OPINION OF ADVOCATE GENERAL TRSTENJAK
delivered on 25 May 2011 [1]

Table of contents

I — Introduction ..... I - 11239

II — Union law ..... I - 11240

A — Primary law ..... I - 11240

B — Secondary law ..... I - 11240

1. Decision 2000/597 ..... I - 11240

2. Regulation No 1605/2002 ..... I - 11242

3. Regulation No 1798/2003 ..... I - 11243

III — Facts of the case ..... I - 11245

IV — Pre-litigation procedure ..... I - 11247

V — Procedure before the Court and forms of order sought by the parties ..... I - 11248

VI — Main arguments of the parties ..... I - 11249

VII — Legal assessment ..... I - 11253

A — Introductory remarks ..... I - 11253

B — System of own resources under Decision 2000/597 ..... I - 11254

C — The audit powers of the Court of Auditors ..... I - 11258

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1. Object, scope and limits of the audit powers of the Court of Auditors .... I - 11258

(a) The power to review acts adopted by the European Union institutions and by the Member States which have a sufficiently direct connection with the Union's revenue or expenditure. ..... I - 11258

(b) The scope of Union law as a restriction of powers in the context of the review of Member States' action by the Court of Auditors ..... I - 11259

(c) Duty to comply with the principles of subsidiarity and proportionality ..... I - 11263

(i) The principle of subsidiarity ..... I - 11263

(ii) The principle of proportionality ..... I - 11265

2. Review criteria for the audit by the Court of Auditors ..... I - 11266

3. Interim conclusion ..... I - 11268

D — Power of the Court of Auditors to review administrative cooperation in the field of value added tax under Regulation No 1798/2003 ..... I - 11268

1. The review of administrative cooperation in the field of value added tax under Regulation No 1798/2003 has a sufficiently direct connection with the Union's revenue ..... I - 11269

2. Compliance with the principle of subsidiarity and the principle of proportionality ..... I - 11272

(a) Compliance with the principle of subsidiarity ..... I - 11273

(b) Compliance with the principle of proportionality ..... I - 11274

E — The breach by the Federal Republic of Germany of its duties of cooperation with the Court of Auditors ..... I - 11278

VIII — Summary ..... I - 11280

IX — Costs ..... I - 11281

X — Conclusion ..... I - 11281

I — Introduction

1. The present case is based on an action for failure to fulfil obligations brought by the Commission pursuant to Article 258 TFEU, by which it seeks a declaration from the Court of Justice that, by refusing to permit the European Court of Auditors ('the Court of Auditors') to review cross-border administrative cooperation in the field of value added tax in Germany, the Federal Republic of Germany has failed to fulfil its obligations under Union law.

2. From a procedural point of view, a distinctive feature of the present case is that the Commission has brought an action for failure to fulfil obligations against a Member State because it purportedly disregarded the audit powers of the Court of Auditors. Although in the past the Court of Auditors has expressly argued that it should be accorded a right to bring actions with a view to the independent judicial enforcement of its powers vis-à-vis the Member States, [2] it does not have the right independently to bring direct actions against Member States which have purportedly disregarded its audit powers, even after the most recent reform of the system of legal protection under Union law by the Treaty of Lisbon. [3] Instead, the Court of Auditors must report such an infringement to the Commission, so that, as in the present case, the Commission can bring Treaty infringement proceedings against the Member State in question under Article 258 TFEU, in which the Court of Auditors can then participate as an intervener.

3. The present case gives the Court of Justice the opportunity to clarify the scope and object of the powers of the Court of Auditors to review Member States' action with reference to a specific audit programme. It is the first action for failure to fulfil obligations which stems from a Member State's refusal to permit an audit in its territory, planned by the

2 — See the 1995 Report by the Court of Auditors to the Reflection Group on the operation of the Treaty on the European Union (French version published in *Revue trimestrielle de droit européen* 1995, p. 689, point 2.6).

3 — In this connection, the general point should be made that the Treaty of Lisbon did not seek to reform the system of legal protection under Union law, but that the main features of the existing system of legal protection were confirmed. See: Thiele, A., 'Das Rechtsschutzsystem nach dem Vertrag von Lissabon – (K)ein Schritt nach vorn?', EuR 2010, p. 30 to 51. It would have been possible to accord the Court of Auditors a right independently to bring direct actions against the Member States without major impairment of the new structure of the TFEU. To that end, provision could have been made, for example, for a new letter (e) in Article 271 TFEU, under which the Court of Auditors could bring an action for failure to fulfil obligations pursuant to Article 258 TFEU against a Member State on grounds of infringement of its audit and access rights under Article 287 TFEU. See Friedrich, C./Inghelram, J., 'Die Klagemöglichkeiten des Europäischen Rechnungshofs vor dem Europäischen Gerichtshof', DÖV 1999, p. 669, 676.

Court of Auditors, relating to the Union's revenue and to assist the Court of Auditors in this regard.

4. The institutional significance of the present Treaty infringement proceedings is confirmed by European Parliament's decision to intervene for the first time in support of the Commission in Treaty infringement proceedings against a Member State.

II — Union law [4]

A — *Primary law*

The powers of the Court of Auditors are laid down in primary law in Article 248 EC.

B — *Secondary law*

1. Decision 2000/597

5. Article 2 of Council Decision 2000/597/EC, Euratom of 29 September 2000 on the system of the European Communities' own resources [5] provides:

'1. Revenue from the following shall constitute own resources entered in the budget of the European Union:

(a) levies, premiums, additional or compensatory amounts, additional amounts or factors and other duties established or to be established by the institutions of the Communities in respect of trade with non-member countries within the framework of the common agricultural policy, and also contributions and other duties provided for within the framework of the common organisation of the markets in sugar;

(b) Common Customs Tariff duties and other duties established or to be established by the institutions of the Communities in respect of trade with

4 — In accordance with the terms used in the TEU and in the TFEU, the expression 'Union law' will be used as an umbrella expression for Community law and Union law. Where individual provisions of primary law are relevant hereinafter, the rules which are applicable *ratione temporis* will be cited.

5 — OJ 2000 L 253, p. 42.

non-member countries and customs duties on products coming under the Treaty establishing the European Coal and Steel Community;

(c) the application of a uniform rate valid for all Member States to the harmonised VAT assessment bases determined according to Community rules. The assessment base to be taken into account for this purpose shall not exceed 50 % of GNP for each Member State, as defined in paragraph 7;

(d) the application of a rate – to be determined pursuant to the budgetary procedure in the light of the total of all other revenue – to the sum of all the Member States' GNPs.

…

4. The uniform rate referred to in paragraph 1(c) shall correspond to the rate resulting from the difference between:

(a) the maximum rate of call of the VAT resource, which is fixed at:

0. 75 % in 2002 and 2003,

0. 50 % from 2004 onwards,

and

(b) a rate ("frozen rate") equivalent to the ratio between the amount of the compensation referred to in Article 4 and the sum of the VAT assessment bases (established in accordance with paragraph (1)(c)) of all Member States, taking into account the fact that the United Kingdom is excluded from the financing of its correction and that the share of Austria, Germany, the Netherlands and Sweden in the financing of the United Kingdom correction is reduced to one fourth of its normal value.

5. The rate fixed under paragraph 1(d) shall apply to the GNP of each Member State.

…

7. For the purposes of applying this Decision, GNP shall mean GNI for the year at market prices as provided by the Commission in application of the ESA 95 in accordance with Regulation (EC) No 2223/96.

Should modifications to the ESA 95 result in significant changes in the GNI as provided by the Commission, the Council, acting unanimously on a proposal of the Commission and after consulting the European Parliament, shall decide whether these modifications shall apply for the purposes of this Decision.'

6. Article 8 of Decision 2000/597 states:

'1. The Communities' own resources referred to in Article 2(1)(a) and (b) shall be collected by the Member States in accordance with the national provisions imposed by law, regulation or administrative action, which shall, where appropriate, be adapted to meet the requirements of Community rules.

...

Member States shall make the resources provided for in Article 2(1)(a) to (d) available to the Commission.

2. Without prejudice to the auditing of the accounts and to checks that they are lawful and regular as laid down in Article 248 of the EC Treaty and Article 160C of the Euratom Treaty, such auditing and checks being mainly concerned with the reliability and effectiveness of national systems and procedures for determining the base for own resources accruing from VAT and GNP and without prejudice to the inspection arrangements made pursuant to Article 279(c) of the EC Treaty and Article 183 point (c) of the Euratom Treaty, the Council shall, acting unanimously on a proposal from the Commission and after consulting the European Parliament, adopt the provisions necessary to apply this Decision and to make possible the inspection of the collection, the making available to the Commission and payment of the revenue referred to in Articles 2 and 5.'

2. Regulation No 1605/2002

7. Article 140 of Council Regulation (EC, Euratom) No 1605/2002 of 25 June 2002 on the Financial Regulation applicable to the general budget of the European Communities [6] provides:

'1. The examination by the Court of Auditors of whether all revenue has been received and all expenditure incurred in a lawful and proper manner shall have regard to the provisions of the Treaties, the budget, this Regulation, the implementing rules and all other acts adopted pursuant to the Treaties.

2. In the performance of its task, the Court of Auditors shall be entitled to consult, in the manner provided for in Article 142, all documents and information relating to the financial management of departments or bodies with regard to operations financed or co-financed by the Communities. It shall have the power to make enquiries of any official responsible for a revenue or expenditure operation and to use any of the auditing procedures appropriate to the aforementioned departments or bodies. The audit in the Member States shall be carried out in conjunction with the national audit institutions or, where they do not have the necessary

6 — OJ 2002 L 248, p. 1.

powers, with the national departments responsible. The Court of Auditors and the national audit bodies of the Member States shall cooperate in a spirit of trust while maintaining their independence.

…'

8. Article 142(1) of Regulation No 1605/2002 states:

'The Commission, the other institutions, the bodies administering revenue or expenditure on the Communities' behalf and the final beneficiaries of payments from the budget shall afford the Court of Auditors all the facilities and give it all the information which the Court of Auditors considers necessary for the performance of its task. They shall place at the disposal of the Court of Auditors all documents concerning the award and performance of contracts financed by the Community budget and all accounts of cash or materials, all accounting records or supporting documents, and also administrative documents relating thereto, all documents relating to revenue and expenditure, all inventories, all organisation charts of departments, which the Court of Auditors considers necessary for auditing the budgetary and financial outturn report on the basis of records or on the spot and, for the same purposes, all documents and data created or stored on a magnetic medium.

The other services and internal audit bodies of the national administrations concerned shall afford the Court of Auditors all the facilities which it considers necessary for the performance of its task.

The first subparagraph shall also apply to natural or legal persons receiving payments from the Community budget.'

3. Regulation No 1798/2003

9. Article 1(1) of Council Regulation (EC) No 1798/2003 of 7 October 2003 on administrative cooperation in the field of value added tax and repealing Regulation (EEC) No 218/92 [7] provides:

'This Regulation lays down the conditions under which the administrative authorities in the Member States responsible for the

7 — OJ 2003 L 264, p. 1.

application of the laws on VAT on supplies of goods and services, intra-Community acquisition of goods and importation of goods are to cooperate with each other and with the Commission to ensure compliance with those laws.

To that end, it lays down rules and procedures to enable the competent authorities of the Member States to cooperate and to exchange with each other any information that may help them to effect a correct assessment of VAT.

This Regulation also lays down rules and procedures for the exchange of certain information by electronic means, in particular as regards VAT on intra-Community transactions.

…'

10. Under Article 3(2) of Regulation No 1798/2003, each Member State must designate a single central liaison office to which principal responsibility shall be delegated for contacts with other Member States in the field of administrative cooperation and it must inform the Commission and the other Member States thereof.

11. Article 5 of Regulation No 1798/2003 provides:

'1. At the request of the requesting authority, the requested authority shall communicate the information referred to in Article 1, including any information relating to a specific case or cases.

2. For the purpose of forwarding the information referred to in paragraph 1, the requested authority shall arrange for the conduct of any administrative enquiries necessary to obtain such information.

3. The request referred to in paragraph 1 may contain a reasoned request for a specific administrative enquiry. If the Member State takes the view that no administrative enquiry is necessary, it shall immediately inform the requesting authority of the reasons thereof.

4. In order to obtain the information sought or to conduct the administrative enquiry requested, the requested authority or the administrative authority to which it has recourse shall proceed as though acting on its own account or at the request of another authority in its own Member State.'

12. Article 35(1) of Regulation No 1798/2003 provides:

'The Member States and the Commission shall examine and evaluate how the arrangements

for administrative cooperation provided for in this Regulation are working. The Commission shall pool the Member States' experience with the aim of improving the operation of those arrangements.'

13. Article 43(1) of Regulation No 1798/2003 reads as follows:

'For the purpose of applying this Regulation, Member States shall take all necessary measures to

(a) ensure effective internal coordination between the competent authorities referred to in Article 3;

(b) establish direct cooperation between the authorities authorised for the purposes of such coordination;

(c) ensure the smooth operation of the information exchange arrangements provided for in this Regulation.'

III — Facts of the case

14. By letter of 26 June 2006, the Court of Auditors informed the German Federal Court of Auditors that it was planning an audit mission from 10 to 13 October 2006. The audit was to cover administrative cooperation in the field of value added tax, as governed by Regulation No 1798/2003 and the relevant implementing measures. The audit was to focus on whether the Member States had established the administrative and organisational structures for administrative cooperation and how cooperation was put into practice in cases of requests for assistance under Article 5 of Regulation No 1798/2003. The audit essentially covered the departments of the central liaison office provided for in Article 2(2) of the regulation. However, other authorities involved in administrative cooperation could also be included in the audit.

15. Making reference to that first letter, the Court of Auditors informed the German Federal Court of Auditors, by letter of 7 September 2006, of further details of the audit. In that letter, notice was given in particular of an audit mission to the German central liaison office in the period from 10 to 13 October 2006. A mission schedule was enclosed with that letter, with a request to forward it to the central liaison office.

16. In that mission schedule the central liaison office was requested to submit information regarding the requests for information within the meaning of Article 5 of Regulation No 1798/2003 received and submitted in 2004/05. The mission schedule also contained an overview of various subjects which were to

be addressed during the audit mission. These included (1) the organisation, equipment and working methods of the central liaison office, (2) exchange of information without prior request within the meaning of Chapter IV of Regulation No 1798/2003, (3) the storage and exchange of information on intra-Community transactions (VIES database), (4) legal problems hampering administrative cooperation, (5) further measures to improve administrative cooperation and to prevent abuse, and (6) sample checks of the requests for information received and submitted.

17. By letter of 18 September 2006, the German Federal Court of Auditors confirmed that it was willing to participate in the audit by the Court of Auditors. To that end, a preliminary discussion at the German Federal Court of Auditors was planned for 9 October 2006.

18. Because the central liaison office, which was to be audited, did not appear to be willing to cooperate with the Court of Auditors, the Court of Auditors contacted the German Federal Court of Auditors again by a letter of 5 October 2006. In that letter, it stated that the central liaison office had neither confirmed the audit mission nor sent the documents which were the subject of a prior request and which were necessary in order properly to prepare the audit. Against this background, the Court of Auditors announced that it wished to postpone the audit mission to the period from 14 to 17 November 2006. At the same time, it requested the German Federal Court of Auditors to make representations to the central liaison office with a view to the proper execution of that audit.

19. By letter of 9 November 2006, the Court of Auditors complained to the German Federal Minister for Finance that the central liaison office, which was to be audited, had neither confirmed the audit dates of 14 to 17 November 2006 nor sent the necessary information. The Court of Auditors announced that it was postponing the date of the audit mission a further time, to the period from 4 to 7 December 2006. At the same time, it explained again the objective of the audit and made clear that, among other things, an audit of samples of requests for information submitted by the central liaison office and requests for information received from other Member States in 2005 was planned. The actual material transactions, including the tax assessment, in so far as they were evident from the documents to be audited, were not covered by the audit. The audit would examine the efficiency and effectiveness of administrative cooperation. In its reply of 4 December 2006, the Federal Ministry of Finance gave notification that an audit by the Court of Auditors was not possible, since it had no legal basis.

20. By a letter of 13 December 2006, the Court of Auditors contacted the German Federal Court of Auditors again and requested it to answer several questions regarding individual requests for information which had been exchanged between the German central liaison office and the central liaison

offices of other Member States pursuant to Article 5 of Regulation No 1798/2003. The German Federal Court of Auditors declined that request on 6 March 2007, stating that the Federal Ministry of Finance had already raised an objection to the announcement of the audit by the Court of Auditors. For reasons of neutrality, the German Federal Court of Auditors could not therefore pass on the relevant information.

21. By a letter of 4 May 2007, the Court of Auditors again contacted the Federal Ministry of Finance and informed it of a number of findings which had been revealed by the audit work in other Member States. In a reply of 29 June 2007, the Federal Ministry of Finance commented on those statements. In that letter, however, there was nothing to suggest that it had changed its negative position regarding the execution of an audit mission in the Federal Republic of Germany.

22. The Court of Auditors published the findings of its audit in its Special Report No 8/2007 concerning administrative cooperation in the field of value added tax [8] ('Special Report No 8/2007'). Observations concerning Germany in the report are based on findings from audit missions to other Member States, information obtained during audit missions at the Commission, and publicly available reports. [9]

IV — Pre-litigation procedure

23. By a letter of formal notice of 23 September 2008, the Commission informed the Federal Republic of Germany that, by its repeated refusal to cooperate with the Court of Auditors, the Federal Republic of Germany had failed to fulfil its obligations under Article 248(1), (2) and (3) EC, Article 140(2) and Article 142(1) of Regulation No 1605/2002, and Article 10 EC. The reason for the infringement was that the Court of Auditors had been prevented from performing its duty of monitoring the Union's revenue. In addition, the audit in question by the Court of Auditors was intended to examine the Union's expenditure in connection with the implementation of Regulation No 1798/2003, in particular assessing the effectiveness and efficiency of the VIES database.

24. In its reply of 23 December 2008, the Federal Republic of Germany rejected the accusations made against it. The crucial factor

8 — OJ 2008 C 20, p. 1.

9 — Special Report No 8/2007, paragraph 14.

was that the Court of Auditors' audit programme was not covered by Article 248 EC, because that audit did not concern either the Union's revenue or its expenditure. The German Government also invoked the principle of subsidiarity.

25. By letter of 23 March 2009, the Commission sent the Federal Republic of Germany a reasoned opinion pursuant to Article 226 EC. It maintained its position that the Court of Auditors had the power to audit administrative cooperation between the Member States in the field of value added tax. Furthermore, the Court of Auditors also had the power to evaluate the Union's expenditure in connection with the VIES database, because that VAT Information Exchange System was financed from the Union budget.

26. In its reply to the reasoned opinion, by letter of 22 May 2009, the Federal Republic of Germany reaffirmed its position that the contested audit was not covered by Article 248 EC in so far as it sought to monitor VAT revenue. In so far as the audit had been planned to monitor the Union's expenditure in connection with the VIES database, the Federal Republic of Germany expressly acknowledged the right of the Court of Auditors to examine the relevant Union expenditure. However, that expenditure had not been the object of the original audit request.

V — Procedure before the Court and forms of order sought by the parties

27. Because, in the Commission's view, the Federal Republic of Germany failed to comply with the reasoned opinion, on 17 December 2009 the Commission brought an action pursuant to Article 258 TFEU.

28. The Commission claims that the Court should:

— declare that, by refusing to permit the Court of Auditors to carry out audits in Germany concerning the administrative cooperation in the field of value added tax which is provided for under Regulation No 1798/2003 and the relevant implementing measures, the Federal Republic of Germany has failed to fulfil its obligations under Article 248(1), (2) and (3) EC, Article 140(2) and Article 142(1) of Regulation No 1605/2002, and Article 10 EC;

— order the Federal Republic of Germany to pay the costs.

29. The Federal Republic of Germany contends that the Court should dismiss the application and order the Commission to pay the costs.

30. By order of the President of the Court of 7 May 2010, the Court of Auditors and the European Parliament were granted leave to intervene in support of the forms of order sought by the Commission. The Court of Auditors and the European Parliament claim that the Commission's application should be granted.

31. At the hearing on 15 March 2011, the representatives of the Commission, the Federal Republic of Germany, the Court of Auditors and the European Parliament presented their oral arguments.

VI — Main arguments of the parties

32. In the view of the Commission, the European Parliament and the Court of Auditors, the refusal by the Federal Republic of Germany to permit the Court of Auditors to audit the administrative cooperation in the field of value added tax constitutes an infringement of Article 248(1), (2) and (3) EC, Article 140(2) and Article 142(1) of Regulation No 1605/2002, and Article 10 EC. On the other hand, the German Government considers its refusal to be consistent with Union law.

33. The *Commission*, the *European Parliament* and the *Court of Auditors* argue in favour of a broad interpretation of the audit powers of the Court of Auditors and the corresponding cooperation duties on the part of the Member States. In this regard, they stress the role of the Court of Auditors, enshrined in primary law, to assess the collection and use of the Union's financial resources and to examine whether the financial operations were correctly recorded and shown, and executed and managed in a lawful and regular manner. As an independent external auditor, it contributes to improving the Union's finances, thereby protecting the financial interests of the citizens of the Union. Against this background and with a view to safeguarding the *effet utile* of the relevant provisions, the audit powers of the Court of Auditors must be given a broad interpretation. It also follows from the requirements of Union law that where audits are carried out in the Member States, the Member States must give the Court of Auditors full assistance in its work.

34. The Member States are thus required to permit all audits by the Court of Auditors for the purpose of assessing the collection and use of the Union's financial resources and to give the Court of Auditors full assistance in this regard. However, the Court of Auditors was refused precisely this by the German authorities. Even though Regulation No 1798/2003 does not itself regulate the collection of Union revenue, it has a clear and direct connection with the Union's revenue. It serves to combat VAT evasion and avoidance and therefore helps to ensure that the Member States have correct VAT receipts and that the Union is able to obtain the own resources accruing from VAT to which it is

entitled under the optimum conditions. The Member States' VAT revenue forms the basis for determining the Union's own resources accruing from VAT. With this in mind, the examination of whether the Member States have set up an efficient system of cooperation and administrative assistance in the field of value added tax is part of the review of own resources accruing from VAT. It should also be borne in mind that the other Member States must compensate for any losses in relation to own resources accruing from VAT by means of higher contributions in GNI-based own resources.

35. The *Court of Auditors* and the *European Parliament* also stress in this connection the difference between the inspections carried out by the Court of Auditors and any inspections by the Commission. The objective of the audits carried out by the Court of Auditors is not to examine the application of Regulation No 1798/2003 by the Member States in order to prompt the imposition of penalties against them in the event of any failure to fulfil obligations, but to review whether the system of administrative cooperation works well in practice, and to propose improvements if necessary. In this regard, the *Court of Auditors* states that the strict interpretation of the Court of Auditors' powers advocated by the German Government would mean that it would be permitted to carry out only very limited audits of the accounts in the field of own resources accruing from VAT, which would prevent it from conducting performance audits. However, those audits are necessary for the Court of Auditors to be able to fulfil its obligation under the wording of Article 248 EC.

36. The *Commission* considers that its view is also supported by Article 43(1) of Regulation No 1798/2003, Article 8(2) of Decision No 2000/597 and Article 140(1) of Regulation No 1605/2002. It is evident from those provisions that the Member States themselves have interpreted the powers of the Court of Auditors under Article 248 EC so broadly that they cover an audit of administrative cooperation in the field of value added tax under Regulation No 1798/2003.

37. The *German Government*, on the other hand, argues in favour of a strict interpretation of the Court of Auditors' powers. The Court of Auditors' role is clearly limited to monitoring transactions which are directly connected with the Union's revenue and expenditure.

38. In the view of the German Government, Regulation No 1798/2003 does not concern the Union's revenue. The Member States' VAT revenue, which is protected by Regulation No 1798/2003, does not constitute Union revenue, but is used merely as a fixed amount in order to calculate the Union's own resources accruing from VAT. The relevant rules for that calculation do not include any correction mode to add the VAT revenue which the Member State could have additionally obtained, for example through the smoother running of intergovernmental administrative assistance.

39. In this connection, the German Government also draws a comparison with GNI-based own resources. In this regard, it states in particular that the calculation of GNI-based own resources is ultimately based on the GNI of the individual Member States. If the way in which the basis for the own resources is formed were subject to review by the Court of Auditors, the Court of Auditors would have the power, in reviewing GNI-based own resources, to review the overall economic policy of the individual Member States, because this affects the GNI of each Member State.

40. On the basis of these considerations, the German Government concludes that the audit powers of the Court of Auditors can relate only to the determination and calculation of the net VAT revenue actually received and to the calculations made by the Member States on the basis of that revenue in order to determine the assessment base for the own resources accruing from VAT. On the other hand, the individual collection, assessment and administration procedures, that is to say the actual method of levying VAT in the Member States, are not subject to its review because those procedures are not actually covered by the determination and calculation of own resources accruing from VAT. It is also not possible in this connection to infer from Article 8(2) of Decision No 2000/597 a power of the Court of Auditors to audit the implementation of Regulation No 1798/2003 in the Member States.

41. The parties are also in dispute as to whether an audit of administrative cooperation in the field of value added tax by the Court of Auditors breaches the principle of subsidiarity.

42. The *German Government* answers this question in the affirmative. The levying of VAT is in principle reviewed by the national courts of auditors. In so far as the Commission takes the view that it is only possible for

the Court of Auditors to review cross-border aspects, it fails to appreciate that Article 35 of Regulation No 1798/2003 already provides for an examination and evaluation by the Commission in conjunction with the Member States. In other words, the Union legislature has already taken steps to address the limited competence of the national courts of auditors. There is therefore no need for an audit by the Court of Auditors.

43. In this regard, the German Government also stresses that the organisation of the tax authorities, tax audits and the recovery of taxes fall within the competence of the Member States. This administrative division of powers between the Union and the Member States cannot be separated from the question which audit bodies may review the relevant administrative activities. The delimitation of the audit powers of the Court of Auditors must therefore correspond with the delimitation of administrative powers. Consequently, without any express basis in the Treaties, an audit of administrative action falling within the competence of the Member States is not permissible.

44. In the view of the *Commission*, the *European Parliament* and the *Court of Auditors*, the argument relating to subsidiarity is not convincing. Rather, the cross-border aspect of administrative cooperation under Regulation No 1798/2003 suggests an audit power on the part of the Court of Auditors. The *Commission* also emphasises the autonomous character of audits by the Court of Auditors. An audit power enjoyed by the Commission or by the national courts of auditors does not therefore automatically rule out an audit power on the part of the Court of Auditors.

45. In its reply, the *Commission* also claims that expenditure is also incurred by the Union in connection with the implementation of Regulation No 1798/2003, since the setting-up and operation of the information systems provided for therein are (partly) financed by the Union budget. As a result, the audit of the implementation and application of Regulation No 1798/2003 also forms part of the examination of whether the Union's expenditure has been incurred in a lawful and regular manner.

46. The *German Government* considers this submission to be equally inadmissible in two regards. First of all, the argument was not put forward in the application, with the result that this submission is out of time under the first subparagraph of Article 42(2) of the Rules of Procedure of the Court of Justice and must therefore be rejected as inadmissible. Secondly, this audit of expenditure was not the subject of the audit request by the Court of Auditors.

VII — Legal assessment

A — *Introductory remarks*

47. The assessment of the compatibility with Union law of the refusal by the Federal Republic of Germany to permit the Court of Auditors to review administrative cooperation in the field of value added tax depends on the answer to the question whether or not the Court of Auditors had the power to carry out such an audit. If the Court of Auditors did not have the power to carry out such an audit, the Federal Republic of Germany would be permitted to refuse to cooperate with the Court of Auditors without giving further reasons. On the other hand, as the European Commission, the European Parliament and the Court of Auditors claim, if the Court of Auditors did have the power to carry out such an audit, the refusal by the Federal Republic of Germany could be regarded as a breach of its duties of cooperation under Union law.

48. Under Article 7(1) EC, the Court of Auditors is one of the institutions of the Union and must act within the limits of the powers conferred upon it by that Treaty. Those powers are laid down in primary law in Article 248 EC, paragraph 1 of which states that the Court of Auditors must examine the accounts of all revenue and expenditure of the Union and the accounts of all revenue and expenditure of all bodies set up by the Union in so far as the relevant constituent instrument does not preclude such examination.

49. The audit powers of the Court of Auditors thus relate in principle to the revenue and expenditure of the Union. [10] Against this background the question arises in the present case, first of all, whether or not a review of administrative cooperation in the field of value added tax concerns the revenue and expenditure of the Union. Taking particular account of the fact that the Court's previous case-law contains only a few statements on the scope of the audit powers enjoyed by the Court of Auditors, I think it is necessary, in order to answer the question, first to define the basic structure of the system of the Union's revenue under Decision 2000/597, which is applicable *ratione temporis*. On that basis, I will then turn to the question whether and under what conditions the audit refused by the Federal Republic of Germany is to be regarded as an

10 — See, in this connection, Ekelmans, M., 'Cour des comptes', in *Rép. communautaire Dalloz* (08/2008), paragraph 47.

examination of the revenue or expenditure of the Union, the implementation of which had to be supported by the Federal Republic of Germany.

B — *System of own resources under Decision 2000/597*

50. Under the first paragraph of Article 269 EC, without prejudice to other revenue, the Union's budget is to be financed wholly from own resources. Under the second paragraph of that article, the Council, acting unanimously on a proposal from the Commission and after consulting the European Parliament, must lay down provisions relating to the system of own resources of the Union.

51. For the relevant period in the present case, the system of own resources was laid down in Decision 2000/597. Article 2(1) of that decision distinguishes between revenue from levies and contributions in the agricultural sector (letter a), revenue from customs duties levied on imports (letter b), own resources accruing from VAT (letter c) and GNI-based own resources [11] (letter d).

52. Under Article 8(1) of Decision 2000/597, the levies and contributions in the agricultural sector due to the Union and import duties – also known as 'traditional own resources' – must be collected by the Member States in accordance with the national provisions imposed by law, regulation or administrative action. Under Article 2(3) of that decision, the Member States may, in return, retain a flat-rate collection fee of 25 %.

53. The Union's own resources accruing from VAT are determined pursuant to Article 2(1)(c) of Decision 2000/597 using complicated calculations. In a first step, the harmonised assessment base for the own resources accruing from VAT is calculated for each Member State on the basis of the actual VAT revenue. The detailed rules for determining that assessment base are contained in Council Regulation (EEC, Euratom) No 1553/89

11 — Although Article 2(1)(d) of Decision 2000/597 does not refer to gross national income (GNI), but to the Member States' gross national product (GNP), Article 2(7) of that decision makes clear that for the purposes of applying the decision, GNP means GNI for the year at market prices as provided by the Commission in application of the ESA 95 in accordance with Regulation No 2223/96. The explanation for this change in terminology given in the fourth recital in the preamble is that it is appropriate to use the most recent statistical concepts for the purposes of own resources.

of 29 May 1989 on the definitive uniform arrangements for the collection of own resources accruing from VAT. [12] The assessment base for the Member State in question, thus determined, is then limited to a maximum of 50 % of its GNI as defined in Article 2(7) of Decision 2000/597 (capping of the VAT assessment base). [13] A uniform rate for all the Member States is then applied to the assessment base for own resources accruing from VAT thus determined. [14] These calculations reveal the own resources accruing from VAT owed by each individual Member State of the Union, which the Member States must make available to the Commission under the third subparagraph of Article 8(1) of Decision 2000/597.

54. Under Article 2(1)(d) of Decision 2000/597, the GNI-based own resources stem from the application of a rate – to be determined pursuant to the budgetary procedure in the light of the total of all other revenue – to the sum of all the Member States' GNIs. These own resources serve to balance the EU budget and can be described in this connection as a kind of keystone [15] required by the system of own resources, because borrowing by the Union is not permissible in principle. [16] This means that structural losses of revenue in the three other categories of own resources must in principle be offset by higher revenue from GNI-based own resources. Under the third subparagraph of Article 8(1) of Decision 2000/597, Member States must make GNI-based own resources available to the Commission.

55. An important difference between traditional own resources, on the one hand, and own resources accruing from VAT and GNI-based own resources, on the other, is that the traditional own resources to be transferred by the Member States to the Commission must in principle correspond to the agricultural levies and customs duties to be collected by the Member States – minus the flat-rate collection fee – whilst there is no such a direct connection between own resources accruing from VAT and national VAT revenue, or

12 — OJ 1989 L 155, p. 9. In general terms, this calculation under Regulation No 1553/89 is as follows: First of all, the Member States' VAT revenue is adjusted to take account of the permissible derogations by the national rules from the uniform rules (Articles 2(3) and 5). The adjusted VAT revenue is then divided by the national VAT rate. If several VAT rates are applied in a Member State, a weighted average rate must be formed (Articles 3, 4 and 5). The assessment base determined from the quotients of the adjusted revenue and the weighted average rate is subsequently adjusted to take account of the transactions from the permissible derogations from the Sixth VAT directive (Articles 2 and 6). See: Meermagen, B., *Beitrags- und Eigenmittelsystem*, Munich 2002, p. 154.

13 — This cap is intended to promote fairer revenue-sharing between the Member States; see Hidien, J., 'Der Rechtscharakter der Mehrwertsteuer-Einnahmen der EU', EuR 1997, p. 95, 103.

14 — The method of calculation of that rate is defined in Article 2(4) of Decision 2000/597.

15 — See Wilms, G., 'Die Reform des EU-Haushaltes im Lichte der Finanziellen Vorschau 2007-2013 und des Vertrages von Lissabon – neue Perspektiven für die Europäische Union?', EuR 2007, p. 707, 710.

16 — This principle is expressed in the third paragraph of Article 268 EC, under which the revenue and expenditure shown in the budget must be in balance.

between GNI-based own resources and national GNI.

56. Against this background, the first subparagraph of Article 8(1) of Decision 2000/597 contains an express provision on the collection of traditional own resources. Under that provision, those own resources must be collected by the Member States in accordance with the national provisions imposed by law, regulation or administrative action, which must, where appropriate, be adapted to meet the requirements of Union rules. The most important rules of Union law on the collection of traditional own resources are contained in Council Regulation (EC, Euratom) No 1150/2000 of 22 May 2000 implementing Decision 2000/597/EC, Euratom on the system of the Communities' own resources, [17] Article 17 of which lays down certain aspects of the Member States' duty to collect and make available those own resources. [18] Furthermore, under Article 18 of that regulation, the Commission not only may request additional inspections by the Member States concerning the establishment and the making available of traditional own resources, but it also has the right to take active part in those inspections.

57. Neither Decision 2000/597 nor Regulation No 1150/2000 makes express provision regarding the collection of national VAT by the Member States. Despite harmonisation in this field, VAT is regarded as a national tax which is collected in principle in accordance with national rules. [19] Nevertheless, Article 12(1) of Regulation No 1553/89 lays down the obligation on the Member States to provide the Commission with information concerning the procedures which they apply for registering taxable persons and determining and collecting VAT and on the modalities and results of their VAT control systems. Under Article 12(2), the Commission must consider, together with the Member State concerned, whether improvements to these procedures can be contemplated with a view to improving their effectiveness.

58. The importance of the four categories of own resources in the financing of the Union budget has changed dramatically since the mid-1990s. Whereas in 1996 the percentage share of 'traditional own resources' in EU own resources was 19.1%, the share of own

17 — OJ 2000 L 130, p. 1, as amended by Council Regulation (EC, Euratom) No 2028/2004 of 16 November 2004 (OJ 2004 L 352, p. 1).

18 — Article 17(2) of Regulation No 1150/2000 provides inter alia that the Member States are free from the obligation to place at the disposal of the Commission the amounts corresponding to established own-resources entitlements if, either for reasons of *force majeure* or for reasons which cannot be attributed to the Member States, these amounts have not been collected.

19 — See Meermagen, B., loc. cit. (footnote 12), p. 161.

resources accruing from VAT was 51.3%, and the share of GNI-based own resources was 29.6%, in 2005 the share of 'traditional own resources' had fallen to 11.4% and the share of own resources accruing from VAT to 14.1%, whilst the share of GNI-based own resources had risen to 74.5%. [20] GNI-based own resources, which were only introduced in 1988, have thus replaced own resources accruing from VAT as the most important source of financing for the Union budget.

59. As I have already mentioned, GNI-based own resources now not only represent the most important source of revenue for the EU, but they also serve to balance the Union budget. If losses in the other categories of own resources are not cushioned by adjustments to expenditure in the EU budget, they must therefore be offset by higher GNI-based own resources.

60. The Court gives express consideration to this connection between the different categories of own resources in its case-law on the collection of traditional own resources by the Member States. In the light of the finding that shortfalls in revenues of own resources must be offset either by another own resource or by an adjustment of expenditure, the Court ruled in *Commission* v *Denmark* that the Member States have the obligation to establish the Union's determinable claims to traditional own resources, otherwise it would have to be accepted that the financial equilibrium of the Union may be disrupted by the conduct of a Member State. [21]

61. In the light of the foregoing, it can be stated, in summary, that the system of own resources of the Union consists of several categories of own resources, namely traditional own resources, own resources accruing from VAT, and GNI-based own resources. The own resources accruing from VAT to be made available by each Member State are determined in this connection on the basis of national VAT revenue, that revenue being used in complicated calculations as a statistical figure for assessing the contributions in own resources accruing from VAT owed by the individual Member States. [22]

20 — Commission report on the operation of the own resources system, COM(2004) 505 final, p. 3

21 — Case C-392/02 [2005] ECR I-9811, paragraphs 54 and 60. See also Case C-423/08 *Commission* v *Italy* [2010] ECR I-5449, paragraph 39; Case C-348/97 *Commission* v *Germany* [2000] ECR I-4429, paragraph 64; and Case C-96/89 *Commission* v *Netherlands* [1991] ECR I-2461, paragraph 37.

22 — As correctly recognised in the European Parliament resolution of 29 March 2007 on the future of the European Union's own resources (OJ 2008 C 27E, p. 214, letter D).

C — *The audit powers of the Court of Auditors*

1. Object, scope and limits of the audit powers of the Court of Auditors

62. In assessing whether, by refusing to permit the Court of Auditors to audit administrative cooperation in the field of value added tax in Germany, the Federal Republic of Germany infringed Union law, it is ultimately crucial whether the Court of Auditors had the power to carry out such an audit and whether it respected the limits of its audit powers in preparing and carrying out that audit. The Member States are required to cooperate with the Court of Auditors only in so far as it acts within the limits of the audit powers conferred upon it. [23]

63. Against this background, I will first analyse the object, scope and limits of the audit powers of the Court of Auditors. I will also examine the review criteria available to the Court of Auditors in the performance of its duties. On the bases of that analysis, I will then assess whether and in what manner the Court of Auditors has the specific power to make administrative cooperation in the field of value added tax pursuant to Regulation No 1798/2003 subject to a review.

(a) The power to review acts adopted by the European Union institutions and by the Member States which have a sufficiently direct connection with the Union's revenue or expenditure

64. Under Article 248(1) EC, the Court of Auditors must examine the accounts of all revenue and expenditure of the Union and of all revenue and expenditure of all bodies set up by the Community in so far as the relevant constituent instrument does not preclude such examination. Article 248(2) EC provides that it must examine whether all revenue has been received and all expenditure incurred in a lawful and regular manner and whether the financial management has been sound; in doing so, it must report in particular on any cases of irregularity. [24] Article 140(1) of Regulation No 1605/2002 – which was adopted on the basis of Article 279 EC – similarly

23 — See point 47 et seq. of this Opinion.

24 — In terms of its scheme, Article 248 EC is structured in such a way that paragraph 1 defines the audit duties of the Court of Auditors. Paragraph 2 contains a list of criteria on the basis of which those audits are to be carried out. Paragraph 3 formulates specific rules and requirements governing the implementation of those audits. Lastly, paragraph 4 contains rules on the publication of the findings of the inspections conducted. See Inghelram, J., 'L'arrêt Ismeri: Quelles conséquences pour la Cour des Comptes européenne?', *Cahiers de droit européen* 2001, p. 707, 709 et seq.; Engwirda, M.B./Moonen, A.F.W., 'De Europese Rekenkamer: positie, bevoegdheden en toekomstperspectief', SEW 2000, p. 246, 249 et seq.

provides that the Court of Auditors must examine whether all revenue has been received and all expenditure incurred in a lawful and proper manner having regard to the provisions of the Treaties, the budget, that regulation, the implementing rules and all other acts adopted pursuant to the Treaties. [25]

65. On the basis of these rules on competences, the Court of Auditors has the power in principle to audit all acts adopted by the European Union institutions and by the Member States which have a sufficiently direct connection with the Union's revenue or expenditure. The Court of Auditors may evaluate the lawfulness of the reviewed acts adopted by the European Union institutions and by the Member States in the light of all the rules and requirements of Union law which may have an effect on the Union's finances. [26] It is also clear from the second and third subparagraphs of Article 248(2) EC, under which the audit of revenue may also be carried out on the basis of the amounts established as due and the audit of expenditure may also be carried out on the basis of commitments undertaken, that the Court of Auditors does not have to wait for the conclusion of the relevant revenue or payment transactions to carry out its audits, but has the right to carry out a 'concomitant audit'. [27]

66. The main condition for the existence of a power of audit on the part of the Court of Auditors is thus the presence of a sufficiently direct connection between the object of the audit and the Union's revenue or expenditure.

(b) The scope of Union law as a restriction of powers in the context of the review of Member States' action by the Court of Auditors

67. In the case of the review of acts adopted by the Union institutions, the presence of a direct connection between the Union's finances and the object of the audit selected by the Court of Auditors is sufficient, as a rule,

25 — Because Regulation No 1605/2002 is based in primary law on Article 279 EC, the question of the priority of application of secondary law in the relationship between Article 248 EC and Article 140(1) of Regulation No 1605/2002 does not arise in the present case. With regard to the principle of the priority of application of secondary law, see my Opinion in Case C-160/08 *Commission* v *Germany* [2010] ECR I-3713, point 99 et seq.

26 — Although the Court has held in general terms, in its judgment in Case 294/83 *Les Verts* v *Parliament* [1986] ECR 1339, paragraph 28, that the Court of Auditors only has power to examine the legality of expenditure with reference to the budget and the secondary provision on which the expenditure is based, this finding, seen in the overall context of that judgment, cannot be regarded as a fundamental restriction of the audit powers of the Court of Auditors to certain rules of Union law. Against this background, in his Opinion in Case 204/86 *Greece* v *Council* [1988] ECR 5323, point 5, Advocate General Mancini rightly stated that the Court of Auditors has the power/duty to verify not only that the provisions relating to the budget which are contained in the Treaties or in the Financial Regulation are complied with, but also any provision belonging to the Union legal order in so far as it has an effect on expenditure. See also Inghelram, J., 'The European Court of Auditors: Current Legal Issues', CMLR 2000, p. 129, 133 et seq.; Ekelmans, M., loc. cit. (footnote 10), paragraphs 41 and 49.

27 — See Ehlermann, C., *Der Europäische Rechnungshof*, Nomos, Baden-Baden 1976, p. 32 et seq.; Magiera, S., in *Das Recht der Europäischen Union* (ed. Grabitz/Hilf), Article 248 EC, paragraph 12 (40th supplement, October 2009).

in order to be able to accept, *eo ipso,* a power of audit on the part of the Court of Auditors.

68. In the case of the review of the acts adopted by the Member States, on the other hand, it must also be borne in mind that the Member States may take a large number of decisions which affect the Union's finances, but which nevertheless fall entirely outside the scope of Union law. Because under Article 248(2) EC the Court of Auditors may not only evaluate whether the financial management has been regular and sound, but also the lawfulness of the object of the audit determined by it in the light of the relevant rules of Union law, [28] it may not, in my view, make national decisions taken by the Member States, in the exercise of the unreserved regulatory sovereignty which they enjoy, the principal object of an audit. [29]

69. With regard to Member States' actions, the power of audit of the Court of Auditors not only requires that the reviewed action by the Member States has a sufficiently direct connection with the Union's finances, but also that the Member States were required to comply with the requirements of Union law in carrying out the reviewed acts.

70. In order to gain a better understanding of this additional restriction of powers in the case of the review of Member States' action, I consider that it is necessary briefly to examine the main characteristics of the reviews of lawfulness conducted by the Court of Auditors.

71. Under Article 248(2) EC, the Court of Auditors may subject the acts adopted by the European Union institutions and by the Member States affecting the Union's finances to a review of lawfulness. Even though that review of lawfulness may overlap with the judicial duties of the Court of Justice, [30] the implementation and the effects of the lawfulness checks by the Court of Auditors and by the

28 — With regard to the audit criteria which may be used by the Court of Auditors in the exercise of its audit powers, see point 93 et seq. of this Opinion.

29 — This does not mean, however, that in conceiving, organising and carrying out its audits, the Court of Auditors must restrict its activities entirely to areas which fall within the scope of Union law. Rather, it must be assumed that the Court of Auditors may also examine, in the context of a review of the principal object, which falls within the scope of Union law, whether national measures and rules adopted by the Member States in the exercise of their regulatory sovereignty are sound if that examination is appropriate, necessary and reasonable in order to attain the general objectives of the audit. See point 134 et seq. of this Opinion.

30 — As an example, see the Court of Auditor's audit of the Commission's financing of measures to combat poverty and social exclusion (Annual Report concerning the financial year 1995, OJ 1996 C 340, p. 1), in which the Court of Auditors concluded that there was no legal basis for the financing of a number of measures from the Union budget (paragraph 6.122 – 6.126). After the United Kingdom brought an action against the Commission, the Court of Justice reached the same conclusion in Case C-106/96 *United Kingdom* v *Commission* [1998] ECR I-2729, and annulled the contested Commission decisions.

Court of Justice are completely different. [31] As far as the exercise of the lawfulness check is concerned, the Court of Justice is in principle able to act only if legally valid proceedings are pending before it. Furthermore, the Court of Justice does base its decision in general on the subject-matter of the proceedings. The Court of Auditors, on the other hand, may also act on its initiative under the second subparagraph of Article 248(4) EC and, in doing so, determine the object of the audit itself, having regard to its powers. In terms of legal consequences, however, judgments delivered by the Court of Justice have the force, formally and materially, of *res judicata* and thus have a binding effect. In contrast, the statements, reports and opinions of the Court of Auditors do not have any formal binding effect. [32]

72. Although the Court of Auditors does not therefore have the task of making definitive legal assessments in the context of its review of lawfulness, it must not be ignored that its statements on the lawfulness of audited transactions carry considerable technical authority in practice. [33] It should also be stressed in this connection that, as a rule, the audits by the Court of Auditors constitute not only a check, but also a form of objective-related advice, where the detection and addressing of abuses and aberrations in the light of Union law seek a modification of the established practice. [34]

73. Having particular regard to the authority of the Court of Auditors, its statements, reports and opinions on the lawfulness of the reviewed acts adopted by the Member States can have a considerable influence on the action of those Member States in the reviewed areas, despite the absence of any formal binding effect. In my opinion, this possibility of authoritative influence by the Court of Auditors means that the Court of Auditors is not entitled to make Member States' action which falls entirely outside the scope of Union law the principal object of its audits, even

31 — See Ekelmans, M., loc. cit. (footnote 10), paragraph 49.

32 — In this connection, in his Opinion in Case C-315/99 P *Ismeri Europa* v *Court of Auditors* [2001] ECR I-5281, point 50 et seq., Advocate General Ruiz-Jarabo Colomer pointed out that the annual or special reports of the Court of Auditors contain its opinions and observations on the financial management which is the subject of examination. He stated in particular that the reports, by their very nature, are unable directly to create rights and obligations, for the audited institutions or bodies. They do not contain a decision, but merely express an opinion. Against this background, Advocate General Ruiz-Jarabo Colomer rightly concluded that a report of the Court of Auditors is not a measure capable of producing legal effects vis-à-vis third parties. According to the case-law of the Court of Justice, such a report may not be the subject of an action for annulment. This view is supported by Inghelram, J., loc. cit. (footnote 24), p. 726 et seq.

33 — Legal literature stresses in this connection that when it commenced its activities, the Court of Auditors was described by the then President of the Court of Justice, H. Kutscher, as the 'financial conscience' of the Union. See Inghelram, J., loc. cit. (footnote 3), p. 676.

34 — With regard to the relationship between audits/inspections and advice given by courts of auditors, see Freytag, M., *Der Europäische Rechnungshof*, Nomos, Baden-Baden 2005, p. 40 et seq.

where this purportedly has a direct connection with the Union's revenue or expenditure.

74. If the Member States' action in an area in which no Union legislation must be complied with could be made the principal object of an audit by the Court of Auditors, there would be the danger that in the review of lawfulness the Court of Auditors could impose on the Member States assessments based on Union law in areas in which Union law actually has no validity. Against this background, a review of the lawfulness of the Member States' action in areas in which they do not have to comply with Union legislation would constitute an infringement of the limits of the powers conferred on the Court of Auditors. [35]

75. With regard to the Union's expenditure, I consider that the presence of a sufficiently direct connection between the Member States' action to be reviewed and the Union's expenditure seems to imply, as a rule, that that action also falls within the scope of Union law.

76. With regard to the Union's revenue, on the other hand, there are a large number of national rules, procedures, decisions and operations which fall entirely outside the scope of Union law, but which may have an effect on the Union's revenue. In accordance with the arguments developed by the German Government, [36] reference can be made in this connection to the relationship between the economic policy of the individual Member States and the GNI-based own resources to be provided by those Member States.

77. Because the economic policy decisions of the individual Member States normally always have an effect on their GNI, it cannot be denied that those national decisions ultimately also have an effect on the calculation of the Union's GNI resources. [37] Nevertheless, such economic policy decisions cannot be made the object of a review by the Court of Auditors, regardless of whether or not they have a direct connection with the Union's revenue. The crucial factor in this connection is that such decisions fall entirely outside the scope of Union law.

35 — See also Article 5(1) EC, under which the Union must act within the limits of the powers conferred upon it by this Treaty and of the objectives assigned to it therein. This 'collective power' of the Union, which concerns the vertical relationship between the Member States and the Union, naturally also determines the 'institutional powers' of the European Union's institutions. With regard to the integration of the collective power of the Union and the powers of its institutions, see von Bogdandy/Bast, 'Die vertikale Kompetenzordnung der Europäischen Union', EuGRZ 2001, p. 441, 444 et seq.

36 — See point 39 of this Opinion.

37 — With regard to the specific method of calculation of GNI-based own resources, see point 54 of this Opinion.

(c) Duty to comply with the principles of subsidiarity and proportionality

80. Under point 1 of Protocol (No 30) on the application of the principles of subsidiarity and proportionality, annexed to the EC Treaty, in exercising the powers conferred on it, each institution must ensure that the principle of subsidiarity is complied with. [38] Consequently, the Court of Auditors is also required to comply with the principle of subsidiarity in exercising its audit powers.

78. In the light of the foregoing, the acts adopted by the institutions and acts adopted by the Member States falling within the scope of Union law which have a sufficiently direct connection with the Union's revenue or expenditure are in principle open to an audit by the Court of Auditors. If the Court of Auditors decides to review such action, however, it must comply with the principle of proportionality and – in relation to the Member States – the principle of subsidiarity in preparing, implementing and concluding that review.

(i) The principle of subsidiarity

81. The applicability of the principle of subsidiarity to the action of the Court of Auditors also follows directly from the function of that principle in the system of division of competences within the Union. Because the principle of subsidiarity constitutes a restriction, laid down in primary law, of the exercise of powers, [39] any transfer of powers to the European Union institutions in the overall scheme of the EC Treaty necessarily takes place on the condition that those powers can be exercised only having regard to the principle of subsidiarity. [40]

79. Under the second paragraph of Article 5 EC, in areas which do not fall within its exclusive competence, the Union must take action, in accordance with the principle of subsidiarity, only if and in so far as the objectives of the proposed action cannot be sufficiently achieved by the Member States and can therefore, by reason of the scale or effects of the proposed action, be better achieved by the Union.

38 — Under Article 311 EC, that Protocol forms an integral part of Union law.

39 — See: Zuleeg, M., in *Kommentar zum Vertrag über die Europäische Union und zur Gründung der Europäischen Gemeinschaft* (ed. Groeben/Schwarze), Vol. 1 (6th edition, Baden-Baden 2003), Article 5 EC, paragraph 26.

40 — See Bast/von Bogdandy, in *Das Recht der Europäischen Union* (ed. Grabitz/Hilf/Nettesheim), Article 5 TEU, paragraph 50 (42nd supplement, September 2010), who rightly stress in this connection that the principle of subsidiarity is used as a criterion where the Union 'takes action', essentially meaning any action by a European Union institution or body to which the requirement relating to rules of competence applies.

82. It must be stressed in this regard, however, that a breach of the principle of subsidiarity by the Court of Auditors could be taken to exist in practice only in exceptional cases. In so far as the Court of Auditors reviews Member States' action as part of inspections of the Union's expenditure, the Union financing context generally also implies that a review of that action must take place at Union level, and therefore by the Court of Auditors. In so far as the action of several Member States is to be reviewed in connection with the Union's revenue, it would seem evident that, as a rule, the Court of Auditors will be the appropriate body to carry out such a cross-border audit.

83. If the Court of Auditors were to restrict an audit in the field of the Union's revenue to just one Member State, on the other hand, situations are perfectly conceivable where the objectives of the audit can be fully attained by the national audit bodies and a direct audit by the Court of Auditors would therefore breach the principle of subsidiarity. If such a situation were to occur, the Court of Auditors would first be required to request the competent national audit body to carry out the planned audit and to notify the findings of the audit and all relevant information. If the national audit body refused to carry out such an audit or if the Court of Auditors did not agree with the findings of the national audit, the Court of Auditors could then carry out the audit itself without breaching the principle of subsidiarity. In that case, the refusal by the national audit body to carry out that audit or the unsatisfactory – from the point of view of the Court of Auditors – findings of the national audit would provide clear evidence that the objectives of the audit in question in the field of the Union's revenue cannot be sufficiently attained by the Member States.

84. When asked about the principle of subsidiarity at the hearing, the European Parliament argued that that principle is essentially geared to the action of the Union legislature and can therefore be applied only in the context of the adoption of legally binding measures by European Union institutions. Because the Court of Auditors does not have decision-making powers, but only the audit powers conferred on it, the principle of subsidiarity is not applicable in principle to the Court of Auditors.

85. That argument is not convincing. Even though the criteria governing the principle of subsidiarity primarily concern rule-making activities, that principle is in principle directed at the Union, and thus at all the European Union institutions, irrespective of the function exercised by the institutions in question. The only restriction of the scope of that principle under the EC Treaty relates to

the nature of the competences exercised by the European Union institutions. Under the second paragraph of Article 5 EC, the European Union institutions are not required to comply with the principle of subsidiarity only where they take action in an area which falls within the exclusive competence of the Union. [41]

86. Because, with the contested audit, the Court of Auditors did not take action in an area which falls within the exclusive competence of the Union, it is therefore required to comply with the principle of subsidiarity in carrying out that audit. [42]

(ii) The principle of proportionality

87. Under the third paragraph of Article 5 EC, any action by the Union may not go beyond what is necessary to achieve the objectives of the Treaty. The principle of proportionality thus formulated, which is also recognised in settled case-law as one of the general principles of Union law, requires that acts adopted by institutions of the European Union do not exceed the limits of what is appropriate and necessary in order to attain the legitimate objectives pursued by the measure in question; where there is a choice between several appropriate measures, recourse must be had to the least onerous, and the disadvantages caused must not be disproportionate to the aims pursued. [43]

88. With regard to the applicability of the principle of proportionality to the action of the Court of Auditors, reference should be made to my above statements on the applicability of the principle of subsidiarity. The principle of proportionality must also be regarded as a restriction on the exercise of powers in the system of division of competences within the Union, the applicability of which to the action of the Court of Auditors can also be inferred directly from point 1 of

41 — See Bast/von Bogdandy, loc. cit. (footnote 40), paragraph 53.

42 — Under the EC Treaty, the areas of the common commercial policy, the fixing of the Common Customs Tariff, conservation of fish stocks, internal organisational and procedural rules, and monetary policy were regarded as falling within the exclusive competence of the Union, according to the majority view in academic literature (see Lienbacher, G., in *EU-Kommentar* (ed. Schwarze), 2nd edition, Baden-Baden 2009, Article 5 EC, paragraph 17, with further references). Since the entry into force of the Lisbon Reform Treaty, the exclusive competences of the Union are now listed exhaustively in Article 3 TFEU.

43 — Case C-343/09 *Afton Chemical* [2010] ECR I-7027, paragraph 45; Case C-365/08 *Agrana Zucker* [2010] ECR I-4341, paragraph 29; Case C-33/08 *Agrana Zucker* [2009] ECR I-5035, paragraph 31; Case C-310/04 *Spain* v *Council* [2006] ECR I-7285, paragraph 97; Case C-189/01 *Jippes and Others* [2001] ECR I-5689, paragraph 81; Joined Cases C-133/93, C-300/93 and C-362/93 *Crispoltoni and Others* [1994] ECR I-4863, paragraph 41; and Case C-331/88 *Fedesa and Others* [1990] ECR I-4023, paragraph 13.

Protocol (No 30) on the application of the principles of subsidiarity and proportionality.

89. When asked about the principle of proportionality at the hearing, the Commission, the European Parliament and the Court of Auditors argued against the application of that principle to the action of the Court of Auditors. In this regard, the European Parliament claimed that the principle applies only to rule-making measures. The Court of Auditors stressed that there is no *de minimis* rule governing the exercise of its audit powers.

90. These arguments are not convincing. Even though critical questions of excessive interference in the Member States' spheres of competence would, in practice, arise predominantly in the case of binding Union legislation, the scope of the principle of proportionality extends to all Union measures. [44] Consequently, the Court of Auditors is also required to comply with that principle in the exercise of its powers.

91. As I have already explained elsewhere, in the context of the judicial review of compliance by the European Union institutions with the principle of proportionality, in principle a three-stage scheme of analysis must be employed, [45] where (1) the appropriateness, (2) the necessity, and (3) the reasonableness of the acts in question are to be reviewed.

92. In summary, it must thus be stated that the action of the Court of Auditors must also be assessed with reference to the principle of proportionality. A breach of that principle would have to be established in particular if its action was inappropriate, unnecessary or unreasonable in order to attain the objectives pursued.

2. Review criteria for the audit by the Court of Auditors

93. The review criteria which may be employed by the Court of Auditors in the exercise of its audit powers are set out in

44 — See Bast/von Bogdandy, loc. cit. (footnote 40), paragraph 69.

45 — With regard to this three-stage structure of the proportionality test, see my Opinions in Case C-221/09 *AJD Tuna* [2010] ECR I-1655, point 94; Case C-213/09 *Chabo* [2010] ECR I-12109, point 67; and Case C-365/08 *Agrana Zucker*, loc. cit. (footnote 43), point 60. See also Simon, D.,'Le contrôle de proportionnalité exercé par la Cour de Justice des Communautés Européennes', *Petites affiches* 2009, No 46, p. 17, 20 et seq. According to the author, however, the review of the lawfulness of the objectives pursued and the subjective reasons for the adoption of the measure in question represent two additional stages of analysis in many judgments.

Article 248(2) EC. Under that provision, the Court of Auditors must examine whether all revenue has been received and all expenditure incurred in a (1) lawful and (2) regular manner and (3) whether the financial management has been sound, and it must (4) report on any cases of irregularity.

94. In practice, the Court of Auditors does not generally draw an express distinction between the examination of whether all revenue has been received and all expenditure incurred in a lawful manner and in a regular manner. [46] In so far as these two notions should be distinguished, the review of regularity generally means an examination of the correct budgetary accounting. The review of lawfulness then relates to an examination to ascertain that the object of the audit is consistent with the relevant Union law. [47]

95. The review by the Court of Auditors as to whether the financial management has been sound essentially relates to the relationship between the purpose pursued by the reviewed action and the resources used. It is examined in particular whether the optimum resources have been used to attain the objectives pursued. [48] Even though, on a traditional understanding, a review of sound financial management is normally conducted in respect of the Union's expenditure, [49] I consider a review of sound financial management under Article 248(2) EC also to be possible in respect of the Union's revenue. This follows in particular from the schematic structure of Article 248 EC, where the audit duties of the Court of Auditors are laid down in paragraph 1 and the review criteria to be applied in that connection are defined in paragraph 2. [50] Because the audit duties of the Court of Auditors under Article 248(1) EC relate to both the Union's expenditure and its revenue, there is no clear reason to restrict reviews based on the criterion of sound financial management laid down in Article 248(2) EC to the Union's expenditure.

96. In its review of the Union's finances, the Court of Auditors must also report on any cases of irregularity. 'Cases of irregularity' in this connection means infringements of lawfulness, regularity and sound financial

46 — See Ekelmans, M., loc. cit. (footnote 10), paragraph 42.

47 — See Ekelmans, M., loc. cit. (footnote 10), paragraph 41 et seq., Freytag, M., loc. cit. (footnote 34), p. 44. With regard to the main characteristics of the reviews of lawfulness conducted by the Court of Auditors, see point 71 et seq. of this Opinion.

48 — See Inghelram, J., Article 287 TFEU, in *EU-Verträge: Kommentar nach dem Vertrag von Lissabon* (ed. Lenz/Borchardt), Cologne 2010, paragraph 5.

49 — See, in this connection, Freytag, M., loc. cit. (footnote 34), p. 44, who explains that the principle of sound financial management encompasses two dimensions in principle: In financial management, either an optimum result is to be achieved with a certain, pre-defined use of financial resources, or a certain, substantively defined policy objective is to be achieved with the lowest possible financial expenditure.

50 — See footnote 24 of this Opinion.

management which adversely affect the Union's revenue or expenditure. [51]

3. Interim conclusion

97. In the light of the foregoing, I conclude that the Court of Auditors has the power in principle to audit all acts adopted by the European Union institutions and by the Member States which have a sufficiently direct connection with the Union's revenue or expenditure. However, in that context, Member States' action can be made the principal object of an audit by the Court of Auditors only if it comes under Union law. This will be the case in particular where the Member States are required to comply with requirements of Union law in adopting or laying down the audited rules, procedures, operations or decisions.

98. In exercising its audit powers, the Court of Auditors must comply with both the principle of subsidiarity and the principle of proportionality. In its reviews the Court of Auditors may examine both the lawfulness and regularity of the acts reviewed and their sound financial management, and it may report on any cases of irregularity in this connection.

51 — Magiera, S., loc. cit. (footnote 27), paragraph 11. See also Inghelram, J., loc. cit. (footnote 24), p. 724 et seq.

D — *Power of the Court of Auditors to review administrative cooperation in the field of value added tax under Regulation No 1798/2003*

99. It is clear from my above statements that the existence of a power of the Court of Auditors to review administrative cooperation in the field of value added tax requires that object of the audit to have a sufficiently direct connection with the Union's finances and to fall within the scope of Union law.

100. The question whether the administrative cooperation in the field of value added tax reviewed by the Court of Auditors falls within the scope of Union law may be easily answered in the affirmative. The contested audit seeks to review such cooperation 'under Regulation No 1798/2003'. It is immediately clear that the reviewed administrative cooperation falls within the scope of Union law in principle.

101. The answer to the question whether the Court of Auditors has the power to carry out the audit in question therefore depends on the presence of a sufficiently direct connection between the object of the audit and the Union's revenue or expenditure. I will examine, in a first step, whether such a connection exists. Because, in my view, the presence of a sufficiently direct connection with the Union's finances must be taken to exist, I will

then consider the question whether the Court of Auditors complied with the principle of subsidiarity and the principle of proportionality in its audit. In doing so, I will also address criticisms made by the German Government of individual statements by the Court of Auditors in its Special Report No 8/2007.

1. The review of administrative cooperation in the field of value added tax under Regulation No 1798/2003 has a sufficiently direct connection with the Union's revenue

102. In considering whether the audit in question by the Court of Auditors has a sufficiently direct connection with the Union's finances, the Commission's argument that the contested audit relates to the Union's expenditure must first be rejected as inadmissible.

103. It is now common ground between the parties that the installation and operation of certain information systems which were introduced in order to implement and realise the cooperation envisaged in Regulation No 1798/2003 in the Member States were (partly) financed from the Union budget, with the result that that expenditure is in principle open to an audit by the Court of Auditors. However, the German Government rightly stresses that the Commission did not raise this plea in the application, but only in the reply. For that reason, this argument put forward by the Commission must be rejected as inadmissible pursuant to Article 42(2) of the Rules of Procedure.

104. In the present case, it must still therefore be examined whether the audit of administrative cooperation in the field of value added tax planned by the Court of Auditors and refused by the Federal Republic of Germany has a sufficiently direct connection with the Union's revenue.

105. In my opinion, this question should be answered in the affirmative.

106. It should be borne in mind, first of all, that the system of administrative cooperation in the field of value added tax laid down in Regulation No 1798/2003 essentially serves to combat tax evasion and tax avoidance extending across the frontiers of Member States, by improving the exchange of information between the Member States which is necessary to ensure the proper application of the VAT

rules. [52] Against this background, the Court of Auditors wished to ascertain in particular whether the Member States participating in the audit had set up the administrative and organisational structures to safeguard the administrative cooperation provided for in Regulation No 1798/2003. In addition, the Court of Auditors wished to examine and evaluate, using the example of several actual requests for information, the practical operation of the 'exchange of information on request' between the competent authorities of the Member States participating in the audit, as governed in Article 5 et seq. [53]

107. Consequently, the audit by the Court of Auditors relates to the legal and practical implementation of Union legislation to improve the exchange of information between the national administrative authorities in the field of value added tax. Because that cooperation ultimately helps to ensure the correct assessment of the value added tax owed to the Member States on cross-border supplies of goods and services, intra-Community acquisition of goods and importation of goods, the audit concerns, first and foremost, the financial interests of the Member States concerned, as the Federal Republic of Germany rightly argues. A reduction in VAT evasion and fraud leads to higher VAT revenue for the Member States.

108. However, at the same time, it is clear from my above description of the system of own resources of the Union that the amount of VAT revenue of the Member States affects the system of own resources of the Union in several ways. Because the relevant assessment base for each Member State in respect of own resources accruing from VAT is calculated on the basis of the actual VAT revenue of each Member State, an increase in national VAT revenue automatically leads to an increase in the own resources accruing from VAT owed by that Member State to the Union. [54] Where expenditure remains the same, such an increase in own resources accruing from VAT also leads to a reduction in the GNI-based own resources which are required to finance the EU budget. [55]

109. Of course, it must always be borne in mind that the higher VAT revenue of a Member State affects the amount of own resources accruing from VAT owed by that Member State only where there is no capping of the assessment base for the own resources accruing

52 — See recitals 1 to 3 in the preamble to Regulation No 1798/2003.

53 — The object of the audit was described as such in several letters from the Court of Auditors to the German Federal Court of Auditors and to the Federal Ministry of Finance. With regard to the correspondence between the Court of Auditors and the Federal Republic of Germany, see point 14 et seq. of this Opinion.

54 — See point 53 of this Opinion.

55 — With regard to this interaction between the amount of GNI-based own resources, on the one hand, and the amount of other own resources, on the other, see point 54 of this Opinion.

from VAT.[56] This exception is not relevant in the present case, however. Structural or practical problems in the operation of a national central liaison office have an impact not only on the correct VAT assessment in the relevant Member State, but also on the correct VAT assessment in all the other Member States which submit requests for information to the Member State in question.

110. The close connection between the Member States' VAT revenue and the Union's revenue from own resources accruing from VAT is highlighted in several places in the Sixth VAT Directive.[57] The second recital states that the Union's budget must, irrespective of other revenue, be financed entirely from the Union's own resources, including those accruing from VAT. Against that background, the 11th and 14th recitals refer to the need to harmonise the substantive VAT rules in order to ensure that own resources accruing from VAT are collected in a uniform manner in all the Member States.

111. The close connection between the collection of VAT by the Member States and the payment of own resources accruing from VAT by the Member States to the Union has also been confirmed on several occasions in the Court's case-law.

112. Three judgments of 12 September 2000,[58] in which the Court confirmed that the failure to assess national VAT in respect of transactions which are essentially subject to VAT under the Sixth VAT Directive constitutes not only an infringement of that directive by the Member State responsible for collection of VAT, but also of the Union's rules on the collection of own resources accruing from VAT, are particularly illuminating. As grounds, the Court stated in particular that since VAT was not levied on a transaction liable for VAT, the corresponding amounts were not taken into account in determining the VAT own resources base. This is sufficient to accept an infringement of the rules relating to the system of own resources of the Union.[59]

113. In its recent case-law, the Court used the review of Italian amnesty arrangements in the field of VAT as an opportunity to reaffirm the connection between the Union legislation on the assessment of own resources accruing

56 — See point 53 of this Opinion.

57 — Sixth Council Directive 77/388/EEC of 17 May 1977 on the harmonisation of the laws of the Member States relating to turnover taxes – Common system of value added tax: uniform basis of assessment (OJ 1977 L 145, p. 1).

58 — Case C-276/97 *Commission* v *France* [2000] ECR I-6251; Case C-358/97 *Commission* v *Ireland* [2000] ECR I-6301; and Case C-359/97 *Commission* v *United Kingdom* [2000] ECR I-6355.

59 — *Commission* v *France*, paragraph 55 et seq.; Case C-358/97 *Commission* v *Ireland*, paragraph 64 et seq.; and Case C-359/97 *Commission* v *United Kingdom*, paragraph 76 et seq., cited in footnote 58.

from VAT and the Member States' obligation to ensure that VAT is collected correctly. First of all, the Court made clear that the Member States must ensure that taxable persons comply with the obligations stemming from the common system of VAT. Although the Court accorded the Member States a certain measure of latitude as to how they use the means at their disposal, it also stated that that latitude is nevertheless limited by the obligation to ensure effective collection of the Union's own resources and not to create significant differences in the manner in which taxable persons are treated. [60] In that finding, the Court thus expressly confirmed that specific obligations in the context of VAT collection by the Member States may also arise from the obligations in respect of the provision of own resources accruing from VAT by those Member States.

114. In summary, administrative cooperation in the field of value added tax under Regulation No 1798/2003 helps to ensure the regular assessment of VAT in the Member States, with the aim of suppressing VAT evasion and VAT fraud and therefore increasing national VAT revenue. Paying particular attention to the fact that in settled case-law the Court has confirmed the direct connection between the VAT revenue of the Member States and the Union's own resources accruing from VAT, it cannot reasonably be denied that administrative cooperation in the field of value added tax under Regulation No 1798/2003 has a sufficiently direct connection with the Union's revenue. Because such cooperation also falls within the scope of Union law, it is in principle open to an audit by the Court of Auditors.

115. In the light of the foregoing, I conclude that the contested audit of administrative cooperation in the field of value added tax under Regulation No 1798/2003 is to be regarded as an examination of the Union's revenue for the purposes of Article 248(1) and (2) EC and Article 140(1) of Regulation No 1605/2002, which in principle falls within the scope of the audit powers of the Court of Auditors.

2. Compliance with the principle of subsidiarity and the principle of proportionality

116. In the light of the finding that the Court of Auditors had the power to carry out the contested audit, it must now be examined whether it also exercised that power of audit

60 — Case C-132/06 *Commission* v *Italy* [2008] ECR I-5457, paragraph 37 et seq.

in accordance with Union law. First of all, I will consider whether the contested audit is compatible with the principle of subsidiarity. I will then consider whether that audit was proportionate.

(a) Compliance with the principle of subsidiarity

117. Because, with the contested audit, the Court of Auditors did not take action in an area which falls within the exclusive competence of the Union, it is therefore required to comply with the principle of subsidiarity in carrying out that audit. [61] There is, however, nothing in the file to suggest a breach of that principle by the Court of Auditors in the context of the contested audit.

118. In preparing the audit, the Court of Auditors informed the Federal Republic of Germany [62] that it wished to examine whether the Member States participating in the audit had set up the administrative and organisational structures to safeguard the administrative cooperation provided for in Regulation No 1798/2003. In addition, the Court of Auditors wished to examine and evaluate, using the example of several actual requests for information, the practical operation of the 'exchange of information on request' between the competent authorities of the Member States participating in the audit, as governed in Article 5 et seq.

119. Faced with the reservations of the German Government, in a letter of 9 November 2006, the Court of Auditors explained to the Federal Minister for Finance [63] that it was planned to audit samples of requests for information submitted by the central liaison office and requests for information received from other Member States in 2005 in order to evaluate administrative cooperation in cases of requests for information in practice. The actual material transactions, including the tax assessment, in so far as they were evident from the documents to be audited, were not covered by the audit. The audit would examine the efficiency and effectiveness of the administrative cooperation. Conclusions were to be drawn from the findings of the audit with a view to combating VAT evasion and fraud more effectively.

120. Having particular regard to the cross-border aspects of the object of the audit, the audit procedures and the objectives of the

61 — See point 79 et seq. of this Opinion.

62 — For an overview of the correspondence between the Court of Auditors and the Federal Republic of Germany, see point 14 et seq. of this Opinion.

63 — Annex 4 to the application.

audit, it is immediately evident that it was not possible either for the national courts of auditors or for other national audit bodies properly to prepare or carry out the contested audit.

121. The procedure laid down in Article 35 of Regulation No 1798/2003 for the examination and evaluation of that regulation by the Commission in collaboration with the Member States also does not constitute an adequate alternative to a review by the Court of Auditors of cooperation between the administrative authorities in question. The procedure laid down in Article 35 of Regulation No 1798/2003 does not really allow a centralised and systematic review and evaluation of cross-border cooperation between the different national administrative authorities, in which the relevant exchange of information is reviewed and evaluated on the basis of multiple samples.

122. In the light of the foregoing, I conclude that the principle of subsidiarity does not prevent the contested audit being carried out by the Court of Auditors.

(b) Compliance with the principle of proportionality

123. By the contested audit, the Court of Auditors wished to evaluate the structural and practical aspects of administrative cooperation under Regulation No 1798/2003 in order to draw conclusions with a view to combating VAT evasion and fraud more effectively. The objective of the audit was to assess whether the information exchanges between Member States are carried out in a timely and effective manner and whether adequate administrative structures and procedures are in place to support administrative cooperation. [64]

124. It is clear from this definition of the objectives of the audit and from the information contained in the file that the Court of Auditors intended essentially to review administrative cooperation on the basis of the review criteria of 'lawfulness' and 'sound financial management', laid down in Article 248(2) EC. [65]

125. Particularly informative in this regard is the mission schedule sent to the German Federal Court of Auditors on 7 September 2006, in which the Court of Auditors listed the subject areas which were to be discussed during the planned audit mission to the central

64 — See specifically Report No 8/2007, paragraph 12.
65 — See point 93 et seq. of this Opinion.

liaison office. [66] It results from the mission schedule in particular that, first, the Court of Auditors wished to check, as part of a review of lawfulness, whether the Federal Republic of Germany had set up a central liaison office in accordance with Regulation No 1798/2003 and whether the exchange of information between the administrative authorities complied with the requirements laid down in that regulation. Secondly, the Court of Auditors wished to examine, as part of a review of sound financial management, whether there were ways of making administrative cooperation more efficient.

126. In this examination of administrative cooperation, the Court of Auditors is required to comply with the principle of proportionality. That principle requires in particular that the individual audit measures are *appropriate*, *necessary* and *reasonable* in order to attain the objectives of the audit. [67]

127. The Court has held that a measure is *appropriate* to ensuring attainment of the objective pursued if it genuinely reflects a concern to attain it in a consistent and systematic manner. [68] A measure is *necessary* if, from among several measures which are appropriate for meeting the objective pursued, it is the least onerous for the interest or legal asset in question. [69] An *unreasonable* restriction of the interests or legal assets in question exists where, despite its contribution to attaining the legitimate objectives pursued, the measure results in excessively strong interference in those interests or legal assets.

128. As regards the *appropriateness* of the contested audit in order to attain the objectives pursued, it is clear, in my opinion, that the audit measures taken by the Court of Auditors were intended to subject the structural and practical aspects of administrative cooperation to a coherent and systematic review. The audit is therefore appropriate in order to attain the objective pursued, which is to evaluate the lawfulness and the performance of the information exchanges between Member States and the existing administrative structures and procedures.

129. In my view, the audit measures taken by the Court of Auditors are also *necessary* in order to attain those objectives of the audit. In particular, it is not apparent how a less intensive audit of the national tax authorities

66 — Annexed to the statement in intervention submitted by the Court of Auditors. See point 15 et seq. of this Opinion.

67 — See point 91 et seq. of this Opinion.

68 — See Case C-384/08 *Attanasio Group* [2010] ECR I-2055, paragraph 51; and Case C-169/08 *Presidente del Consiglio dei Ministri* [2009] ECR I-10821, paragraph 42.

69 — Case 265/87 *Schräder* [1989] ECR 2237, paragraph 21.

and of individual procedures could have provided the required information.

130. In reviewing the *reasonableness* of the contested audit, it must be examined in particular whether the audit measures taken by the Court of Auditors resulted in excessive interference in the sphere of competence of the Member States concerned.

131. By the contested audit, the Court of Auditors first wished to check whether the Federal Republic of Germany had set up a central liaison office in accordance with Regulation No 1798/2003 and whether the exchange of information between the administrative authorities complied with the requirements laid down in that regulation. Secondly, the Court of Auditors wished to examine whether there were ways of making administrative cooperation more efficient. Although that review of the performance of specific administrative processes also entailed a critical analysis of the Member States' decisions, which come under national administrative autonomy, the file does not contain any information which could indicate that the individual audit measures were unreasonable in the overall context of the contested review.

132. These considerations relating to the proportionality of the action of the Court of Auditors in the context of the contested audit can be illustrated by means of an analysis of the German Government's criticisms of the individual findings of the Court of Auditors in its Special Report No 8/2007.

133. In the view of the German Government, Special Report No 8/2007 contains assessments of the organisation and the division of responsibilities of the tax authorities in the individual Member States, which constitute unacceptable and thus disproportionate interference in the Member States' powers. In this connection, the German Government objects in particular that in paragraph 38 et seq. of its Special Report the Court of Auditors examined the organisational set-up of the central liaison office in the Member States under review and found, among other things, that the tasks of the German central liaison office had been split between three units of the Central Federal Tax Office, one based in Bonn, the two others in Saarlouis. [70] The German Government also complains that, in paragraph 22 et seq. of the Special Report, the Court of Auditors finds that the Member States have not made sufficient use

70 — Although the Federal Republic of Germany refused to cooperate with the Court of Auditors in the contested audit, Special Report No 8/2007 also includes statements and observations relating to the German central liaison office and its effect. They are based on findings from audit missions to other Member States, information obtained during audit missions at the Commission, and publicly available reports; see point 22 of this Opinion.

of the possibilities of decentralisation offered by Regulation No 1798/2003.

134. This criticism made by the German Government of the proportionality of the action of the Court of Auditors is not convincing.

135. Although the German Government rightly states that, with its analyses of the organisation and the division of responsibilities of the national tax authorities, the Court of Auditors reviews decisions of the Member States concerned which cannot be challenged under Union law, it cannot be inferred that the Court of Auditors has exercised its audit powers in a disproportionate manner.

136. It should be stated, in particular, that the statements on insufficient decentralisation are intended to explain why the possibilities for exchange of information between the Member States under Article 5 of Regulation No 1798/2003 are not used particularly intensively. [71] The analysis of the organisational set-up of the German central liaison office is also conducted in the context of the finding that half of the requests for information under Article 5 of Regulation No 1798/2003 were answered late. [72] In this regard, the Court of Auditors states that in some Member States with a high number of late replies, complicated organisational set-ups contribute to delays and create problems in monitoring. [73] Italy, the Netherlands and Germany are cited as examples of Member States with complicated organisational set-ups. [74]

137. It is immediately clear from this description that the analysis of the organisation and the division of responsibilities of the national tax authorities serves to attain, in a consistent and systematic manner, the objective of the audit, which is to evaluate the adequacy of the information exchanges between Member States and the existing administrative structures and procedures. In the light of this objective of the audit, these analyses by the Court of Auditors are necessary in order to indicate and explain the objectively established deficiencies in administrative cooperation.

138. Giving particular consideration to the fact that the findings of the Court of Auditors

71 — Paragraph 19 et seq. of Special Report No 8/2007

72 — Ibid., paragraph 24 et seq.

73 — Ibid., paragraph 38.

74 — Ibid., paragraphs 39 to 41.

which are challenged by the German Government form part of a performance audit, in which the Court of Auditors stresses in various places that the criticised decisions are consistent with Union law, [75] thereby making clear that no criticism of the Member States concerned, from the point of view of Union law, can be inferred from that analysis, they also do not constitute unreasonable interference by the Court of Auditors in the sphere of competence of the Member States. [76]

139. Against this background, it cannot be disputed, in my view, that the analysis of the distribution of powers between the individual national administrative authorities and of the organisational structure of the central liaison office, conducted by the Court of Auditors in the form of a performance audit, is proportionate.

140. On the basis of these considerations, I conclude that the Court of Auditors complied with the principle of proportionality as regards both the general conception and the practical organisation, implementation and conclusion of its review of administrative cooperation in the field of value added tax under Regulation No 1798/2003.

E — *The breach by the Federal Republic of Germany of its duties of cooperation with the Court of Auditors*

141. If, as in the present case, the Court of Auditors decides, in the exercise of the powers conferred on it and having regard to the principles of subsidiarity and proportionality, to carry out a review of administrative cooperation in the field of value added tax, the Member States are required to cooperate sincerely with the Court of Auditors.

75 — The Court of Auditors introduced its analysis of the absence of devolved competences to territorial services with the statement that decentralisation is a possibility offered by the regulation (paragraph 22 of Special Report No 8/2007). The statements contained in the Special Report regarding the organisational set-up of the central liaison office go no further than the general finding that, in some Member States visited with a high number of late replies to requests for information, complicated organisational set-ups in the central liaison office contribute to these delays.

76 — It is thus important that, in the parts of the audit being challenged, the Court of Auditors evaluated the performance and not the lawfulness of the organisation and division of responsibilities of the national tax authorities. The choice of review criterion applied by the Court of Auditors to assess the Member States' action influence the intensity of any interference in the sphere of competence of the Member State under review. It is immediately apparent that a review of the lawfulness of the Member States' action may constitute much greater interference in the sphere of competence of the Member States than a performance audit. Whilst a review of lawfulness by the Court of Auditors relates to the question whether the Member States have exercised their powers in accordance with Union law, the performance audit relates to the question, which is less serious from a purely legal perspective, whether national measures are adequate, regardless of whether they are consistent with Union law.

142. The corresponding duties of cooperation on the part of the Member States stem, first of all, from the specific requirements laid down in Article 248(3) EC. [77] Under the first subparagraph of Article 248(3) EC, the audit must be based on records and, if necessary, performed on the spot in the Member States, in liaison with national audit bodies or, if these do not have the necessary powers, with the competent national departments. The Court of Auditors and the national audit bodies of the Member States must cooperate in a spirit of trust while maintaining their independence. Under the second subparagraph of Article 248(3) EC, the national audit bodies or, if these do not have the necessary powers, the competent national departments, must forward to the Court of Auditors, at its request, any document or information necessary to carry out its task.

143. In addition to the duties of cooperation on the part of the Member States expressly laid down in Article 248(3) EC, there is also the general duty of the Member States to cooperate sincerely with the Court of Auditors under Article 10 EC in conjunction with Article 248(1) and (2) EC.

77 — For a particularly instructive analysis of Article 248(3) EC in the context of audits carried out by the Court of Auditors in the Member States, see Inghelram, J., loc. cit. (footnote 26), p. 138 et seq.

144. Regulation No 1605/2002, which was adopted on the basis of Article 279 EC, contains rules governing cooperation between the Member States and the Court of Auditors. Thus, Article 140(2) of that regulation provides inter alia that the audit in the Member States must be carried out in conjunction with the national audit institutions or, where they do not have the necessary powers, with the national departments responsible and that the Court of Auditors and the national audit bodies of the Member States must cooperate in a spirit of trust while maintaining their independence.

145. In the light of these rules of Union law, the refusal by the German central liaison office, the Federal Ministry of Finance and the German Federal Court of Auditors to permit the Court of Auditors to carry out the contested audit and to assist it in this regard, as claimed by the Commission in its application, must be regarded as an infringement by the Federal Republic of Germany of Article 10 EC in conjunction with Article 248(1) and (2) EC, Article 248(3) EC and Article 140(2) of Regulation No 1605/2002.

146. With its action, however, the Commission also alleges that the Federal Republic of Germany has infringed Article 142(1) of Regulation No 1605/2002, under which the Commission, the other institutions, the

bodies administering revenue or expenditure on the Union's behalf and the final beneficiaries of payments from the budget must afford the Court of Auditors all the facilities and give it all the information which the Court of Auditors considers necessary for the performance of its task.

147. On the basis of the facts, this plea can only be understood to mean that bodies administering revenue on the Union's behalf are purported to have refused to cooperate sincerely with the Court of Auditors. However, the Commission has not made clear which German bodies might be classified as 'bodies administering revenue on the Union's behalf' in the context of the audit request by the Court of Auditors. Giving particular consideration to the fact that, despite harmonisation in this field, VAT is regarded as a national tax which is collected in principle in accordance with national rules, [78] neither the central liaison office nor the Federal Ministry of Finance can readily be regarded as bodies administering revenue on the Union's behalf.

148. Because in proceedings under Article 258 TFEU for failure to fulfil obligations it falls to the Commission to prove the allegation that the obligation has not been fulfilled and to place before the Court the information needed to assess the case, [79] and the Commission has failed to comply with that duty to produce evidence as regards the alleged infringement of Article 142(1) of Regulation No 1605/2002, that plea must be rejected as unfounded.

VIII — Summary

149. In summary, I conclude that pursuant to Article 248(1) and (2) EC and Article 140(2) of Regulation No 1605/2002, the Court of Auditors has the power to review administrative cooperation in the field of value added tax under Regulation No 1798/2003. In the exercise of that power of audit, the Court of Auditors complied with both the principle of subsidiarity and the principle of proportionality. Consequently, the Federal Republic of Germany was required, under Article 248(3) EC, Article 10 EC in conjunction with Article 248(1) and (2) EC, and under Article 140(2) of Regulation No 1605/2002, to permit the Court of Auditors to carry out

78 — See point 57 of this Opinion.

79 — See Case C-160/08 *Commission* v *Germany* [2010] ECR I-3713, paragraph 116; Case C-246/08 *Commission* v *Finland* [2009] ECR I-10605, paragraph 52; Case C-438/07 *Commission* v *Sweden* [2009] ECR I-9517, paragraph 49; and Case C-507/03 *Commission* v *Ireland* [2007] ECR I-9777, paragraph 33.

that audit and to assist it sincerely in accordance with those provisions.

150. Against this background, the refusal by the central liaison office, the Federal Ministry of Finance and the German Federal Court of Auditors to permit the Court of Auditors to carry out the audit of administrative cooperation in the field of value added tax and to assist it in this regard must be regarded as failure by the Federal Republic of Germany to fulfil its obligations under Article 10 EC in conjunction with Article 248(1) and (2) EC, Article 248(3) EC and Article 140(2) of Regulation No 1605/2002.

IX — Costs

151. Under Article 69(2) of the Rules of Procedure, the unsuccessful party is to be ordered to pay the costs if they have been applied for in the successful party's pleadings. Since the Commission has applied for costs to be awarded against the Federal Republic of Germany and the latter has been essentially unsuccessful, it must be ordered to pay the costs. In accordance with Article 69(4) of those Rules, the institutions which have intervened in the proceedings are to bear its own costs.

X — Conclusion

152. In the light of the foregoing considerations, I propose that the Court:

'(1) declare that, by refusing to permit the Court of Auditors to carry out audits in Germany concerning the administrative cooperation in the field of value added tax which is provided for under Council Regulation (EC) No 1798/2003 of 7 October 2003 on administrative cooperation in the field of value added tax and repealing Regulation (EEC) No 218/92 and to assist it in this regard, the

Federal Republic of Germany has failed to fulfil its obligations under Article 10 EC in conjunction with Article 248(1) and (2) EC, Article 248(3) EC, and Article 140(2) of Council Regulation (EC, Euratom) No 1605/2002 of 25 June 2002 on the Financial Regulation applicable to the general budget of the European Communities;

(2) dismiss the action as to the remainder;

(3) order the Federal Republic of Germany to pay the costs;

(4) order the European Parliament and the European Court of Auditors to bear their own costs.'