JUDGMENT OF THE COURT (Grand Chamber)

27 February 2007 *

In Case C-354/04 P,

APPEAL under Article 56 of the Statute of the Court of Justice lodged at the Court on 17 August 2004,

Gestoras Pro Amnistía, established at Hernani (Spain),

Juan Mari Olano Olano, residing in Madrid (Spain),

Julen Zelarain Errasti, residing in Madrid (Spain),

represented by D. Rouget, avocat,

appellants,

the other parties to the proceedings being:

Council of the European Union, represented by E. Finnegan and M. Bauer, acting as Agents,

defendant at first instance,

* Language of the case: French.

Kingdom of Spain, represented by the Abogacía del Estado,

United Kingdom of Great Britain and Northern Ireland,

interveners at first instance,

THE COURT (Grand Chamber),

composed of V. Skouris, President, P. Jann, C.W.A. Timmermans, A. Rosas, K. Lenaerts and R. Schintgen, Presidents of Chambers, A. Tizzano, J.N. Cunha Rodrigues, R. Silva de Lapuerta, L. Bay Larsen, P. Lindh, J.-C. Bonichot (Rapporteur) and T. von Danwitz, Judges,

Advocate General: P. Mengozzi,
Registrar: R. Grass,

having regard to the written procedure,

after hearing the Opinion of the Advocate General at the sitting on 26 October 2006

gives the following

Judgment

1 By their appeal Gestoras Pro Amnistía, Mr Olano Olano and Mr Zelarain Errasti request the Court to set aside the order of the Court of First Instance of the

European Communities of 7 June 2004 in Case T-333/02 *Gestoras Pro Amnistía and Others* v *Council* (not published in the European Court Reports, 'the order under appeal'), by which the Court of First Instance dismissed their action for damages for the harm allegedly sustained by the applicants at first instance due to the inclusion of Gestoras Pro Amnistía in the list of persons, groups or entities referred to in Article 1 of Council Common Position 2001/931/CFSP of 27 December 2001 on the application of specific measures to combat terrorism (OJ 2001 L 344, p. 93), in Article 1 of Council Common Position 2002/340/CFSP of 2 May 2002 updating Common Position 2001/931 (OJ 2002 L 116, p. 75), and in Article 1 of Council Common Position 2002/462/CFSP of 17 June 2002 updating Common Position 2001/931 and repealing Common Position 2002/340 (OJ 2002 L 160, p. 32).

Background to the dispute

2 The background to the dispute was set out as follows in paragraphs 1 to 11 of the order under appeal:

'1 It is apparent from the documents before the Court that Gestoras Pro Amnistía is an organisation whose object is the protection of human rights in the Basque country and, in particular, the protection of the rights of political prisoners and exiles. According to the applicants, this organisation was created in 1976 and is established in Hernani (Spain). It has appointed Mr J.M. Olano Olano and Mr J. Zelarain Errasti its spokespersons. No official documentation has been provided in this respect.

2 On 28 September 2001, the United Nations Security Council adopted Resolution 1373 (2001), by which, in particular, it decided that all States should afford one another the greatest measure of assistance in connection with

criminal investigations or criminal proceedings relating to the financing or support of terrorist acts, including assistance in obtaining evidence in their possession necessary for the proceedings.

3 By orders of 2 and 19 November 2001 the central investigating judge No 5 at the Audiencia Nacional (National High Court), Madrid (Spain), ordered the imprisonment of the alleged leaders of Gestoras Pro Amnistía, including its two spokespersons, and declared its activities illegal, on the ground that that organisation was an integral part of the Basque separatist organisation ETA. Gestoras Pro Amnistía appealed against that decision.

4 On 27 December 2001, considering that action by the Community [and the Member States] was necessary in order to implement Resolution 1373 (2001) of the United Nations Security Council, the Council [of the European Union] adopted Common Position 2001/931 ... . That common position was adopted on the basis of Article 15 EU, which comes under Title V of the EU Treaty entitled "Provisions on a common foreign and security policy" (CFSP), and Article 34 EU, which comes under Title VI of the EU Treaty entitled "Provisions on police and judicial cooperation in criminal matters" .... .

5 Articles 1 and 4 of Common Position 2001/931 provide:

"*Article 1*

1. This Common Position applies in accordance with the provisions of the following Articles to persons, groups and entities involved in terrorist acts and listed in the Annex.

...

6. The names of persons and entities on the list in the Annex shall be reviewed at regular intervals and at least once every six months to ensure that there are grounds for keeping them on the list."

"Article 4

Member States shall, through police and judicial cooperation in criminal matters within the framework of Title VI of the [EU] Treaty, afford each other the widest possible assistance in preventing and combating terrorist acts. To that end they shall, with respect to enquiries and proceedings conducted by their authorities in respect of any of the persons, groups and entities listed in the Annex, fully exploit, upon request, their existing powers in accordance with acts of the European Union and other international agreements, arrangements and conventions which are binding upon Member States."

6 The annex to Common Position 2001/931 indicates in point 2 entitled "Groups and entities":

"* — Euskadi Ta Askatasuna/Tierra Vasca y Libertad/Basque Fatherland and Liberty (ETA)"

(The following organisations are part of the terrorist group ETA: K.a.s., Xaki, Ekin, Jarrai-Haika-Segi, Gestoras pro amnistía.)".

7 The note at the bottom of this annex states that "[p]ersons marked with an * shall be the subject of Article 4 only".

8 On 27 December 2001, the Council also adopted Common Position 2001/930/CFSP on combating terrorism (OJ 2001 L 344, p. 90), Regulation (EC) No 2580/2001 on specific restrictive measures directed against certain persons and entities with a view to combating terrorism (OJ 2001 L 344, p. 70) and Decision 2001/927/EC establishing the list provided for in Article 2(3) of Regulation (EC) No 2580/2001 (OJ 2001 L 344, p. 83). None of those texts mentions the applicants.

9 According to the Council declaration [of 18 December 2001] annexed to the minutes at the time of the adoption of Common Position 2001/931 and Regulation No 2580/2001 ("the Council declaration concerning the right to compensation"):

"The Council recalls regarding Article 1(6) of Common Position [2001/931] that in the event of any error in respect of the persons, groups or entities referred to, the injured party shall have the right to seek judicial redress."

10 By decision of 23 May 2002, the European Court of Human Rights dismissed as inadmissible the action brought by the applicants against the 15 Member States, concerning Common Position 2001/931, on the ground that the situation complained of did not entitle them to be regarded as victims of an infringement of the European Convention on Human Rights and Fundamental Freedoms [signed at Rome on 4 November 1950, "ECHR"] [*Reports of Judgments and Decisions* 2002-V].

11 On 2 May and 17 June 2002, the Council adopted, on the basis of Articles 15 EU and 34 EU, Common Positions 2002/340/CFSP and 2002/462/CFSP updating Common Position 2001/931 (OJ 2002 L 116, p. 75, and OJ 2002 L 160, p. 32). The annexes to these two common positions contain the name "Gestoras Pro Amnistía", which appears in the same way as it does in Common Position 2001/931.'

3 In addition to that account of the background to the dispute, it is to be noted that, as provided in the first subparagraph of Article 1(4) of Common Position 2001/931:

'The list in the Annex [of persons, groups and entities involved in terrorist acts] is to be drawn up on the basis of precise information or material in the relevant file which indicates that a decision has been taken by a competent authority in respect of [those] persons, groups and entities ..., irrespective of whether it concerns the instigation of investigations or prosecution for a terrorist act, an attempt to perpetrate, participate in or facilitate such an act based on serious and credible evidence or clues, or condemnation [sic] for such deeds ...'

4 Gestoras Pro Amnistía applied to the Council for access to the documents on which the Council relied in entering it in the list annexed to Common Position 2001/931. By letter of 27 March 2002 the Secretary-General of the Council communicated to Gestoras Pro Amnistía a series of documents relating to that Common Position. Taking the view that those documents did not concern it specifically or personally, the association addressed a fresh request to the Council which the latter rejected by letter of 21 May 2002, on the ground that the information necessary for the drawing up of that list had been returned to the national delegations concerned after it had been examined and the decision adopted.

The action before the Court of First Instance and the order under appeal

5 By application lodged at the Registry of the Court of First Instance on 31 October 2002 the appellants claimed that the Court should:

— order the Council to pay the sum of EUR 1 000 000 to Gestoras Pro Amnistía and the sum of EUR 100 000 each to Mr Olano Olano and Mr Zelarain Errasti, as compensation for the damage allegedly suffered as a result of the inclusion of Gestoras Pro Amnistía in the list of persons, groups and entities referred to in Article 1 of Common Positions 2001/931, 2002/340 and 2002/462 respectively;

— order that those sums should bear default interest at the rate of 4.5% per annum from the date of the decision of the Court of First Instance until actual payment should have been effected; and

— order the Council to pay the costs.

6 By separate document lodged at the Registry of the Court of First Instance on 12 February 2003, the Council raised an objection of inadmissibility pursuant to Article 114 of the Rules of Procedure of the Court of First Instance, arguing that the action should be declared manifestly inadmissible and that 'the applicant' should be ordered to pay the costs.

7 By order of 5 June 2003 the President of the Second Chamber of the Court of First Instance granted the requests of the Kingdom of Spain and the United Kingdom of Great Britain and Northern Ireland for leave to intervene in support of the forms of order sought by the Council. Only the Kingdom of Spain submitted its observations on the objection of inadmissibility.

8 In their observations on the plea of inadmissibility, the appellants claimed that the Court of First Instance should:

— declare the action for damages admissible;

— alternatively, find that the Council had infringed general principles of Community law;

— in any event, order the Council to pay the costs.

9 By the order under appeal, made pursuant to Article 111 of its Rules of Procedure, the Court of First Instance dismissed the action without opening the oral procedure.

10 First, it held that it clearly had no jurisdiction, in the legal system of the European Union, to hear and determine the appellants' claim for damages.

11 In reaching that conclusion the Court of First Instance noted that the appellants were affected only by Article 4 of Common Position 2001/931, by virtue of which the Member States are to afford one another the widest possible assistance through the police and judicial cooperation in criminal matters provided for by Title VI of the EU Treaty and, accordingly, that the measures which, it was claimed, gave rise to the alleged damage had as their sole relevant legal basis Article 34 EU. It found that the only legal remedies provided by Article 35(1), (6) and (7) EU, referred to by Article 46 EU, were the reference for a preliminary ruling, the action for annulment

and the procedure for settling disputes between Member States. In consequence, it found that no judicial remedy allowing for an order for damages was available under Title VI of the EU Treaty.

12 Second, the Court of First Instance held that it did, nevertheless, have jurisdiction to rule on the action, but only in so far as the latter was based on infringement of the powers of the Community.

13 The Court of First Instance noted that the Community judicature did have jurisdiction to consider whether an act adopted under the EU Treaty does not affect the powers of the Community. So it investigated, in paragraphs 41 to 47 of the order under appeal, whether in adopting the contested measures the Council had not unlawfully encroached upon the powers of the Community.

14 That court considered, however, that the appellants had failed to cite any legal basis in the EC Treaty that had been disregarded. It held that the Council was fully entitled to rely on Title VI of the EU Treaty in order to adopt the acts at issue and that, therefore, in so far as the action was based on a failure to observe the powers of the Community, it had to be dismissed as manifestly unfounded.

Forms of order sought by the parties before the Court of Justice

15 The appellants claim that the Court should:

— set aside the order under appeal;

— itself give a ruling on the action and grant the forms of order requested before the Court of First Instance by the appellants, and

— order the Council to pay the costs.

16 The Council contends that the Court should:

— dismiss the appeal as clearly inadmissible;

— in the alternative, dismiss it as unfounded;

— if necessary, refer the case back to the Court of First Instance, and

— order the appellants to pay the costs.

17 The Kingdom of Spain seeks forms of order identical to those of the Council.

Concerning the appeal

Admissibility of the appeal

Arguments of the parties

18 The Council and the Kingdom of Spain maintain that the arguments put forward by the appellants are in substance identical to those set out at first instance, and do not

make specific reference to the error of law which they claim vitiates the order under appeal. The appeal should therefore be dismissed as clearly inadmissible.

Findings of the Court

— With regard to the part of the appeal challenging the order in so far as the latter rejects the plea alleging that the Council encroached upon the powers conferred on the Community

19 Before the Court of First Instance the appellants argued that the Council, in adopting Common Position 2001/931, confirmed by Common Positions 2002/340 and 2002/462, deliberately encroached on the powers conferred on the Community for the purpose of depriving the persons referred to in that common position of the right to an effective remedy

20 In the order under appeal, the Court of First Instance held that it had jurisdiction to take cognisance of the action brought by the appellants only in so far as it was based on failure to have regard to the powers of the Community, referring in particular to Case C-170/96 *Commission* v *Council* [1998] ECR I-2763, paragraph 17. In paragraphs 45 and 46 of the order under appeal, the Court held that Article 34 EU was the relevant legal basis for the adoption of Article 4 of Common Position 2001/931 and that the appellants had failed to cite a legal basis in the EC Treaty that had been disregarded.

21 In their appeal before the Court of Justice, the appellants do no more than reaffirm that the Council adopted those common positions on the legal basis of Article 34 EU for the sole purpose of depriving them of the right to a remedy. They do not, however, put forward any argument in support of that claim.

22 It is clear from Article 225 EC, from the first paragraph of Article 58 of the Statute of the Court of Justice and from Article 112(1)(c) of its Rules of Procedure that an appeal must indicate precisely the contested elements of the judgment or order which the appellant seeks to have set aside, and also the legal arguments specifically advanced in support of the appeal (see, in particular, Case C-352/98 P *Bergaderm and Goupil* v *Commission* [2000] ECR I-5291, paragraph 34; Case C-248/99 P *France* v *Monsanto and Commission* [2002] ECR I-1, paragraph 68; and the order in Case C-488/01 P *Martínez* v *Parliament* [2003] ECR I-13355, paragraph 40).

23 In the present case, as the Council and the Kingdom of Spain maintain, the appeal does not state why the legal ground relied on by the Court of First Instance in paragraphs 45 and 46 of the order under appeal is incorrect. The appeal is therefore and to that extent inadmissible.

— With regard to the part of the appeal challenging the order in so far as the latter finds that the Court of First Instance has no jurisdiction to hear and determine the action for damages

24 As stated above, it is clear from Article 225 EC, from the first paragraph of Article 58 of the Statute of the Court of Justice and from Article 112(1)(c) of its Rules of Procedure that an appeal must indicate precisely the contested elements of the judgment or order which the appellant seeks to have set aside, and also the legal arguments specifically advanced in support of the appeal.

25 In this case, and contrary to the submissions of the Council and the Kingdom of Spain, the appeal, in so far as it concerns the refusal of the Court of First Instance to hold that it had jurisdiction to entertain the action for damages, is not confined to a reproduction of the pleas in law and arguments raised before the Court of First Instance, but does indicate the contested elements of the order under appeal and the legal arguments specifically advanced in support of the appeal.

26 It follows that the appeal is admissible in so far as it challenges that part of the order under appeal in which the Court of First Instance held that it had no jurisdiction to entertain the action for damages.

The admissibility of certain grounds of challenge put forward in support of the appeal

Arguments of the parties

27 With regard to the admissibility of certain grounds of appeal, the Council and the Kingdom of Spain maintain, moreover, that the ground relating to the examination of the two successive versions of the footnote in the Annex to Common Position 2001/931, which marks with an '*' the classes that are to be 'the subject of Article 4 only', was put forward for the first time in the reply and is therefore inadmissible. According to the appellants, that examination demonstrated that, before being amended by the Council's Common Position 2003/482/CFSP of 27 June 2003 (OJ 2003 L 160, p. 100), that footnote covered only 'persons', that is to say, natural persons to the exclusion of 'groups and entities' and that, in those circumstances, on 31 October 2002, the date on which it brought its action before the Court of First Instance, Gestoras Pro Amnistía did not belong to the class of 'persons [who are to] be the subject of Article 4 only' but to that of groups and entities subject to the actions of the Community mentioned in Articles 2 and 3 of Common Position 2001/931.

28 In addition, the Council maintains that two grounds of appeal raised by the appellants were not put before the Court of First Instance and are therefore inadmissible. The first is the plea claiming that the Member States are bound to perform their obligations under earlier agreements, in accordance with Article 30 of the Vienna Convention on the Law of Treaties of 23 May 1969 on the application of successive treaties relating to the same subject-matter and with Article 307 of the EC

Treaty. Those obligations under earlier agreements guarantee effective observance of human rights and fundamental freedoms. The second ground which the Council regards as inadmissible is the claim that there exists in the Court's case-law a principle of interpretation called 'wider jurisdiction', by virtue of which the Court has already accepted jurisdiction outside the bounds of the Treaty.

Findings of the Court

29 Under Article 48(2) of the Rules of Procedure of the Court of First Instance, no new plea in law may be introduced in the course of proceedings unless it is based on matters of law or of fact which have come to light in the course of the procedure.

30 To allow a party to put forward for the first time before the Court of Justice a plea in law which it has not raised before the Court of First Instance would be to allow it to bring before the Court, whose jurisdiction in appeals is limited, a case of wider ambit than that which came before the Court of First Instance. In an appeal the Court's jurisdiction is confined to review of the findings of law on the pleas argued before the Court of First Instance (see Case C-136/92 P *Commission* v *Brazzelli Lualdi and Others* [1994] ECR I-1981, paragraphs 58 and 59).

31 In the present case, the grounds of appeal relating to the altered wording of the footnote in the Annex to Common Position 2001/931, to the performance by the Member States of their obligations under earlier agreements or treaties and to the principle of general interpretation relating to a 'wider jurisdiction' of the Court were not raised by the appellants before the Court of First Instance.

32 Those grounds of appeal are, consequently, inadmissible.

Substance

Arguments of the parties

33 The appellants maintain that the Court of First Instance erred in declining jurisdiction to consider their action for damages.

34 The Union is a community governed by the rule of law, guaranteeing by virtue of Article 6(2) EU the right to an effective remedy laid down in Article 13 of the ECHR and the right to a tribunal provided by Article 6 of that convention.

35 Furthermore, by its declaration concerning the right to redress, the Council has, in the appellants' view, accepted that any error in drawing up the list annexed to Common Position 2001/931 amounts to fault on its part, which gives entitlement to redress. In that declaration, the Council stated that that right must be afforded to persons, groups and entities referred to, like the appellants, in Article 4 of Common Position 2001/931, on the same conditions as it is to the persons, groups and entities entered in the list annexed to Regulation No 2580/2001 or covered by Article 3 of that Common Position, who may apply to the Court of First Instance if they are mentioned in acts adopted under the EC Treaty. In this connection the appellants refer to the order of the President of the Court of First Instance of 15 May 2003 in Case T-47/03 R *Sison* v *Council* [2003] ECR II-2047).

36 Since the act giving rise to the alleged damage is an act of the Council, adopted jointly by all the Member States, an action for damages cannot be brought before the national courts, which would lack jurisdiction to entertain it, the liability of the Member States not being severable.

37 It is also pointed out that in the eighth recital in the preamble to Council Decision 2003/48/JHA of 19 December 2002 on the implementation of specific measures for police and judicial cooperation to combat terrorism in accordance with Article 4 of Common Position 2001/931 (OJ 2003 L 16, p. 68) it is stated that '[t]his Decision respects the fundamental rights and observes the principles recognised by Article 6 of the Treaty on European Union. Nothing in this Decision may be interpreted as allowing infringement of the legal protection afforded under national law to the persons, groups and entities listed in the Annex to Common Position 2001/931/CFSP'.

38 The Council declaration concerning the right to redress, clarified by the eighth recital in the preamble to Decision 2003/48, constitutes, together with Article 6(2) EU, a firm legal base for the assertion of the jurisdiction of the Community judicature. It is argued that the Court of First Instance therefore vitiated the order under appeal by an error of law in declaring that it had no jurisdiction to rule on the appellants' claims for damages.

39 In addition, the appellants claim that, with a view to combating terrorism, the Council adopted a number of measures on various legal bases for the purpose of depriving certain classes of persons, groups and entities of the right to an effective remedy.

40 The Council maintains that the appeal is unfounded. The Court of First Instance correctly considered that no claim for damages is provided for under Title VI of the EU Treaty. Since what was at issue was not an act adopted in the context of the European Community but an act adopted under the provisions governing the Union, an action for damages may not be brought on the basis of Article 288 EC. In support of its view the Council relies on the judgment in Case 99/74 *Grands moulins des Antilles* v *Commission* [1975] ECR 1531, paragraph 17.

41 The eighth recital in the preamble to Decision 2003/48 mentions only the legal protection afforded 'under national law', not under Community law. Neither that document nor the Council's declaration concerning the right to redress is such as to enable the Community judicature to give a ruling on the appellants' claim for damages, which is not provided for by the EU Treaty.

42 The Kingdom of Spain states that Gestoras Pro Amnistía's activities were declared illegal by order of 19 December 2001 of central investigating judge No 5 of the Audiencia Nacional de Madrid. The same central investigating judge issued an international warrant for the arrest of Mr Olano Olano, who had several times been sentenced by Spanish courts for, inter alia, possession of arms, munitions or explosives. He was arrested by the French police on 3 December 2001, handed over to the Spanish authorities and then imprisoned in Madrid. Mr Zelarain Errasti was arrested on 31 October 2001 by reason of his responsibility within Gestoras Pro Amnistía and prosecuted before the Spanish courts in the proceedings brought against that association and in other proceedings on the ground that he belonged to a terrorist organisation.

43 On the merits, the Kingdom of Spain supports the Council's views. There is nothing in the appeal capable of calling into question the legality of the order under appeal.

Findings of the Court

— The ground of appeal alleging disregard for the provisions of Title VI of the EU Treaty

44 It follows from Article 46 EU that the provisions of the EC and EAEC Treaties concerning the powers of the Court of Justice are applicable to Title VI of the EU Treaty only 'under the conditions provided for by Article 35 EU'.

45 That article provides that the Court of Justice has jurisdiction in three situations. First, by virtue of Article 35(1) EU, it has jurisdiction to give preliminary rulings on the validity and interpretation of framework decisions and decisions, on the interpretation of conventions established under Title VI of the EU Treaty and on the validity and interpretation of the measures implementing them. Second, Article 35(6) EU provides also for the Court of Justice to have jurisdiction to review the legality of framework decisions and decisions in actions brought by a Member State or the Commission of the European Communities on grounds of lack of competence, infringement of an essential procedural requirement, infringement of the EU Treaty or of any rule of law relating to its application, or misuse of powers. Last, Article 35(7) EU provides for the Court of Justice to have jurisdiction to rule on any dispute between Member States regarding the interpretation or the application of acts adopted under Article 34(2) EU whenever such dispute cannot be settled by the Council within six months of its being referred to the latter by one of its members.

46 In contrast, Article 35 EU confers no jurisdiction on the Court of Justice to entertain any action for damages whatsoever.

47 In addition, Article 41(1) EU does not include, among the articles of the Treaty establishing the European Community applicable to the areas referred to in Title VI of the Treaty on European Union, the second paragraph of Article 288 EC, according to which the Community must, in accordance with the general principles common to the laws of the Member States, make good any damage caused by its institutions or by its servants in the performance of their duties, or Article 235 EC, under which the Court has jurisdiction in disputes relating to compensation for damage provided for in the second paragraph of Article 288 EC (see, by analogy, Case C-160/03 *Spain* v *Eurojust* [2005] ECR I-2077, paragraph 38).

48 It follows from the foregoing that the Court of First Instance did not vitiate its order by any error of law in finding that no action for damages is provided for under Title VI of the EU Treaty. The ground of appeal must therefore be rejected.

— The ground of appeal alleging disregard for the right to effective judicial protection

49 The appellants also invoked before the Court of First Instance the observance of fundamental rights, in particular the right to effective judicial protection under Article 6(2) EU. In essence they argue that they have no means of challenging Gestoras Pro Amnistía's inclusion in the list annexed to Common Position 2001/931 and that the order under appeal prejudices their right to effective judicial protection.

50 It is true that, as regards the Union, the treaties have established a system of legal remedies in which, by virtue of Article 35 EU, the jurisdiction of the Court is less extensive under Title VI of the Treaty on European Union than it is under the EC Treaty (see, to this effect, Case C-105/03 *Pupino* [2005] ECR I-5285, paragraph 35). It is even less extensive under Title V. While a system of legal remedies, in particular a body of rules governing non-contractual liability, other than that established by the treaties can indeed be envisaged, it is for the Member States, should the case arise, to reform the system currently in force in accordance with Article 48 EU.

51 Nevertheless, the appellants cannot validly argue that they are deprived of all judicial protection. As is clear from Article 6 EU, the Union is founded on the principle of the rule of law and it respects fundamental rights as general principles of Community law. It follows that the institutions are subject to review of the conformity of their acts with the treaties and the general principles of law, just like the Member States when they implement the law of the Union.

52 Here it is to be noted that Article 34 EU provides that the Council may adopt acts varying in nature and scope. Under Article 34(2)(a) EU the Council may 'adopt common positions defining the approach of the Union to a particular matter'. A common position requires the compliance of the Member States by virtue of the principle of the duty to cooperate in good faith, which means in particular that Member States are to take all appropriate measures, whether general or particular, to ensure fulfilment of their obligations under European Union law (see *Pupino*, paragraph 42). Article 37 EU thus provides that the Member States are to defend the common positions '[w]ithin international organisations and at international conferences in which they take part'. However, a common position is not supposed to produce of itself legal effects in relation to third parties. That is why, in the system established by Title VI of the EU Treaty, only framework decisions and decisions may be the subject of an action for annulment before the Court of Justice. The Court's jurisdiction, as defined by Article 35(1) EU, to give preliminary rulings also

does not extend to common positions but is limited to rulings on the validity and interpretation of framework decisions and decisions, on the interpretation of conventions established under Title VI and on the validity and interpretation of the measures implementing them.

53 Article 35(1) EU, in that it does not enable national courts to refer a question to the Court for a preliminary ruling on a common position but only a question concerning the acts listed in that provision, treats as acts capable of being the subject of such a reference for a preliminary ruling all measures adopted by the Council and intended to produce legal effects in relation to third parties. Given that the procedure enabling the Court to give preliminary rulings is designed to guarantee observance of the law in the interpretation and application of the Treaty, it would run counter to that objective to interpret Article 35(1) EU narrowly. The right to make a reference to the Court for a preliminary ruling must therefore exist in respect of all measures adopted by the Council, whatever their nature or form, which are intended to have legal effects in relation to third parties (see, by analogy, Case 22/70 *Commission* v *Council (ERTA)* [1971] ECR 263, paragraphs 38 to 42, and Case C-57/95 *France* v *Commission* [1997] ECR I-1627, paragraph 7 et seq.).

54 As a result, it has to be possible to make subject to review by the Court a common position which, because of its content, has a scope going beyond that assigned by the EU Treaty to that kind of act. Therefore, a national court hearing a dispute which indirectly raises the issue of the validity or interpretation of a common position adopted on the basis of Article 34 EU, as is the case in this instance for part of Common Position 2001/931 and in any event for Article 4 thereof and the Annex thereto, and which has serious doubts whether that common position is really intended to produce legal effects in relation to third parties, would be able, subject to the conditions fixed by Article 35 EU, to ask the Court to give a preliminary ruling. It would then fall to the Court to find, where appropriate, that the common position is intended to produce legal effects in relation to third parties, to accord it its true classification and to give a preliminary ruling.

55 The Court would also have jurisdiction to review the lawfulness of such acts when an action has been brought by a Member State or the Commission on the conditions fixed by Article 35(6) EU.

56 Finally, it is to be borne in mind that it is for the Member States and, in particular, their courts and tribunals, to interpret and apply national procedural rules governing the exercise of rights of action in a way that enables natural and legal persons to challenge before the courts the lawfulness of any decision or other national measure relating to the drawing up of an act of the European Union or to its application to them and to seek compensation for any loss suffered.

57 It follows that the appellants are incorrect in maintaining that the contested common position leaves them without a remedy, contrary to the requirement of effective judicial protection, and that the order under appeal prejudices their right to such protection. That ground of appeal must, in consequence, be rejected.

— The ground of appeal alleging disregard for the declaration made by the Council in its decision 15453/01 of 18 December 2001

58 Before the Court of First Instance the appellants invoked the declaration made by the Council in its decision 15453/01 of 18 December 2001 according to which: 'The Council recalls regarding Article 1(6) of the Common Position on the application of specific measures to combat terrorism, and Article 2(3) of the regulation on specific restrictive measures directed against certain persons and entities with a view to combating terrorism that in the event of any error in respect of the persons, groups or entities referred to, the injured party shall have the right to seek judicial redress'.

59 According to the appellants, that declaration must be interpreted in the light of the eighth recital in the preamble to Council Decision 2003/48/JHA of 19 December 2002 on the implementation of specific measures for police and judicial cooperation to combat terrorism, which states that '[t]his Decision respects the fundamental rights and observes the principles recognised by Article 6 of the Treaty on European Union. Nothing in this Decision may be interpreted as allowing infringement of the legal protection afforded under national law to the persons, groups and entities listed in the Annex to Common Position 2001/931/CFSP'.

60 It is, however, clear from the Court's settled case-law that such a declaration is insufficient to create a legal remedy not provided for by the applicable texts and that it cannot therefore be given any legal significance or be used in the interpretation of law emanating from the EU Treaty where, as in this case, no reference is made to the content of the declaration in the wording of the provision in question (see, to this effect, Case C-292/89 *Antonissen* [1991] ECR I-745, paragraph 18; Case C-329/95 *VAG Sverige* [1997] ECR I-2675, paragraph 23; and Case C-49/02 *Heidelberger Bauchemie* [2004] ECR I-6129, paragraph 17).

61 There was, therefore, no error of law in the Court of First Instance's finding in the order under appeal that the declaration made by the Council in its decision 15453/01 of 18 December 2001 could not suffice to confer jurisdiction on the Court to hear and determine an action for damages under Title VI of the EU Treaty.

62 It follows from all the foregoing that it was without vitiating its order by any error of law that the Court of First Instance declared that it manifestly had no jurisdiction to entertain the action for damages seeking compensation for any damage that might have been caused to the appellants by the inclusion of Gestoras Pro Amnistía in the list annexed to Common Position 2001/931, as updated by Common Positions 2002/340 and 2002/462.

63 None of the grounds of appeal being well founded, the appeal must be dismissed.

Costs

64 Under Article 69(2) of the Rules of Procedure, which is applicable to the procedure on appeal pursuant to Article 118 of those Rules, the unsuccessful party is to be ordered to pay the costs if they have been applied for in the successful party's pleadings. Since the Council has applied for costs against the appellants and the latter have been unsuccessful, they must be ordered to pay the costs.

65 Pursuant to the first subparagraph of Article 69(4) of the Rules of Procedure, which also applies to appeals by virtue of Article 118 thereof, the Member States which have intervened in the proceedings are to bear their own costs. In accordance with that provision, it must therefore be ordered that the Kingdom of Spain is to bear its own costs.

On those grounds, the Court (Grand Chamber) hereby:

1. **Dismisses the appeal;**

2. **Orders Gestoras Pro Amnistía, Mr J.M. Olano Olano and Mr J. Zelarain Errasti to pay the costs;**

3. **Orders the Kingdom of Spain to bear its own costs.**

[Signatures]