Opinion of Advocate General Francis Geoffrey Jacobs (3 October 2002)

Caption: In his Opinion of 3 October 2002, Advocate General Francis Geoffrey Jacobs maintains that the investigative responsibility conferred on OLAF (the Anti-Fraud Office) by the Community legislator is not liable to undermine the operational autonomy of the European Investment Bank (EIB) or its reputation on the financial markets. He also emphasises that the EIB is a body which forms an integral part of the Community framework and that its financial interests are closely linked with the financial interests of the Community.

Source: "Opinion of Mr Advocate General Jacobs delivered on 3 October 2002 in Case 15/00, Commission of the European Communities v European Investment Bank, in Reports of Cases before the Court. 2003, p. I 7290.

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OPINION OF ADVOCATE GENERAL JACOBS
delivered on 3 October 2002 [1]

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1 — Original language: English.

Introduction

1. In this case the Commission seeks the annulment of the Decision of 10 November 1999 of the Management Committee of the European Investment Bank ('the EIB') concerning cooperation with the European Anti-Fraud Office (OLAF).[2] The Commission — supported by the Council, the European Parliament and the Netherlands Government — submits that that decision is contrary to Regulation (EC) No 1073/1999 of the European Parliament and of the Council of 25 May 1999[3] and Council Regulation (Euratom) No 1074/1999 of 25 May 1999 concerning investigations conducted by the European Anti-Fraud Office (OLAF).[4] The EIB submits, principally, that the case is inadmissible since the Court is not competent under Articles 230 and 237 EC to review, at the instigation of the Commission, the legality of measures adopted by the Management Committee of the EIB. In the Regulation No 1073/1999 and Regulation No 1074/1999 inapplicable pursuant to Article 241 EC and Article 156 EA for (i) lack of legal basis, (ii) violation of the independence conferred upon the EIB by the EC Treaty, (iii) infringement of the principle of proportionality and (iv) infringement of the duty to give reasons laid down in Article 253 EC and Article 162 EA.

2. The case raises a number of important issues concerning, in particular, the scope of the Court's competence to review measures adopted by the organs of the EIB, the scope of Community competence to adopt measures under Article 280 EC and Article 203 EA aimed at combating fraud and other illegal activities affecting the financial interests of the Community, and the relationship between the EIB and the European Communities.

2 — The Decision has not been published in the Official Journal, but was communicated to the Commission, the Council and the European Parliament by letter dated 16 November 1999. A document summarising the main features of the provisions and procedures relevant to the investigation of suspected fraud within the EIB was attached to that letter.

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

4 — OJ 1999 L 136, p. 8. Hereinafter 'Regulation No 1074/1999'.

3. It may be noted that the case has elements in common with *Commission* v *European Central Bank*. [5] In order to avoid needless repetition, I will cross-refer to my Opinion in that case where appropriate. [6]

Background

4. For a detailed description of the factual and legal background to the adoption of the regulations in issue, I refer to my Opinion in *Commission* v *European Central Bank*. [7] Here it may suffice to recall that substantial amounts of Community funds are lost each year as a result of fraud and other irregularities committed by physical and legal persons, and that the Community institutions and the Member States have (i) granted the Community a specific legal basis for action in the field of fraud prevention, [8] (ii) established administrative structures [9] and (iii) adopted legislative measures aimed at prevention of fraud by individual recipients of Community funds in the Member States [10] or by members and staff of the institutions and bodies of the Community.

5. For present purposes, the initiatives taken by the Commission and the EIB are particularly relevant. The Commission first created a specific anti-fraud unit (*Unité de Coordination de la Lutte Anti-Fraude* (UCLAF)) in 1987. In 1995 that unit was given responsibility for all Commission anti-fraud activity, including investigation of fraud and other irregularities committed by Commission staff. In order to strengthen the protection of the Community's financial interests and, perhaps, in response to criticisms levelled at UCLAF [11] the Commission proposed in 1998 to create a new and independent anti-fraud service to be known as the Anti-Fraud Office or Office de Lutte Anti-Fraude (OLAF). [12] While the Commission initially proposed to establish OLAF — and to lay down detailed provi-

5 — Case C-11/00.

6 — Opinion of 3 October 2002.

7 — Cited in note 6, paragraphs 3 to 7.

8 — Article 280 EC.

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

10 — Council Regulation No 2988/95 of 18 December 1995 on the protection of the European Communities financial interests, OJ 1995 L 312, p. 1, and the more detailed provisions contained in Council Regulation (Euratom, EC) No 2185/96 of 11 November 1996 concerning on-the-spot checks and inspections carried out by the Commission in order to protect the European Communities' financial interests against fraud and other irregularities, OJ 1996 L 292, p. 2. Those measures are complemented by, in particular, the Convention drawn up on the basis of Article K.3 of the Treaty on European Union, on the protection of the European Communities' financial interests, OJ 1995 C 316, p. 49.

11 — See, in particular, Court of Auditors Special Report No 8/98 on the Commission's services specifically involved in the fight against fraud, notably the 'Unité de Coordination de la Lutte Anti-Fraude' (UCLAF) together with the Commission's replies, OJ 1998 C 230, p. 1.

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

sions for its operation — by a regulation based on Article 308 EC, OLAF was eventually established by a Commission decision. [13] General rules for its activities, which include 'external investigations' in the Member States and 'internal investigations' of fraud within the Community institutions and bodies, were laid down in Regulation No 1073/1999, which is the first measure to have been adopted on the basis of Article 280(4) EC. [14] The Regulation envisages the adoption, by each of the institutions and bodies of the European Community, of a decision laying down more detailed rules for the procedures to be followed in internal investigations conducted by OLAF, and an interinstitutional agreement concluded in 1999 between the Parliament, the Council and the Commission provides a model for those decisions. [15]

6. Within the EIB, responsibility for fraud prevention lies primarily with the Internal Audit service. According to the explanation of the EIB, the primary task of that service is to examine and evaluate the adequacy and effectiveness of the internal services and procedures of the EIB. [16] It may, moreover, carry out special missions including investigations of suspected instances of fraud in accordance with procedures set out in the General Office Procedures Manual of the EIB. [17]

The relevant Community provisions

Provisions of the EC Treaty

7. Article 9 EC provides:

'A European Investment Bank is hereby established, which shall act within the limits of the powers conferred upon it by this Treaty and the Statute annexed thereto.'

8. Article 230 EC, as far as relevant, provides:

'The Court of Justice shall review the legality of acts adopted jointly by the European Parliament and the Council, of acts of the Council, of the Commission and

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

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

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

16 — The EIB refers in that regard to the Internal Audit Charter (*Charte de l'audit interne*). That document has not been published.

17 — That document has not been published.

of the ECB, other than recommendations and opinions, and of acts of the European Parliament intended to produce legal effects vis-à-vis third parties.

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

...'

9. Article 237 EC provides:

'The Court of Justice shall, within the limits hereinafter laid down, have jurisdiction in disputes concerning:

(a) the fulfilment by Member States of obligations under the Statute of the European Investment Bank. In this connection, the Board of Directors of the Bank shall enjoy the powers conferred upon the Commission by Article 226;

(b) measures adopted by the Board of Governors of the European Investment Bank. In this connection, any Member State, the Commission or the Board of Directors of the Bank may institute proceedings under the conditions laid down in Article 230;

(c) measures adopted by the Board of Directors of the European Investment Bank. Proceedings against such measures may be instituted only by Member States or by the Commission, under the conditions laid down in Article 230, and solely on the grounds of non-compliance with the procedure provided for in Article 21(2), (5), (6) and (7) of the Statute of the Bank...'

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

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

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

they take to counter fraud affecting their own financial interests.

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

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

...'

11. According to Article 253 EC:

'Regulations, directives and decisions adopted jointly by the European Parliament and the Council, and such acts adopted by the Council or the Commission, shall state the reasons on which they are based and shall refer to any proposals or opinions which were required to be obtained pursuant to this Treaty.'

Provisions of the Euratom Treaty

12. Article 183a EA provides:

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

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

13. Article 203 EA provides:

'If action by the Community should prove necessary to attain one of the objectives of

the Community and this Treaty has not provided the necessary powers, the Council shall, acting unanimously on a proposal from the Commission and after consulting the European Parliament, take the appropriate measures.'

...

The Member States shall be liable only up to the amount of their share of the capital subscribed and not paid up.'

14. According to Article 162 EA:

'Regulations, directives and decisions of the Council and of the Commission shall state the reasons on which they are based and shall refer to any proposals or opinions which were required to be obtained pursuant to this Treaty.'

Provisions of the Statute of the EIB [18]

15. Article 4 of the Statute, as far as relevant, provides:

'1. The capital of the Bank shall be ECU 62 013 million, subscribed by the Member States as follows:

16. Article 5 of the Statute provides:

'1. The subscribed capital shall be paid in by Member States to the extent of 7.50162895% on average of the amounts laid down in Article 4(1).

2. In the event of an increase in the subscribed capital, the Board of Governors, acting unanimously, shall fix the percentage to be paid up and the arrangements for payment.

3. The Board of Directors may require payment of the balance of the subscribed capital, to such extent as may be required for the Bank to meet its obligations towards those who have made loans to it.'

18 — Protocol on the Statute of the European Investment Bank annexed to the Treaty establishing the European Community.

17. According to Article 8 of the Statute:

'The Bank shall be directed and managed by a Board of Governors, a Board of Directors and a Management Committee.'

18. Article 9 of the Statute, as far as relevant, provides:

'1. The Board of Governors shall consist of the ministers designated by the Member States.

2. The Board of Governors shall lay down general directives for the credit policy of the Bank, with particular reference to the objectives to be pursued as progress is made in the attainment of the common market.

The Board of Governors shall ensure that these directives are implemented.

3. The Board of Governors shall in addition:

...

(h) approve the Rules of Procedure of the Bank.'

19. Article 11 of the Statute, as far as relevant, provides:

'1. The Board of Directors shall have sole power to take decisions in respect of granting loans and guarantees and raising loans; it shall fix the interest rates on loans granted and the commission on guarantees; it shall see that the Bank is properly run; it shall ensure that the Bank is managed in accordance with the provisions of this Treaty and of this Statute and with the general directives laid down by the Board of Governors.

At the end of the financial year the Board of Directors shall submit a report to the Board of Governors and shall publish it when approved.

2. The Board of Directors shall consist of 25 directors and 13 alternates.

The directors shall be appointed by the Board of Governors for five years as shown below:

...

— one director nominated by the Commission.

The alternates shall be appointed by the Board of Governors for five years as shown below:

...

— one alternate nominated by the Commission.'

...

3. The Management Committee shall be responsible for the current business of the Bank, under the authority of the President and the supervision of the Board of Directors.

It shall prepare the decisions of the Board of Directors, in particular decisions on the raising of loans and the granting of loans and guarantees; it shall ensure that these decisions are implemented.

...

8. The Management Committee and the staff of the Bank shall be responsible only to the Bank and shall be completely independent in the performance of their duties.'

20. Article 13, as far as relevant, provides:

'1. The Management Committee shall consist of a President and six Vice-Presidents appointed for a period of six years by the Board of Governors on a proposal from the Board of Directors.

21. Article 14 provides:

'1. A Committee consisting of three members, appointed on the grounds of their competence by the Board of Governors, shall annually verify that the operations of the Bank have been conducted and its books kept in a proper manner.

2. The Committee shall confirm that the balance sheet and profit and loss account are in agreement with the accounts and faithfully reflect the position of the Bank in respect of its assets and liabilities.'

22. Article 17 provides:

'At the request of a Member State or of the Commission, or on its own initiative, the Board of Governors shall, in accordance with the same provisions as governed their adoption, interpret or supplement the directives laid down by it under Article 9 of this Statute.'

23. Article 20, as far as relevant, provides:

'In its loan and guarantee operations, the Bank shall observe the following principles:

1. It shall ensure that its funds are employed as rationally as possible in the interests of the Community.

It may grant loans or guarantees only:

...

(b) where the execution of the project contributes to an increase in economic productivity in general and promotes the attainment of the common market.'

24. Article 21, as far as relevant, provides:

'1. Applications for loans or guarantees may be made to the Bank either through the Commission or through the Member State in whose territory the project will be carried out. An undertaking may also apply direct to the Bank for a loan or guarantee.

2. Applications made through the Commission shall be submitted for an opinion to the Member State in whose territory the project will be carried out. Applications made through a Member State shall be submitted to the Commission for an opinion. Applications made direct by an

undertaking shall be submitted to the Member State concerned and to the Commission.

...

3. The Board of Directors shall rule on applications for loans or guarantees submitted to it by the Management Committee.

4. The Management Committee shall examine whether applications for loans or guarantees submitted to it comply with the provisions of this Statute, in particular with Article 20. Where the Management Committee is in favour of granting the loan or guarantee, it shall submit the draft contract to the Board of Directors; the Committee may make its favourable opinion subject to such conditions as it considers essential. Where the Management Committee is against granting the loan or guarantee, it shall submit the relevant documents together with its opinion to the Board of Directors.

5. Where the Management Committee delivers an unfavourable opinion, the Board of Directors may not grant the loan or guarantee concerned unless its decision is unanimous.

6. Where the Commission delivers an unfavourable opinion, the Board of Directors may not grant the loan or guarantee concerned unless its decision is unanimous, the director nominated by the Commission abstaining.

7. Where both the Management Committee and the Commission deliver an unfavourable opinion, the Board of Directors may not grant the loan or guarantee.'

25. Article 22(1) provides:

'The Bank shall borrow on the international capital markets the funds necessary for the performance of its tasks.'

The decision establishing the European Anti-fraud Office

26. The European Anti-fraud Office (OLAF) was established by Commission Decision No 1999/352 of 28 April 1999 (Decision No 1999/352), [19] adopted on the basis of Article 162 of the EC Treaty (now Article 218 EC), Article 16 of the ECSC Treaty and Article 131 of the Euratom Treaty.

19 — Cited in note 13.

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

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

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

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

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

The Office shall exercise the Commission's powers as they are defined in the provisions established in the framework of the Treaties, and subject to the limits and conditions laid down therein.

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

...

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

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

'A Surveillance Committee shall be established, the composition and powers of

which shall be laid down by the Community legislature. This Committee shall be responsible for the regular monitoring of the discharge by the Office of its investigative function.'

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

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

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

The regulations concerning investigations carried out by the European Anti-fraud Office

31. Regulation No 1073/1999 [20] and Regulation No 1074/1999 [21] were adopted respectively on the basis of Article 280 EC and Article 203 EA. The two regulations contain substantially identical provisions.

32. Article 1 of Regulation No 1073/1999 and Regulation No 1074/1999, entitled 'Objectives and tasks', provides:

'1. In order to step up the fight against fraud, corruption and any other illegal activity affecting the financial interests of the European Community, the European Anti-Fraud Office established by Commission Decision 1999/352/EC, ECSC, Euratom (hereinafter "the Office") shall exercise the powers of investigation conferred on the Commission by the Community rules and Regulations and agreements in force in those areas.

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

20 — Cited in note 3.
21 — Cited in note 4.

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

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

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

33. Article 4 of Regulation No 1073/1999 and Regulation No 1074/1999, entitled 'Internal investigations', so far as is relevant provides:

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

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

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

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

— the Office may request oral information from members of the institu-

tions and bodies, from managers of offices and agencies and from the staff of the institutions, bodies, offices and agencies.

...

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

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

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

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

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

34. According to Article 5 of Regulation No 1073/1999 and Regulation No 1074/1999, 'internal investigations shall be opened by a decision of the Director of the Office, acting on his own initiative or following a request from the institution, body, office or agency within which the investigation is to be conducted'.

35. Article 6 of Regulation No 1073/1999 and Regulation No 1074/1999, entitled 'Investigations procedure', provides:

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

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

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

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

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

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

36. Under Article 7 of Regulation No 1073/1999 and Regulation No 1074/1999, entitled 'Duty to inform the Office':

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

2. The institutions, bodies, offices and agencies and, in so far as national law allows, the Member States shall, at the request of the Office or on their own initiative, forward any document or information they hold which relates to a current internal investigation.

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

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

37. Article 8 of Regulation No 1073/1999 and Regulation No 1074/1999 lays down rules aimed at protecting the confidentiality of information and protection of data obtained in the course of investigations.

38. Article 9 of Regulation No 1073/1999 and Regulation No 1074/1999, so far as is relevant, provides:

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

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

...

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

39. Articles 11, 12 and 14 of Regulation No 1073/1999 and Regulation No 1074/1999 lay down rules concerning the tasks of the Supervisory Committee, the tasks of the Director and the right to complain against acts adversely affecting officials or other servants of the Communities adopted by the Office in the course of internal investigations.

The Interinstitutional agreement concerning internal investigations by the European Anti-fraud Office

40. On 25 May 1999 the European Parliament, the Council of the European Union

and the Commission of the European Communities concluded an interinstitutional agreement concerning internal investigations by the European Anti-fraud Office [22] ('the Interinstitutional Agreement').

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

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

The contested decision

43. On 10 November 1999 the Management Committee of the EIB adopted a decision concerning cooperation with the European Anti-fraud Office (OLAF) ('the contested decision'). [23]

44. After referring to Decision No 1999/352, the preamble to the contested decision states that the EIB 'welcom[es] the objectives of OLAF and the possibility of cooperating with it', whilst '[r]eaffirming its commitment to maintaining a strong and comprehensive internal control framework, including measures against fraud'. According to the preamble, the contested decision was moreover adopted '[t]aking into account the legal framework of the EIB as laid down in the EC Treaty and the Protocol on the Statute of the European Investment Bank'.

45. The contested decision is divided into two parts. Part I, entitled 'Investigations relating to fraudulent activity in connection with operations managed by the EIB under mandate and involving expenditure of Community budget funds', applies 'in respect of operations that are carried out by the [EIB] under mandate from the Community and have given, or will, in the normal course of events, give rise to expenditure of Community budget funds' [24] and 'to operations carried out by the [EIB] with resources from the European Development Fund, subject to satisfactory confirmation being provided to the [EIB] that the Fund is within the remit of OLAF' [25] (hereinafter: 'category I operations'). Part II applies to investigations relating to fraudulent activity 'in connection with EIB operation other than those

22 — Cited in note 15.
23 — See note 2.
24 — Point 1 of Part I of the contested decision.
25 — Point 2 of Part I of the contested decision.

covered by Part I' [26] (hereinafter: 'category II operations').

46. With regard to category I operations, Points 4 to 11 of Part I of the contested decision lay down the following provisions.

47. Point 4 of Part I provides:

'Applicable procedures. Suspicions of fraudulent activity relating to members of EIB staff or governing bodies in connection with [category I operations] shall be dealt with in accordance with the general procedures and rules applicable in the Bank; these cover the reporting of suspicions, the investigation of them, the reporting on the results of inquiries to the Audit Committee and to other organs of the Bank as the case may be, as well as action to be taken on the basis of such inquiries.'

48. Point 5 of Part I provides:

'Activation of investigation by OLAF. In addition to the above, where the Director of OLAF notifies the President of a suspicion relating to a member of EIB staff or governing body and concerning alleged fraudulent activity in connection with a relevant operation, specifying the circumstances giving rise to the suspicion, the President will promptly forward the matter to the Head of Internal Audit for investigation.'

49. Point 6 of Part I provides:

'Reporting to OLAF. The report of the Head of Internal Audit on the results of the investigation and on action taken shall, in addition to the normal communication to the Audit Committee, be transmitted without delay to the Director of OLAF, with a request for any observations that he may have

(i) in cases referred to in paragraph 5, and

(ii) in other cases under paragraph 4 where evidence of fraudulent activity has been detected.'

26 — Title of Part II.

50. Point 7 of Part I provides:

'Observations by OLAF. Any observations by the Director of OLAF on reports referred to in paragraph 6 and transmitted to the President shall be forwarded to the Head of Internal Audit and to the Audit Committee. The President shall keep the Director of OLAF informed and in a timely manner of subsequent action.'

51. Point 8 of Part I provides:

'Reporting to the Commission. In cases under paragraph 4, where evidence of fraudulent activity has been detected, the report on the results of the investigation and on action taken shall be transmitted to the Commission, in its role as principal under the mandate in question.'

52. Point 9 of Part I provides:

'Handling of request for cooperation. Where, in the course of its own investigations relating to relevant operations, OLAF requires access to information held by the Bank, and where the Director of OLAF addresses to the President a request specifying the circumstances of the investigation and the need for information or other cooperation, the President will ensure that a timely response is provided. The Audit Committee shall be informed of the request and of the response provided, or to be provided, as the case may be.'

53. Point 10 of Part I provides:

'Measures. Depending on the request, and on the circumstances of each case, the President will

— authorise the provision of specified documents or other information by the Bank's services; and/or

— order the Head of Internal Audit to conduct an inquiry and to provide a report to OLAF; or

— authorise the Bank's services to give OLAF access to specific documents or other information, subject to necessary conditions and/or other safeguards to be defined.

In so doing the President will seek to maintain maximum cooperation with OLAF within the terms of this decision.'

54. Point 11 of Part I provides:

'If, in connection with relevant operations, circumstances come to the attention of the Bank which, in its opinion, constitute evidence of, or grounds to suspect, fraudulent activity outside the Bank affecting Community financial interests, and where such circumstances fall within the investigative powers of OLAF, the Director of OLAF will be informed of those circumstances through the President, who will offer the maximum cooperation of the Bank in any subsequent investigations.'

55. With regard to category II operations, Part II of the contested decision provides:

'1. The established framework, as currently set out in the EIB procedures for the investigation of cases of suspected fraud involving EIB staff or members of its governing bodies shall continue to apply.

2. Within this framework, which provides for recourse to external assistance or expertise, the Bank will wish to take advantage of having recourse to the assistance of OLAF and will seek to establish with OLAF appropriate modalities[.]'

Procedure and claims of the parties

56. The Commission asks the Court, pursuant principally to Article 237(b) EC and in the alternative to Article 230 EC, to annul the contested decision and to order the EIB to pay the costs. Its essential submission is that the contested decision is contrary to, in particular, Article 4 of Regulation No 1073/1999 and Regulation No 1074/1999.

57. The EIB asks the Court to dismiss the application as inadmissible. In the alternative, the EIB submits that the Court should declare Regulation No 1073/1999 and Regulation No 1074/1999 inapplicable pursuant to Article 241 EC and Article 156 EA and reject the application as unfounded. It asks, in any event, the Court to order the Commission to bear the costs.

58. The European Parliament, the Council and the Netherlands Government have intervened in support of the Commission. They put forward arguments substantially

similar to those of the Commission. In the following the interventions will be mentioned only where relevant and, in particular, in so far as they differ from the Commission's arguments.

Identification of the issues

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

— Is the application admissible under Article 237 EC or, in the alternative, Article 230 EC?

— Is the contested decision contrary to Regulation No 1073/1999 and Regulation No 1074/1999?

— If so, should Regulation No 1073/1999 be declared inapplicable pursuant to Article 241 EC and Regulation No 1074/1999 inapplicable pursuant to Article 156 EA?

60. Before considering the second of those questions, I propose to examine briefly whether Regulation No 1073/1999 and Regulation No 1074/1999 must be interpreted as applying to the EIB, since the Commission's application can in any event succeed only if that question is to be answered in the affirmative.

Admissibility

Summary of the arguments

61. The parties have submitted detailed observations on the issue of admissibility which may be summarised as follows.

62. The Commission's application is based primarily on Article 237(b) EC and, subsidiarily, on Article 230 EC. Although Article 237(b) EC applies only to the measures of the Board of Governors of the EIB, the Commission considers that the present action is admissible under that provision. In that regard, it recalls that Article 9(3)(h) of the Statute envisages that the Board of Governors are to approve the rules of procedure of the EIB. Considering that the subject-matter of the contested decision falls within the ambit of [relève de la sphère] those rules, the Commission assumes that the contested decision was adopted pursuant to a delegation of power from the Board of Governors to the Management Committee. The contested

decision must, therefore, be considered to be imputable to the Board of Governors. Moreover, to hold that the contested decision cannot be reviewed would enable the EIB to evade the jurisdiction of the Court of Justice under Article 237 EC by manipulating its internal decision-making procedure.

63. With regard to Article 230 EC, the Commission emphasises that the Court of Justice must — under Article 220 EC — ensure that the law is observed in the interpretation and application of the Treaty, that according to the Court's case-law the EIB forms an integral part of the Community legal order, [27] and that Article 237 EC does not exhaustively list the circumstances in which the Court of Justice is competent to review measures adopted by the EIB. [28] Given that the present case raises issues of a 'quasi-constitutional' nature, and that there is thus an evident need for judicial protection, it would be incompatible with the nature of the Community as a legal order governed by the rule of law, which the Court recognised in *Les Verts*, [29] if the matter could not be brought before the Court of Justice. It would, according to the Commission, be unacceptable if the EIB could undermine the intentions of the Community legislature in an area as important as that of fraud prevention without any judicial supervision by the Court of Justice.

64. In response to those arguments, the EIB notes, first of all, that although the Commission relies on Regulation No 1074/1999 in its application, it does not explain which provisions of the Euratom Treaty give it competence to challenge the contested decision before the Court of Justice. Since there is no equivalent to Article 237 EC in that Treaty, the EIB considers that the Commission must be relying on Article 146 EA which is similar to Article 230 EC. However, neither that provision nor any other provision of the Euratom Treaty mentions the EIB.

65. The EIB submits, secondly, that the contested decision cannot be challenged by the Commission pursuant to Article 237 EC. Stressing that the Court of Justice must, according to Article 7(1) EC, act within the powers conferred upon it by the Treaty, the EIB contends that Article 237 EC must be interpreted as listing exhaustively the circumstances in which the Court is competent to review measures of the EIB. By omitting to refer to decisions of the Management Committee — a body established and granted specific powers by the Statute [30] — the Treaty deliberately excluded them from the scope of the Court's competence.

66. Moreover, the contested decision was — contrary to what the Commission alleges — adopted by the Management Committee within the scope of its own powers under Article 13(3) and (8) of the

27 — The Commission refers in that regard to Case 110/75 *Mills* v *EIB* [1976] ECR 955, paragraphs 14 of the judgment; Case 85/86 *Commission* v *Board of Governors of the European Investment Bank* [1988] ECR 1281, paragraph 24; and Case C-370/89 *SGEEM and Etroy* v *EIB* [1992] ECR 6211, paragraph 13.

28 — The Commission refers in that regard to *Mills* v *EIB*, paragraphs 15 to 18 of the judgment and *SGEEM and Etroy* v *EIB*, paragraph 17.

29 — Case 294/83 [1986] ECR 1339.

30 — The EIB refers to Articles 8 and 13 of the Statute.

Statute, which provide that the Management Committee 'shall be responsible for the current business of the Bank, under the authority of the President and the supervision of the Board of Directors' and that '[t]he Management Committee and the staff of the Bank shall be responsible only to the Bank and shall be completely independent in the performance of their duties'. In that context, the EIB explains that the Board of Governors was regularly informed by the President of the EIB of the work undertaken by the Management Committee to prepare the adoption of measures concerning fraud prevention. The members of the Governing Board did not, however, ask for the Board to be convened or for the contested decision to be debated during one of its ordinary meetings. [31] Thus, the Commission cannot — in the absence of any proof, or even allegation, of an abuse of procedure — claim that the EIB has sought to evade the system of judicial protection laid down by the Treaty.

67. According to the EIB, the contested decision cannot be reviewed under Article 230 EC either. Given that the wording of Article 230 EC refers only to the institutions of the Community and the ECB, that provision is inapplicable as a whole to the EIB. To admit that measures not mentioned in Article 237 EC may be reviewed under Article 230 EC would also empty Article 237 EC, which constitutes a *lex specialis*, of its content. Moreover, the case-law invoked by the Commission, which concerns the competence of the Court of Justice to rule on the non-contractual liability of the EIB [32] and on disputes between the EIB and members of its staff, [33] does not support the proposition that Article 237 EC is not exhaustive with regard to review of decisions adopted by the EIB. Nor is the reasoning of the Court in *Les Verts*, [34] relied upon by the Commission, applicable to the EIB. In that case the Court of Justice acknowledged the possibility of review of measures adopted by the European Parliament essentially to ensure that the extension of the powers of one of the institutions of the Community, which was not mentioned at all in Article 230 EC, did not undermine the need for judicial protection. However, the EIB is not an institution, it has maintained its original tasks, which is to grant loans and guarantees, and the possibility of review of the decisions of (some of) its bodies was always envisaged by Article 237 EC. [35]

68. Finally, the EIB considers that the present case is inadmissible in so far as the Commission alleges in substance that the EIB has failed to act by omitting to adopt a decision under Article 4(1) and (6) of Regulation No 1073/1999 and Regulation No 1074/1999. Articles 232 EC and 148 EA, which provide for an action

31 — The EIB points out that that would have been possible under Articles 2 and 3 of the Rules of Procedure of the EIB.

32 — Pursuant to Articles 235 and 288 EC.

33 — Pursuant to Article 236 EC.

34 — Case 294/83, cited in note 29.

35 — The EIB refers in that regard to the Order of the Court of First Instance in Case T-460/93 *Tête* v *EIB* [1993] ECR II-1257, paragraphs 17, 18 and 20.

against a failure to act, do not apply to the EIB and require, in any event, a procedure which has not been complied with in the present case.

Analysis

69. In order to determine whether the Commission's application is admissible it is, in the light of the arguments of the parties, necessary to consider the following issues:

— Is the contested decision to be regarded as a measure of the Board of Governors which may be reviewed pursuant to Article 230 EC and/or 237(b) EC?

— If so, is the Commission's action inadmissible to the extent that it alleges a violation of Regulation No 1074/1999 which is a measure adopted under the Euratom Treaty?

— Is the Commission's action inadmissible to the extent that it seeks to establish a failure to act by the EIB?

— Admissibility under Article 237(b) EC

70. Article 237(b) and (c) EC provide for review by the Court of Justice of measures adopted by the Board of Governors and the Board of Directors of the EIB, but makes no reference to the Management Committee. It might, as the EIB points out, be inferred from that wording that decisions adopted by the Management Committee cannot, in principle, be reviewed pursuant to Article 237 EC.

71. It would however, as the Commission points out, be unacceptable if the EIB were able — by a creative organisation of its internal decision-making process — to evade the judicial scrutiny intended by Article 237(b) and (c) EC. Decisions formally adopted by the Management Committee must, therefore, be reviewable if an analysis of the circumstances leading to their adoption and of their substance reveals that they are imputable to the Board of Governors or the Board of Directors.

72. In that context, it may be noted that when the Court was asked to consider whether acts adopted by representatives of the Member States acting, not in their capacity as members of the Council of Ministers, but as representatives of their governments, are subject to judicial review by the Court, it held that although such

measures fall outside the scope of Article 230 EC, 'it is not enough that an act should be described as a "decision of the Member States" for it to be excluded from review... In order for such an act to be excluded from review, it must still be determined whether, having regard to its content and all the circumstances in which it was adopted, the act in question is not in reality a decision of the Council.' [36]

73. According to the EIB the contested decision is not imputable to the Governing Board since, essentially, the Board did not adopt a decision delegating power to the Management Committee to adopt decisions concerning fraud prevention and omitted to call a meeting or place the issue of cooperation with OLAF on its agenda although it was informed of the work undertaken by the Management Committee.

74. I disagree. A decision of the Management Committee which has legal effect may, in my view, be attributed to the Board of Governors where the Board has been informed of the work undertaken to prepare the decision and of its final content without raising any objections. The absence of a formal delegation of power or explicit endorsement during a meeting of the Governing Board cannot be decisive.

36 — Joined cases C-181/91 and C-248/91 *European Parliament v Council and Commission* [1993] ECR I-3685, paragraph 14 of the judgment.

75. In that regard, it may be recalled that the Management Committee is, according to Article 13(3) of the Statute, 'responsible for the current business of the Bank, under the supervision of the President and the Board of Directors'. The notion of 'current business' must be understood in the light of Article 267 EC which provides that the EIB is to 'grant loans and give guarantees which facilitate the financing of... projects in all sectors of the economy', and in the light of the provisions of the Statute defining the tasks of the Governing Board and the Board of Directors. Under Article 9 of the Statute the Board of Governors is to lay down general directives for the credit policy of the Bank and, *inter alia*, decide whether to increase the subscribed capital of the EIB, approve the annual report of the Board of Directors and the annual balance sheet and profit and loss account, and approve the Rules of Procedure of the Bank. The Board of Directors is, in accordance with Article 11 of the Statute, to take decisions in respect of granting loans and guarantees and raising loans, fix the interest rates on loans granted and the commission on guarantees, and check that the Bank is managed properly and lawfully in accordance with the Treaty and the general directives laid down by the Board of Governors.

76. It emerges from those provisions that the essential task of the Management Committee under the Treaty and the Statute is to prepare and implement the decisions about loans and guarantees which are adopted by the Board of Directors in accordance with the general directives of

the Board of Governors.[37] While the Statute does not entirely preclude the possibility that the Management Committee might, as part of the current business of the EIB, take legally binding decisions with effect for third parties,[38] it clearly envisages that such decisions are normally to be adopted by either the Board of Governors or the Board of Directors.

77. The absence of a reference in Article 237 EC to the Management Committee reflects this division of competence within the EIB. In so far as the Management Committee is in general supposed to prepare — rather than adopt — legally binding decisions, the Treaty draftsmen appear to have taken the view that judicial scrutiny of Management Committee action was unnecessary. A parallel may be drawn here with Article 230 EC which provides for review of final and legally binding acts of the institutions and the ECB, not of steps which merely prepare the adoption of such acts.[39]

78. If however the Management Committee adopts a decision having legal effect that underlying assumption no longer applies. Such a decision must therefore be open to review.[40] That is so especially where, as in the present case, the Management Committee adopts a decision the content of which can only with great difficulty, if at all, be fitted within the notion of 'current business' and which is evidently liable to undermine the effectiveness of one or more Community regulations.

79. I consider for those reasons that the contested decision must be imputed to the Board of Governors and that it is, therefore, a reviewable act under Article 237(b) EC.

80. It might be objected that the Management Committee acts 'under... the supervision of the Board of Directors',[41] and that legally binding decisions adopted by the Management Committee should therefore be attributed to the Board of Directors rather than to the Board of Governors. Pursuant to Article 237(c) EC decisions of the Board of Directors may be reviewed only for non-compliance with the procedures laid down in Article 21(2), (5), (6) and (7) of the Statute. The Commission's claim that the contested decision is

37 — See similarly J. Käser, The European Investment Bank: its role and place within the European Community System, *Yearbook of European Law* 1984, p. 303, at p. 315; S. Izzo, 'The juridical nature of the European Investment Bank', *Journal of regional policy* 1992, p. 123, at p. 128; D. Dunnett, 'The European Investment Bank: autonomous instrument of common policy?' *Common Market Law Review* 1994, p. 721, at p. 735; F. Leneuf-Péraldi, 'Banque européenne d'investissement', *Juris-Classeur Europe*, Fascicule 2160, no. 56.

38 — See, in that regard, F. Mosconi, *Commentaire Mégret*, vol. 8, (1979), pp. 39 and 40; G. Marchegiani, *Commentaire Mégret*, vol. 9, (2nd ed., 2000), p. 489 for the view that the Management Committee has a residual power to take measures which are not explicitly reserved by the Statute for the Board of Governors or the Board of Directors of the EIB.

39 — See, in particular, Case 60/81 *IBM* v *Commission* [1981] ECR 2639; Case C-25/94 *Commission* v *Council* [1996] ECR I-1469, paragraph 27 of the judgment.

40 — See by analogy my Opinion in *Commission* v *Council*, cited in note 39, paragraphs 46 to 48 concerning decisions of the Committee of Permanent Representatives (Coreper).

41 — Article 13(3) of the Statute.

contrary to Regulation No 1073/1999 and Regulation No 1074/1999 would therefore appear to be inadmissible.

81. That objection is not convincing in my view. The procedural rules laid down in Article 21(2), (5), (6) and (7) of the Statute are concerned exclusively with the adoption of decisions concerning the award of loans and guarantees. It is thus clear that the Treaty did not intend such decisions, which are of an essentially commercial nature, to be subject to full judicial review by the Court of Justice. However, it cannot in my view be inferred from Article 237(c) EC that decisions adopted by the organs of the EIB which are not directly related to the award of loans and guarantees, and which have legal effect, cannot be subject to judicial review. Moreover, according to Article 8 of the Statute read together with Article 9, the Board of Governors has ultimate responsibility for the direction and management of the EIB. Therefore it cannot be decisive that the Board of Directors has responsibility for everyday supervision of the Management Committee under Article 13 of the Statute.

82. I am encouraged in that view by the Court's case-law concerning the types of acts which are susceptible to review under Article 230 EC. Under the first paragraph of Article 173 of the EEC Treaty, the Court was originally competent to review 'acts of the Council and the Commission other than recommendations and opinions'. Article 189 of the EEC Treaty (now Article 249 EC) defined binding Community acts as regulations, directives and decisions. It might have been thought, on the basis of those provisions, that the Court was competent only to review regulations, directives and decisions adopted by the Council or the Commission. However, in *ERTA* [42] the Court was willing to review the legality of Council proceedings regarding the negotiation and conclusion by the Member States of an agreement on the working conditions of the crews of vehicles engaged in international road transport [43] on the ground, essentially, that the purpose of the procedure for judicial review laid down in Article 173 of the EEC Treaty — which is to ensure observance of the law in the interpretation and application of the Treaty — would not be fulfilled unless it was possible to challenge all measures, whatever their nature or form, which are intended to have legal effects. [44] In *Les Verts* [45] the Court was asked to review two measures, adopted by the European Parliament, on the reimbursement of expenses incurred by parties taking part in the 1984 elections. In declaring that action admissible, it emphasised that the Community 'is a Community based on the rule of law, inasmuch as neither its Member States nor its institutions can avoid a review of... the measures adopted by them' [46] and that 'the Treaty [has] established a complete system of legal remedies and procedures designed

42 — Case 22/70 *Commission* v *Council* [1971] ECR 263, paragraphs 39 to 42 of the judgment.

43 — The European Road Transport Agreement.

44 — For an application of that principle to a Commission Communication, see Case C-57/95 *France* v *Commission* [1997] ECR I-1627. See also *Commission* v *Council*, cited in note 39, paragraph 29 of the judgment.

45 — Cited in note 29.

46 — Paragraph 23 of the judgment.

to permit the Court of Justice to review the legality of measures adopted by the Institutions',[47] and it held that while 'Article 173 refers only to acts of the Council and the Commission... an interpretation of [that provision] which excluded measures adopted by the European Parliament from those which could be contested would lead to a result contrary to both the spirit of the Treaty as expressed in Article 164 [now Article 220 EC] and to its system'.[48]

83. While those two judgments cannot be transposed directly to the present case, the essence of the Court's reasoning is surely applicable. The provisions of the Treaty institute a complete system of judicial review under which all legally binding acts are, in the absence of very clear words in the Treaty to the contrary, subject to judicial scrutiny by the Court of Justice to ensure observance of the rule of law. While Article 237 EC does not mention the Management Committee, it does not explicitly — or by sufficiently clear implication — exclude the possibility that legally binding decisions adopted by that Committee may be attributed to the Board of Governors or, as the case may be, the Board of Directors and reviewed on that basis. The essential point is that, as the Council submits, whenever the EIB acts as a Community body, rather than as a commercial bank, its measures must be subject to judicial review.

84. In the light of that conclusion, it is not necessary to consider the Commission's subsidiary argument that decisions of the Management Committee may be reviewed pursuant to Article 230 EC.

— Admissibility of the submissions relating to Regulation No 1074/1999

85. The EIB contends, essentially, that the Commission cannot invoke an alleged violation of a measure adopted under the Euratom Treaty in an action pursuant to Article 230 EC. The Commission's application is thus inadmissible in so far as it seeks to establish that the contested decision is contrary to Regulation No 1074/1999.

86. I cannot accept that submission.

87. In *Greece* v *Council*[49] the Court held that '[t]he need for a complete and consistent review of legality requires [Article 230 EC] to be construed as not depriving the Court of jurisdiction to consider, in proceedings for the annulment of a measure based on a provision of the EEC Treaty, a submission concerning the

47 — Ibid.

48 — Paragraphs 24 and 25 of the judgment. See also Case 2/88 *Zwartveld* [1990] ECR I-3365, paragraphs 23 and 24 of the order.

49 — Case 62/88 *Greece* v *Council* [1990] ECR I-1527, paragraph 8 of the judgment.

infringement of a rule of the [Euratom] or ECSC Treaties'.[50] The present case is essentially similar: the contested decision was adopted pursuant to the EC Treaty, and it was therefore appropriate for the Commission to challenge it under Article 237 EC. Since the provisions of the Euratom Treaty conferring jurisdiction upon the Court of Justice do not mention the EIB, it would seem that the contested decision could not be reviewed directly under that Treaty. The need for a complete system of judicial review therefore requires Articles 230 and 237 EC to be interpreted so as to allow the Court to consider submissions concerning the compatibility of the contested decision with provisions of the Euratom Treaty. The same applies, in my view, to submissions concerning infringement of a regulation adopted pursuant to the Euratom Treaty. The need for a complete system of judicial review is the same, and a violation of a regulation is by definition also a Treaty violation, since the EC and Euratom Treaties provide that regulations are binding in their entirety and directly applicable in all Member States.[51]

88. Moreover, while the contested decision was adopted by the EIB under the EC Treaty, Regulation No 1074/1999 is clearly relevant for the resolution of the present case. The EIB provides substantial amounts of loans and guarantees on a mandate from Euratom, and it would seem that the competence of OLAF to investigate activities of the EIB acting under such a mandate could be based only on Regulation No 1074/1999.

— Does the Commission's action seek to establish a failure to act?

89. The EIB's last objection to admissibility — that the Commission seeks in substance a ruling for a failure to act — should not, in my view, be upheld either. It appears from the Commission's arguments, as clarified by its reply, that its essential submission is that the contested decision is contrary to Regulation No 1073/1999 and Regulation No 1074/1999 in that it establishes a parallel system of fraud prevention and excludes OLAF from carrying out internal investigations in accordance with, in particular, Article 4 of the Regulations. Thus, as I understand the Commission's reply, it does not make any separate allegation that by failing to adopt a decision pursuant to Article 4(1) and (6) of Regulation No 1073/1999 and Regulation No 1074/1999 the EIB acted contrary to Community law.

Do Regulation No 1073/1999 and Regulation No 1074/1999 apply to the EIB?

90. The EIB accepts, as I understand its arguments, that the Community legislature intended Regulation No 1073/1999 and Regulation No 1074/1999 to apply to its activities. That is surely correct. It is, as I have explained in my Opinion in *Commission* v *European Central Bank*,[52] entirely

50 — Paragraph 8 of the judgment.

51 — Article 249 EC; Article 161 EA.

52 — Cited in note 5, paragraphs 49 to 52.

clear from the wording and drafting history of Regulation No 1073/1999 that it is intended to apply to the ECB. The same applies to the EIB which must be regarded as one of the 'bodies... established by' the EC Treaty to which the Regulation applies according to the seventh recital of the preamble, Articles 1(3), 4(1) 4(6), 6(6), 7(1), (2) and (3), 9(4), 10(3), the second paragraph of Article 5 and the second paragraph of Article 14.

91. The wording of Regulation No 1074/1999 is substantially identical to that of Regulation No 1073/1999, and the legislative history does not give any grounds for interpreting its scope *ratione personae* differently.

92. I thus consider that Regulation No 1073/1999 and Regulation No 1074/1999 apply to the EIB.

Is the contested decision contrary to Regulation No 1073/1999 and Regulation No 1074/1999?

93. The next issue to be considered is whether the contested decision is contrary to Regulation No 1073/1999 and Regulation No 1074/1999.

94. According to the Commission, the contested decision is contrary to Regulation No 1073/1999 and Regulation No 1074/1999 in several respects. It recalls that the contested decision is divided into two parts: Part I which applies to operations carried out by the EIB under mandate from the Community and giving rise to expenditure of Community budget funds or resources from the European Development Fund, and Part II which applies to all other EIB operations. The Commission considers Part I to be contrary to Regulation No 1073/1999 and Regulation No 1074/1999 in three respects.

95. First, the Commission recalls that Article 4(1) of Regulation No 1073/1999 and Regulation No 1074/1999 provides that '[i]n the areas referred to in Article 1, the Office shall carry out administrative investigations within the institutions, bodies, offices and agencies'.[53] However, according to point 4 of Part I of the contested decision, '[s]uspicions of fraudulent activity relating to members of EIB staff or governing bodies in connection with [category I operations] shall be dealt with in accordance with the general procedures and rules applicable in the Bank'.

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

96. Second, it follows from points 5 to 8 of Part I that the cooperation between the EIB and OLAF envisaged by the contested decision consists essentially in the conduct, at the request of the Director of OLAF, of internal investigations by the Internal Audit of the EIB the results of which are reported to OLAF. That clearly does not correspond to the system of internal investigations envisaged by Regulation No 1073/1999 and Regulation No 1074/1999. In that regard, the Commission emphasises that internal investigations differ fundamentally in nature from auditing. While auditing may serve the purpose of identifying irregularities, internal investigations are specifically aimed at establishing the existence of fraud or other irregularities and collecting all relevant evidence capable of leading to disciplinary or criminal liability for the persons concerned.

97. Third, under points 9 and 10 of Part I, access to information held by the EIB is subject, in each case, to the authorisation of the President of the EIB. That is incompatible with Article 4(2) of Regulation No 1073/1999 and Regulation No 1074/1999 according to which OLAF has a right of immediate and unannounced access to any information held by the institutions, bodies, offices and agencies, and to their premises, subject only to a requirement of notification.

98. Part II of the contested decision is, according to the Commission, even more clearly contrary to the provisions of Regulation No 1073/1999 and Regulation No 1074/1999. Part II merely envisages that the EIB may have recourse to the assistance of OLAF when it so desires, and that it will seek to establish — in cooperation with OLAF — appropriate procedures and modalities for such assistance.

99. In addition to those points, the Commission in its application contends that the EIB has violated Regulation No 1073/1999 and Regulation No 1074/1999 since, by adopting the contested decision, it has not fulfilled its obligation to adopt a decision laying down the modalities for internal investigations pursuant to Article 4(1) and (6). However, it appears from its reply that its essential submission is that the contested decision is in substance contrary to the provisions of Regulation No 1073/1999 and Regulation No 1074/1999.

100. The EIB has not specifically denied that the contested decision is contrary to Regulation No 1073/1999 and Regulation No 1074/1999, its argument being rather that the Regulations do not apply to it. I therefore consider it to be common ground that the contested decision is contrary to, in particular, Article 4 of Regulation No 1073/1999 and Regulation No 1074/1999

Should Regulation No 1073/1999 and Regulation No 1074/1999 be declared inapplicable?

101. In the light of that conclusion, it is necessary to consider the EIB's plea that

Regulation No 1073/1999 and Regulation No 1074/1999 should be declared inapplicable pursuant to Article 241 EC and Article 156 EA.

102. The Commission has, correctly in my view, refrained from contesting the admissibility of that plea by arguing that the EIB cannot invoke those Articles. The plea of illegality under those Articles is designed at least in part to enable a party to challenge indirectly a regulation which it considers unlawful where that party does not have the standing to challenge it directly. In the present case, it is not clear that the EIB would have had standing to challenge the regulations directly under Article 230 EC or Article 146 EA, and it would therefore seem that the plea of illegality under Article 241 EC and Article 156 EA should be open to it.

103. It might be thought that the EIB cannot invoke Article 156 EA since its status is governed only by the EC Treaty. However if, as I have argued above, [54] acts of the EIB adopted under the EC Treaty must comply with acts adopted under the Euratom Treaty, it is clear that the EIB must be able to defend itself by invoking the unlawfulness of such acts pursuant to Article 156 EA or the 'general principle of law' to which Articles 241 EC and 156 EA 'give expression'. [55]

104. The EIB submits that the Regulations should be declared inapplicable on the following grounds: (i) they provide for a system of internal investigations which violates the independence of the EIB envisaged by the Treaty and the Statute; (ii) they lack legal basis in the EC and Euratom Treaties; (iii) they are contrary to the principle of proportionality; and (iv) they fail to fulfil the requirement in Articles 253 EC and 162 EA that regulations must state the reasons on which they are based.

Independence

105. The EIB submits that it would be contrary to its independence, as envisaged by the Treaty and the Statute and recognised by the Court's case-law, to apply Regulation No 1073/1999 and Regulation No 1074/1999 to its activities.

106. In that regard, it first sets out briefly the legislative history of the EEC Treaty and the events which led to the establishment of the EIB. According to its explanations, which are essentially consonant with the relevant literature, [56] the Member States rejected the idea — which had

54 — Paragraph 87.

55 — See Case 92/78 *Simmenthal* v *Commission* [1979] ECR 777, paragraph 39 of the judgment.

56 — See, in particular, R. Henrion, 'La Banque européenne d'investissement', in *Droit des Communautées européennes, Les Nouvelles* (1969), Chapter 11, No 2427 to 2429; D. Dunnett, cited in note 37, at pp. 723 to 725; G. Marchegiani, cited in note 38, pp. 430 to 433; see also the Opinion of Advocate General Mancini in Case 85/86, cited in note 27, paragraph 11.

found favour at the Messina conference held in June 1955 [57] — of establishing a European fund (fonds d'investissement) for the support and encouragement of private investment, and resolved instead to create an investment bank, owned by the Member States. [58] The proposal for an investment bank, which drew inspiration from the example of the International Bank for Reconstruction and Development (the World Bank), prevailed for essentially two reasons. On the one hand, the idea of planning private investment on a European scale which underpinned the suggestion for a fund may have been less widely supported when the EEC Treaty was finally negotiated in late 1956. On the other hand, some Member States were clearly unwilling to contribute the large financial resources which would have been necessary to set up the fund. [59] For those reasons, the Member States chose to establish a bank which, whilst operating independently of the Community institutions, would further the aims of the Community by supporting investment through the grant of loans and guarantees from funds raised on the international capital markets.

107. Against that background, the EIB argues that the Treaty draftsmen clearly intended it to be independent of the Community institutions, and it recalls that according to the case-law, 'the [EIB] must be able to act in complete independence on the financial markets, like any other bank'. [60] More specifically, it stresses

(i) that the EIB is not a Community institution within the meaning of Article 7 EC;

(ii) that the EC Treaty has conferred upon the EIB legal personality distinct from the legal personality of the European Community; [61]

(iii) that the EIB has its own internal decision-making bodies established by primary Community law; [62]

(iv) that the EIB is financially independent of the European Community in that it has its own budget, its own annual balance sheet and profit and loss account which is approved by the Board of Governors, [63] and its own capital paid up by the Member States; [64]

(v) and that the Court of Auditors is competent to examine the accounts of the EIB only in respect of its activity in managing Community revenue and expenditure. [65]

57 — See Rapport des chefs de délégation aux ministres des affaires étrangères, Comité intergouvernemental créé par la Conférence de Messine, of 21 April 1956 (the Spaak Report), at pp. 76 to 82.

58 — The Bank was intended to open up 'fresh resources' according to Article 3(j) of the EEC Treaty. (The Treaty on European Union deleted and partially replaced that provision by Article 4b of the EC Treaty, which is now Article 9 EC.)

59 — According to the EIB, the Member States were also motivated by a desire to prevent vicarious liability from arising out of the activities of the fund. It is however not clear from the legislative history that this concern played an important role.

60 — Case 85/86, cited in note 27, paragraph 28 of the judgment.

61 — Article 266 EC and Article 28(1) of the Statute.

62 — The Governing Board, the Board of Directors and the Management Committee, see Article 8 of the Statute.

63 — Article 9(f) of the Statute.

64 — Article 4 and 5 of the Statute.

65 — Article 248(3) EC. The practical arrangements governing the relationship between the Court of Auditors and the EIB are laid down in an agreement between the parties and the Commission. Under that agreement, which was concluded 19 March 1999, the Court of Auditors may also examine activities of the EIB in respect of operations carried out on a mandate from the European Social Fund.

108. Finally, the EIB notes that although it manages funds which constitute expenditure and revenue on the Community budget, acting typically on a mandate from the Commission, those funds amount to only 10% of the total loan and guarantee portfolio of the EIB. They therefore do not justify the submission of the activities of the EIB to the powers of OLAF.

109. In response to those submissions, the Commission argues, essentially, that the particular status of the EIB within the Treaty is functional [fonctionnel] and limited to what is necessary for the accomplishment of its particular tasks. In that regard it points out

(i) that the provision establishing the EIB [66] is placed in Part One of the EC Treaty setting out the 'principles' of the Community;

(ii) that in the Chapter of the Treaty devoted to the EIB [67] Article 267 provides that the EIB must 'contribute... to the balanced and steady development of the common market in the interest of the Community';

(iii) that according to the Statute the EIB is to 'ensure that its funds are employed as rationally as possible in the interests of the Community' [68] and that it may grant loans or guarantees only where 'the execution of the project... promotes the attainment of the common market'; [69] and

(iv) that Article 159 EC envisages that 'the Community' is to support economic and social cohesion by 'the action it takes through... the [EIB]'.

Those provisions show that the activities of the EIB pursue the same objectives as those of the Community. That, moreover, applies to all of the activities of the EIB; no distinction can be drawn in that regard between, on the one hand, loans and guarantees granted on a mandate from the Community budget or the European Social Fund and, on the other, loans and guarantees granted from the funds raised by the EIB on the capital markets.

110. In addition to those points, the Commission notes

(i) that under the Statute applications for loans and guarantees are to be submitted to the Commission for an opinion, [70] and that where the Commission delivers an unfavourable opinion, the Board of Directors may not grant the loan or guarantee concerned unless its decision is unanimous; [71]

(ii) that although the activities of the Management Committee of the EIB are subject to internal controls by the Board of Directors [72] and the Audit

66 — Article 9 EC, inserted into the Treaty by the Treaty on European Union.

67 — Chapter 5 of Title I ('Provisions governing the institutions') of Part Five ('Institutions of the Community').

68 — Article 20(1) of the Statute.

69 — Article 20(1)(b) of the Statute.

70 — Article 21(2) of the Statute.

71 — Article 21(6) of the Statute.

72 — According to Article 11(1) of the Statute, the Board of Directors is to 'ensure that the Bank is managed in accordance with the provisions of this Treaty and of this Statute and with the general directives laid down by the Board of Governors'.

Committee of the EIB,[73] the Court of Auditors has certain powers in respect of the EIB under Article 248(3) EC; (iii) that the EIB is subject to the jurisdiction of the European Court of Justice under, *inter alia*, Article 237 EC; and (v) that there is legislative practice for laying down provisions of general application with effect for the EIB.[74]

111. On the basis of all of those considerations, the Commission considers that the EIB forms an integral part of the Community framework. It is not an organisation which is independent of the European Community, but a Community body [organisme de la Communauté] which acts within the context — and contributes to the attainment — of the goals of the Community, and which is subject to the provisions of general measures adopted by the Community legislature.

112. Finally, the Commission states that the EIB has not, in any event, shown how the power of OLAF to conduct internal investigations might *in concreto* affect or inhibit the exercise of the tasks entrusted to it by the Treaty. The task of OLAF under Regulation No 1073/1999 and Regulation No 1074/1999 is only to establish facts which may constitute fraud, and that has nothing to do with the banking operations of the EIB. Thus, OLAF is no more capable of interfering with the activities of the EIB than its own Internal Audit service,[75] the Audit Committee of the EIB or the Court of Auditors.

113. The EIB's submissions must, as the Commission and the interveners point out, be assessed in the light of the Court's case-law. The judgment in *Commission* v *Board of Governors of the European Investment Bank*[76] is of particular importance. That case gave the Court an opportunity to consider the constitutional position of the EIB within the Treaty system. The case concerned the issue of whether the tax paid by servants of the EIB was to be levied for the benefit of the EIB or for the benefit of the Community. While it was hardly in doubt that the relevant tax provisions were to be understood as meaning that the tax should be allocated to the Community, the EIB argued that 'it is neither an institution nor a department of the Communities; rather, it enjoys autonomy vis-à-vis the Communities by virtue of its legal status, its composition and its institutional structure, as well as by virtue of the nature and origin of its resources, which are absolutely independent of the Communities' budget'.[77]

114. On this point, the Court ruled that 'it is true that under [Article 266 EC] the Bank has legal personality distinct from that of the Community and that it is administered

73 — See Article 14 of the Statute.

74 — The Commission refers to Council Regulation No 1260/1999 of 21 June 1999 laying down general provisions on the Structural Funds, OJ 1999 L 161, p. 1.

75 — On the role of internal audit within the EIB, see above paragraph 6 and below paragraph 148.

76 — Case 85/86, cited in note 27.

77 — Paragraph 27 of the judgment.

and managed by organs of its own in accordance with its statute. In order to perform the tasks assigned to it by [Article 267 EC] the Bank must be able to act in complete independence on the financial markets, like any other bank. Indeed, the Bank is not financed out of the budget but from its own resources, which consist in particular of the capital subscribed by the Member States and funds borrowed on the financial markets. Lastly, the Bank draws up annual accounts and a profit and loss account which are audited annually by a committee appointed by the Board of Governors. Nevertheless, the fact that the Bank has that degree of operational and institutional autonomy does not mean that it is totally separated from the Communities and exempt from every rule of Community law. It is clear in particular from Article 130 of the Treaty that the Bank is intended to contribute towards the attainment of the Community' s objectives and thus by virtue of the Treaty forms part of the framework of the Community. The position of the Bank is therefore ambivalent inasmuch as it is characterised on the one hand by independence in the management of its affairs, in particular in the sphere of financial operations, and on the other by a close link with the Community as regards its objectives. It is entirely compatible with the ambivalent nature of the Bank that the provisions generally applicable to the taxation of staff at the Community level should also apply to the staff of the Bank. This is true in particular of the rule that the tax in question is collected for the benefit of the Communities' budget. Contrary to the contentions of the Board of Governors, the fact that the tax is allotted to that purpose is not liable to undermine the operational autonomy and reputation of the Bank as an independent institution on the financial markets since it does not affect the capital or the actual management of the Bank'. [78]

115. Reference should also be made to the judgment in *SGEEM and Etroy*. [79] In that case the issue was whether the EIB must be regarded, for the purposes of Articles 235 and 288 EC, as one of the Community institutions in respect of which the Community can incur non-contractual liability. The Court held that 'the Bank constitutes a Community body established by the Treaty (Case 110/75 *Mills* v *EIB* [1976] ECR 955, paragraph 14). [80] It is intended to contribute towards the attainment of the Community's objectives and thus by virtue of the Treaty forms part of the framework of the Community (Case 85/86 *Commission* v *EIB* [1988] ECR 1281, paragraph 29). It follows that any acts and omissions towards the applicants for which the Bank may have been responsible in the implementation of the financing contract in question are attributable to the Community in accordance with the general principles common to the Member States, referred to in the second paragraph of [Article 288 EC]'. [81]

116. The reasoning of the Court in those cases demonstrate, in my view, two things.

78 — Paragraphs 28 to 30 of the judgment.

79 — Case C-370/89, cited in note 27.

80 — In the English version of the judgment in *Mills*, the French expression 'organisme' was incorrectly translated as 'institution' rather than 'body'. That error was however corrected in the cited passage.

81 — Paragraphs 13 and 14 of the judgment.

117. First, the EIB must be regarded as a Community body which forms an integral part of the Community framework. That conclusion is supported by the arguments presented by the Commission in the present case and by the following considerations. The close functional link between the activities of the EIB and the objectives of the Community is confirmed by the wording of Article 9 EC according to which the EIB is to 'act within the limits of the powers conferred upon it by this Treaty and the Statute annexed thereto' and Article 104(11) EC under which the Council may 'invite the [EIB] to reconsider its lending policy towards' a Member State which does not fulfil the requirements as to the size of its government deficit stipulated in the Protocol on the excessive deficit procedure. [82] That link is moreover reflected in provisions which envisage either cooperation between the EIB and the Commission, or active participation of the Commission in the work of the EIB. [83] Thus, under Article 11(2) of the Statute, the Commission appoints one director and one alternate to the Board of Directors of the EIB, [84] and Article 17 of the Statute envisages that the Board of Governors is, at the request of the Commission, to interpret or supplement the general directives for the credit policy of the Bank laid down by it under Article 9 of the Statute.

118. Second, owing to the close functional relationship between the EIB and the Community, the Community egislature is competent to adopt measures applicable to the EIB in the same way as to other institutions, bodies, offices and agencies. That competence is however limited in that the application to the EIB of such measures must not damage the operational autonomy of the EIB or its reputation as an independent institution on the financial markets.

119. The question, then, is whether the application to the EIB of Regulation No 1073/1999 and Regulation No 1074/1999 would damage its operational autonomy or its reputation on the financial markets.

120. I agree with the Commission that the EIB has failed to explain how the exercise of the powers of OLAF under Regulation No 1073/1999 and Regulation No 1074/1999 could in practice affect or interfere with its power to decide autonomously on applications for loans and guarantees. Nor could it, in my view, have provided such an explanation. As I have argued in my Opinion in *Commission* v *European Central Bank*, [85] the provisions of those Regulations guarantee OLAF a substantial degree of operational independence although it is set up within the Commission's administrative and budgetary structures. There is therefore in my view very little, if any, risk that OLAF could be used by the Commission, or by some other institution or body, as a vehicle for putting political pressure on the

82 — Protocol annexed to the EC Treaty.

83 — See in that regard D. Dunnett, cited in note 37, at p. 758 describing the role of the Commission in the affairs of the EIB as 'central'.

84 — Under Article 11(2) of the Statute, the Board of Directors consists of 25 directors and 13 alternates.

85 — Cited in note 6, at paragraphs 161 to 165.

members of the governing bodies of the EIB.

121. That view is, as the Council points out, supported by the fact that OLAF would not exercise a continuous control over the financial management of the EIB; it acts only where there are, exceptionally, grounds for suspecting that fraud or other irregularities within the meaning of Regulation No 1073/1999 have occurred. And even then, OLAF does not have the power to take legal action where an internal investigation reveals the existence of fraud or other irregularities. The essential functions of OLAF are, as the Commission stresses, (i) to investigate suspicions of fraud and irregularities by, *inter alia*, analysing information transmitted to it by institutions, bodies and individuals, [86] carrying out on-the-spot checks, [87] inspecting files and accounts, [88] and requesting oral information from members and managers of the institutions and bodies of the Community; [89] (ii) to draw up reports specifying the facts established, the financial loss, if any, and the findings of the investigations including the recommendation of the Director of OLAF on the action to be taken; and (iii) to forward those reports together with other relevant information to the institution, body, office or agency concerned [90] and — where matters liable to result in criminal proceedings are at stake — to the judicial authorities of the Member State concerned. [91] Thus, it is for the EIB to 'take such action, in particular disciplinary or legal, on the internal investigations, as the results of those investigations warrant' and to 'report thereon to the Director of the Office, within a deadline laid down by him in... his reports'. [92]

122. Moreover, the EIB might, as the Commission and the Netherlands Government point out, exclude access to information which is particularly important for its ability to carry out its tasks independently in the decision to be adopted under Article 4(1) and (6) of Regulation No 1073/1999. [93] In that context, it may be noted that while the Commission, the Council and the European Parliament have adopted decisions pursuant to Article 4 without providing for any such exceptions, [94] the Court of Justice has adopted

86 — Under Article 7 of Regulation No 1073/1999 and Regulation No 1074/1999 the institutions and bodies of the Community are obliged to forward to OLAF information relating to possible cases of fraud, corruption and other illegal activities.

87 — Article 4(2) and 6 of Regulation No 1073/1999 and Regulation No 1074/1999.

88 — Article 4(2) of Regulation No 1073/1999 and Regulation No 1074/1999.

89 — Article 4(2) of Regulation No 1073/1999 and Regulation No 1074/1999.

90 — Article 9(4) of Regulation No 1073/1999 and Regulation No 1074/1999.

91 — Article 10(2) of Regulation No 1073/1999 and Regulation No 1074/1999.

92 — Article 9(4) of Regulation No 1073/1999 and Regulation No 1074/1999.

93 — See further below at paragraph 155.

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

a decision [95] which — by reference to its tasks, its independence and the secrecy of its deliberations [96] as set out in the Treaties and the Statute of the Court [97] — excludes from the scope of internal investigations documents and information held or created in the course of legal proceedings. [98]

123. The question remains whether the application to the EIB of Regulation No 1073/1999 and Regulation No 1074/1999 would damage its reputation and thus its credit rating and ability to raise funds at attractive rates on the international capital markets. [99]

124. The EIB suggests, as I understand its argument, that that might be the case because commercial banks are generally subject to prudential supervision, but not to anti-fraud investigations by bodies such as OLAF.

95 — Décision de la Cour de Justice du 26 octobre 1999 relative aux conditions et modalités des enquêtes internes en matière de lutte contre la fraude, la corruption et toute activité illégale préjudiciable aux intérêts des Communautés.

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

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

98 — Article 3 of the Decision.

99 — It appears that the credit rating of the EIB has, since its inception, been extremely favourable ('AAA'). See F. Leneuf-Péraldi, cited in note 37, No 19.

125. In the absence of more detailed explanations, that argument cannot be upheld. In any event, I am not convinced that the submission of the EIB to the same system of external, specialised and independent control of its financial dealings as other Community institutions and bodies would reduce its standing or reputation on the financial markets. Indeed, it would seem to me that the reputation of the EIB might suffer considerable damage if accusations of fraud directed at members of its management or staff could not be dispelled through an investigation carried out by a body outside the EIB itself.

126. In the light of those considerations, I conclude that the application to the activities of the EIB of Regulation No 1073/1999 and Regulation No 1074/1999 is not contrary to its independence as envisaged by the Treaty and the Statute and recognised by the Court's case-law.

The legal basis of Regulation No 1073/1999

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

128. First, the EIB submits that the notion of 'the financial interests of the Community' in Article 280 EC must be understood essentially as equivalent to that of the notion of 'the budget' of the European Community mentioned in Article 268 EC. It follows that Article 280 EC enables the Community to take measures aimed only at protecting the Community against fraud and other illegal activities which entail a loss of revenue or an increase in expenses occurring on the budget of the Community. The capital and budget of the EIB are, however, separate from the budget of the Community. Article 280 EC cannot therefore be a valid legal basis for measures aimed at combating fraud within the EIB. According to the EIB, that view is borne out by Article 248(3) EC under which the Court of Auditors is competent to audit the activities of the EIB only in respect of 'Community expenditure and revenue managed by the Bank', and by legislative practice. [100]

129. Second, the EIB emphasises that Article 280(4) EC grants the Community the power only to take 'the necessary measures' to combat fraud 'in the Member States' and that according to Article 280(4) EC measures adopted by the Community must not concern 'national criminal law'. Regulation No 1073/1999 is therefore invalid in so far as it extends the powers of OLAF to the institutions and bodies of the European Community.

130. Those arguments — which are essentially similar to the arguments raised by the defendant in *Commission* v *European Central Bank* — cannot be accepted.

131. As explained in my Opinion in that case, [101] a detailed analysis of the wording, structure and history of Article 280 EC shows

(i) that the legislature is empowered to adopt measures aimed at preventing fraud and other illegal activities which, even if not directly related to the *budget* of the Community, are capable of harming *the financial interests* of the Community in a broad sense by adversely affecting its assets, and

100 — The EIB refers in that regard to Regulation No 2988/95, cited in note 10, which defines in Article 1(2) 'irregularity' as 'any infringement of a provision of Community law resulting from an act or omission by an economic operator, which has, or would have, the effect of prejudicing the general budget of the Communities or budgets managed by them, either by reducing or losing revenue accruing from own resources collected directly on behalf of the Communities, or by an unjustified item of expenditure', and to the Convention drawn up on the basis of Article K.3 of the Treaty on European Union, on the protection of the European Communities' financial interests, cited in note 10, which provides in Article 1 that 'fraud affecting the European Communities' financial interests shall consist of... in respect of expenditure, any intentional act or omission... which has as its effect the misappropriation or wrongful retention of funds from the general budget of the European Communities or budgets managed by, or on behalf of, the European Communities'.

101 — Cited in note 6, paragraphs 105 to 112 and 117 to 119.

(ii) that such measures may aim to combat fraud and other irregularities which occur within the institutions and bodies of the Community.

132. The EIB is, as recalled above, [102] a body which forms an integral part of the Community framework. As a Community body, the financial interests of the EIB are in my view part and parcel of the financial interests of the Community. The fact that there is, as the EIB stresses, a degree of separation between the finances of the EIB and those of the rest of the Community institutions and bodies, and that its capital is not derived from the budget of the Community, is therefore not decisive.

133. I accordingly conclude that the validity of Regulation No 1073/1999 is not affected by the fact that it was adopted pursuant to Article 280(4) EC.

The legal basis of Regulation No 1074/1999

134. According to the EIB, Regulation No 1074/1999 is invalid in so far as it was adopted on the basis of Article 203 EA. It puts forward two essential submissions in that regard.

135. First, measures adopted under the Euratom Treaty cannot apply to the EIB, since the EIB is not mentioned at all in that Treaty and has no organic relationship with the Euratom Community. In that context, the EIB stresses that there is no provision equivalent to Article 237 EC (which, it will be recalled, confers on the Court of Justice jurisdiction to review measures of the EIB) in the Euratom Treaty, and that Article 146 EC (which is essentially similar to Article 230 EC) does not refer to measures adopted by the EIB. The fact that the EIB manages, on a mandate from the Commission, certain loans contracted in the name of Euratom cannot be equated with an organic relationship with the Euratom Community.

136. Second, it submits that Article 203 EA is not a correct legal basis for Regulation No 1074/1999. Given that Regulation No 1073/1999 was adopted on the basis of Article 280 EC, and that it was considered necessary to insert Article 280(4) EC in the EC Treaty in order to give the Council the necessary powers to adopt that regulation, it follows that the legislature could not have adopted it on the basis of Article 308 EC. The legislature could not, then, have adopted Regulation No 1074/1999 on the basis of Article 203 EA which is the equivalent of Article 308 EC. Measures can moreover be adopted on the basis of Article 203 EA only if they are 'necessary to attain one of the objectives of

102 — See note 27 and above paragraphs 113 to 118.

the Community'. Title I of the Euratom Treaty, entitled 'The tasks of the Community' makes no reference to fraud prevention [103] and although Article 183a EA, which corresponds to Article 209a of the EC Treaty, refers to fraud affecting the financial interests of the Community, that provision only imposes obligations on the Member States and does not envisage the adoption of Community measures. Nor can it be inferred from that provision that fraud prevention is one of the objectives of Euratom within the meaning of Article 230 EA. Finally, the extensive powers of investigation conferred upon OLAF by Regulation No 1074/1999, and the concomitant obligations which it seeks to impose on the EIB, cannot be regarded as 'appropriate measures' within the meaning of Article 203 EA.

137. The Commission resists those submissions. It points out that Regulation No 1074/1999 is relevant for the present case only because the EIB carries out operations, acting on a mandate from the Commission, which fall within the scope of the Euratom Treaty. [104] When acting in that sphere, the EIB is obliged to comply with the conditions and modalities applicable to such operations under the provisions of the Euratom Treaty and measures adopted pursuant to it. That obligation has nothing to do with an organic relationship between the EIB and the Euratom Community.

138. Article 203 EA is moreover the appropriate legal basis for Regulation No 1074/1999 in the same way as Article 235 of the EC Treaty (now Article 308 EC) would have been the correct legal basis for Regulation No 1073/1999 prior to the insertion of Article 280(4) EC into the Treaty by the Treaty of Amsterdam.

139. I cannot accept the EIB's first submission. The fact that a body is not explicitly mentioned in, or does not have organic links with, the Euratom Treaty cannot by itself exclude the legislature from adopting measures under that Treaty with effect for the body in question. In that context, it may be noted that the legislature may regulate the behaviour not only of Member States, but of bodies within Member States and private individuals although none of those is explicitly mentioned in the Treaty or has organic links with it. There are, of course, limits to the exercise of that power in so far as measures adopted under the Euratom Treaty must not be contrary to provisions of that Treaty, or any of the other Community Treaties, such as provisions which grant the body certain privileges (e.g., a right to be

103 — The EIB refers, in particular, to the second paragraph of Article 1 EA which provides: 'It shall be the task of the Community to contribute to the raising of the standard of living in the Member States and to the development of relations with the other countries by creating the conditions necessary for the speedy establishment and growth of nuclear industries.'

104 — The Commission refers in that regard to Council Decision No 77/270 of 29 March 1977 empowering the Commission to issue Euratom loans for the purpose of contributing to the financing of nuclear power stations, OJ 1977 L 88, p. 9, and Council Decision No 94/179 of 21 March 1994 amending Decision 77/270/Euratom, to authorise the Commission to contract Euratom borrowings in order to contribute to the financing required for improving the degree of safety and efficiency of nuclear power stations in certain non- member countries, OJ 1994 L 84, p. 41.

consulted) or immunities (e.g., a degree of operational independence). The EIB's contention that Regulation No 1074/1999 is contrary to its independence as recognised by the EC Treaty has been considered above.

140. The EIB's second submission, that Article 203 EA was not a correct legal basis for Regulation No 1074/1999, cannot in my view be accepted either.

141. First, the fact that Regulation No 1073/1999 was based on Article 280(4) EC is not relevant for determining the scope of Article 203 EA. There is no evidence in the documents before the Court, in the travaux préparatoires to the Treaty of Amsterdam, or in the drafting history of Regulation No 1073/1999 to suggest that it was, as the EIB asserts, considered necessary to insert Article 280(4) EC in the EC Treaty in order to give the Council the necessary powers to adopt that regulation. In that context, it may be recalled that the Commission proposed to establish OLAF and to lay down detailed provisions for its operation by a regulation based on Article 308 EC. [105] While the Commission stated in the explanatory memorandum that it intended to present an amended proposal based on Article 280(4) EC after the entry into force of the Treaty of Amsterdam, [106] it appears that the Commission considered that to be necessary only because Article 280(4) EC is a more specific legal basis which excludes recourse to the more general provision of Article 308 EC. [107]

142. Second, the Court has acknowledged [108] by reference to Article 209a of the EC Treaty that 'the protection of the financial interests of the Community... constitutes an independent objective which, under the scheme of the [EC] Treaty, is placed in Title II (financial provisions) of Part V relating to the Community institutions'. [109] On that basis the Court held that 'since Article 209a of the Treaty, in the version applicable when [Council Regulation No 515/97 of 13 March 1997 on mutual assistance between the administrative authorities of the Member States and cooperation between the latter and the Commission to ensure the correct application of the law on customs and agricultural matters [110]] was adopted, indicated the objective to be attained but did not confer on the Community competence to set up a system of the kind at issue, recourse to Article 235 of the Treaty was justified'. [111] Article 183a EA is, as the EIB

105 — Proposal for a Council regulation (EC, Euratom) establishing a European Fraud Investigation Office, COM(1998) 717 Final. See further above, paragraph 5.

106 — COM(1998) 717 Final, paragraph 16 of the explanatory memorandum.

107 — Case 45/86 *Commission* v *Council* [1987] ECR 1493, paragraph 13 of the judgment, subsequently reaffirmed on several occasions.

108 — Case C-209/97 *Commission* v *Council* [1999] ECR I-8067.

109 — Paragraph 29 of the judgment.

110 — OJ 1997 L 82, p. 1.

111 — Paragraph 33 of the judgment.

itself points out, identical to Article 209a of the EC Treaty. The protection of the financial interests of the Community must therefore be regraded as one of the objectives of the Euratom Treaty within the meaning of Article 203 EA.

143. Third, whether Regulation No 1074/1999 was an appropriate measure for the attainment of that objective goes, in my view, to the proportionality of the measure; and it is to that issue that I now turn.

Proportionality

144. The EIB submits that the application of Regulation No 1073/1999 and Regulation No 1074/1999 to its affairs is contrary to the principle of proportionality.

145. It states that the Regulations confer upon OLAF extensive powers of investigation and oblige the institutions, bodies and staff of the Community to inform and cooperate actively with OLAF. Thus, under Article 5(2) the Director of OLAF may decide to open an investigation at his own imitative without, according to the EIB, having to state the reasons and factual basis of his decision. Article 4 gives OLAF immediate and unannounced access to information held by the institutions, bodies, offices and agencies and to their premises, and empowers it to request oral information. Article 4(6)(a) imposes a duty on the part of members, managers, officials and other servants of the institutions, bodies, offices and agencies to cooperate with and supply information to OLAF, which is complemented by Articles 7 and 6(6) according to which the institutions, bodies, offices and agencies must inform OLAF of possible cases of fraud or corruption or any other illegal activity, forward relevant documents to OLAF and ensure that their members, managers and staff assist OLAF in the fulfilment of its task.

146. According to the EIB, those provisions grant OLAF an unlimited right of access, without prior notification or authorisation from the affected institution or body, and the right to seize documents of all kinds. Those extensive powers are incompatible with the activities of a bank and with the very nature of a financial institution subject to the system of prudential supervision which applies to banks and, therefore, disproportionate.

147. The powers of OLAF exceed, moreover, what is necessary since appropriate

and effective measures aimed at combating fraud exist within the EIB. First, Article 14(1) of the Statute envisages that a Committee consisting of three members, appointed on the grounds of their competence by the Board of Governors, is annually to verify that the operations of the Bank have been conducted and its books kept in a proper manner. According to Article 14(2), the task of that Committee — known as the Audit Committee — is to confirm that the balance sheet and profit and loss account are in agreement with the accounts and faithfully reflect the position of the Bank in respect of its assets and liabilities. The Rules of Procedure of the EIB provides that the Audit Committee, which is to be assisted by all the departments and services of the EIB, may demand access to all documents necessary for the completion of its tasks. [112] The Audit Committee also has recourse to external auditors, which it appoints after consulting the Committee of Directors, and it is assisted by an observer appointed by the Board of Governors. [113]

148. Second, the EIB has since 1984 had an Internal Audit service which examines and evaluates the adequacy and effectiveness of the internal services and procedures of the EIB. [114] That service has, according to the EIB, unlimited access to all documents and persons within the Bank and may carry out special missions, including investigations of suspected fraud. [115] The General Office Procedures Manual of the EIB [116] lays down the procedure to be followed in the course of such investigations. According to the EIB's explanations, the Manual envisages that the head of Internal Audit is to carry out a preliminary investigation whenever an instance of fraud is discovered or suspected and report his findings, together with his recommendations, to the Director of Human Resources or, as the case may be, the President of the General Secretariat of the EIB. Based on that report, which is communicated to the Audit Committee and the external auditors of the EIB, the President of the General Secretariat may decide to initiate disciplinary action or to carry out a more detailed investigation. For that purpose, the President may decide to supplement the resources of Internal Audit by seeking the assistance of external auditors, experts or the national police forces. Moreover, the EIB considers that all members of staff who are aware of actions which constitute, or may constitute fraud, are obliged to inform the Director of Human Resources or the head of Internal Audit.

149. Third, the activities of the EIB in managing Community expenditure and

112 — Article 24 of the Rules of Procedure. That provision is placed in Chapter V (Articles 22 to 27) entitled 'Audit Committee'. The Rules of Procedure were approved on 4 December 1958 and have since undergone a number of amendments. When the contested decision was adopted on 10 November 1999, the version of the Rules of Procedure in force was dated 9 June 1997. Those Rules have since then been amended and replaced by a new version dated 5 June 2000. The wording of Article 24 is identical in the two versions of the Rules. The Rules of Procedure have not been published in the Official Journal, but the relevant texts were provided to the Court by the EIB.

113 — Article 25 of the Rules of the Procedure.

114 — The EIB refers in that regard to the Internal Audit Charter (*Charte de l'audit interne*). That document has not been published.

115 — The EIB refers in that regard to the Internal Audit Procedures Manual. That document has not been published.

116 — That document has not been published.

revenue are examined by the Court of Auditors pursuant to Article 248(3) EC in accordance with the procedures laid down in the agreement between the EIB, the Commission and the Court of Auditors envisaged by that provision. [117] The EIB also states, without further explanation, that it has implemented the recommendations set out in the *Framework for internal control systems in banking organisations*, adopted by the Basel Committee on Banking Supervision in September 1998.

150. In addition to those points, the EIB stresses that the obligation for the staff of the EIB to act lawfully and to abstain from any behaviour which might constitute fraud is clearly spelled out in the rules applicable to the EIB. It notes, in particular, that under the Staff Regulations of the EIB [118] no member of staff is to request, receive or accept, from external sources, any direct or indirect advantage related in any way to his relationship with the Bank, [119] and that disciplinary sanctions may be imposed for violations of that rule. [120] Moreover, the Code of Conduct for EIB staff [121] emphasises that in order to comply with high standards of professional ethics members of EIB staff must abstain from any behaviour which might create a conflict of interests, [122] subject to the possibility of disciplinary action or termination of contract. [123]

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

152. According to the Commission, the independence of the EIB and its status of a bank do not render the application of Regulation No 1073/1999 disproportionate either. Those are issues which can and should be resolved in the decision to be

117 — See note 65.

118 — Article 29 of the Rules of Procedure of the EIB provides that the Staff Regulations of the Bank are to be fixed by the Board of Directors. The Staff Regulations of the Bank were approved on 20 April 1960 and then amended on a number of occasions. The Staff Regulations have not been published in the Official Journal.

119 — Article 7 of the Staff Regulations, unofficial translation from the French text as cited by the EIB.

120 — Article 38 of the Staff Regulations.

121 — Adopted by the Management Committee on 27 March 1997.

122 — Article 1.4 of the Code of Conduct.

123 — Article 1.5 of the Code of Conduct.

adopted by the EIB pursuant to Article 4(1) and (6) of the Regulation.

153. Moreover, the EIB exaggerates the powers of OLAF under Regulation No 1073/1999 and Regulation No 1074/1999. With regard to the duty to give reasons for decisions to open an investigation, the Commission draws attention to Article 6(3) of the Regulations according to which '[t]he Office's employees shall be equipped for each intervention with a written authority issued by the Director *indicating the subject matter* of the investigation'. [124] And OLAF does not, as the EIB appears to suggest, have the power under Article 4 of the Regulations to remove original documents from institutions and bodies under investigation; it may only take copies and take the necessary measures, for example in cooperation with the affected institution or body, to ensure that documents are kept in a safe place. Finally, OLAF is — contrary to what the EIB suggests — always obliged to inform the affected institution or body when it carries out an internal investigation.

154. Those arguments call for two preliminary observations.

155. First, the question whether the powers of OLAF under Regulation No 1073/1999 and Regulation No 1074/1999 are incompatible with the independence, status of a bank and tasks of the EIB has been dealt with above. There is, in my view, no reason to revisit that analysis in the guise of a discussion of the principle of proportionality. Suffice it to say that I agree with the Commission that the reconciliation of the special status and tasks of the EIB with the powers of OLAF is an issue, or bundle of issues, which must be resolved, following a constructive dialogue between the parties consonant with the principle of loyal cooperation, [125] in the decision to be adopted by the EIB under Article 4(1) and (6) of Regulation No 1073/1999.

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

124 — Emphasis added.

125 — Article 10 EC.

157. The application to the activities of the EIB of the general scheme laid down by Regulation No 1073/1999 and Regulation No 1074/1999 is not, in my view, disproportionate in that sense. While the rules, internal codes and procedures to which the EIB refers may provide some protection against fraud and other irregularities, the legislature could in my view properly consider that control by an external and independent body would be more effective and, perhaps as importantly, would be seen to be more effective. In that context, it may be noted that the task of auditing differs fundamentally in its nature from the task and controls to be carried out by OLAF. It therefore cannot be argued that the scheme envisaged by Regulation No 1073/1999 and Regulation No 1074/1999 is unnecessary merely because the accounts of the EIB are audited by external auditors, verified by the Audit Committee and examined by the Court of Auditors.

158. Nor has the EIB shown that there are any specific aspects of the powers conferred upon OLAF by the Regulations which are excessive or unnecessary for the achievement of its tasks. The power of the Director of OLAF to open investigations at his own initiative under Article 6 is to my mind an essential precondition for OLAF's ability to operate effectively in response to information provided directly to it by members of staff, and in full operational independence from the Commission and other institutions and bodies.

159. The same applies, in my view, to the powers conferred in particular by Article 4 of the Regulations. If OLAF were not empowered to access documents and data, take copies, ensure that documents and data are secured where necessary, and ask for oral information, its ability to uncover fraud and other irregularities would be severely limited. And Regulation No 1073/1999 and Regulation No 1074/1999 seek to prevent those powers from being exercised in an unreasonable manner; according to Article 4(1) and the 10th recital of the preamble to the Regulations, the powers of OLAF must be exercised in compliance with the Treaty, human rights and fundamental freedoms, the Protocol on the privileges and immunities of the European Community and the Staff Regulations. [126] Moreover, OLAF will, as the Council points out, be obliged to conduct its investigations in accordance with the general principles of Community law including the principle of proportionality.

160. Finally, it may be recalled that the Commission initially proposed to establish OLAF by a Community Regulation and to lay down detailed provisions for the conduct of internal investigations in all of the institutions, bodies, offices and agencies of the Community. [127] In contrast to that proposal, Regulation No 1073/1999 and Regulation No 1074/1999 lay down only

126 — Article 4(1) and the 10th recital of the preamble to Regulation No 1073/1999 and Regulation No 1074/1999.

127 — See above paragraph 5.

general rules for the procedures and modalities of internal investigations and envisage the adoption of more detailed arrangements in decisions pursuant to Article 4(1) and (6). I agree with the Council that that system — which allows the specific tasks and situation of each institution, body, office or agency to be taken into account — strikes an appropriate balance between the exigencies of institutional organisational autonomy and effective fraud prevention. [128]

161. I accordingly conclude that Regulation No 1073/1999 and Regulation No 1074/1999 are not contrary to the principle of proportionality in so far as they apply to the EIB.

The obligation to state reasons under Articles 253 EC and 162 EA

162. That brings me to the last objection of invalidity raised by the EIB in the present case. It contends that Regulation No 1073/1999 and Regulation No 1074/1999 do not satisfy the requirement laid down in Articles 253 EC and 162 EA that regulations must state the reasons on which they are based since they: (i) fail to refer to the measures adopted by the EIB to combat fraud; (ii) fail to explain in what way those measures are insufficient, inefficient, or unsuitable; and (iii) fail to show why it is necessary to grant OLAF the broad powers of investigation envisaged by, in particular, Articles 4(2) and 5(2) and to require institutions, bodies and staff to cooperate with OLAF under Articles 4(6)(a), 6(6) and 7(1) to (3) of the Regulations.

163. The Commission contests that submission. The various internal rules and codes referred to by the EIB in the present case were not presented to the legislature in the course of the procedure leading to the adoption of Regulation No 1073/1999 and Regulation No 1074/1999. It is difficult to see, then, how the legislature could have taken account of them or even referred to them in the preamble. In any event, the omission of such a reference cannot amount to a violation of Articles 253 EC and 162 EA.

164. It is settled case-law that the statement of reasons required by Article 253 EC must be 'appropriate to the act at issue and must disclose in a clear and unequivocal fashion the reasoning followed by the institution which adopted the measure in question in such a way as to enable the persons concerned to ascertain the reasons for the measure and to enable the competent Community court to exercise its power of review. The requirements to be satisfied by the statement of reasons depend on the circumstances of each case, in particular the content of the measure in question, the

128 — See also in that regard the fourth recital of the preamble to Regulation No 1073/1999 and Regulation No 1074/1999.

nature of the reasons given and the interest which the addressees of the measure, or other parties to whom it is of direct and individual concern, may have in obtaining explanations'. [129] However, 'it is not necessary for the reasoning to go into all the relevant facts and points of law, since the question whether the statement of reasons meets the requirements of Article [253 EC] must be assessed with regard not only to its wording but also to its context and to all the legal rules governing the matter in question'. [130] More specifically, the Court has held that although regulations must clearly indicate the purpose pursued, the legislature is not required to specify the often very numerous and complex matters of fact and law dealt with or to give a specific statement of reasons for each of the technical choices made. [131]

165. It seems clear from that case-law that when the legislature adopts a regulation to achieve a certain purpose, it is not required to refer in detail to the different measures which may already have been adopted by the affected institutions and bodies, or to explain in detail why those measures are deemed less effective or suitable. The fact that an institution or body affected by a regulation has objected during the legislative procedure does not moreover entail an obligation to respond, in the adopted measure, to all of the arguments put forward. Nor can the legislature be required to give detailed reasons with regard to each of the specific powers granted to an office or agency in order to achieve the purpose of a regulation. A clear indication of the overall purpose to be achieved, a statement setting out the general situation which led to its adoption [132] and, perhaps, an explanation of the essential content of its provisions will generally suffice.

166. The preambles to Regulation No 1073/1999 and Regulation No 1074/1999 state clearly what is the purpose to be achieved, [133] indicate the scope *ratione materiae* [134] and *ratione personae* [135] of the powers of investigation conferred on OLAF, sum up the essential content of the adopted provisions, [136] and point out the legal limitations to which the exercise of those powers is subject. [137] Moreover, in the last recital of the preambles, the legislature stated that 'the operation of the Office is likely to step up the fight against fraud, corruption and any other illegal activities affecting the Communities' financial interests and is therefore compatible with the proportionality principle'. There is therefore, in my view, no doubt that the Regulations fulfil the requirement to state reasons laid down in Articles 253 EC and 162 EA.

129 — See, in particular, Case C-367/95 P *Commission* v *Sytraval and Brink's France* [1998] ECR I-1719, paragraph 63 of the judgment and the case-law cited there.

130 — Ibid.

131 — See, in particular, Case 250/84 *Eridania* [1986] ECR 117, paragraph 38 of the judgment.

132 — Case 5/67 *Beus* [1968] ECR 83, at p. 95.

133 — See, in particular, the first, second and seventh recitals.

134 — See, in particular, the fifth recital.

135 — See, in particular, the seventh recital.

136 — See, in particular, the 11th to 18th recital.

137 — See, in particular, the 10th and 19th recitals.

Conclusion

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

(1) declare void the Decision of 10 November 1999 of the Management Committee of the European Investment Bank concerning cooperation with the European Anti-Fraud Office (OLAF);

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

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