

JUDGMENT OF THE COURT

10 July 2003 *

In Case C-11/00,

Commission of the European Communities, represented initially by C.W.A. Timmermans, H.P. Hartvig and U. Wölker, and subsequently by J.-L. Dewost, H.P. Hartvig and U. Wölker, acting as Agents, with an address for service in Luxembourg,

applicant,

supported by

Kingdom of the Netherlands, represented initially by M.A. Fierstra, and subsequently by J. van Bakel, acting as Agents,

by

European Parliament, represented by J. Schoo and H. Duintjer Tebbens, acting as Agents, with an address for service in Luxembourg,

and by

Council of the European Union, represented by J. Aussant, F. van Craeynest and F. Anton, acting as Agents, with an address for service in Luxembourg,

interveners,

* Language of the case: French.

V

European Central Bank, represented by A. Sáinz de Vicuña and C. Zilioli, acting as Agents, and A. Dashwood, Barrister, with an address for service in Luxembourg,

defendant,

APPLICATION for annulment of Decision 1999/726/EC of the European Central Bank of 7 October 1999 on fraud prevention (ECB/1999/5) (OJ 1999 L 291, p. 36),

THE COURT,

composed of: G.C. Rodríguez Iglesias, President, J.-P. Puissechot, M. Wathelet and R. Schintgen (Presidents of Chambers), C. Gulmann, D.A.O. Edward, A. La Pergola (Rapporteur), P. Jann, V. Skouris, F. Macken, N. Colneric, S. von Bahr and A. Rosas, Judges,

Advocate General: F.G. Jacobs,

Registrar: R. Grass,

having regard to the Report for the Hearing,

after hearing oral argument from the parties at the hearing on 3 July 2002, at which the Commission was represented by M. Petite, acting as Agent, the Kingdom of the Netherlands by N. Bel, acting as Agent, the Parliament by J. Schoo and H. Duintjer Tebbens, the Council by J. Aussant, F. van Craeynest and F. Anton and the European Central Bank by A. Sáinz de Vicuña, C. Zilioli and A. Dashwood,

after hearing the Opinion of the Advocate General at the sitting on 3 October 2002,

gives the following

Judgment

- 1 By application lodged at the Court Registry on 14 January 2000, the Commission of the European Communities brought an action pursuant to Article 230 EC for annulment of Decision 1999/726/EC of the European Central Bank of 7 October 1999 on fraud prevention (ECB/1999/5) (OJ 1999 L 291, p. 36; ‘the contested decision’).
- 2 By orders of the President of the Court of 7 September 2000, the Kingdom of the Netherlands, the European Parliament and the Council of the European Union were granted leave to intervene in support of the form of order sought by the Commission.

Legal framework

Primary legislation

- 3 Under [Article 3 TEU]:

‘The Community shall have as its task, by establishing a common market and an economic and monetary union and by implementing common policies or activities referred to in Articles 3 and 4, to promote throughout the Community a harmonious, balanced and sustainable development of economic activities, a high level of employment and of social protection, equality between men and women, sustainable and non-inflationary growth, a high degree of competitiveness and convergence of economic performance, a high level of protection and improvement of the quality of the environment, the raising of the standard of living and quality of life, and economic and social cohesion and solidarity among Member States.’

- 4 Under [Article 119 TFEU]:

‘1. For the purposes set out in Article 2, the activities of the Member States and the Community shall include, as provided in this Treaty and in accordance with the timetable set out therein, the adoption of an economic policy which is based on the close coordination of Member States’ economic policies, on the internal market and on the definition of common objectives, and conducted in accordance with the principle of an open market economy with free competition.

2. Concurrently with the foregoing, and as provided in this Treaty and in accordance with the timetable and the procedures set out therein, these activities shall include the irrevocable fixing of exchange rates leading to the introduction of a single currency, the ECU, and the definition and conduct of a single monetary policy and exchange-rate policy the primary objective of both of which shall be to maintain price stability and, without prejudice to this objective, to support the general economic policies in the Community, in accordance with the principle of an open market economy with free competition.

3. These activities of the Member States and the Community shall entail compliance with the following guiding principles: stable prices, sound public finances and monetary conditions and a sustainable balance of payments.'

5 [] provides:

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

6 [Article 127 TFEU] provides:

'1. The primary objective of the ESCB shall be to maintain price stability. Without prejudice to the objective of price stability, the ESCB shall support the general economic policies in the Community with a view to contributing to the achievement of the objectives of the Community as laid down in Article 2. The ESCB shall act in accordance with the principle of an open market economy with

free competition, favouring an efficient allocation of resources, and in compliance with the principles set out in Article 4.

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

- to define and implement the monetary policy of the Community;
- to conduct foreign exchange operations consistent with the provisions of [Article 138 and 219 TFEU];
- to hold and manage the official foreign reserves of the Member States;
- to promote the smooth operation of payment systems.

...

4. The ECB shall be consulted:.

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

...’.

7 [Article 130 TFEU] provides:

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

8 [Article 325 TFEU] provides:

‘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.

...

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.’

9 [Article 339 TFEU] provides:

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

10 The Statute of the ESCB is included in a Protocol annexed to the EC Treaty. Article 12.3 thereof provides:

‘The Governing Council shall adopt Rules of Procedure which determine the internal organisation of the ECB and its decision-making bodies.’

11 Article 27 of the ESCB Statute, ‘Auditing’, provides:

‘27.1 The accounts of the ECB and national central banks shall be audited by independent external auditors recommended by the Governing Council and approved by the Council. The auditors shall have full power to examine all books and accounts of the ECB and national central banks and obtain full information about their transactions.’

27.2 The provisions of Article 248 of this Treaty shall only apply to an examination of the operational efficiency of the management of the ECB.'

- 12 Article 36.1 of the ESCB Statute provides:

'The Governing Council, on a proposal from the Executive Board, shall lay down the conditions of employment of the staff of the ECB.'

Secondary legislation

- 13 The European Anti-Fraud Office ('OLAF') was established by Commission Decision 1999/352/EC, ECSC, Euratom of 28 April 1999 establishing the European Anti-fraud Office (OLAF) (OJ 1999 L 136, p. 20), 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 EAEC Treaty.
- 14 Article 2 of Decision 1999/352, which sets out OLAF's functions, provides at paragraph 1:

'[OLAF] 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.'

[OLAF] 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.

[OLAF] 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.

[OLAF] may be entrusted with investigations in other areas by the Commission or by the other institutions or bodies.'

15 Article 3 of Decision 1999/352 provides:

'[OLAF] shall exercise the powers of investigation referred to in Article 2(1) in complete independence. In exercising these powers, the Director of [OLAF] shall neither seek nor take instructions from the Commission, any government or any other institution or body.'

16 Article 4 of Decision 1999/352 provides:

‘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 [OLAF] of its investigative function.’

17 Under Article 5 of Decision 1999/352:

‘1. [OLAF] shall be headed by a Director, nominated by the Commission, after consulting in European Parliament and the Council, for a term of five years, which may be renewed once....

2. The Commission shall exercise, with regard to the Director, the powers conferred to the appointing authority. Any measure under Articles 87, 88 and 90 of the Staff Regulations of Officials of the European Communities shall be taken, after consulting the Surveillance Committee, by reasoned decision of the Commission. The decision shall be communicated for information to the European Parliament and the Council.’

18 Article 6 of Decision 1999/352 provides:

‘1. The Director of [OLAF] shall exercise, with regard to the staff of [OLAF], the powers conferred by the Staff Regulations of Officials of the European Communities on the appointing authority and by the Conditions of Employment of Other Servants of the Communities on the authority authorised to conclude contracts of employment...

2. After consulting the Surveillance Committee, the Director shall send the Director-General for Budgets a preliminary draft budget to be entered in the special heading for [OLAF] in the annual general budget.

3. The Director shall act as authorising officer for implementation of the special budget heading for part A of the budget, concerning [OLAF], and the specific anti-fraud headings of part B....

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

19 Under Article 7 of Decision 1999/352, the decision is to 'take effect on the date of the entry into force of the European Parliament and Council Regulation (EC) concerning investigations carried out by [OLAF]'.

20 Regulation (EC) No 1073/1999 of the European Parliament and of the Council of 25 May 1999 concerning investigations conducted by the European Anti-Fraud Office (OLAF) (OJ 1999 L 136, p. 1) was adopted on the basis of Article 280 EC.

21 The first four recitals in the preamble to that regulation make the following statements:

'(1) ... the institutions and the Member States attach great importance to the protection of the Communities' financial interests and to the fight against fraud and any other illegal activities detrimental to the Communities' financial interests;...

- (2) ... the protection of the Communities' financial interests extends not only to the management of budget appropriations but also to all measures affecting or liable to affect their assets;
- (3) ... all available means must be deployed fully to attain this objective, notably in the context of investigative duties devolving upon the Community...
- (4) ... to reinforce the means available for combating fraud, while respecting the principle of each institution's internal organisational autonomy, the Commission has established among its own departments... [OLAF] with responsibility for conducting administrative fraud investigations;... it has given [OLAF] full independence to exercise its investigative function;...'

22 The seventh recital to Regulation No 1073/1999 states that: 'given the need to step up the fight against fraud, corruption and any other illegal activities detrimental to the Communities' financial interests, [OLAF] must be able to conduct internal investigations in all the institutions, bodies, offices and agencies established by, or on the basis of, the EC and Euratom Treaties'.

23 The 10th recital to the regulation states that investigations undertaken by OLAF 'must be conducted in accordance with the Treaty and in particular with the Protocol on the privileges and immunities of the European Communities, while respecting the Staff Regulations of officials and the conditions of employment of other servants of the European Communities (... referred to as "the Staff Regulations" [in that regulation]), and with full respect for human rights and fundamental freedoms, in particular the principle of fairness, for the right of persons involved to express their views on the facts concerning them and for the principle that the conclusions of an investigation may be based solely on elements

which have evidential value'. The recital goes on to state that 'to that end the institutions, bodies, offices and agencies must lay down the terms and conditions under which such internal investigations are conducted'.

- ²⁴ The 12th recital to Regulation No 1073/1999 states that 'to ensure that [OLAF] is independent in carrying out the tasks conferred on it by this Regulation, its Director must be given the power to open an investigation on his own initiative'.
- ²⁵ The 18th recital to Regulation No 1073/1999 states that 'administrative investigations should be conducted under the authority of... [OLAF's] Director..., in full independence from the institutions, bodies, offices and agencies and from the Supervisory Committee'.
- ²⁶ The 21st recital to Regulation No 1073/1999 states that 'entrusting to an independent [European Anti-Fraud Office] the task of conducting external administrative investigations in this area is accordingly in full compliance with the subsidiarity principle laid down by Article 5 of the Treaty' and that 'the operation of [a European Anti-Fraud 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'.
- ²⁷ Article 1 of Regulation No 1073/1999 provides that:

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

shall exercise the powers of investigation conferred on the Commission by the Community rules and Regulations and agreements in force in those areas.

...

3. Within the institutions, bodies, offices and agencies established by, or on the basis of, the Treaties (... “the institutions, bodies, offices and agencies”), [OLAF] 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...’.

28 Article 2 of Regulation No 1073/1999 provides that:

‘Within the meaning of this Regulation, “administrative investigations” (... “investigations”) shall mean all inspections, checks and other measures undertaken by employees of [OLAF] in the performance of their duties, in accordance with Articles 3 and 4, with a view to achieving the objectives set out

in Article 1 and to establishing, where necessary, the irregular nature of the activities under investigation. These investigations shall not affect the powers of the Member States to bring criminal proceedings.'

29 Article 4, headed 'Internal Investigations', provides:

'1. In the areas referred to in Article 1, [OLAF] shall carry out administrative investigations within the institutions, bodies, offices and agencies ("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:

- [OLAF] shall have the right of immediate and unannounced access to any information held by the institutions, bodies, offices and agencies, and to their premises. [OLAF] shall be empowered to inspect the accounts of the institutions, bodies, offices and agencies. [OLAF] 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,

- [OLAF] may request oral information from members of the institutions and bodies, from managers of offices and agencies and from the staff of the institutions, bodies, offices and agencies.

...

4. The institutions, bodies, offices and agencies shall be informed whenever [OLAF] employees... 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 [OLAF's] servants;

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

30 The second paragraph of Article 5 of Regulation No 1073/1999 provides that:

'Internal investigations shall be opened by a decision of [OLAF's] Director..., acting on his own initiative or following a request from the institution, body, office or agency within which the investigation is to be conducted.'

31 Headed 'Investigations procedure', Article 6 of the regulation provides:

'1. The Director of [OLAF] shall direct the conduct of investigations.

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

3. [OLAF'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, [OLAF'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 [OLAF's] employees to fulfil their task. The institutions and bodies shall ensure that their members and staff afford the necessary assistance to enable [OLAF's] agents to fulfil their task; the offices and agencies shall ensure that their managers and staff do likewise.'

32 Under Article 7 of Regulation No 1073/1999, headed 'Duty to inform [OLAF]':

'1. The institutions, bodies, offices and agencies shall forward to [OLAF] 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 [OLAF] or on their own initiative, forward any document or information they hold which relates to a current internal investigation.

...

3. The institutions, bodies, offices and agencies, and, in so far as national law allows, the Member States shall also send [OLAF] 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.'

- 33 Paragraphs 2 and 4 of Article 8 of Regulation No 1073/1999, entitled 'Confidentiality and data protection', provide:

'2. Information forwarded or obtained in the course of internal investigations, in whatever form, shall be subject to professional secrecy and shall enjoy the protection given by the provisions applicable to the institutions of the European Communities.

Such information may not be communicated to persons other than those within the institutions of the European Communities or in the Member States whose functions require them to know, nor may it be used for purposes other than to prevent fraud, corruption or any other illegal activity.

...

4. The Director of [OLAF] and the members of the Supervisory Committee referred to in Article 11 shall ensure that this Article and Articles 286 and 287 of the Treaty are applied.'

34 Article 9 of the regulation provides:

‘1. On completion of an investigation carried out by [OLAF], 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 [OLAF] 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. Reports drawn up on that basis shall constitute admissible evidence in administrative or judicial proceedings of the Member State in which their use proves necessary, in the same way and under the same conditions as administrative reports drawn up by national administrative inspectors. They shall be subject to the same evaluation rules as those applicable to administrative reports drawn up by national administrative inspectors and shall be of identical value to such reports

...

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 [OLAF], within a deadline laid down by him in the findings of his report.’

35 Article 11 of Regulation No 1073/1999 provides:

‘1. The Supervisory Committee shall reinforce [OLAF’s] independence by regular monitoring of the implementation of the investigative function.

...

2. It shall be composed of five independent outside persons who possess the qualifications required for appointment in their respective countries to senior posts relating to [OLAF’s] areas of activity. They shall be appointed by common accord of the European Parliament, the Council and the Commission.

...

5. In carrying out their duties, they shall neither seek nor take instructions from any government or any institution, body, office or agency.

...

7. The Director shall forward to the Supervisory Committee each year [OLAF’s] programme of activities referred to in Article 1 of this Regulation. The Director shall keep the committee regularly informed of [OLAF’s] activities, its investigations, the results thereof and the action taken on them. Where an

investigation has been in progress for more than nine months, the Director shall inform the Supervisory Committee of the reasons for which it has not yet been possible to wind up the investigation, and of the expected time for completion. The Director shall inform the committee of cases where the institution, body, agency or office concerned has failed to act on the recommendations made by it. The Director shall inform the committee of cases requiring information to be forwarded to the judicial authorities of a Member State.

8. The Supervisory Committee shall adopt at least one report on its activities per year which it shall send to the institutions. The committee may submit reports to the European Parliament, the Council, the Commission and the Court of Auditors on the results of [OLAF's] investigations and the action taken thereon.'

36 Article 12 of Regulation No 1073/1999 deals with the Director of OLAF. It reproduces certain statements from Decision 1999/352 and also provides at paragraph (3) that:

'The Director shall neither seek nor take instructions from any government or any institution, body, office or agency in the performance of his duties with regard to the opening and carrying out of external and internal investigations or to the drafting of reports following such investigations. If the Director considers that a measure taken by the Commission calls his independence into question, he shall be entitled to bring an action against his institution before the Court of Justice.

The Director shall report regularly to the European Parliament, the Council, the Commission and the Court of Auditors on the findings of investigations carried out by [OLAF] whilst respecting the confidentiality of those investigations, the legitimate rights of the persons concerned and, where appropriate, national provisions applicable to judicial proceedings.

The above institutions shall ensure that the confidentiality of the investigations conducted by [OLAF] is respected, together with the legitimate rights of the persons concerned, and, where judicial proceedings have been instituted, that all national provisions applicable to such proceedings have been adhered to.’

37 Under Article 14 of the Regulation:

‘Pending amendment of the Staff Regulations, any official or other servant of the European Communities may submit to the Director of [OLAF] a complaint by virtue of this Article against an act adversely affecting him committed by [OLAF] as part of an internal investigation, in accordance with the procedures laid down in Article 90(2) of the Staff Regulations. Article 91 of the Staff Regulations shall apply to decisions taken with regard to such complaints.

The above provisions shall apply by analogy to the staff of the institutions, bodies, offices and agencies which are not subject to the Staff Regulations.’

38 On 25 May 1999, the Parliament, the Council and the Commission concluded an interinstitutional agreement concerning internal investigations by the European Anti-Fraud Office (OLAF) (OJ 1999 L 136, p. 15; ‘the interinstitutional agreement’). By that agreement, the institutions agreed ‘[t]o adopt common rules consisting of the implementing measures required to ensure the smooth operation of the investigations carried out by [OLAF] within their institution’ and ‘[t]o 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’.

- 39 The interinstitutional agreement states 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

- 40 The contested decision was adopted by the Governing Council of the ECB on the basis of Article 12.3 of the ESCB Statute.

- 41 The first eight recitals of the preamble to the contested decision are worded as follows:

'(1) ... the ECB, together with the institutions of the European Communities and the Member States, attaches great importance to the protection of the Communities' financial interests and to efforts to combat fraud and other illegal activities detrimental to the Communities' financial interests;

(2) ... the Cologne European Council in June 1999 considered it eminently desirable that the ECB should join the institutions of the European Communities in efforts to combat fraud within the European Union;

(3) ... the ECB attaches great importance to the protection of its own financial interests and to efforts to combat fraud and other illegal activities detrimental to its financial interests;

- (4) ... all available means must be fully deployed to attain these objectives, notably in the context of investigative duties devolving upon the ECB and the institutions of the European Communities, while maintaining the current distribution and balance of responsibilities between the ECB and the institutions of the European Communities;
- (5) ... the institutions of the European Communities and the Member States have taken action to combat fraud and other illegal activities detrimental to the Communities' financial interests on the basis of Article 280 of the Treaty establishing the European Community...;
- (6) ... the independence of the ECB is provided for by the Treaty and the [ESCB] Statute;... in accordance with the Treaty and [that] Statute, the ECB has its own budget and its own financial resources separate from those of the European Communities;
- (7) ... to reinforce the means available for combating fraud, by [Decision 1999/352], the Commission has established [OLAF] among its own departments... with responsibility for conducting administrative investigations to this end;
- (8) ... combating fraud and other illegal activities detrimental to the financial interests of the ECB is a core function of the Directorate for Internal Audit [(“D-IA”)] and... that Directorate is responsible for conducting administrative investigations within the ECB to this end’.

42 The 10th recital to the contested decision states that ‘to enhance and reinforce the independence of the activities of the [D-IA] in combating fraud and other illegal activities detrimental to the financial interests of the ECB, this Directorate should report to an anti-fraud committee made up of highly qualified outside independent persons on these issues’.

43 Under the heading ‘Responsibility for reporting on fraud issues’, Article 2 of the contested decision provides:

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

44 Article 1(1) and (2) of the contested decision establishes an anti-fraud committee (‘the ECB Anti-Fraud Committee’), which is intended to reinforce the D-IA’s independence in the activities referred to in Article 2 of the decision and is responsible for the regular monitoring and the discharge of those activities.

45 In accordance with the provision in Article 1(3) to (5), the ECB Anti-Fraud Committee is composed of three outside independent persons who are appointed for three years by a decision of the ECB Governing Council and who are prohibited from either seeking or taking, in carrying out their duties, instructions from the decision-making bodies of the ECB, from institutions or bodies of the European Communities, from any government or from any other institution or body.

46 In order to ensure that the D-IA may act effectively and with the required level of independence, Article 3 of the contested decision provides that its Director is to report to the ECB anti-fraud committee on fraud issues. In addition, Article 1(7) of the contested decision provides that the Director of the D-IA is to forward a programme of its activities to the Anti-Fraud Committee each year and that the Directorate is to keep the anti-fraud committee regularly informed of its activities, in particular its investigations, the results thereof and the actions taken in that connection. Article 1(7) also states that the Director of the D-IA is to inform the ECB Anti-Fraud Committee of cases in which the decision-making bodies of the ECB have failed to act on recommendations and of cases in which information needs to be forwarded to the judicial authorities of a Member State.

47 Under Article 1(8) of the contested decision, the ECB Anti-Fraud Committee is to present to the Governing Council, the external auditors of the ECB and the Court of Auditors reports on the results of the D-IA's investigations and, at least once a year, a report on its activities. Under Article 1(10) of the decision, the committee may inform the competent national judicial authority where reasonable evidence shows that there may have been a breach of national criminal law.

48 Article 4 of the contested decision *inter alia* imposes an obligation on the D-IA to inform the persons concerned that they are under investigation and to allow them to express their views before any conclusions referring to them by name are drawn. The first paragraph of Article 5 of the decision states that the activities of the D-IA are to be 'carried out subject to both the rules of the Treaties, in particular Article 6 of the Treaty on European Union, and the Protocol on the privileges and immunities of the European Communities with due regard to the Conditions of employment for staff of the [ECB].'

49 The second paragraph of Article 5 of the contested decision provides:

‘Staff of the ECB shall, and any other person may, inform the anti-fraud committee or the [D-IA] of any fraud or illegal activities detrimental to the financial interests of the ECB. Staff of the ECB must in no way suffer inequitable or discriminatory treatment as a result of having contributed to the activities of the anti-fraud committee or the [D-IA] referred to in this Decision.’

50 Article 6 of the decision provides that any member of the staff of the ECB may submit to the Executive Board or the anti-fraud committee a complaint in respect of an act or omission of the D-IA having an adverse effect on him.

51 Article 1(9) of the contested decision states:

‘The anti-fraud committee shall be responsible for the relations with the Supervisory Committee of [OLAF] referred to in Article 11 of Regulation (EC) No 1073/1999.... These relations shall follow the principles established by a decision of the ECB.’

The application

52 In its application, the Commission claims that the Court should annul the contested decision on the ground that it infringes Regulation No 1073/1999, in particular Article 4 thereof.

53 It submits, first, that the eighth recital to, and Article 2 of, the contested decision make clear that, according to that decision, the D-IA is solely responsible for administrative investigations within the ECB so far as combating fraud is concerned. That amounts to the outright negation of both the investigative powers conferred on OLAF by Regulation No 1073/1999 and the applicability of the regulation to the ECB and reflects the line taken by the ECB whilst the regulation was in its preparatory stages. Thus, the preamble to the contested decision draws an express distinction between the rules adopted on the basis of [Article 325 TFEU] and the rules dealing with the ECB and refers to the independence of the ECB and to the fact that it has its own budget and its own financial resources.

54 That the rules put in place by the contested decision are distinct from, and operate independently of, those established by Regulation No 1073/1999 is also apparent from the fact that the only point of contact between the two sets of rules is to be found in Article 1(9) of the contested decision, which provides that the ECB anti-fraud committee is responsible for relations with OLAF's Supervisory Committee on the basis of the principles established by a decision of the ECB.

55 Second, the Commission argues that in view of the approach taken by the ECB the contested decision includes no measures for implementing Article 4(6) of Regulation No 1073/1999 but instead provides that the staff of the ECB are to inform the D-IA rather than OLAF in any case of fraud.

Pleas in defence put forward by the ECB

56 The ECB contends, first, that the contested decision does not infringe Regulation No 1073/1999. Since the decision is therefore not in any way unlawful for the

purposes of Article 230 EC, the application should be dismissed, irrespective of whether or not Regulation No 1073/1999 applies to the ECB.

- 57 Second, the ECB submits that the regulation must be interpreted as not applying to it. Should the Court not so interpret it, it must declare the regulation unlawful, on the ground that it was adopted in breach of [Article 125 TFEU, 130 TFEU, 325 TFEU] and the principle of proportionality and, consequently, declare the regulation inapplicable, in accordance with [Article 277 TFEU].
- 58 It is appropriate, first, to examine whether Regulation No 1073/1999 applies and then, only if it is found to be applicable, to ascertain whether the contested decision infringes the provisions of that regulation.

The applicability of Regulation No 1073/1999

- 59 In order to ascertain whether, as the ECB submits, Regulation No 1073/1999 should be declared inapplicable, it is appropriate to examine, first, whether the regulation must be interpreted as applying to the ECB and, if so, to ascertain, second, whether it may be held to be inapplicable on the ground that it is illegal, in accordance with [Article 277 TFEU].

The scope of Regulation No 1073/1999

- 60 The ECB submits that Regulation No 1073/1999 must be interpreted so as to exclude the ECB from its scope. It argues in particular that the expression ‘bodies, offices and agencies established by, or on the basis of, the Treaties’ in Article 1(3) of the regulation lacks precision so that, particularly since Article 280(4) EC was chosen as the legal basis for the regulation, it may be construed as not applying to ‘bodies’ whose financial interests are distinct from those of the European Community and are not linked to the latter’s budget.
- 61 In the ECB’s submission, such an interpretation is the only one which preserves the legality of the regulation, for which reason it should, in accordance with the Court’s case-law, be preferred (Case C-135/93 *Spain v Commission* [1995] ECR I-1651, paragraph 37).
- 62 That argument cannot be accepted.
- 63 As both the Commission and the interveners have rightly argued, it must be found that the expression ‘institutions, bodies, offices and agencies established by, or on the basis of, the Treaties’ in Article 1(3) of Regulation No 1073/1999 must indeed be interpreted as including the ECB.
- 64 It is sufficient to point out in that connection that, regardless of the distinctive features of its status within the Community legal order, the ECB was indeed established by the EC Treaty, as is apparent from the actual wording of Article 8 EC.

- 65 It does not follow from either the preamble to, or the provisions of, Regulation No 1073/1999 that the Community legislature intended to draw any distinction between the institutions, bodies, offices and agencies established by, or on the basis of, the Treaties, in particular by excluding those bodies, offices or agencies which have resources distinct from the Community budget.
- 66 Instead, the seventh recital to Regulation No 1073/1999 specifically draws attention to the need to extend the scope of OLAF's internal investigations to 'all' the institutions, bodies, offices and agencies.
- 67 Given the clear terms of Regulation No 1073/1999, there can be no doubt that the regulation must be interpreted as being intended to apply to the ECB, irrespective of whether or not that circumstance is apt to affect the legality of the regulation.

The ECB's plea alleging that Regulation No 1073/1999 is illegal

- 68 Since it has been established that the ECB is not excluded from the scope of Regulation No 1073/1999, it is appropriate to examine whether, as the ECB contends, the regulation must be declared inapplicable under [Article 277 TFEU].

- 69 In that regard, the ECB submits, first, that it was not possible to adopt Regulation No 1073/1999 on the basis of [Article 325 TFEU] and that the regulation is thus *ultra vires*. Second, the regulation was adopted in breach of essential procedural requirements, since the ECB was not consulted beforehand as required under

[Article 127 TFEU]. The ECB submits, third, that its inclusion within the scope of Regulation No 1073/1999 entails a breach of the EC Treaty by undermining the ECB's independence as enshrined in [Article 130 TFEU]. Fourth, the regulation infringes the principle of proportionality, since its application to the ECB is not a suitable means of attaining the objectives pursued by the regulation and goes beyond what is necessary for that end.

- 70 The Commission and the interveners deny that Regulation No 1073/1999 is unlawful. The Commission also submits, as a preliminary point, that it is not open to the ECB to rely on [Article 277 TFEU] in order to invoke the inapplicability of the regulation.
- 71 In those circumstances, it is appropriate to ascertain whether the ECB is entitled, in the context of these proceedings, to plead that Regulation No 1073/1999 is illegal, before proceeding, should that plea be held admissible, to examine the merits of the objection thus raised.

Admissibility of the objection of illegality

- 72 The Commission maintains that the defendant cannot invoke the illegality of Regulation No 1073/1999 on the basis of [Article 277 TFEU] in these proceedings, since it did not challenge the regulation under [Article 263 TFEU] within the two-month period prescribed by that article.

73 The ECB submits that the conditions imposed by [Article 277 TFEU] are met in this case, since Regulation No 1073/1999 was adopted jointly by the Parliament and the Council, was in breach of an essential procedural requirement, is *ultra vires* and is contrary to both the EC Treaty and the principle of proportionality. The ECB adds that the reason why it did not bring an action for annulment of the regulation was that it believed that the regulation did not apply to it, since [Article 325 TFEU] had been chosen as the legal basis for the regulation and since the ECB had not been consulted prior to its adoption.

74 In that regard, it must certainly be borne in mind that according to settled case-law a decision adopted by the Community institutions which has not been challenged by its addressee within the time-limit laid down by the fifth paragraph of [Article 263 TFEU] becomes definitive as against that person (see, most recently, Case C-241/01 *National Farmers' Union* [2002] ECR I-9079, paragraph 34, and the case-law cited).

75 Furthermore, the Court has also held that the general principle, to which [Article 277 TFEU] gives expression and which has the effect of ensuring that every person has or will have had the opportunity to challenge a Community measure which forms the basis of a decision adversely affecting him, does not in any way preclude a regulation from becoming definitive as against an individual in regard to whom it must be considered to be an individual decision and who could undoubtedly have sought its annulment under [Article 263 TFEU], a fact which prevents that individual from pleading the illegality of that regulation before the national court. The Court has found that such a conclusion applies to regulations imposing anti-dumping duties by virtue of their dual nature as acts of a legislative nature and acts liable to be of direct and individual concern to certain traders (see Case C-239/99 *Nachi Europe* [2001] ECR I-1197, paragraph 37).

76

The principles thus recalled nevertheless do not in any way affect the rule laid down by [Article 277 TFEU], which provides that any party may, in proceedings in

which a regulation of the kind referred to in [Article 277 TFEU] is at issue, plead the grounds specified in the second paragraph of [Article 263 TFEU] in order to invoke before the Court of Justice the inapplicability of that regulation.

- 77 However, on this occasion the Court finds that the legislative nature of Regulation No 1073/1999 has not been challenged by any of the parties and that, more particularly, it has not been claimed that the regulation should be treated as a decision or that the ECB would, in such a case, be the addressee thereof.
- 78 In those circumstances, the ECB cannot be denied the right to invoke in these proceedings the possible illegality of Regulation No 1073/1999 under [Article 277 TFEU] and the submission that the plea of illegality is inadmissible must therefore be rejected.

Plea alleging lack of legal basis

- 79 In support of its submission of illegality, the ECB first puts forward an argument that Regulation No 1073/1999 must be declared inapplicable on the ground that it could not be adopted on the basis of [Article 325 TFEU].

- 80 The expression ‘financial interests of the Community’ in [Article 325 TFEU] relates solely to expenditure and revenue coming within the budget of the European Community. It therefore does not allow measures to be adopted on the basis of [Article 325 TFEU] for the purpose of combating fraud within the ECB, since the latter has its own budget and resources.

⁸¹ More generally, [Article 325 TFEU] does not allow measures to be adopted which are intended to combat fraud within the institutions, bodies, offices and agencies established by, or on the basis of, the Treaties.

The concept of ‘affecting the financial interests of the Community’

— *Arguments of the ECB*

⁸² In the ECB’s submission, [Article 325 TFEU] allows the adoption of anti-fraud measures only for the purposes of safeguarding the Community budget. That is borne out by, *inter alia*, the fact that [Article 325 TFEU] is found under Title II of Part Five of the EC Treaty, headed ‘Financial Provisions’, which deals, as a whole, with various aspects of the contents, preparation, adoption and implementation of the Community budget and with the financing of expenditure charged to the budget from the Community’s own resources.

⁸³ It follows that Community provisions adopted on the basis of [Article 325 TFEU]

with a view to combating fraud cannot apply to the ECB, since the latter has its own budget, which is separate from the European Community budget and reflects its financial independence.

⁸⁴ The ECB’s resources, as is clear from Articles 28 to 30 of the ESCB Statute, are provided exclusively by shareholder contributions from the national central banks (‘the NCBs’) and from income generated in the performance of the ECB’s and the NCBs’ business and allocated in accordance with Articles 32 and 33 of the Statute. The ECB receives no funds from the Community budget and there is no mechanism for offsetting from the budget any losses the ECB might make,

such losses being, pursuant to Article 33.2 of the Statute, offset against the general reserve fund of the ECB or, if necessary, covered by the NCBs.

85 The ECB adds that Part Five of the EC Treaty, in which [Article 325 TFEU] appears deals, according to its heading, with ‘Institutions of the Community’ and does not include a chapter on the ECB. The ECB’s finances are governed by Chapter VI of the ESCB Statute, ‘Financial provisions of the ESCB’.

86 That the ECB is financially independent is also borne out by the fact that adoption of its budget and its annual accounts are exclusively a matter for its managing bodies, as is apparent from Article 26.2 of the ESCB Statute and Articles 15 and 16.4 of the Rules of Procedure of the ECB, as amended on 22 April 1999 (OJ 1999 L 125, p. 34).

87 Any links which may exist between the Community budget and the ECB are too incidental to the ECB’s tasks to warrant its being subject to measures adopted on the basis of [Article 325 TFEU]. In particular, the Community tax on staff salaries paid into the Community budget by the ECB represents less than 3% of its own budget.

88 Furthermore, the ECB’s interpretation is consonant with earlier legislative practice, which acknowledged the link between ‘the financial interests of the Community’, on the one hand, and the general budget of the European Communities and the budgets managed by them, on the other. In that regard, the ECB refers in particular to the definition of ‘irregularity’ in Article 1(2) of Council Regulation (EC, Euratom) No 2988/95 of 18 December 1995 on the

protection of the European Communities financial interests (OJ 1995 L 312, p. 1) and the concept of ‘fraud affecting the European Communities’ financial interests’, as defined in Article 1 of the Convention on the protection of the European Communities’ financial interests established by the Council Act 95/C 316/03 of 26 July 1995 (OJ 1995 C 316, p. 49).

— Findings of the Court

89 Contrary to the submissions made by the ECB for the purposes of its first ground of defence, the expression ‘financial interests of the Community’ in [Article 325 TFEU] must be interpreted as encompassing not only revenue and expenditure covered by the Community budget but also, in principle, revenue and expenditure covered by the budget of other bodies, offices and agencies established by the EC Treaty.

90 Among the factors bearing out such a finding is, first, the fact that (as the Advocate General has pointed out at paragraph 117 of his Opinion) the expression is peculiar to [Article 325 TFEU] and is different from the terms used in other provisions of Title II of Part Five of the EC Treaty, which refer invariably to the ‘budget’ of the European Community. The same may be said of the fact, pointed to by the Netherlands Government, that the expression ‘financial interests of the Community’ seems wider than the expression ‘items of revenue and expenditure of the Community’ found *inter alia* in [Article 310 TFEU].

91

Second, the fact that a body, office or agency owes its existence to the EC Treaty suggests that it was intended to contribute towards the attainment of the European Community’s objectives and places it within the framework of the Community, so that the resources that it has at its disposal by virtue of the Treaty have by their nature a particular and direct financial interest for the Community.

- 92 As regards more specifically the ECB, it may be noted in that respect that it is clear from Article 8 EC and [Article 129 TFEU] that the ECB was established and given legal personality by the EC Treaty. Furthermore, under [Article 119 TFEU] and [Article 127 TFEU], the primary objective of the ESCB, at the heart of which is the ECB, is to maintain price stability and, without prejudice to this objective, to lend support to the general economic policies in the European Community, with a view to contributing to the achievement of the objectives of the Community as laid down in [Article 3 TFEU], which include an economic and monetary union and also the promotion of sustainable and non-inflationary growth. It follows that the ECB, pursuant to the EC Treaty, falls squarely within the Community framework.
- 93 Various other Community legal provisions afford further confirmation that the ECB's resources and their use are thus of evident financial interest to the European Community and its objectives.
- 94 One such provision is Article 27 of the ESCB Statute, the first paragraph of which states that the external auditors responsible for examining the books and accounts of the ECB must be approved by the Council and the second paragraph of which provides that the competence of the Court of Auditors includes examining the operational efficiency of the ECB. The same is true of Article 28.1 and Article 30.4 of the Statute, which provide that it is within the limits and under the conditions set by the Council that the ECB's capital may be increased by its Governing Council and that further calls of foreign reserve assets may be effected by the ECB. Finally, [Article 129 TFEU] entitles the Council to amend various provisions of the ESCB Statute including certain articles in Chapter VI of the Statute, 'Financial Provisions of the ESCB'.
- 95 It is clear from the foregoing considerations that the expression 'financial interests of the Community' in [Article 325 TFEU] is not restricted exclusively to the budget of the European Community in the strict sense but also covers the

resources and expenditure of the ECB (see, by analogy, in relation to the applicability to the European Investment Bank of Article 179 of the EC Treaty (now [Article 270 TFEU]), Case 110/75 *Mills v EIB* [1976] ECR 955, paragraph 14).

96 That finding is not affected by the mere fact, on the assumption that it is correct, that a particular legislative practice (which, moreover, predated the inclusion in the Treaty of paragraphs (1) and (4) of [Article 325 TFEU]) had given a different meaning to the expression ‘financial interests of the Community’.

97 It follows that the fact that Regulation No 1073/1999 also concerns the ECB, which, having been established by the EC Treaty, by virtue of that Treaty has its own resources distinct from those of the Community budget, does not provide grounds for finding the regulation inapplicable on the basis of [Article 277 TFEU].

The possibility of adopting anti-fraud measures relating to the institutions, bodies, offices and agencies established by, or on the basis of, the Treaties

98 In view of the wording of [Article 325 TFEU], which provides that the European Community is to adopt measures ‘with a view to affording effective and equivalent protection in the Member States’ and that such measures cannot concern ‘the application of national criminal law or the national administration of justice’, the ECB submits that the powers of the Community legislature are limited to adopting measures intended to improve the mechanisms for combating fraud at the level of the Member States. In the ECB’s submission, measures intended to combat fraud or irregularities within the institutions, bodies, offices and agencies established by, or on the basis of, the Treaties cannot be adopted under that provision.

99 That argument cannot be accepted.

100 By introducing into [Article 325 TFEU] the statements in paragraphs 1 and 4, the

draftsmen of the Treaty of Amsterdam clearly intended to step up the fight against fraud and irregularities affecting the financial interests of the European Community, in particular by expressly conferring on the Community the specific task of ‘combating’, like the Member States, such fraud and irregularities by adopting ‘measures’ which act as a ‘deterrent’ and afford ‘effective protection in the Member States’.

101 In that regard, the fact that [Article 325 TFEU] specifies that the measures are to be taken in accordance with that article does not mean that the scope of the Community’s competence in this sphere is to be determined exclusively by reference to the remaining paragraphs of [Article 325 TFEU], in particular paragraph 4.

102 [Article 325 TFEU] must be construed as providing a fuller explanation of the Community’s competence and specifying certain of the conditions on which it is exercised. It thus lays down the procedural requirements governing the adoption of Community measures and likewise states that action by the European Community is as much aimed at preventing fraud as at combating it. It also states that the Community’s powers are subject to certain limits in that the measures adopted cannot concern the application of national criminal law or the administration of justice in the Member States.

103 In that context, the fact that [Article 325 TFEU] refers in particular to the need to afford effective and equivalent protection in the Member States cannot, as the Advocate General has rightly pointed out at paragraph 108 of his Opinion, be

taken to mean that the draftsmen of the Treaty of Amsterdam implicitly intended to make any action taken by the Community subject to a supplementary restriction as basic as a prohibition on combating fraud and other irregularities affecting its financial interests by adopting legislative measures covering the institutions, bodies, offices and agencies established by, or on the basis of, the Treaties.

104 Quite apart from the fact that such a restriction of the Community's competence is not apparent from the wording of [Article 325 TFEU], it would, as the Commission and all the interveners rightly maintain, scarcely be compatible with the objectives pursued by that article. It is not disputed that if the protection of the European Community's financial interests is to be rendered effective, it is essential that the deterrence of, and the fight against, fraud and other irregularities operate at all levels at which those interests are liable to be affected by such phenomena. Furthermore, it is often the case that phenomena fought in that way simultaneously involve actors at various levels.

105 It follows from the foregoing considerations that the ECB's plea alleging lack of a proper legal basis for Regulation No 1073/1999 must be rejected and therefore the regulation cannot be declared inapplicable on that ground under [Article 277 TFEU].

Plea relating to the failure to consult the ECB

106 By its second plea, the ECB contends that Regulation No 1073/1999 must be declared inapplicable on the ground that it was adopted in breach of [Article 127 TFEU], since the ECB was not consulted beforehand.

107 In the ECB's submission, the regulation encroaches upon its powers of internal organisation as derived, first, from the principle of implied powers, second, from Article 12.3 of the ESCB Statute, which provides that the ECB's Governing Council is to adopt its Rules of Procedure, and Article 36 of the Statute, which confers power on the Governing Council to lay down the conditions of employment of staff of the ECB and, third, from the fact that the ECB is an independent institution, witness the fact that it has its own managing organs under the EC Treaty. More specifically, Regulation No 1073/1999 effectively undermines the internal structure and/or the staff of the ECB.

108 The ECB argues that its power to organise its internal affairs is one of 'its fields of competence' under [Article 127 TFEU] and that it should therefore have been consulted before Regulation No 1073/1999 was adopted, as required by [Article 127 TFEU]

109 The Commission contends, in particular, that [Article 127 TFEU] is not aimed at each and every measure adopted by the Community legislature which is capable of having consequences for the ECB but rather measures which concern substantive matters falling within the ECB's responsibilities, particularly in the sphere of monetary policy. The Council likewise argues that [Article 127 TFEU] does not apply in this instance, since Regulation No 1073/1999 does not encroach on the ECB's tasks, but solely on its administrative powers.

110 In that regard, the Court observes that [Article 127 TFEU] is placed in Chapter 2, devoted to monetary policy, of Title VII of Part Three of the EC Treaty and that the obligation laid down in that provision to consult the ECB on any proposed act in its field of competence is intended, as the Advocate General points out at paragraph 140 of his Opinion, essentially to ensure that the legislature adopts the act only when the body has been heard, which, by virtue of the specific functions that it exercises in the Community framework in the area concerned and by virtue

of the high degree of expertise that it enjoys, is particularly well placed to play a useful role in the legislative process envisaged.

- 111 That is not the case as regards the prevention of fraud detrimental to the financial interests of the Community, an area in which the ECB has not been assigned any specific tasks. Furthermore, the fact that Regulation No 1073/1999 may affect the ECB's internal organisation does not mean that the ECB should be treated differently from the other institutions, bodies, offices and agencies established by the Treaties.
- 112 It follows that the ECB's submission relating to the fact that it was not consulted before Regulation No 1073/1999 was adopted must be rejected and that the regulation cannot therefore be declared inapplicable on that ground under [Article 277 TFEU].

Plea alleging that the ECB's independence was undermined

Arguments of the parties

- 113 By its third plea, the ECB contends that Regulation No 1073/1999 must be declared inapplicable on the ground that the system of administrative investigations for which it provides conflicts with the ECB's independence, as guaranteed by [Article 103 TFEU].

114 In the ECB's submission, the guarantee of independence covers not only the performance of the ESCB's basic tasks as set out in [Article 127 TFEU] but, more generally, the exercise of all the ECB's other powers under the EC Treaty, that is to say, particularly the powers which are conferred on it by Articles 12.3 and 36.1 of the ESCB Statute concerning its internal organisation and the conditions of employment of its staff, and which include the adoption of anti-fraud measures.

115 That conclusion is inevitable, first, given the Convergence Report drawn up in 1998 by the European Monetary Institute in accordance with Article 109 J of the EC Treaty (now Article 121 EC), from which it is clear that the independence which the NCBs, and therefore the ECB too, must enjoy, must be such as to shield them from 'all sources of external influence'.

116 Next, account must be taken of the fact, already invoked by the ECB in support of its plea alleging that Regulation No 1073/1999 lacks a legal basis, that the ECB has financial independence associated with the fact that it has and manages its own budget, which is distinct from the European Community's budget.

117 Finally, it is significant that the members of the decision-making bodies of the ECB have a statute of their own, in order to ensure their independence. In that connection, the ECB refers to [Article 283 TFEU], which defines the procedure for appointment of members of the Executive Board of the ECB and stipulates that their term of office is to be eight years and non-renewable. The ECB also invokes Article 11.4 of the ESCB Statute, which provides that a member of the Executive Board may be compulsorily retired by the Court of Justice only on an application by the Governing Council or the Executive Board of the ECB. It also refers to Article 14.2 of the ESCB Statute, which provides that a Governor of an NCB who has been relieved from office may refer the relevant decision to the Court of Justice.

- 118 As to the regime established by Regulation No 1073/1999, the ECB submits that conferring on OLAF power to conduct internal investigations within the ECB undermines its independence, since both the exercise of such a power and the mere threat of its being exercised are capable of bringing pressure to bear on the members of the Governing Council or the Executive Board of the ECB and of jeopardising their independence when taking decisions.
- 119 Although it concedes that the likelihood that such pressure might ever be exerted in practice or that it might have any impact on decision-making within the ECB is 'extremely small', the ECB maintains that the need to maintain the complete confidence of unstable financial markets makes it essential to avoid any situation potentially capable, even from the aspect of form or mere appearances, of giving rise to fear that OLAF's powers might be such as to put the Commission in a position to influence the ECB.
- 120 The ECB draws attention in that regard to the fact that OLAF is an internal Commission department, retaining certain links, in particular budgetary links, with the Commission, whilst its staff, who are subject to the Staff Regulations of Officials of the European Communities, are dependent on the Commission for professional advancement.
- 121 The ECB also expresses certain doubts about the guarantees attendant upon the exercise of OLAF's powers. More particularly, it is not convinced that Article 6(3) of Regulation No 1073/1999 can prevent OLAF from conducting an investigation where it does not have adequate reasons for doing so. Similarly, the ECB claims that the only reference to OLAF's obligation to respect fundamental rights is to be found not in the operative part of the regulation but in the preamble thereto.
- 122 The Commission submits, first, that the ECB is an integral part of the European Community. Thus, under [Article 343 TFEU] the ECB enjoys such privileges and

immunities as are necessary for the performance of its tasks under the conditions laid down in the Protocol on the Privileges and Immunities of the European Communities, and its staff's salaries are subject to Community tax. Likewise, the ECB is subject to the Court of Justice's power of review and, as regards the efficiency of its management, to control by the Court of Auditors, as provided for in Article 27.2 of the ESCB Statute. Further, the ECB is required to submit an annual report on the activities of the ESCB and on monetary policy, in particular to the Parliament, whose competent committees may also hear the President of the ECB and the other members of its Executive Board, as provided for by [Article 284 TFEU]

¹²³ In the Commission's submission, the ECB, like monetary policy, in respect of which it has specific powers, contributes to the pursuit of the general objectives of the European Community, as may be seen from [Article 127 TFEU].

¹²⁴ The Commission further submits that various provisions of the EC Treaty show that the ECB is not beyond the reach of the powers of the Community legislature. Thus, it refers to [Article 129 TFEU], which provides that certain articles of the ESCB Statute may be amended by the Council, with the assent of the Parliament. The Commission emphasises in that regard that Article 36.1 of the ESCB Statute, which provides that the Governing Council is to lay down the conditions of employment of the ECB staff, is among the provisions capable of being thus amended by the Council, which confirms that even in its internal affairs, the ECB is not guaranteed absolute independence *vis-à-vis* the Community legislature.

¹²⁵ The Commission also cites [Article 129 TFEU] and [Article 132 TFEU], first indent, and

(3) EC, from which it is apparent that various provisions of the ESCB Statute require that supplementary measures be adopted by the Council. It also refers to

[Article 127 TFEU], pursuant to which the Council may confer upon the ECB certain specific tasks relating to the prudential supervision of financial institutions.

- 126 In the Commission's submission, it must be concluded from the foregoing that the independence which the ECB enjoys and which [Article 130 TFEU] is intended to protect, is strictly functional and is limited to the performance of the specific tasks conferred upon the ECB by the EC Treaty and the ESCB Statute. The fact that it is independent does not have the consequence of placing the ECB beyond the reach of the rules of the Treaty.
- 127 The ECB's situation is in that regard comparable to that of the European Investment Bank, in respect of which the Court of Justice has held that recognition of its operational and institutional autonomy does not mean that it is totally separated from the Communities and exempt from every rule of Community law (Case 85/86 *Commission v EIB* [1988] ECR 1281, and Case C-370/89 *SGEEM and Etroy v EIB* [1992] ECR I-6211).
- 128 In the present case, the ECB has not shown how a regulation adopted by the Community legislature in the sphere of fraud prevention is capable in practice of preventing it from carrying out its particular tasks. The ECB's independence is not affected by the fact that an independent body such as OLAF may conduct anti-fraud administrative investigations within the ECB for the purpose of establishing elements of fact, in respect of which subsequent action is a matter for the ECB or the national authorities.
- 129 Finally, Regulation No 1073/1999 provides all the requisite guarantees concerning respect for fundamental rights, as may be seen in particular from Article 4(1) and (6), Article 6(3) and Article 14.

Findings of the Court

- 130 For the purposes of adjudicating on the ECB's plea, it is appropriate to state at the outset that the draftsmen of the EC Treaty clearly intended to ensure that the ECB should be in a position to carry out independently the tasks conferred upon it by the Treaty.
- 131 The most direct evidence of that intention is in [Article 130 TFEU] which expressly prohibits the ECB and the members of its decision-making bodies, when exercising the powers and carrying out the tasks conferred on the ECB by the EC Treaty and the ESCB Statute, from seeking or taking instructions from Community institutions or bodies, from any government of a Member State or from any other body, and prohibits those Community institutions or bodies and those governments from seeking to influence the members of the ECB's decision-making bodies in the performance of their tasks.
- 132 It should also be observed that the ECB has legal personality; that it has its own resources and budget and its own decision-making bodies and enjoys such privileges and immunities as are necessary for the performance of its tasks; or, further, that only the Court of Justice, on application by the Governing Council or the Executive Board, may retire a member of the ECB's Executive Board, on the conditions laid down in Article 11.4 of the ESCB Statute. Those factors are without doubt conducive to strengthening the independence thus enshrined in [Article 130 TFEU]
- 133 However, Community institutions such as, notably, the Parliament, the Commission or the Court itself, enjoy independence and guarantees comparable in a number of respects to those thus afforded to the ECB. In that regard,

reference may, for example, be made to [Article 245 TFEU], which states that the Members of the Commission are, in the general interest of the Community, to be completely independent in the performance of their duties. That provision states, in terms quite close to those used in [Article 130 TFEU], that in the performance of their duties the Members of the Commission are neither to seek nor to take instructions from any government or from any other body and, further, that each Member State undertakes not to seek to influence those Members in the performance of their tasks.

- 134 As is clear from the wording of [Article 130 TFEU], the outside influences from which that provision seeks to shield the ECB and its decision-making bodies are those likely to interfere with the performance of the ‘tasks’ which the EC Treaty and the ESCB Statute assign to the ECB. As the Advocate General has pointed out at paragraphs 150 and 155 of his Opinion, Article 108 EC seeks, in essence, to shield the ECB from all political pressure in order to enable it effectively to pursue the objectives attributed to its tasks, through the independent exercise of the specific powers conferred on it for that purpose by the EC Treaty and the ESCB Statute.

- 135 By contrast, as the Commission and the interveners have rightly pointed out, recognition that the ECB has such independence does not have the consequence of separating it entirely from the European Community and exempting it from every rule of Community law. First, it is evident from [Article 127 TFEU] that the ECB is to contribute to the achievement of the objectives of the European Community, whilst Article 8 EC states that the ECB is to act within the limits of the powers conferred upon it by the EC Treaty and the ESCB Statute. Second, as the Commission has observed, the ECB is, on the conditions laid down by the EC Treaty and the ESCB Statute, subject to various kinds of Community controls, notably review by the Court of Justice and control by the Court of Auditors. Finally, it is evident that it was not the intention of the Treaty draftsmen to shield the ECB from any kind of legislative action taken by the Community legislature, as is clear from, *inter alia*, [Article 127 TFEU], [Article 130 TFEU] and [Article 132 TFEU], first indent, and (3) EC, which are cited by the Commission.

- 136 It follows from the foregoing that there are no grounds which *prima facie* preclude the Community legislature from adopting, by virtue of the powers conferred on it by the EC Treaty and under the conditions laid down therein, legislative measures capable of applying to the ECB.
- 137 Furthermore, as pointed out by the Commission and by the Advocate General at paragraph 160 of his Opinion, the ECB has not established how the fact that it is subject to measures adopted by the Community legislature in the area of fraud prevention and the prevention of any other unlawful activities detrimental to the European Community's financial interests, such as the measures provided for in Regulation No 1073/1999, is such as to undermine its ability to perform independently the specific tasks conferred on it by the EC Treaty.
- 138 First, neither the fact that OLAF was established by the Commission and is incorporated within the Commission's administrative and budgetary structures on the conditions laid down in Decision 1999/352, nor the fact that the Community legislature has conferred on such a body external to the ECB powers of investigation on the conditions laid down in Regulation No 1073/1999, is *per se* capable of undermining the ECB's independence.
- 139 As is apparent, in particular, from the fourth, 10th, 12th and 18th recitals in the preamble to, and Articles 4, 5, second paragraph, 6, 11 and 12 of, Regulation No 1073/1999, the rules put in place by the regulation reflect the settled intention of the Community legislature to subject the powers conferred on OLAF, first, to guarantees intended to ensure OLAF's complete independence, in particular from the Commission, and, second, to strict observance of the rules of Community law, including, in particular, the Protocol on the Privileges and Immunities of the European Communities, human rights and fundamental freedoms and the Staff Regulations of officials of the European Communities and the Conditions of Employment of other servants of the European Communities.

140 Furthermore, under Regulation No 1073/1999, the exercise of those powers is subject to various specific rules and guarantees, whilst the purpose for which they may be used is clearly delineated. In that respect, Article 2 of Regulation No 1073/1999 provides that OLAF's administrative investigations are to be conducted with a view to achieving the objectives set out in Article 1 of the regulation and to establishing, where necessary, the irregular nature of the activities under investigation. The means which OLAF has at its disposal for the purpose of pursuing those objectives are specifically listed, notably in Articles 4, 7 and 9 of the regulation.

141 As the Council has rightly pointed out, the system of investigation set up by Regulation No 1073/1999 is specifically intended to permit the investigation of suspicions relating to acts of fraud or corruption or other illegal activities detrimental to the financial interests of the European Community, without in any way being similar to forms of control which, like financial control, are likely to follow a more rigid pattern. Contrary to the ECB's submission in that regard, a decision by OLAF's Director to open an investigation, like the decision of an institution, body, agency or organ established by, or on the basis of, the Treaties to request that an investigation be opened, cannot be taken unless there are sufficiently serious suspicions. Furthermore, as the ECB itself has observed, it is clear from the wording of Article 6(3) of Regulation No 1073/1999 that the written authority with which the OLAF inspectors must be equipped must indicate the subject-matter of the investigation.

142 It is sufficient to state that any defects in the way in which the provisions of the regulation are applied cannot entail its illegality.

143 Second, it is appropriate to point out, as have the Commission and the Netherlands Government, and also the Advocate General at paragraph 167 of his Opinion, that the internal investigations which OLAF may carry out must, as is clear from the second subparagraph of Article 4(1) of Regulation No 1073/1999, also be carried out under the conditions and in accordance with the procedures

provided for in decisions adopted by each institution, body, office and agency. Thus it is conceivable that matters specific to the performance of its tasks will, where appropriate, be taken into account by the ECB when it adopts such a decision and it is incumbent on the ECB to establish that any restrictions in that regard are necessary.

- ¹⁴⁴ Furthermore, even if some economic operators were upset by the fact that certain investigative powers in relation to the ECB should have been conferred on a body such as OLAF because they appreciate neither the precise nature of those powers nor the fact that the powers are subject to various guarantees, in particular those designed to ensure that OLAF is completely independent, it cannot be maintained that such a circumstance, arising exclusively from a lack of information or from the failure of the operators concerned to see the real picture, would result in Regulation No 1073/1999 undermining the ECB's independence.

- ¹⁴⁵ It follows from the foregoing considerations that the ECB's plea alleging that its independence is undermined must be rejected and that Regulation No 1073/1999 cannot therefore be declared inapplicable on that ground under[Article 277 TFEU].

Plea alleging breach of the principle of proportionality

Arguments of the ECB

- ¹⁴⁶ By its fourth plea, the ECB submits that Regulation No 1073/1999 must be declared inapplicable on the ground that it is inconsistent with the principle of proportionality.

- 147 The ECB contends, first, that the application to it of the investigative powers provided for in Regulation No 1073/1999 is unnecessary, since there are various other adequate financial controls for detecting and preventing fraud within the ECB.
- 148 In that regard, it refers to Article 27 of the ESCB Statute, which provides, first, that the accounts of the ECB are to be audited by independent external auditors recommended by the ECB's Governing Council and approved by the Council and, second, that the Court of Auditors is to examine the operational efficiency of the management of the ECB.
- 149 Furthermore, the ECB's Governing Council, acting under the ECB's independent powers of organisation, has established two other layers of control, namely the D-IA and the ECB Anti-Fraud Committee.
- 150 It is clear from the contested decision and from Administrative Circular 8/99 of 12 October 1999, 'ECB Audit Charter', that the D-IA, which has a high level of expertise, was made responsible for investigating and reporting, without restriction, cases of fraud, and that the unit is directly responsible to the ECB's President and enjoys complete operational independence.
- 151 According to the explanations provided by the ECB, the D-IA must also respect various internationally recognised accounting standards, including the Standards for the Professional Practice of Internal Auditing produced by the Institute of Internal Auditors and the International Standards on Auditing and International Auditing Practice Statements drawn up by the International Federation of Accountants, which set out various standards of conduct applying to accountants, who are called on, in particular, to be aware of the risk of fraud and to assist in guarding against and detecting it.

- 152 Second, the ECB argues that a number of its decisions or operations require that a high degree of confidentiality be maintained. That is particularly true of the procedure whereby the ECB adopts decisions setting interest rates for monetary policy operations, of the technical aspects of the production of banknotes and of the actions intended to affect exchange rates.
- 153 The ECB concludes that, if it were subject to Regulation No 1073/1999, it would be obliged to exclude from the scope of OLAF investigations the entire range of activities pertaining to the basic tasks set out in [Article 127 TFEU], which would therefore be subject to the control of the D-IA alone, so that OLAF's role would be marginal and, accordingly, ill adapted to the objectives pursued by the regulation.
- 154 Third, a characteristic of the ECB is the highly decentralised way in which it operates, which means that action is regularly taken by the NCBs. In view of that decentralisation, the fact that the powers of internal investigation conferred on OLAF relate only to the ECB, and not to the NCBs, means that those powers are ineffective in combating fraud, since OLAF is not in a position to carry out investigations within the NCBs.
- 155 On the other hand, according to the ECB's explanations, coordination of the internal audit functions of the ECB and the NCBs has been dealt with in various measures adopted by the Governing Council of the ECB, which allow joint audits to be carried out in these different bodies.

Findings of the Court

- 156 As a preliminary point, it must be borne in mind that the principle of proportionality, which is one of the general principles of Community law, requires that measures implemented through Community provisions should be appropriate for attaining the objective pursued and must not go beyond what is necessary to achieve it (see, *inter alia*, Case 137/85 *Maizena* [1987] ECR 4587, paragraph 15; and Case C-491/01 *British American Tobacco (Investments) and Imperial Tobacco* [2002] ECR I-11453, paragraph 122).
- 157 With regard to judicial review of the conditions referred to in the previous paragraph, the Community legislature must be allowed a broad discretion in an area such as that involved in the present case, so that the legality of a measure adopted in that sphere can be affected only if the measure is manifestly inappropriate having regard to the objective which the competent institution is seeking to pursue (see, to that effect, *British American Tobacco (Investments) and Imperial Tobacco*, paragraph 123, and the case-law cited there).
- 158 First, the ECB has not established that the Community legislature made a manifest error of assessment. The legislature was entitled to take the view that notwithstanding the existence of control mechanisms specific to the various institutions, bodies, offices and agencies established by, or on the basis of, the Treaties, including those to which the ECB refers with regard to itself, it was necessary, for the purposes of strengthening the prevention of, and the fight against, fraud, corruption and other irregularities detrimental to the financial interests of the European Community, to set up a control mechanism which is simultaneously centralised within one particular organ, specialised and operated independently and uniformly with respect to those institutions, bodies, offices and agencies.

- 159 The investigative function conferred on OLAF is different, as regards its specific nature and its specific subject-matter, which are described at paragraph 141 of this judgment, from general control tasks such as those entrusted to the Court of Auditors, as regards examination of the operational efficiency of the ECB, and to external auditors, as regards the auditing of its accounts.
- 160 Furthermore, as regards the functions assigned to the D-IA and the ECB's Anti-Fraud Committee by the contested decision, the Community legislature was entitled to take the view that disparate control mechanisms adopted within the institutions, bodies, offices or agencies established by, or on the basis of, the Treaties, with the existence of such control mechanisms and the procedures followed by them being left to the discretion of those entities, did not, given the objectives pursued, constitute a solution presenting a degree of effectiveness equivalent to that which might be expected of a system designed to centralise the investigative function within one and the same specialised and independent body. It is appropriate to bear in mind that Regulation No 1073/1999 was intended to confer on OLAF an investigative function to be exercised both within those institutions, bodies, offices and agencies by means of 'internal' investigations and outside those same entities by means of 'external' investigations.
- 161 Second, the fact that the ESCB operates in various respects in a decentralised way does not render ineffective investigations conducted by OLAF within the ECB or the communication by the ECB of information to OLAF in accordance with the provisions of Regulation No 1073/1999. That is so irrespective of the results which might be produced by any controls of the NCBs, carried out in accordance with the appropriate procedures. In any event, as the Advocate General has pointed out at paragraph 187 of his Opinion, the ECB has not provided precise explanations as to why investigation and notification would be ineffective.
- 162 Third, although it is indisputable that certain kinds of sensitive information relating to the activities of the ECB must be subject to confidentiality so that the

tasks conferred on it by the EC Treaty are not jeopardised, it should be observed in that regard that Regulation No 1073/1999 specifically provided, as is clear from the second subparagraph of Article 4(1), that OLAF's internal investigations must be carried out under the conditions and in accordance with the procedures provided for in the regulation and in the decisions adopted by each institution, body, office and agency. As stated at paragraph 143 of this judgment, it is therefore not inconceivable that certain matters specific to the performance of the ECB's tasks will, where appropriate, be taken into account by the ECB when it adopts the decision referred to in the second subparagraph of Article 4(1) of Regulation No 1073/1999, and it is incumbent on the ECB to establish that any restrictions in that regard are necessary.

163 Such specific information is, however, evidently not such that the possibility of its being taken into account could, as the ECB submits, ultimately render OLAF's powers completely ineffective by denying it access to the majority of the documents held by the ECB. As the Advocate General has pointed out at paragraph 186 of his Opinion, it is also appropriate to take account of the fact that under Article 8 of Regulation No 1073/1999 and Article 287 EC, the information forwarded or obtained in the course of internal investigations is subject to professional secrecy, so that its possible communication and its use are subject to very strict conditions.

164 It follows that the plea alleging breach of the principle of proportionality in so far as Regulation No 1073/1999 applies to the ECB must be rejected and that the regulation cannot be declared inapplicable on that ground under Article 241 EC.

165 Since the four pleas put forward by the ECB in support of the objection of illegality based on [Article 277 TFEU] have thus been rejected, it must be concluded that Regulation No 1073/1999 applies to the ECB. Thus, it is appropriate to examine whether the contested decision must be annulled because — as the Commission maintains — it infringes the provisions of that regulation.

Infringement of Regulation No 1073/1999

Arguments of the ECB

- ¹⁶⁶ The ECB denies that there is a proper foundation for the arguments put forward by the Commission in support of its action, as set out at paragraphs 52 to 55 of this judgment. It contends that the contested decision does not infringe the provisions of Regulation No 1073/1999 and that the application must therefore be dismissed.
- ¹⁶⁷ In the ECB's submission, the investigative powers conferred on the D-IA predated the contested decision, which in that respect had no more than a purely declaratory effect, witness in particular the use of the present indicative in the eighth recital to, and Article 2 of, the decision, which state that the D-IA 'is' responsible for conducting administrative investigations for the purpose of combating fraud and other illegal activities detrimental to the financial interests of the ECB. The only new factor introduced by the contested decision is the increased independence of the D-IA by virtue of the creation of the ECB Anti-Fraud Committee. In acting in that way, the ECB confined itself to responding, by adopting a measure of internal organisation, to the need to combat fraud in the way best adapted to its functions.
- ¹⁶⁸ Since Regulation No 1073/1999 cannot be interpreted as preventing the ECB from strengthening its own mechanisms for combating fraud, OLAF not having exclusive competence in that sphere, the contested decision does not infringe that regulation. It does not prevent OLAF from playing any role, since both systems of control can coexist.
- ¹⁶⁹ In addition, the ECB submits that Regulation No 1073/1999 does not oblige it to adopt a decision of the kind referred to in Article 4(1), second subparagraph, and

(6), as may be seen from the wording of the second subparagraph, which merely requires the institutions to 'consult each other on the rules to be laid down by such decisions'. The institutions, bodies, offices and agencies are thus free to refrain from adopting such a decision and to leave matters to the Treaties, to general principles of Community law, to the instrument regulating them and to Regulation No 1073/1999 itself. The ECB also submits that no period is laid down within which such a decision must be adopted.

170 Moreover, in adopting the contested decision, the ECB did not intend to implement Article 4(1), second subparagraph, and (6) of Regulation No 1073/1999.

171 Finally, the question as to whether, by having failed to implement those provisions, the ECB might have infringed an obligation to act under the Treaty cannot be addressed in the context of an action based on [Article 263 TFEU] but requires the introduction of an action on the basis of [Article 265 TFEU].

Findings of the Court

172 As the Commission rightly submits, the contested decision must be read in the light of its recitals.

173 It must be found in that respect that the grounds put forward in the preamble to explain why the measures included in the contested decision are being adopted reflect the ECB's intention to set up a system which is distinct from and exclusive of that provided for by Regulation No 1073/1999: the primary reason for doing so is, in the ECB's submission, that the regulation does not apply to it.

- 174 It is clear from the first recital read with the third to eighth recitals to the contested decision that the decision is intended to confer on the D-IA responsibility for carrying out investigative duties specifically devolving upon the ECB. It is also clear that the decision was adopted on the basis of the circumstance that the ECB has its own budget and its own financial resources, which correspond to its own financial interest, separate from the financial interests of the European Community, and that it is necessary, for the purpose of combating fraud, to maintain the current distribution and balance of responsibilities between the institutions of the European Community and the ECB and also to take account of the ECB's independence.
- 175 Such considerations, which underpin the arguments whereby the ECB seeks in these proceedings to establish that Regulation No 1073/1999 does not apply to it, clearly reflect a decision by the ECB to regard the regulation as inapplicable to it and also a refusal to adopt the decision provided for in Article 4(1), second subparagraph, and (6) of the regulation rather than reflecting, as the ECB suggests, no more than a desire to strengthen the mechanisms for combating fraud put in place in the exercise of its autonomous power to organise its internal affairs.
- 176 That finding is also borne out by an examination of the operative part of the contested decision.
- 177 In that regard, as is clear from a comparison between the recitals and the provisions of Regulation No 1073/1999, on the one hand, and those of the contested decision, on the other, the system provided for in the decision is, as the Advocate General stated at paragraph 87 of his Opinion, to a very large extent modelled on the system put in place by the regulation.

- 178 That circumstance, and also the fact that the contested decision, whilst omitting any reference to the powers conferred on OLAF and any operational cooperation with OLAF, none the less lays down in Article 1(9) the principle that the Anti-Fraud Committee of the ECB is to be responsible for relations with OLAF's Supervisory Committee, reflect a decision not to apply the system laid down by Regulation No 1073/1999.
- 179 Read in the light of the foregoing considerations, the statement in Article 2 of the contested decision that the D-IA is responsible for investigating and reporting on all issues related to the prevention and detection of fraud and other illegal activities must be interpreted, as the Advocate General explains at paragraph 77 of his Opinion, as seeking to confer on the D-IA a monopoly in respect of such investigations and reports.
- 180 Read in the light of the same considerations, Article 5 of the contested decision gives effect to the ECB's decision to exclude, as regards members of its staff, the obligation imposed in Article 4(6)(a) of Regulation No 1073/1999 to cooperate with, and supply information to, OLAF's servants. Without making the slightest reference to that obligation, Article 5 of the contested decision requires the staff of the ECB to inform the Anti-Fraud Committee or the D-IA of any fraud or illegal activities detrimental to the financial interests of the ECB and provides that members of staff must not suffer inequitable or discriminatory treatment as a result of having done so.
- 181 It follows from the foregoing that in adopting the contested decision, which is based on the incorrect premiss that Regulation No 1073/1999 does not apply to the ECB and which consequently gives expression to the ECB's intention to assume sole responsibility for combating fraud within it, the ECB failed to apply the system set up by the regulation and, instead of adopting the decision referred to in Article 4(1), second subparagraph, and (6) of the regulation, established a separate system peculiar to the ECB.

- 182 In failing to apply Regulation No 1073/1999 and refusing to adapt its internal procedures in such a way as to satisfy the requirements laid down by the regulation, the ECB infringed the regulation, in particular Article 4 thereof, and exceeded the margin of autonomy of organisation which it retains for the purpose of combating fraud.
- 183 Nor, contrary to the ECB's contention, is there any doubt that Article 4(1), second subparagraph, and (6) of Regulation No 1073/1999 does indeed require the institutions, bodies, offices and agencies established by, or on the basis of, the Treaties to adopt the decision referred to in those provisions. That conclusion is inevitable, as the Advocate General has shown at paragraphs 90, 91 and 94 of his Opinion, in the light of both the wording of those provisions and the 10th recital to Regulation No 1073/1999.
- 184 As to the fact that those provisions do not lay down a period within which the decision is to be adopted, it is sufficient to state that that does not have the slightest impact on the finding made at paragraph 181 of this judgment.
- 185 Furthermore, this action, which seeks annulment of the contested decision on the basis of pleas alleging infringement of Regulation No 1073/1999, which have been upheld at paragraph 181 of this judgment, cannot, contrary to the ECB's submission, be confused with the separate action which might, if necessary, have been brought against the ECB on the basis of [Article 265 TFEU] for a declaration that the ECB failed to adopt the decision required under Article 4(1), second subparagraph, and (6) of Regulation No 1073/1999.

186 It follows from all of the foregoing considerations that the Commission's action must be upheld and that the contested decision must be annulled.

Costs

187 Under Article 69(2) of the Rules of Procedure, the unsuccessful party is to be ordered to pay the costs if they have been applied for in the successful party's pleadings. Since the Commission has applied for the ECB to be ordered to pay the costs and the latter has been unsuccessful, it must be ordered to pay the costs. Under the first subparagraph of Article 69(4) of the Rules of Procedure, the Kingdom of the Netherlands, the European Parliament and the Council are to bear their own costs.

On those grounds,

THE COURT

hereby:

1. Annuls Decision 1999/726/EC of the European Central Bank of 7 October 1999 on fraud prevention (ECB/1999/5);

2. Orders the European Central Bank to pay the costs;
3. Orders the Kingdom of the Netherlands, the European Parliament and the Council of the European Union to bear their own costs.

Rodríguez Iglesias	Puissochet	Wathelet
Schintgen	Gulmann	Edward
La Pergola	Jann	Skouris
Macken	Colneric	
von Bahr	Rosas	

Delivered in open court in Luxembourg on 10 July 2003.

R. Grass

Registrar

G.C. Rodríguez Iglesias

President