the ESCB, the second paragraph provides a list of the basic tasks to be carried out through the ESCB. Following the third paragraph, which merely clarifies the content of the third indent of paragraph 2, the fourth paragraph provides for consultation of the ECB.

137. The notion of measures 'in its fields of competence' in the fourth paragraph must be understood in the light of the enumeration of tasks in Article 105(2) EC, and of the fact that Article 105 EC is placed in Chapter 2 under the heading 'Monetary policy' rather than in Chapter 3 which lays down 'Institutional provisions' for the ECB. [102] It follows, in my view, that Article 105(4) EC must be interpreted as applying to proposed measures which are concerned with the issues covered by Article 105(2) EC (monetary policy, foreign exchange operations, management of foreign reserves and payment systems) and, perhaps, by Article 105(5) and (6) EC (prudential supervision) and Article 106 EC (issue of bank notes and coins). Article 105(4) EC does not, however, apply to measures falling within, or overlapping with, the specific competences which the ECB has been granted under Articles 12 and 36 of the Statute. [103]

138. I am encouraged in that view by the travaux préparatoires to Article 105(4) EC. The draft treaty amending the Treaty establishing the European Economic Community with a view to achieving economic and monetary union, which was presented by the Commission in 1991, [104] envisaged consultation of the ECB on 'any draft Community legislation... on monetary, prudential supervision, banking or financial

102 — It may be noted, in that regard, that Article 112(2)(a) EC — which is placed in Chapter 3 of Title VII — explicitly provides for consultation of the Governing Council of the ECB prior to the appointment of the President, the Vice-President and the other members of the Executive Board.

103 — See similarly R. Smits, cited in note 46, p. 212; J. Rideau, *Droit institutionnel de l'Union et des Communautés européennes* (3rd ed., 1999), p. 614, who states that, by virtue of Article 105(4) EC, the ECB is 'associée à l'exercice du pouvoir de décision attribué au Conseil *en matière monétaire*' (emphasis added).

104 — *Bulletin of the European Communities* No 2/91.

matters'. In the explanatory memorandum issued concomitantly with the draft treaty, the Commission stated that its proposal 'entitles the [ECB] to be consulted by... the Commission... regarding any draft legislation... in the fields within its competence'. [105] It seems reasonable to assume that the Treaty draftsmen, by referring in Article 105(4) EC to the 'fields of competence' of the ECB, did not intend a different meaning; and that inference is consistent with the other travaux préparatoires to the Treaty on European Union. [106]

139. It cannot be objected against that view that Article 105(4) EC refers, in the plural, to the 'fields' of competence of the ECB. While Article 117(6) EC provided — until the establishment of the ECB — for consultation of the EMI on proposed Community acts within its 'field of competence'. The use of the singular in that provision reflected the fact that the tasks of the EMI were limited; under Article 117(2) and (3) EC its role was, essentially, to prepare the third phase of monetary union. The tasks laid upon the ECB by the provisions of Chapter 2 of Title VII of the Treaty are however much wider and the reference to the 'fields' of competence of ECB in Article 105(4) EC must, in my view, be interpreted as reflecting that situation.

140. The interpretation which I have suggested is also consistent with the purpose of Article 105(4) EC. The consultation envisaged by that provision aims, in my view, to ensure that the legislature is well informed when it adopts measures relating to subjects of which the ECB has particular knowledge or expertise, in particular, monetary policy. [107] Thus, the involvement of the ECB under Article 105(4) EC seeks to enhance the quality of Community legislation to the advantage of the European polity as a whole; it is not designed to protect the interests of the ECB, or to give the ECB a voice over all measures which are capable of affecting its internal organisation.

141. Since Regulation No 1073/1999 is plainly not within the fields of competence of the ECB outlined in Articles 105 and 106 EC, I conclude that it was not adopted in violation of Article 105(4) EC.

105 — Commentary to Article 106b of the draft treaty, point 4(iv).

106 — While the draft treaty on economic and monetary union, presented by the Luxembourg Presidency of the Council (*Europe Documents*, Document No 1722/1723, 5 July 1991) did not envisage consultation of the ECB, Article 108(2) of the draft treaty on economic and monetary union, presented by the Netherlands Presidency of the Council (*Europe Documents*, Document No 1740/1741, 1 November 1991) required consultation of the ECB on draft legislative provisions 'in the monetary, prudential or financial field'. For a similar proposal, see Article 4 of the draft ESCB Statute proposed by the Committee of Governors, and the commentary to that draft (*Europe Documents*, Document No 1669/1670, 8 December 1990).

107 — See similarly R. Smits, cited in note 46, p. 210.

142. The fact that the Council consulted the EMI on the proposal for Regulation No 1197/98 does not affect that conclusion. The Council is entitled to consult institutions and bodies of the Community even where it is not obliged to do so. [108] Its decision to consult the EMI is therefore not relevant for determining the scope of Article 105(4) EC. Moreover, the ECB has refrained, rightly in my view, from arguing that the consultation which took place created a legitimate expectation that the ECB would be consulted on other measures relating to internal organisation and conditions of employment of staff.

143. Nor is that conclusion contradicted by Council Decision 93/717/EEC [109] which defined the situations under which the authorities of the Member States were, pursuant to Article 117(6) EC, to consult the EMI on draft legislative provisions falling within its field of competence. [110] Article 1 of that Decision provided for consultation in particular on (i) currency legislation, the status of the ecu and means of payment, (ii) the status and powers of national central banks and the instruments of monetary policy, (iii) the collection, compilation and dissemination of monetary, financial, banking and balance of payments statistics, (iv) clearing and payment systems, in particular for cross-border transactions, and (v) rules applicable to financial institutions in so far as they influence the stability of financial institutions and markets. It cannot, in my view, be inferred from the reference to legislation concerning 'the status and powers of national central banks' that legislation concerning investigation of fraud and other irregularities committed by members and staff of central banks fall within the 'field of competence' of the EMI or, by analogy, the 'fields of competence' of the ECB.

144. Finally, it might be argued that the Community legislature is, as a corollary of the independence of the ECB enshrined in Article 108 EC and the principle of institutional balance, obliged to consult the ECB on measures which are liable to have a substantial impact on its internal organisation. However, if such a general principle existed, the legislature would not, in my view, be required to engage in formal consultations; it would be obliged only to involve the ECB by giving it an opportunity to express its views in due time before the adoption of the relevant measures. Since — according to the explanations of the parties — the ECB participated in meetings on the setting up of OLAF held within Council working groups, meetings of the COREPER and of the Council it was, in any event, given adequate opportunity to voice its concerns.

108 — See, by analogy, Case 165/87 *Commission* v *Council* [1988] ECR 5545, paragraph 20 of the judgment.

109 — Council Decision of 22 November 1993 on the consultation of the European Monetary Institute by the authorities of the Member States on draft legislative provisions, OJ 1993 L 332, p. 14.

110 — The Decision was adopted in accordance with Article 117(6) EC which provides that '[w]ithin the limits and under the conditions set out by the Council, acting by a qualified majority on a proposal from the Commission and after consulting the European Parliament and the EMI, the EMI shall be consulted by the authorities of the Member States on any draft legislative provision within its field of competence'.

Independence

145. According to the ECB, Regulation No 1073/1999 is — if it is to be interpreted as applying to the ECB — contrary to the principle of central bank independence enshrined in Article 108 EC.

146. In its view, the independence conferred by Article 108 EC upon the ECB applies to all of the tasks and duties which the ECB has under the Treaty and the Statute, not only to basic tasks set out in Article 105(2) EC. Under Articles 12.3 and 36.1 of the Statute the ECB is competent to adopt rules of procedure for its internal organisation and rules concerning the conditions of employment of its staff. Those competences must be exercised independently. Moreover, referring to the convergence report issued by the EMI in 1998, [111] in which the EMI gave the Member States guidance and recorded the progress of the process of adaptation of national laws required for entry into the Monetary Union, the ECB argues that in order to be exercised independently within the meaning of Article 108 EC, its powers must be shielded from 'all sources of external influence'. [112] The very existence of the powers of OLAF under Regulation No 1073/1999 could be considered a source of external influence, since the threat of those powers being exercised is capable of putting the members of the Executive Board and the Governing Council under pressure. While the ECB accepts that the risk of OLAF's powers being used in this way is minimal, it stresses that the independence of the ECB is a question of form, or appearance, as well as substance. Economic agents, who may not be familiar with the institutional structure of OLAF, might fear that the Commission is given the possibility of influencing the ECB by exercising the extensive powers of OLAF which, according to the ECB, may be compared to those of a criminal investigation. Thus, the application of Regulation No 1073/1999 might undermine the confidence of the financial markets in the ECB and in the euro.

147. In response to those submissions, the Commission replies, essentially, that the independence of the ECB within the Treaty is functional (fonctionnel) and limited to what is necessary for the accomplishment of its particular tasks. Moreover, the ECB has not shown how the power of OLAF to conduct internal investigations might *in concreto* affect or inhibit the exercise of those tasks. In that regard, the Commission points out that the task of OLAF under Regulation No 1073/1999 is only to establish the facts, and that it is for the ECB itself or, as the case may be, the national judicial authorities to take appropriate

111 — Convergence Report: Report required by Article 109j of the Treaty establishing the European Community, March 1998.

112 — The argument of the ECB is based, it seems, on p. 292 of the Report where the EMI stated that '[t]he prohibition on instructions and attempts to influence covers all sources of external influence on the [national central banks] in relation to ESCB matters which prevent them from complying with the Treaty and the Statute'.

action. Thus, OLAF is no more capable of influencing the decision-making of the ECB than the internal anti-fraud system of the ECB.

148. In order to determine whether the application of the provisions of Regulation No 1073/1999 to the ECB would violate its independence, it is necessary to consider the purpose and the essential features of that independence as provided for in the Treaty and the Statute. [113]

149. It will be recalled that under Article 108 EC 'neither the ECB... nor any member of [its] decision-making bodies shall seek or take instructions from Community institutions or bodies' 'when exercising the powers and carrying out the tasks and duties conferred upon them by [the] Treaty and the Statute of the ESCB', and that '[t]he Community institutions and bodies... undertake to respect this principle and not to seek to influence the members of the decision-making bodies of the ECB... in the performance of [its] tasks'.

150. That provision establishes, according to its wording, a principle of central bank independence. [114] It is, as the ECB itself points out, clear that the independence thus established is not an end in itself; it serves a specific purpose. By shielding the decision-making process of the ECB from short-term political pressures the principle of independence aims to enable the ECB effectively to pursue the aim of price stability and, without prejudice to that aim, support the economic policies of the Community as required by Article 105(1) EC. [115]

151. While the consequences of the principle of independence are to some extent spelled out in the provisions of the Statute it may, as the present case reveals, require further elaboration by the Court of Justice. The principle may, as the ECB points out, be divided into institutional, personal and financial aspects. [116]

152. The ECB is institutionally independent since it has been granted legal personality, distinct from that of the Community, [117] and is neither to seek nor to take instructions from any of the Community

113 — The following comments will focus on the independence of the ECB *vis-a-vis* the institutions and bodies of the Community. For further details, and discussion of the independence of the ECB *vis-a-vis* the authorities of the Member States, see R. Smits, cited in note 46, pp. 161 to 178.

114 — See F. Amtenbrink and J. de Haan, cited in note 47, at p. 70.

115 — Central bank independence is thought to serve economic policy goals, notably to reduce inflation and, perhaps, promote economic growth. For an overview of the, not entirely conclusive, empirical evidence, see F. Amtenbrink, *The Democratic Accountability of Central Banks* (1999), pp. 11 to 17 and 23 to 26.

116 — The terminology used here is consistent with that suggested in, e.g, J.-V. Louis, *Vers un système européen de banques centrales* (1989), pp. 25-28; R. Smits, cited in note 46, pp. 155-158. For a similar, if not identical, classification and further useful references, see F. Amtenbrink, op. cit., pp. 18 to 22.

117 — Article 107(2) EC and Article 9.1 of the Statute.

institutions and bodies in the performance of its tasks. [118] The institutions and bodies of the Community — with the notable exception of the Court of Justice — do not have the power to approve, suspend, annul or defer decisions of the ECB, nor are the institutions entitled to vote during the meetings of the Executive Board and the Governing Council. [119] Moreover, the Treaty has granted the ECB powers to adopt regulations, decisions, recommendations and opinions considered necessary to carry out certain tasks [120] and, as has already been mentioned, to lay down its own rules of procedure for its internal organisation and the terms of employment of its staff. [121]

153. The rules governing the appointment, security of tenure and external activities of the members of the Executive Board and the Governing Council confer upon the ECB a high level of personal independence. Thus, the President and the members of the Executive Board are appointed (by common accord of the Member States) for a non-renewable period of eight years. [122] The Statute also seeks to secure the personal independence of the Governing Council — which comprises the Executive Board and the Governors of the national central banks [123] — by providing that the Governors are to be appointed (by the competent national authorities) for a period of no less than five years. [124] Security of tenure is assured since a member of the Executive Board may be compulsorily retired (by the Court of Justice on an application by the Governing Council or the Executive Board) only if he no longer fulfils the conditions required for the performance of his duties or if he has been guilty of serious misconduct. [125] Equally strict conditions apply where the authorities of a Member State seek to relieve a central bank Governor, and member of the Governing Council, of his functions. [126] Moreover, the members of the Executive Board must perform their duties on a full-time basis and are generally precluded from engaging in any other occupation. [127]

154. Financially, the ECB is also independent. It has its own budget, which is drawn up by the Executive Board in accordance with principles established by the Governing Council, and its own assets paid up by the national central banks. [128] Moreover, the accounts of the ECB are audited by independent external auditors appointed by the ECB; [129] the competence of the Court of Auditors is limited to examining the operational efficiency of the management of the ECB. [130]

118 — Article 108 EC.
119 — Article 113(1) EC.
120 — Article 110 EC.
121 — Article 12.3 and 36.1 of the Statute.
122 — Article 112(2)(b) EC and Article 12.2 of the Statute.
123 — Article 112(1) EC.
124 — First paragraph of Article 14.2 of the Statute.
125 — Article 11.4 of the Statute.
126 — Second paragraph of Article 14.2 of the Statute.
127 — Second paragraph of Article 11.1 of the Statute.
128 — See above paragraph 113.
129 — Article 27.1 of the Statute.
130 — Article 248 EC and Article 27.2 of the Statute.

155. As is evident from this summary, the Treaty and the Statute confer upon the ECB a high level of independence which is equivalent to, or perhaps greater [131] than, the independence of the national central banks which prevailed prior to the reforms undertaken at national level in order to comply with the requirements for entry into the Monetary Union. [132] However, the principle of independence does not imply a total isolation from, or a complete absence of cooperation with, the institutions and bodies of the Community. The Treaty prohibits only influence which is liable to undermine the ability of the ECB to carry out its tasks effectively with a view to price stability, and which must therefore be regarded as undue. [133]

156. Thus, the Treaty envisages that the President of the Council and a member of the Commission are to participate in meetings of the Governing Council [134] and of the General Council. [135] While they do not have the right to vote, it seems clear that their status is not limited to that of mere observers. They presumably have the right to speak in order to influence, within reasonable limits, the decision-making of the governing bodies of the ECB, [136] and the President of the Council may submit a motion for deliberation by the Governing Council. [137] Moreover, the Treaty provides mechanisms through which the European Parliament may exercise a degree of influence on the decision-making of the ECB. The Parliament is to be consulted on the appointment of members of the Executive Board. [138] The President of the ECB must present an annual report on the activities of the ESCB and on the monetary policy of both the previous and the current year to the Parliament which may hold a general debate on that basis. [139] In addition, the competent committees of the Parliament may organise hearings of the President of the ECB and the other members of the Executive Board. [140]

157. And, as the Commission recalls, the Council and the Parliament [141] may (i) amend certain provisions of the Statute; [142] (ii) adopt complementary rules for the activities of the ECB; [143] (iii) confer additional tasks on the ECB in the area of prudential supervision; [144] (iv) conclude international agreements in the area of

131 — See M. Foresti, 'The independence of the European Central Bank: the Maastricht Treaty in the light of the theory of "Central Bank independence"', in S. Beretta (ed.) *Verso il completamento dell'integrazione europea: aspetti reali e finanziari* (1996), p. 13; I. Begg and D. Green, 'The political economy of the European Central Bank', in P. Arestis and M. Sawyer (eds.), *The Political Economy of Central Banking* (1998), p. 122; G. Sobbrio, 'The role of the European Central Bank: independence, control, regulations and European institutions', *Rivista di diritto finanziario e scienza delle finanze* 2001, p. 335 and 349.

132 — Those requirements are to be found, in particular, in Article 109 EC and Article 14 of the Statute.

133 — See similarly J.-V. Louis, 'A legal and institutional approach for building a monetary union', *Common Market Law Review* 1998, p. 33, at p. 44.

134 — First paragraph of Article 113 EC.

135 — Article 46.2 of the Statute.

136 — See similarly R. Smits, cited in note 46, at pp. 171-173.

137 — Second paragraph of Article 113(1) EC.

138 — Article 112(2)(b) EC.

139 — First paragraph of Article 113(3) EC.

140 — Second paragraph of Article 113(3) EC.

141 — Parliamentary assent is required (i) in the context of the procedure for amendment of the Statute laid down in Article 107(5) EC and Article 41.1 of the Statute and (ii) for conferring tasks on the ECB in the area of prudential supervision under Article 105(6) EC.

142 — Such amendments must be adopted in accordance with the specific procedure laid down in Article 107(5) EC.

143 — Article 105(6) EC.

144 — Article 105(6) EC.

monetary policy;[145] and (v) delegate — and lay down conditions for — the exercise of powers to the ECB.[146]

158. Those provisions — which establish (i) a limited degree of democratic accountability for the achievement by the ECB of the tasks laid upon it by the Treaty[147] and (ii) a degree of co-operation between the Community institutions, which are responsible under Chapter 1 of Title VII for the economic policy of the Community, and the ECB, which is responsible for the monetary policy of the Community — may be contrasted with those provisions of the Treaty which make it clear that the ECB is, as are all other Community institutions, bodies, offices and agencies, subject to the principle of the rule of law.[148] The ECB is thus subject to the jurisdiction of the European Court of Justice and bound by Community law.[149]

159. It is in the light of those comments that the submissions of the ECB must be considered. The ECB presents, in substance, two arguments. First, it contends that the powers conferred upon OLAF by Regulation No 1073/1999 might, by putting the members of its governing bodies under pressure, *actually* undermine the ability of the ECB to implement the tasks and exercise the powers conferred upon by it by the Treaty independently. Second, it maintains that the powers of OLAF under the Regulation might *be seen to* undermine the ability of the ECB to act independently.

160. I disagree with the first of those arguments. The ECB has, as the Commission points out, failed to explain how the exercise of the powers of OLAF under Regulation No 1073/1999 could in practice affect the decision-making process of the ECB. Nor could it, in my view, have provided such an explanation.

161. It is true, as the ECB points out, that OLAF is not a body entirely separate from the Commission; OLAF was established by a decision,[150] based on the power of the Commission to adopt measures of internal organisation,[151] and the preamble to Regu-

145 — Article 111 EC.

146 — Article 110(1) and (3) EC.

147 — Whether the accountability of the ECB envisaged by the Treaty is adequate is not at issue in the present case. See in that regard L. Gormley and J. de Haan, 'The democratic deficit of the European Central Bank', *European Law Review* 1996, p. 95; F. Amtenbrink, cited in note 116, esp. at pp. 359-363; J. de Haan and S. Eijffinger, 'The democratic accountability of the European Central Bank: a comment on two fairy tales' *Journal of Common Market Studies* 2000, p. 393.

148 — That principle is enshrined in Article 6 of the Treaty on European Union.

149 — Articles 230, 232, 234, 237, 241 and 235 EC in conjunction with Article 288 EC, and Articles 14.2, 35 and 36 of the Statute.

150 — Cited in note 11.

151 — Articles 218 EC, 16 CS and 131 EA. Article 6(4) of Decision No 1999/352 accordingly provides that 'Commission decisions concerning its internal organisation shall apply to the Office in so far as they are compatible with the provisions concerning the Office adopted by the Community legislator, with this Decision and with the detailed rules implementing it'.

lation No 1073/1999 refers to OLAF as an entity which has been 'established among [the Commission's] own departments'. [152] It is however clear from the provisions of Decision No 1999/352 and Regulation No 1073/1999 that OLAF is not an ordinary department of the Commission either.

162. According to Article 3 of Decision No 1999/352 OLAF 'shall exercise [its] powers of investigation in complete independence'. Article 12(3) of Regulation No 1073/1999 states, more precisely, that 'the Director shall neither seek nor take instructions from any government or any institution, body, office or agency in the performance of his duties with regard to the opening and carrying out of external and internal investigations or to the drafting of reports following such investigations'. [153]

163. In order to render the independence of OLAF effective, Decision No 1999/352 and Regulation No 1073/1999 provide, in particular, that OLAF is to be headed by a Director [154] and that its activities are to be monitored and assisted by a Supervisory Committee. [155] The Director is solely responsible for directing the investigations of OLAF [156] and acts as appointing authority for its staff. [157] While the Director is nominated by the Commission, for a period of five years, the nomination is subject to the approval of the Supervisory Committee and consultations with the European Parliament and the Council. [158] The Commission can take disciplinary action against the Director only by reasoned decision after consulting the Supervisory Committee. [159] The Supervisory Committee consists of five independent outside persons who possess the qualifications required for appointment in their respective countries to senior posts relating to the areas of activity of OLAF, [160] appointed for a period of three years [161] by common accord of the European Parliament, the Council and the Commission. [162]

164. In accordance with the independence of OLAF envisaged by Decision No 1999/352 and Regulation No 1073/1999, it is for the Director alone to decide whether to initiate internal investigations in particular cases. Thus, investigations can be opened only by a decision of the Director who may act at the request of an institution or body or at his own

152 — Fourth recital.

153 — See also the 18th recital of the preamble to the Regulation.

154 — The first paragraph of Article 5(1) of Decision No 1999/352; Article 12(1) of Regulation No 1073/1999.

155 — Article 4 of Decision No 1999/352; Article 11 of Regulation No 1073/1999. For a detailed account of the activities of the Supervisory Committee, see OLAF Supervisory Committee Report July 2000-September 2001, 11 October 2001.

156 — Second paragraph of Article 5(1) of Decision No 1999/352; Article 6(1) of Regulation No 1073/1999.

157 — Article 6(1) of Decision No 1999/352.

158 — The first paragraph of Article 5(1) of Decision No 1999/352; Article 12(2) of Regulation No 1073/1999. The period of nomination may be renewed once.

159 — Article 12(4) of Regulation No 1073/1999.

160 — Article 11(2) of Regulation No 1073/1999.

161 — Article 11(3) of Regulation No 1073/1999. The period may be renewed once.

162 — Article 11(2) of Regulation No 1073/1999.

initiative. [163] If, in this context, the Director considers that a measure taken by the Commission calls his independence into question, he may bring an action against it before the Court of Justice. [164]

165. Those institutional and legal arrangements guarantee OLAF a substantial degree of operational independence although it is set up within the Commission's administrative and budgetary structures. There is therefore in my view very little, if any, risk that OLAF could be used by the Commission, or by some other institution or body, as a vehicle for putting political pressure on the members of the governing bodies of the ECB.

166. That view is, as the Council points out, supported by the fact that OLAF does not exercise continuous control over the financial management of the ECB; it acts only where there are, exceptionally, grounds for suspecting that fraud or other irregularities within the meaning of Regulation No 1073/1999 have occurred. And even then, OLAF does not have the power to take disciplinary or legal action where an internal investigation reveals the existence of fraud or other irregularities. The essential functions of OLAF are, as the Commission stresses, (i) to investigate suspicions of fraud and irregularities by, *inter alia*, analysing information transmitted to it by institutions, bodies and individuals, [165] carrying out on-the-spot checks, [166] inspecting files and accounts, [167] and requesting oral information from members and managers of the institutions and bodies of the Community; [168] (ii) to draw up reports specifying the facts established, the financial loss, if any, and the findings of the investigations including the recommendation of the Director of OLAF on the action to be taken; and (iii) to forward those reports together with other relevant information to the institution, body, office or agency concerned [169] and — where matters liable to result in criminal proceedings are at stake — to the competent authorities of the Member State concerned. [170] Thus, it is for the ECB to 'take such action, in particular disciplinary or legal, on the internal investigations, as the results of those investigations warrant' and to 'report thereon to the Director of the Office, within a deadline laid down by him in... his report'. [171]

167. Moreover, the ECB might, as the Commission and the Netherlands Government point out, exclude access to infor-

163 — Article 5 of Regulation No 1073/1999. See also the 12th recital of the preamble to the Regulation, which states that 'to ensure that the Office is independent in carrying out the tasks conferred on it by this Regulation, its Director must be given the power to open an investigation on his own initiative'.

164 — Article 12(3) of Regulation No 1073/1999.

165 — Under Article 7 of Regulation No 1073/1999 the institutions and bodies of the Community are obliged to forward to OLAF information relating to possible cases of fraud, corruption and other illegal activities.

166 — Article 4(2) and (6) of Regulation No 1073/1999.

167 — Article 4(2) of Regulation No 1073/1999.

168 — Article 4(2) of Regulation No 1073/1999.

169 — Article 9(4) of Regulation No 1073/1999.

170 — Article 10(2) of Regulation No 1073/99.

171 — Article 9(4) of Regulation No 1073/99.

mation which is particularly important for its ability to carry out its tasks independently with a view to price stability in the decision to be adopted under Article 4(1) and (6) of Regulation No 1073/1999. [172] In that context, it may be noted that while the Commission, the Council and the European Parliament have adopted decisions pursuant to Article 4 without providing for any such exceptions, [173] the Court of Justice has, without adhering to the Interinstitutional Agreement, adopted a decision [174] which — by reference to its tasks, its independence and the secrecy of its deliberations [175] as set out in the Treaties and the Statute of the Court [176] — excludes from the scope of internal investigations documents and information held or created in the course of legal proceedings. [177]

168. What, then, of the second argument of the ECB that the powers conferred upon OLAF by Regulation No 1073/1999 might *be seen to* undermine the ability of the ECB to act independently?

169. I am not convinced by that argument either.

170. It may well be true, as the ECB states, that economic operators cannot be expected to be fully aware of the institutional arrangements which guarantee OLAF a high degree of operational independence from the Commission, and that some operators might therefore suspect, erroneously, that the Commission would be in a position to put pressure on the ECB via investigations, or the threat of investigations, by OLAF. However, other operators might feel reassured to know that, albeit independent, the ECB is subject to the same system of external, specialised and independent control of its financial dealings as other Community institutions and bodies. Indeed, it would seem to me that the reputation of the ECB might suffer considerable damage if accusations of fraud directed at members of its management or staff could not be cleared through an investigation carried out by a body outside the ECB itself.

171. Moreover, the Treaty and the Statute provide the ECB with a very high degree of

172 — See further below at paragraph 186.

173 — Commission Decision of 2 June 1999 concerning the terms and conditions for internal investigations in relation to the prevention of fraud, corruption and any illegal activity detrimental to the Communities' interests, OJ 1999 L 149, p. 57; Council Decision of 25 May 1999 concerning the terms and conditions for internal investigations in relation to the prevention of fraud, corruption and any illegal activity detrimental to the Communities' interests; OJ 1999 L 149, p. 36; European Parliament Decision of 18 November 1999 on the amendment to the Rules of Procedure following the Interinstitutional Agreement of 25 May 1999 on the internal investigations conducted by the European Anti-Fraud Office (OLAF) and, annexed thereto, European Parliament Decision concerning the terms and conditions for internal investigations in relation to the prevention of fraud, corruption and any illegal activity detrimental to the Communities' interests, OJ 1999 L 202, p. 1.

174 — Décision de la Cour de Justice du 26 octobre 1999 relative aux conditions et modalités des enquêtes internes en matière de lutte contre la fraude, la corruption et toute activité illégale préjudiciable aux intérêts des Communautés. This Decision is available only in French and has not been published in the Official Journal.

175 — Fifth, sixth and seventh recital of the preamble to the Decision.

176 — Protocol on the Statute of the Court of Justice, signed at Brussels on 17 April 1957, as last amended by Article 6 III (3)(c) of the Treaty of Amsterdam.

177 — Article 3 of the Decision.

institutional, personal, and financial independence. [178] In this constitutional context — of whose salient features economic operators are surely conscious — the effect on the perceived independence of the ECB of the application of Regulation No 1073/1999 would, in any event, be limited. That is, in my view, true even if the ECB as a relatively new entity may not yet fully enjoy the solid and long-standing reputation of certain national central banks.

172. I am encouraged in that view by the specialised literature on the topic of central bank independence. [179] That literature does not suggest that freedom from investigations, either by national judicial authorities or by specialised administrative anti-fraud units, is essential or even relevant in determining the overall level of independence of a bank, or its ability to deliver price stability.

173. The argument that the powers of OLAF are liable to undermine the perceived independence of the ECB must also, as the Council points out, be assessed in the light of the situation in the Member States.

While there may be no exact equivalent of OLAF in the Member States, it emerges from a comparative analysis that the national central banks are subject to a number of different external controls aimed at detecting and preventing fraud. Thus, the national central banks are in all the Member States subject to control by the office of the public prosecutor or the national police, which have greater powers of investigation than the powers of OLAF under Regulation No 1073/1999. [180] The laws of the majority of Member States also provide for the establishment of *ad hoc* parliamentary committees with powers of investigation similar to those envisaged by Regulation No 1073/1999, [181] and confer upon a public auditing body the task of verifying the accounts of the national central banks and investigating allegations of fraud. [182] There is, as the Council stresses, no suggestion in the Convergence Reports adopted by the EMI and the ECB that any of these provisions of national law are such as to affect the independence of the

178 — See above, paragraphs 148 to 158.

179 — For an overview, and further references, see F. Amtenbrink, cited in note 116, pp. 11 to 26.

180 — It appears that in most Member States the investigation of fraud falls within the jurisdiction of the ordinary police and/or prosecution services. However, in some States that task is entrusted to a specialised department within the prosecution service or the police. In other Member States a body outside the prosecution service and police exercises functions essentially similar to those of the police with regard to fraud.

181 — That applies to, at least, Belgium, Denmark, Finland, France, Germany, Greece, Italy, Netherlands, Portugal, Spain and Sweden.

182 — That applies to, at least, Austria, Finland, France, Germany, Ireland, the Netherlands, Spain and (with the exception of those tasks that are relevant to the missions of the ESCB) Portugal. In States where no provision is made for control by a public auditing body, the accounts of the central bank are generally audited by independent external auditors. That applies to Denmark, Ireland, Luxembourg, Portugal and the United Kingdom.

national central banks envisaged in Article 108 EC.[183] Nor is there is any evidence that investigations of the national central banks by external bodies have adversely affected their reputation on the financial markets or their ability to implement an effective monetary policy aimed at price stability.

174. Finally, I would not accept the ECB's argument even if it had been, or could be, shown that the application of Regulation No 1073/1999 would reduce market confidence in the ECB to some extent. The ECB is, as pointed out above, subject to the rule of law. It is thus required not only to pursue price stability and contribute to the aims of the Community in accordance with Article 105 EC, but also to conduct its affairs lawfully and without fraud detrimental to the financial interests of the Community. The application of Regulation No 1073/1999 to the ECB aims to, and will in my view, assist the ECB in its efforts to ensure that that obligation is, and is seen to be, respected.

175. I would accordingly reject the ECB's submission that the application of Regulation No 1073/1999 to the ECB violates the principle of independence enshrined in Article 108 EC.

183 — See EMI Report 'Progress Towards Convergence 1996', November 1996, pp. 100 to 104; EMI Convergence Report 1998, cited in note 111, pp. 12 and 13 and 291 to 295; ECB Convergence Report 2000, pp. 65, 69 to 72; ECB Convergence Report 2002, pp. 40 and 44 to 46. Those reports are available at http://www.ecb.int.

Proportionality

176. That brings me to the last objection of invalidity raised by the ECB in the present case. It submits that Regulation No 1073/1999 is contrary to the principle of proportionality in so far as it applies to the ECB. Three essential arguments are made in support of that submission.

177. First, the application of Regulation No 1073/1999 to the ECB is unnecessary since the ECB is already subject to adequate financial controls, internally by D-IA and the anti-fraud committee, externally by independent auditors appointed pursuant to Article 27 of the Statute. If the Community legislature considered that further measures were necessary, it could have conferred upon the external independent auditors the task of detecting and investigating fraud within the ECB.

178. Second, the ECB considers that the scheme envisaged by Regulation No 1073/1999 is unsuited to the specific nature of its activities. The majority of the tasks of the ECB are extremely market-sensitive and therefore subject to strict requirements of confidentiality. Given the risk that information obtained by OLAF in the course of internal investigations might leak, the ECB would therefore be forced to exclude from the scope of OLAF investigations all information pertaining to the execution of its basic tasks listed in

Article 105(2) EC by a decision adopted pursuant to Article 4(1) and (6) of the Regulation. OLAF would, then, play only a marginal role, and its limited access to information might even lead to erroneous findings.

179. Third, Regulation No 1073/1999 is also ill adapted to the decentralised nature of the ESCB. Internal investigations of the activities of the ECB would, according to the ECB, often reveal the need for investigations of one or more national central banks. However, OLAF is not competent to carry out such investigations.

180. In reply to those arguments, the Commission recalls that the Community legislature considered it necessary, in order to strengthen the fight against fraud, to establish a single independent and specialised service for all the institutions, bodies, offices and agencies of the Community. The fact that in doing so the legislature did not take account of the existence of different internal and external controls for each of those institutions, bodies, offices and agencies cannot be regarded as disproportionate. The existence of those various controls will certainly affect the way in which internal inquiries are carried out in practice, but it is not a convincing argument for excluding the application of Regulation No 1073/1999 altogether.

181. According to the Commission, the specific nature of the tasks entrusted to the ECB does not render the application of Regulation No 1073/1999 disproportionate either. The nature of the tasks of the ECB, and the concomitant need for confidentiality, are issues which can and should be resolved in the decision to be adopted by the ECB pursuant to Article 4(1) and (6) of the Regulation. Nor is the decentralised operation of the ESCB a convincing argument for the ECB's submission. The absence of a power for OLAF to carry out investigations of the national central banks is irrelevant for its power to investigate the ECB itself, and investigations of the national central banks may, in any event, be carried out by the national authorities in cooperation with OLAF if necessary.

182. I cannot accept the ECB's submissions.

183. It is not for the Court of Justice to substitute its judgment for that of the Community legislature when reviewing the lawfulness of general measures. The Court will annul such measures only if it is clearly established that they are, as a whole or as regards certain aspects, disproportionate. The issue in the present case is therefore not whether the different internal and external controls to which the ECB is subject are adequate, but whether by establishing a general system of external and independent control the legislature clearly exceeded what is necessary in order to combat fraud.

184. The application of Regulation No 1073/1999 to the ECB is not, in my view, clearly unnecessary. While the internal ECB anti-fraud system established by the contested decision provides some protection against fraud and other irregularities, the legislature was in my view correct in assuming that control by an external and independent body would be more effective and, perhaps as importantly, would be seen to be more effective. Moreover, Regulation No 1073/1999 was adopted prior to the contested decision. The improvements to the ECB anti-fraud system introduced by that decision (e.g. the establishment of the anti-fraud committee) therefore cannot, in any event, render the Regulation disproportionate. It cannot be objected against that view that the external auditors appointed pursuant to Article 27 of the Statute have the power to examine and approve the accounts of the ECB, since the task of auditing differs fundamentally in nature from the task and controls to carried out by OLAF.

185. With regard to the specific nature of the tasks entrusted to the ECB, I agree with the Commission that those are issues which must be resolved, following a constructive dialogue between the parties consonant with the principle of loyal cooperation, [184] in the decision to be adopted by the ECB under Article 4(1) and (6) of Regulation No 1073/1999.

186. The ECB's assertion that most, if not all, of its activities would have to be excluded from the scope of internal investigations in such a decision in order to preserve confidentiality is unconvincing. While it may be true that information relating to the setting of ECB interest rates and the security features of euro bank notes must be kept secret, information relating to other aspects of the ECB's activities might be considered less sensitive. In any event, there would be no basis for excluding from internal investigations information relating to those ECB activities which are not linked directly with the tasks listed in Articles 105 and 106 EC, such as decisions about procurement of goods and services. The alleged need for exclusions must, moreover, be considered in the light of Article 8 of Regulation No 1073/1999 which provides that '[i]nformation forwarded or obtained in the course of internal investigations, in whatever form, shall be subject to professional secrecy and shall enjoy the protection given by the provisions applicable to the institutions of the European Communities... Such information may not be communicated to persons other than those within the institutions of the European Communities or in the Member States whose functions require them to know, nor may it be used for purposes other than to prevent fraud,

184 — Article 10 EC.

corruption or any other illegal activity', [185] and which obliges the Director of the Office and the members of the Supervisory Committee to ensure that Article 287 EC is applied. [186]

187. Moreover, while the inability of OLAF to carry out investigations within the national central banks in its own name might reduce the effectiveness of Regulation No 1073/1999 to some extent, the ECB has not provided precise explanations to support its assertion that OLAF would as a result of that limitation of its powers be unable to complete its task with regard to the ECB itself.

188. Finally, it may be recalled that the Commission initially proposed to establish OLAF by a Community Regulation and to lay down detailed provisions for the conduct of internal investigations in all of the institutions, bodies, agencies and offices of the Community. [187] In contrast to that proposal, Regulation No 1073/1999 lays down only general rules for the procedures and modalities of internal investigations and envisages the adoption of more detailed arrangements in a decision pursuant to Article 4(1) and (6). I agree with the Council that that system — which allows the specific tasks and situation of each institution, body, office or agency to be taken into account — strikes an appropriate and proportionate balance between the exigencies of institutional organisational autonomy and effective fraud prevention. [188]

189. I accordingly conclude that Regulation No 1073/1999 is not contrary to the principle of proportionality in so far as it applies to the ECB.

Admissibility under Article 241 EC

190. It will be recalled that the Commission contests the admissibility of the ECB's submission that Regulation No 1073/1999 should be declared inapplicable pursuant to Article 241 EC (the 'plea of illegality'), contending that such a plea is not open to the ECB. [189] The parties and the interveners have not submitted detailed submission on that point. In the light of the conclusion I have reached on the substance of the four essential arguments put forward by the ECB in support of that plea, I will therefore deal with the question of admissibility only

185 — Article 8(2).

186 — Article 8(4). Article 287 EC is cited above in paragraph 14.

187 — See above paragraph 7 with note 10.

188 — See also in that regard the fourth recital of the preamble to Regulation No 1073/1999.

189 — See above paragraphs 98 to 100.

briefly and without expressing a final view.[190] The issue is difficult and the arguments finely balanced.

191. The view that an institution or body may invoke the invalidity of a regulation as a defence in an action seeking the annulment of a measure adopted by that institution or body for violating the regulation in question is, as the ECB stresses, supported by the wording of Article 241 EC according to which 'any party' may in proceedings in which 'a regulation' is at issue 'invoke before the Court of Justice [its] inapplicability', and it might be considered contrary to the principle of legality if, faced with a regulation alleged by the defendant institution or body to be illegal in certain respects, the Court were to declare that that institution or body had acted unlawfully, or failed to fulfil its obligations, without examining the allegations and merely pointed out that they could have been made in proceedings for annulment. Moreover, while the Court of Justice has never explicitly ruled that a Member State may invoke the invalidity of a regulation as a defence in an infringement action under Article 226 EC, it has never excluded that possibility, and some judgments may be read as implicitly endorsing that possibility;[191] if indeed the Member States have that possibility, it is arguable that the institutions or bodies of the Community should be treated likewise in the context of annulment actions under Article 230 EC.

192. All those arguments must, however, be weighed against important considerations of principle. The time-limit for instituting proceedings laid down in the fifth paragraph of Article 230 EC aims to guarantee legal certainty within the Community. To interpret Article 241 EC as opening up an additional possibility of review for applicants who would have been able to institute proceedings for annulment as of right, but have omitted to do so, would run counter to that aim and might encourage delaying tactics. It may be recalled in that regard that the Court held

190 — According to the case-law, it is for the Court to decide whether in the circumstances of the case the proper administration of justice justifies the dismissal of an action on the merits without ruling on the objection of inadmissibility raised by the Commission, see judgment of 26 February 2002 in Case C-23/00 P *Council* v *Boehringer*.

191 — See, in that regard, the Opinion of Advocate General Darmon in Case C-258/89 *Commission* v *Spain* [1991] ECR I-3977, paragraphs 15 to 21. See also, favouring this view, the Opinions of Advocate General Roemer in Case 32/65 *Italy* v *Council and Commission* [1966] ECR 389, at p. 414; Advocate General Slynn in Case 181/85 *France* v *Commission* [1987] ECR 689, pp. 702 to 704; Advocate General Mancini in Case 204/86 *Greece* v *Council* [1988] ECR 5323, paragraph 6; and A. Barav, 'The exception of illegality in Community law: a critical analysis', *Common Market Law Review* 1974, p. 366; P. Dubois, 'L'exception d'illégalité devant la Cour de Justice des Communautés européennes', *Cahiers de droit européen* 1978, p. 411; H. Schermers and D. Waelbroeck, *Judicial Protection in the European Communities* (5th ed. 1992), paragraphs 467 and 531; K. Lenaerts & D. Arts, *Procedural Law of the European Union* (1999), p. 223.

in *TWD* [192] that an individual cannot challenge a measure pursuant to Article 234 EC where, although there was no doubt about his standing under the fourth paragraph of Article 230 EC, he omitted to take action within the time-limit laid down in the fifth paragraph of that article. The Court's reasoning in that case was based, essentially, on the need to safeguard legal certainty by preventing Community measures from being called into question indefinitely [193] and to prevent individuals from evading the time-limit laid down in the fifth paragraph of Article 230 EC. [194] The same considerations apply, in my view, to indirect challenges to Community acts raised by Member States, institutions and bodies under Article 241 EC. [195]

193. That argument might be thought consistent with the purpose of Article 241 EC. In *Simmenthal* the Court held that Article 184 of the EC Treaty (now Article 241 EC) 'gives expression to a general principle conferring upon any party to proceedings the right to challenge, for the purpose of obtaining the annulment of a decision of direct and individual concern to that party, the validity of previous acts of the institutions which form the legal basis of the decision which is being attacked, if that party was not entitled under Article [230 EC] to bring a direct action challenging those acts by which it was thus affected without having been in a position to ask that they be declared void'. This passage might be taken to suggest that the essential purpose of Article 241 EC is to ensure that judicial protection is available where, owing to the restrictions on standing in Article 230 EC, a direct challenge is precluded. [196]

194. None the less, and placing particular emphasis on the clear wording of Article 241 EC, which creates a remedy (if only an incidental one), I tentatively conclude that the ECB's second plea in law — to the effect that Regulation No 1073/1999 should be declared inapplicable — is admissible. In that context, it is in my view irrelevant whether or not the ECB was aware that the Regulation applied to it. [197] There is no basis in the text of Article 241 EC for limiting its scope by reference to the subjective knowledge of the person, Member State, institution or body seeking to invoke it, and that would, in any event, be a difficult test to apply in practice.

192 — Case C-188/92 [1994] ECR I-833. See also Case C-178/95 *Wiljo* [1997] ECR I-585; Case C-239/99 *Nachi Europe* [2001] ECR I-1197.

193 — Paragraph 16 of the judgment.

194 — Paragraph 17 of the judgment.

195 — See similarly my Opinion in *Nachi*, cited in note 192, at paragraph 69.

196 — See similarly G. Bebr, 'Judicial remedy of private parties against normative acts of the European Communities: the role of the exception of illegality', *Common Market Law Review* 1966, p. 7; R. Joliet, *Le droit institutionnel des Communautés européennes. Le contentieux* (1981), pp. 132 and 133; J. Usher, 'The Interrelationship of Articles 173, 177 and 184 EEC', *European Law Review* 1979 p. 36.

197 — See similarly the Opinion of Advocate General Slynn in Case 181/85, cited in note 191, p. 703.

Conclusion

195. In the light of all the foregoing observations, I am of the opinion that the Court of Justice should:

(1) declare void Decision 1999/726/EC of the European Central Bank of 7 October 1999 on fraud prevention;

(2) order the ECB to pay the costs of the Commission;

(3) order the European Parliament, the Council and the Kingdom of the Netherlands to bear their own costs.