OPINION OF ADVOCATE GENERAL POIARES MADURO delivered on 21 June 2007 [1]

1. The action before the Court in this case is the first direct action brought by the Republic of Poland. It raises several important and untested legal issues which justify consideration by the Grand Chamber. It is brought in the context of the protracted and difficult accession negotiations concerning the agricultural sector and reform of the common agricultural policy (hereinafter the 'CAP') and seeks clarification from the Court of the extent of the power enjoyed by Community institutions to adapt provisions of accession agreements. It will also require the Court to determine the extent of the judicial protection afforded to prospective Member States against acts adopted between the signature and entry into force of accession instruments.

I — Legal framework and facts

2. This action seeks the annulment of Article 1(5) of Council Decision 2004/281/EC of 22 March 2004 adapting the Act concerning the conditions of accession of the Czech Republic, the Republic of Estonia, the Republic of Cyprus, the Republic of Latvia, the Republic of Lithuania, the Republic of Hungary, the Republic of Malta, the Republic of Poland, the Republic of Slovenia and the Slovak Republic and the adjustments to the Treaties on which the European Union is founded, following the reform of the common agricultural policy. [2]

3. The contested decision was adopted under Article 2(3) of the Treaty between the Kingdom of Belgium, the Kingdom of Denmark, the Federal Republic of Germany, the Hellenic Republic, the Kingdom of Spain, the French Republic, Ireland, the Italian Republic, the Grand Duchy of Luxembourg, the Kingdom of the Netherlands, the Repub-

1 — Original language: Portuguese.

2 — OJ 2004 L 93, p. 1, hereinafter the 'contested decision'.

lic of Austria, the Portuguese Republic, the Republic of Finland, the Kingdom of Sweden, the United Kingdom of Great Britain and Northern Ireland (Member States of the European Union) and the Czech Republic, the Republic of Estonia, the Republic of Cyprus, the Republic of Latvia, the Republic of Lithuania, the Republic of Hungary, the Republic of Malta, the Republic of Poland, the Republic of Slovenia, the Slovak Republic on the accession of the Czech Republic, the Republic of Estonia, the Republic of Cyprus, the Republic of Latvia, the Republic of Lithuania, the Republic of Hungary, the Republic of Malta, the Republic of Poland, the Republic of Slovenia and the Slovak Republic to the European Union, [3] which provides that: '[n]notwithstanding paragraph 2, the institutions of the Union may adopt before accession the measures referred to in ... Articles 21 and 23 ... . These measures shall enter into force only subject to and on the date of the entry into force of this Treaty'. It was adopted under Article 23 of the Act concerning the conditions of accession of the Czech Republic, the Republic of Estonia, the Republic of Cyprus, the Republic of Latvia, the Republic of Lithuania, the Republic of Hungary, the Republic of Malta, the Republic of Poland, the Republic of Slovenia and the Slovak Republic and the adjustments to the Treaties on which the European Union is founded, [4] according to which 'the Council, acting unanimously on a proposal from the Commission and after consulting the European Parliament, may make the adaptations to the provisions of this Act relating to the [CAP] which may prove necessary as a result of a modification in Community rules. Such adaptations may be made before the date of accession'.

4. The applicant is complaining that Article 1(5) of the contested decision (hereinafter the 'contested provision') extended the mechanism providing for a gradual introduction of direct payments ('phasing-in' mechanism) in the new Member States to new direct payments, thus bringing about an extension to the derogations from the principle of payment in full. This extension of the system of part payments results in a considerable diminution in payments to Polish farmers in contrast to a situation where payments are made in their full amount.

5. This action is but the litigious counterpart to the challenge to the mechanism for the gradual introduction of direct payments made by the Republic of Poland at the time of the accession negotiations. On many occasions during those negotiations Poland sought to secure that access to direct payments in full would be available to Polish farmers as from the date of accession. It did so in vain. In an issues paper of 30 January 2002, [5] the Commission had advocated the progressive introduction during a transi-

3 — Signed on 16 April 2003 and entered into force on 1 May 2004 (OJ 2003 L 236, p. 17, hereinafter the 'Treaty of Accession').

4 — OJ 2003 L 236, p. 33, hereinafter the 'Act of Accession'.

5 — *Enlargement and Agriculture: successfully integrating the new Member States into the CAP*, SEC(2002) 95 final.

tional period of direct payments in the new Member States for several reasons, relating essentially to the need to pursue the restructuring under way in the agricultural sector of those States, the farmers' income situation and the requirement to avoid imbalances in relation to other economic sectors or the creation of situations in which speculative returns may be anticipated. On the basis of that recommendation, the position of the fifteen Member States in relation to the Republic of Poland at the accession negotiations, laid down in a common position of the European Union dated 31 October 2002, [6] was to decline Poland's request that direct payments be granted to its farmers after accession to the same extent as they are to farmers in the Union and progressively to introduce those payments in Poland during a transitional period. Discussions on this point continued until the accession conference held on the occasion of the European Council of Copenhagen on 12 and 13 December 2002. The conclusions of the latter state that the question of the progressive introduction of direct payments in the new Member States was resolved in line with the terms of the common position of 31 October 2002. When, following the reform of the CAP secured after the signature of the Treaty of Accession, the Commission presented, on 27 October 2003, the draft of the contested decision, the Polish Government was unable to prevent its adoption, despite its opposition expressed at all stages of the legislative procedure.

6. For a proper understanding of the legal issues involved in the dispute, it is necessary briefly to recall the legislative framework.

6 — Common position of 31 October 2002, CONF-PL 81/02.

7. Payments directly granted to farmers under income support regimes were initially governed by Council Regulation (EC) No 1259/1999 of 17 May 1999 establishing common rules for direct support schemes under the common agricultural policy; [7] the list of those direct support schemes is annexed to that regulation. Article 20 of the Act of Accession provides that 'the acts listed in Annex II to this Act shall be adapted as specified in that Annex'. The mechanism for the gradual introduction of direct payments in the new Member States was, for its part, provided for in Annex II, Chapter 6 A, point 27, to the Act, inserting Article 1a into Regulation No 1259/1999. Under Article 1a, the mechanism for gradual introduction concerns direct payments 'granted under the support regimes mentioned in Article 1'. For its part, Article 1 of Regulation No 1259/1999 defines these direct payments and refers to the annex to that regulation which lists them. [8]

8. Accordingly, on 29 September 2003, the Council adopted Regulation (EC) No 1782/2003 of 29 September 2003 establishing common rules for direct support

7 — OJ 1999 L 160, p. 113.

8 — Article 1 of Regulation No 1259/1999 provides: 'This regulation shall apply to payments granted directly to farmers under support schemes in the framework of the [CAP] which are financed in full or in part by the "Guarantee" section of the EAGGF, except those provided for under Regulation (EC) No 1257/1999.
These support schemes are listed in the Annex.'

schemes under the common agricultural policy and establishing certain support schemes for farmers and amending Regulations (EEC) No 2019/93, (EC) No 1452/2001, (EC) No 1453/2001, (EC) No 1454/2001, (EC) No 1868/94, (EC) No 1251/1999, (EC) No 1254/1999, (EC) No 1673/2000, (EEC) No 2358/71 and (EC) No 2529/2001, [9] repealing Regulation No 1259/1999 with effect from 1 May 2004. Article 1 of Regulation No 1782/2003 and Annex I thereto add to the already existing schemes direct support schemes to farmers producing nuts and energy crops and provide for additional payments under the direct support scheme to the dairy sector.

9. By the contested decision of 22 March 2004, the Council, in Article 1(5), replaced the provisions amending Regulation No 1259/1999 in point 27 of Chapter 6 A of Annex II to the Act of Accession with provisions amending Regulation No 1782/2003, in order to take account of the amendments to the CAP as a result of the adoption of the latter regulation, occurring after the signature of the accession instruments. Point 27 inserted Article 143a into Regulation No 1782/2003, providing for the gradual introduction, in the new Member States, according to a timetable, of 'direct payments', that is to say not only payments which already appear in Annex I to the Regulation but also those subsequently inserted into that Annex.

10. According to the Republic of Poland, the contested provision unlawfully extends the system of part payments. It no longer applies only to the support instruments exhaustively enumerated in the Annex to Regulation No 1259/1999. It henceforth concerns all 'direct payments' in general, that is to say also new direct payments. The latter include the payments already introduced by Regulation No 1782/2003, namely the payments in the sectors of nuts and fuel crops and the additional payments in the dairy sector. They also include the direct payments to be subsequently put in place and, therefore, inserted in Annex I to Regulation No 1782/2003.

11. It is for that reason that the applicant has brought this action for annulment which it is essentially basing on three pleas. But, before examining the merits of the action, it is appropriate first to express a view on its admissibility.

9 — OJ 2003 L 270, p. 1.

II — Admissibility

A — *A strict reading of the conditions as to admissibility*

1. Computation of the time-limit for bringing an action

12. In this case, on 23 September 2004, the Council raised a plea of inadmissibility in regard to the action under Article 91 of the Rules of Procedure, arguing that it was manifestly inadmissible for being out of time. The Court decided to rule on this plea at the same time as the substance.

13. Certainly the admissibility of the action brought by the Republic of Poland is not free from difficulty. Under the Court's case-law, which ordinarily is particularly vigilant in regard to the observance of procedural time-limits and, more broadly, the conditions as to admissibility, the action would appear to be out of time. That is what I will note in the first instance. Yet the principles underlying the legal order of the Union, in particular the principle of effective judicial protection and the way it has been progressively interpreted by the Court, should, in my opinion, ultimately militate in favour of a different solution. I will then go on to set out the possible ways of accepting the admissibility of the action.

14. The contested decision was published in the *Official Journal of the European Union* of 30 March 2004. The Republic of Poland lodged its application on 28 June 2004. However, under the fifth paragraph of Article 230 EC, proceedings 'shall be instituted within two months of the publication of the measure ... or, in the absence thereof, on the day on which it came to the knowledge of the [plaintiff]'. Under the traditional rules for computing time-limits, the applicant is therefore time-barred.

15. As is clear from the fifth paragraph of Article 230 EC and is confirmed by the case-law of the Court, [10] the criterion of the date on which the measure came to the notice of the person concerned is of secondary importance in relation to the criterion of the date of publication. The date to be taken into account in determining the starting point from which the time-limit begins to run is therefore the date of publication of the act, even if, in the present case, the applicant had knowledge of the contents of the contested decision before that date, as is borne out by the fact that at every stage of the legislative

10 — See, in particular, Case C-309/95 *Commission* v *Council* [1998] ECR I-655; Case C-122/95 *Germany* v *Council* [1998] ECR I-973, paragraphs 34 to 39; and Case T-14/96 *BAI* v *Commission* [1999] ECR II-139, paragraphs 32 to 36.

process that ended in the adoption of that decision it opposed its adoption by sending numerous communications and observations to the Council and the Commission.

16. The contested decision was published in OJ L 93 of 30 March 2004. There is a presumption that the date of publication is the date appearing on the relevant issue of the Official Journal. [11]

17. Yet in this case the applicant maintains that the edition of the Official Journal of 30 March 2004 was not available on that date in the official languages of the ten new Member States, even though under Article 8 of the contested decision it is to be drawn up in the nine official languages of the acceding States; further, and in any event, the Polish edition of the Official Journal was forwarded to the Polish public authorities only much later, on 27 July 2005. Since publication in the official languages of the new Member States only took place well after 30 March 2004, the applicant even infers from this that the Council deliberately pre-dated the number of the Official Journal in which the contested decision was published.

18. Those arguments cannot prevail. Indeed it is settled case-law that the publication of a legislative measure is deemed complete only if the number of the Official Journal in which it was published is available in all the official languages. [12] It is also the case that if it were shown that the date on which the number was in fact available does not correspond with the date appearing on it, only the date of actual publication may be taken into account, for a 'fundamental principle in the Community legal order requires that a measure adopted by the public authorities shall not be applicable to those concerned before they have the opportunity to make themselves acquainted with it'. [13] Thus, in *Germany* v *Council*, [14] the contested measure had been published in the *Official Journal of the European Communities* of 23 December 1994, but that Official Journal was available only from 13 February 1995. It was the latter date which was therefore taken into consideration as the starting point of the period for bringing proceedings. It is true, finally, that were it to be shown that the issue of the Official Journal in which the contested measure was published was deliberately pre-dated, that measure should be annulled for breach of the principle of legal certainty. [15]

19. None the less, it is clear from information provided by the Director-General of the

11 — See Case 98/78 *Racke* [1979] ECR 69, paragraph 15, and Case 99/78 *Decker* [1979] ECR 101, paragraph 3.

12 — Ibid.

13 — Ibid.

14 — Cited above. See also Case C-337/88 *SAFA* [1990] ECR I-1, paragraph 12, and Case T-115/94 *Opel Austria* v *Council* [1997] ECR II-39, paragraph 127.

15 — See to this effect *Opel Austria* v *Council*, paragraphs 128 to 134.

Office for Official Publications of the European Communities in reply to a question posed by the Court [16] that OJ L 93 of 30 March 2004 was indeed available in all the languages of the new Member States as from that date. It is true that the applicant has challenged the veracity of that information, but that reply cannot be called in question in the absence of sound evidence, which has not been adduced before the Court. The fact that this issue of the Official Journal was available for consultation in Polish on the EurLEX internet site only on 15 December 2004 is immaterial, inasmuch as the only authentic form of publication of legislative texts is the printed version. Nor, further, can it be disputed that publication is deemed to have taken place and, accordingly, the Official Journal is deemed to be available on the date when the copy of the Official Journal reproducing the measure is actually available in all the Community languages at the Publications Office in Luxembourg. The reason for this is that '*it is important that the date on which a regulation is to be regarded as published should not vary according to the availability of the* Official Journal of the [European] Communities *in the territory of each Member State*' and that '*the unity and uniform application of Community law require that ..., save as otherwise expressly provided, a regulation should enter into force on the same date in all the Member States, regardless of any delays which may arise in spite of efforts to ensure rapid distribution of the Official Journal throughout the Community*'. [17] Moreover, the allowance of 15 days from the *dies a quo* under Article 81(1) of the Rules of Procedure of the Court as well as the period of 10 days on account of distance are specifically to make a flat-rate allowance for the vagaries inherent in the distribution of the Official Journal in order to allow all applicants fully to utilise the two-month period made available to them by the EC Treaty. [18]

20. In this case, the starting point of the time-limit for bringing proceedings is therefore 30 March 2004. Accordingly, the period is calculated in the following way. Under Article 80(a) of the Rules of Procedure, 'a period expressed in days, weeks, months or years is to be calculated from the moment at which an event occurs or an action takes place, the day during which that event occurs or that action takes place shall not be counted as falling within the period in question'. Moreover, the *dies a quo* or starting point of the period of two months for bringing proceedings provided for in the fifth paragraph of Article 230 EC was deferred, under Article 81(1) of the Rules of Procedure of the Court, [19] from 30 March 2004 to midnight on 14 April 2004. Further-

16 — See order of 15 November 2006 in Case C-273/04 *Poland* v *Council*, not published in the ECR.

17 — Judgments cited above in *Racke*, paragraph 16, and *Decker*, paragraph 4. My emphasis.

18 — See on this Opinion of Advocate General Reischl in Case 88/76 *Société pour l'exportation des sucres* v *Commission* [1977] ECR 709, 731, and Case 76/79 *Könecke* v *Commission* [1980] ECR 665, 683.

19 — Article 81(1) of the Rules of Procedure in force at the time when the action was brought was in the following terms: 'The period of time allowed for commencing proceedings against a measure adopted by an institution shall run from the day following the receipt by the person concerned of notification of the measure or, where the measure is published, from the 15th day after publication thereof in the *Official Journal of the European Communities*.'

more, under Article 80(1)(b) of the Rules of Procedure, [20] a period expressed in months ends with the expiry of the same day in the last month as the *dies a quo*. That period for bringing proceedings therefore ended on the expiry of 14 June 2004. Regard being had also to the one-off period on account of distance of 10 days, which is to be added to the procedural time-limits under Article 81(2) of the Rules of Procedure, [21] the total period allowed for bringing proceedings expired at midnight on Thursday 24 June 2004, and that date is not on the list of statutory holidays laid down by Article 1 of the annex to the Rules of Procedure.

21. The application was received at the Court Registry on 28 June 2004. Accordingly it was lodged out of time.

2. The arguments deployed by the applicant in favour of determining the starting point of the period for bringing proceedings to be the date of accession

22. The applicant, supported by the intervening States, maintains that the *dies a quo* should be the date of entry into force of the Treaty of Accession, that is to say 1 May 2004. It invokes several arguments in support. The first two may rapidly be disposed of.

23. The Republic of Poland submits first that the measures provided for in Article 23 of the Act of Accession take effect and assume a mandatory nature on the date of and subject to entry into force of the Treaty of Accession. That is correct and is borne out, moreover, by Article 9 of the contested decision. [22] However, that does not mean that the measures provided for in Article 23 cannot be opposed once they have been published. It is important not to confuse the challengeability of a measure which is dependent on the completion of all the requisite formalities as to publicity and causes the period for bringing proceedings to start running, on the one hand, with the producing of legal effects, namely entry into force, which may be delayed, on the other. The fact that the first paragraph of Article 254 EC lays down the date of entry into force of acts of secondary law which are subject to a mandatory publication requirement as the 20th day following publication, where no other date is expressly fixed, has therefore never been understood as preventing the time-limit for bringing proceedings

20 — Worded as follows:
'a period expressed in weeks, months or in years shall end with the expiry of whichever day in the last week, month or year is the same day of the week, or falls on the same date, as the day during which the event or action from which the period is to be calculated occurred or took place. If, in a period expressed in months or in years, the day on which it should expire does not occur in the last month, the period shall end with the expiry of the last day of that month'.

21 — Since amendment of that provision of the Rules of Procedure of 28 November 2000 (OJ 2000 L 322, p. 1).

22 — Article 9 of the contested decision provides as follows:
'This Decision shall take effect on 1 May 2004 subject to the entry into force of the Treaty concerning Accession of the Czech Republic, the Republic of Estonia, the Republic of Cyprus, The Republic of Latvia, the Republic of Lithuania, the Republic of Hungary, the Republic of Malta, the Republic of Poland, the Republic of Slovenia, and the Slovak Republic of the European Union.'

from starting to run on the day of publication.

24. In support of determining the *dies a quo* of the period for bringing proceedings to be 1 May 2004, the Republic of Poland also refers to Article 58 of the Act of Accession [23] and Article 8 [24] and 9 of the contested decision. Under those provisions, measures adopted by the institutions prior to accession, including the decision at issue, are drawn up in the nine languages of the new Member States and are valid in those languages with effect from and subject to entry into force of the Treaty of Accession. According to the applicant, as a result the Polish version of the contested measure becomes valid and consequently the issue of the Official Journal reproducing it is deemed available only with effect from 1 May 2004. Here again, this reasoning does not carry conviction. The fact that the contested decision states that they are equally authentic in the twenty-one languages simply means that the measure is to be drawn up in all the official language versions and that none can take precedence over another. On the supposition that only entry into force of the Treaty of Accession confers authentic validity on the different language versions, that would in any event be true of the versions in all twenty-one languages of the existing and new Member States.

25. The objections to prescription which the applicant and the intervening States found on the principle of the rule of law, the right to effective judicial protection and non-discrimination are weightier. To justify the fact that the period for bringing proceedings to annul a measure adopted under Article 23 of the Treaty of Accession runs only from 1 May 2004 for the new Member States, they claim in particular that, on the date of publication of the measure, the applicant was not yet a member of the Union and therefore did not have standing to bring an action for annulment. Consequently, if the period for bringing proceedings is deemed to run from the date of publication that would enable the institution issuing a measure to evade review of the lawfulness of a measure adopted under Article 23 of the Act of Accession, by adopting and publishing it at least two months before the acceding states acquire the status of member. However, the principle of a community based on the rule of law entails the putting in place of a full and effective system for reviewing the legality of Community measures and of judicial protection. In the present case, in light of the date of publication of the contested decision, the Republic of Poland has available to it only a truncated period for bringing proceedings, which undermines the effect-

23 — Article 58 of the Act of Accession provides:
'The texts of the acts of the institutions, and of the European Central Bank, adopted before accession and drawn up by the Council, the Commission or the European Central Bank in the Czech, Estonian, Hungarian, Latvian, Lithuanian, Maltese, Polish, Slovak and Slovenian languages shall, from the date of accession, be authentic under the same conditions as the texts drawn up in the present eleven languages. They shall be published in the *Official Journal of the European Union* if the texts in the present languages were so published.'

24 — Article 8 of the contested decision provides:
'The Decision shall be drawn up in the Spanish, Czech, Danish, German, Estonian, Greek, English, French, Irish, Italian, Latvian, Lithuanian, Hungarian, Maltese, Dutch, Polish, Portuguese, Slovak, Slovenian, Finnish and Swedish languages, all twenty-one texts being equally authentic.'

iveness of its right of action and discriminates against it in relation to existing Member States.

26. If, as I will go on to show, the principles of a community based on the rule of law and the right to an effective judicial remedy relied on by the applicant must in fact lead to a finding that the action is admissible, that does not seem to me to be the case in relation to the argument based on the principle of non-discrimination. The Republic of Poland maintains that deeming the point of departure of the period for bringing proceedings to be the date of publication of the contested decision would have the consequence of leaving the applicant with only a truncated, shortened period, which would discriminate against it in relation to existing Member States in the exercise of its right to an effective judicial remedy. However, I find it hard to see what would constitute the alleged discrimination. Existing and new Member States were granted the same period for bringing proceedings as from the date of publication of the contested measure. Certainly, on that date, the future Member States did not yet have the status of privileged applicants and were entitled only to bring an action under the fourth paragraph of Article 230 EC to challenge the measure. And it is true that the application of the requirements laid down by that provision meant that the admissibility of any action by them would not be free from problems, unlike in the case of existing Member States. But that difference in treatment merely stems from the fact that the status of Member State which confers equal rights on the new Member States is acquired only from the date of entry into force of the Act of Accession. In the view of the Council and the Commission, to deem the *dies a quo* to be the date of entry into force of the Act of Accession for the new Member States would even, on the pretext of placing them on an equal footing with the existing Member States in regard to the period available to them for bringing proceedings as privileged applicants, be favouring them over existing Member States in regard this time to the starting point of the period for bringing proceedings.

B — *Approaches to a finding in favour of admissibility*

27. As has been seen, the strict application of Article 230 EC could lead to a finding that the application by the Republic of Poland is inadmissible. However, a line of authorities from the Court exists in parallel which reveals a more generous conception of the admissibility of actions. In my view, certain fundamental principles of the legal order of the Union, in particular the principle of the right to effective judicial protection, militate in favour of giving precedence to that line of authorities.

28. The point of departure must be the principle of a community based on the rule of law. As is well known, the judgment in *Les Verts* v *Parliament*[25] put it in the following terms:

'... the European Economic Community is a community based on the rule of law, inasmuch as neither its Member States nor its institutions can avoid a review of the question whether the measures adopted by them are in conformity with the basic constitutional charter, the Treaty. In particular, in Articles 230 EC and 241 EC, on the one hand, and in Article 234 EC, on the other, the Treaty established a complete system of legal remedies and procedures designed to permit the Court of Justice to review the legality of measures adopted by the institutions. Natural and legal persons are thus protected against the application to them of general measures which they cannot contest directly before the Court by reason of the special conditions of admissibility laid down in [the second paragraph of Article 230 EC]. Where the Community institutions are responsible for the administrative implementation of such measures, natural or legal persons may bring a direct action before the Court against implementing measures which are addressed to them or which are of direct and individual concern to them and, in support of such an action, plead the illegality of the general measure on which they are based. Where implementation is a matter for the national authorities, such persons may plead the invalidity of general measures before the national courts and cause the latter to request the Court of Justice for a preliminary ruling'.

29. Thus construed, the concept of a community based on the rule of law has a dual dimension:[26] a legislative dimension which entails compliance with the Treaty of measures of the institutions and Member States; a judicial dimension affording judicial protection against unlawful Community measures. As an '[e]lement of a community based on the rule of law',[27] the right to an effective judicial remedy was recognised by the Court immediately after the judgment in *Les Verts* v *Parliament*. Drawing inspiration from the constitutional traditions shared by the Member States and from Articles 6 and 13 of the European Convention for the Protection of Human Rights and Fundamental Freedoms, signed on 4 November 1950, the Court elevated it to the status of a general principle of Community law.[28] The objective was to avoid the creation of powers beyond the reach of the law and the courts and to ensure structural congruity in that connection: the transfer of state powers must go hand in hand with the conferral of powers of review and rights of action. That notion is now, as we know, enshrined in Article 6(1) EU. Initially, only the domestic courts were

25 — Case 294/83 *Les Verts* v *Parliament* [1986] ECR 1339, paragraph 23.

26 — See Simon, D., 'La Communauté de droit', *Réalités et perspectives du droit communautaire des droits fondamentaux*, Bruylant, Bruxelles, 2000, p. 85.

27 — Case T-177/01 *Jégo-Quéré* v *Commission* [2002] ECR II-2365, paragraph 41.

28 — See Case 222/84 *Johnston* [1986] ECR 1651, paragraph 18.

subject to the requirements flowing from this principle. [29] But, once the opportunity was afforded to it, the Court progressively set about extending its scope to the judicial protection afforded by the Community Courts. Thus, it verified whether the Court of First Instance had not infringed the principle of the right to an effective judicial remedy by holding that a notification could not form the subject-matter of an action for annulment; [30] and held that the general principle of the right to complete and effective judicial protection warrants the grant of interim measures 'in order to ensure that there is no lacuna in the legal protection provided by the Court of Justice'. [31]

30. This principle of the right to an effective judicial remedy is construed as prohibiting, if not any restriction, then at least any defect in judicial protection. That judicial dictate has recently been reiterated by the Court in the *Eurojust* case. [32] Albeit it declared inadmissible the actions for annulment brought against several procedures for the recruitment by Eurojust of temporary agents, it stated — doubtless only for that reason — that that did not result in an infringement of the right to effective judicial protection. The measures at issue were not in fact exempt from any judicial review, since the main persons concerned, namely the candidates for the different posts mentioned in the contested recruitment procedures, had available to them access to the Community judicature under the conditions laid down in Article 91 of the Staff Regulations of Officials of the European Communities and, in the event of such action, it was admissible for the Member States to intervene in the dispute and, if appropriate, to bring an appeal against the judgment of the Court of First Instance.

31. It follows from this interpretation of the right to effective judicial protection that where a right of action is structured in such a way as to leave the applicants without recourse, the Court has never recoiled from applying a broad interpretation of the conditions governing admissibility.

32. That approach is particularly clear in regard to the action for annulment under Article 230 EC. The Court does not hesitate to apply a broad interpretation of the terms of its competence in order to secure access to the Community judicature; that is true in regard both to the concept of an actionable

29 — See Case C-432/05 *Unibet* [2007] ECR I-2271.

30 — See Case C-282/95 P *Guérin Automobiles* v *Commission* [1997] ECR I-1503, paragraphs 33 to 40.

31 — Orders in Cases C-399/95 R *Germany* v *Commission* [1996] ECR I-2441, paragraph 46, and C-445/00 R *Austria* v *Council* [2001] ECR I-1461, paragraph 111.

32 — Case C-160/03 *Spain* v *Eurojust* [2005] ECR I-2077.

measure and persons having a right of action. Thus, in the *AETR*[33] case, the Court extended the action for annulment, beyond the classic acts adopted by the institutions, to all measures taken by the institutions, whatever may be their nature or form, which seek to produce legal effects, justifying that solution by reference to its duty to ensure observance of the law, that is to say judicial protection against unlawful Community measures. In *Les Verts* v *Parliament*,[34] it should be recalled, even though the letter of the Treaty did not mention the measures of that institution as being amenable to an action for annulment, the Court held that proceedings could be brought against the Parliament on the basis of the principle of a community based on the rule of law which entails there being a full system of review of the lawfulness of measures adopted by the institutions.

33. The broad notion of 'individually concerned' applied in certain cases seems also to have been impliedly motivated by the concern to afford judicial protection.[35] Thus, in *Piraiki-Patraiki* v *Commission*,[36] doubtless the Court took account of the fact that the applicants who were seeking annulment of the Commission decision authorising the French Government to put in place import quotas for cotton originating in Greece were all Greek cotton exporters who would have found it difficult to challenge the national measure addressed solely to the importers; in the *Codorniu* v *Council* case,[37] deeming admissible a claim by an individual seeking annulment of a genuine regulation causing it particularly severe loss, doubtless it took into consideration the fact that the applicants had no other recourse than to contravene that regulation in order to challenge its validity,[38] in the context of procedures leading to the application of the penalties provided for by national law; in *Cofaz and Others* v *Commission*,[39] ruling that competing undertakings were individually concerned by a decision declaring aid compatible with the common market, it was doubtless influenced by Advocate General VerLoren van Themaat, who argued that, since Article 87(1) does not have direct effect, Community law affords those undertakings 'no alternative legal protection by national courts'.[40] Finally, in *Allied Corporation and Others* v *Commission*[41] the Court acknowledged that the producers and exporters concerned had the right to seek the annulment of regulations imposing anti-dumping duties; the Court this time expressly held that that right 'does not give rise to a risk of duplication of means of redress since it is possible to bring an action in the national courts only following the collection of an anti-dumping duty which

33 — Case 22/70 *Commission* v *Council* ('*AETR*') [1971] ECR 263, paragraphs 40 and 41.

34 — Cited above, paragraphs 23 to 25.

35 — See Lanaerts, K., 'The legal protection of private parties under the EC Treaty: a coherent and complete system of judicial review?', *Mélanges en l'honneur de Giuseppe Federico Mancini*, ed. Dott. A. Giuffre, Milan, 1998, p. 591, 608 to 613.

36 — Case 11/82 [1985] ECR 207.

37 — Case C-309/89 *Codorniu* v *Council* [1994] ECR I-1853.

38 — See Moitinho de Almeida, J.C., 'Le recours en annulation des particuliers: nouvelles refléxions sur l'expression "la concernent ... individuellement"', Mél. Ulrich Everling, Nomos Verlasgesellschaft, Baden-Baden, 1995, p. 849, 868.

39 — Case 169/84 *COFAZ* v *Commission* [1986] ECR 391.

40 — Opinion in *COFAZ* v *Commission*, at p. 403.

41 — Joined Cases 239/82 and 275/82 *Allied Corporation* v *Commission* [1984] ECR 1005, paragraph 13.

is normally paid by an importer residing within the Community'.

34. Furthermore, where judicial protection is at stake, the Court does not hesitate to go beyond the wording of Article 230 EC and to fill the lacunae in the text. As Advocate General Mancini emphasised, 'the obligation to observe the law ... takes precedence over the strict terms of the written law. Whenever required in the interests of judicial protection, the Court is prepared to correct or complete rules which limit its powers in the name of the principle which defines its mission'. [42] Illustrative of this case-law which is above all faithful to the principle of a community founded on the rule of law from which the right to an effective judicial remedy stems is the judgment in *Les Verts* v *Parliament*. Although the letter of Article 173 of the EC Treaty (now, after amendment, Article 230 EC) did not mention the Parliament as a defendant to proceedings, the Court held that 'the spirit of the Treaty as expressed in Article [220 EC]' and its 'system' give rise to the principle of a community based on the rule of law with the possibility of a direct action against all measures adopted by the institutions seeking to produce legal effects in regard to third parties; consequently, it upheld the passive participation by the Parliament in annulment proceedings. [43] Also worthy of mention is the recognition by the Court of the active legal capacity of the Parliament in regard to actions for annulment, notwithstanding the fact that Article 173 of the EC Treaty does not mention that institution in the list of applicants. That recognition was prompted by the uncertain, not to say ineffective, nature of judicial protection of the prerogatives of the Parliament entrusted to the other institutions, Member States and individuals. [44]

35. It could, it is true, be countered that the judgment in *Unión de Pequeños Agricultores* v *Council* [45] called a halt to this boldness in favour of the community founded on the rule of law and gave way today to a judicial policy more conscious of the need for self-restraint. The Court no longer regards itself as entitled to depart from the letter of the Treaty where the latter appears to undermine the right to effective judicial protection, for fear of encroaching on the treaty-revising power enjoyed by the Member States. In actual fact, that does not seem to me to be the construction to be placed on that judgment. [46] The refusal by the Court to disregard the conditions governing admissibility imposed by the fourth paragraph of Article 230 EC on actions for annulment by individuals may be accounted for by the fact that observance of those conditions, though entailing a limitation of judicial protection, did not preclude it altogether and that,

42 — Opinion in *Les Verts* v *Parliament*, cited above, at p. 1350.

43 — Judgment in *Les Verts* v *Parliament*, cited above, paragraphs 23 to 25.

44 — Case C-70/88 *Parliament* v *Council* [1990] ECR I-2041.

45 — Case C-50/00 P [2002] ECR I-6677.

46 — See my Opinion in Case C-141/02 P *Commission* v *max.mobil* [2005] ECR I-1283, point 48, in particular footnote 50.

accordingly, improvements to the 'system of judicial review of the legality of Community measures'[47] must remain the responsibility of the Member States. In fact, the defects in judicial protection stemming from the fact that the applicants did not have the capacity to bring an action for annulment was palliated by the pressing reminder to the Member States and their courts of the obligation to provide for and apply a system of rights of action and procedures securing observance of the right to effective judicial protection.[48] That analysis appears in my view to be supported by the solution arrived at recently in the case of *Gestoras Pro Amnistía and Others* v *Council*,[49] in which the Court ruled inadmissible an action founded on non-contractual liability seeking to obtain restitution in respect of loss allegedly suffered as a result of the listing of persons involved in acts of terrorism, which list was appended to a common position adopted under Title VI of the EU Treaty. As regards the applicants complaining of an infringement of the right to effective judicial protection, it is true that the Court deferred to a possible revision of the Treaties the task of putting in place a system of non-contractual liability within the framework of the third pillar. It was none the less careful to underline that, notwithstanding that limitation on its competences under Article 35 EU and Title VI of the EU Treaty, the applicants were not deprived of all judicial protection. In that connection and although the wording of Article 35 EU does not provide for the review of common positions, the Court has declared itself competent in particular to rule on the interpretation or validity of a common position intended to produce legal effects in regard to third parties; it also recalled the duty incumbent on the Member States and, specifically, on their courts to interpret and apply the internal rules of procedure governing the bringing of actions in a way which allows natural and legal persons to challenge before the courts the lawfulness of any decision or of any other national measure relating to the drawing up or application to them of an act of the European Union and to seek reparation of losses suffered, if applicable.

36. It is in faithfulness to that line of case-law that I propose that the Court should go beyond the wording of the fifth paragraph of Article 230 EC and find the application brought by the Republic of Poland admissible. In light of this proposition, I must immediately deal with three objections.

37. The first is the objection, advanced by the Council, that the Court cannot be expected to do what the parties to the Treaty of Accession refused to do. They were entirely at liberty to provide for temporary derogations to the founding treaties. Indeed the Act of Accession contained a good number of transitional provisions which derogate from the treaties and secondary law. In particular, special and simplified procedures were introduced to take account of the accession and of the need to adjust the acts of the institutions to simpler procedures than those which normally apply. If the parties to the Treaty of Accession had been of the view that the provisions of that Treaty

47 — *Unión de Pequeños Agricultores* v *Council*, cited above, paragraph 45.

48 — Ibid., paragraphs 41 and 42.

49 — Case C-354/04 P [2007] ECR I-1579.

were not such as properly to ensure judicial protection in the new Member States they could very well have inserted the necessary provisions. Such provisions could have provided that by way of derogation the time-limit for bringing proceedings for the new Member States would not begin to run until the date of accession and not from the date of the publication of acts. It must however be noted that they did not choose to do so and no special rule or other transitional provision derogating from the provisions of the fifth paragraph of Article 230 EC, or from those of the Rules of Procedure relating to time-limits for bringing actions, was approved at the accession negotiations.

38. To my mind that objection does not stand up to scrutiny, as it could have been made in respect of all the earlier legal arguments. It seems to me to be difficult to interpret the silence of the Treaty of Accession as an expression of the parties' determination to reject any derogation from the *dies a quo* laid down by the fifth paragraph of Article 230 EC. It rather more reflects the fact that they had not thought about the shortfall in judicial protection in the new Member States arising, in regard to acts adopted between the signature and entry into force of the Treaty of Accession, as a result of determining the date of their publication as the date from which the time-limit for bringing proceedings begins to run. In any event, it is important to remember that the fact that the parties did not deem it necessary to amend the wording of Article 173 of the EC Treaty despite a proposal to that effect from the Commission during the negotiations for the Single European Act did not prevent the Court from investing the Parliament with active and passive legal capacity with regard to actions for annulment.

39. The second objection raised in particular by the Council is the claim that there is a priori nothing to prevent the Republic of Poland from bringing an action for annulment from the date of publication of the contested decision. It could not, it is true, rely on the second paragraph of Article 230 EC for this purpose. But it was possible for it to rely on the fourth paragraph of Article 230 EC.

40. The situation outlined is undoubtedly new in the case-law. [50] An initial clue is none the less provided by approaches to determining who may be an intervener under Article 40 of the Statute of the Court of Justice. [51] Under this provision a non-Member State may be allowed to intervene, as the

50 — See however Case T-319/05 *Swiss Confederation* v *Commission*, pending before the Court of First Instance.

51 — Which is worded as follows:
'Member States and institutions of the Communities may intervene in cases before the Court.
The same right shall be open to any other person establishing an interest in the result of any case submitted to the Court, save in cases between Member States, between institutions of the Communities or between Member States and institutions of the Communities.
...'

second paragraph of Article 40 of the Statute entitles 'any other person' to do so; [52] and the exclusion in that provision of intervention by any person other than the Member States and the Community institutions in disputes between Member States, between Community institutions or between Member States and Community institutions cannot be claimed to apply. [53] In other words, a non-Member State which cannot claim the status of litigant conferred on the Member States by the Community system may bring proceedings under the right of action conferred on legal persons.

41. That application of Article 40 of the Statute of the Court of Justice is corroborated by the approaches concerning the right to bring annulment proceedings enjoyed by overseas countries and territories, regions and autonomous communities. '[T]he purpose of the fourth paragraph of Article 173 of the Treaty ... is to provide appropriate judicial protection for all persons, natural or legal, who are directly and individually concerned by acts of the Community institutions. Standing to bring an action must accordingly be recognised in the light of that purpose alone and the action for annulment must therefore be available to all those who fulfil the objective conditions prescribed, that is to say, those who possess the requisite legal personality and are directly and individually concerned by the contested measure. This must also be the approach where the applicant is a public entity which satisfies those criteria'. [54] Accordingly, where a region has legal personality under its domestic law, it must in that capacity be regarded as a legal person for the purposes of the fourth paragraph of Article 230 of the EC Treaty [55] and may in principle bring an action for annulment. [56] The same reasoning must apply to the Republic of Poland, which under its own domestic law has legal personality and, like any state, is recognised by international law as having international personality. It therefore had capacity from the date of publication of the contested measure to bring proceedings before the Court to challenge an act adversely affecting it. Plainly, its right of action under the fourth paragraph of Article 230 EC was not unlimited. It was governed by the conditions as to admissibility: this is to verify that it had a proper interest in challenging the contested decision and thus to prevent the right of action in question from being transformed into a kind of *actio popularis*. [57] Those conditions dictate inter alia that there must a direct and individual link with a contested measure of which it is not an addressee. In

52 — See order in Joined Cases 91/82 R and 200/82 R *Chris International Foods* v *Commission* [1983] ECR 417. It will be observed that the fact that a decision addressed by the Commission to the Kingdom of Sweden, which at the time was a non-Member State, was found to be able to be challenged as a 'decision addressed to another person' within the meaning of the fourth paragraph of Article 230 EC also militates in favour of the view that the term 'person' as used in the contested Community provisions may also relate to a non-Member State (see Case C-135/92 *Fiskano* v *Commission* [1994] ECR I-2885).

53 — See order in Case T-319/05 *Swiss Confederation* v *Commission*, cited above.

54 — Case T-288/97 *Regione autonoma Friuli-Venezia Giulia* v *Commission* [1999] ECR II-1871, paragraph 41.

55 — See, for example, Case T-214/95 *Vlaams Gewest* v *Commission* [1998] ECR II-717, paragraph 28.

56 — See, for example, Cases C-452/98 *Nederlandse Antillen* v *Council* [2001] ECR I-8973, paragraph 51, and C-142/00 P *Commission* v *Nederlandse Antillen* [2003] ECR I-3483, paragraph 59; Joined Cases T-132/96 and T-143/96 *Freistaat Sachsen and Others* v *Commission* [1999] ECR II-3663, paragraph 81, and order in Case T-37/04 R *Região autónoma dos Açores* v *Council* [2004] ECR II-2153, paragraph 112.

57 — See to this effect *Regione autonoma Friuli-Venezia Giulia* v *Commission*, paragraph 49.

that connection, the fact that the Republic of Poland was designated by name in the Act of Accession implemented by the contested measure does not exempt it from the requirement of establishing a direct and individual link. The Court has already held that the fact that an overseas country or territory ('OCT') is mentioned in the fourth part and in Annex IV to the EC Treaty does not exempt it from having to prove that it is individually and directly concerned by an implementing measure adopted. [58] In fact the individual-link requirement could in this case preclude the admissibility of the application brought by the Republic of Poland.

42. It is clear from the Court's case-law that '[I]n order to determine whether an act is of general application or not, it is necessary to consider its nature and the legal effects which it is intended to, or does in fact produce'. [59] In this case, the contested provision seeks to replace the provisions of Annex II to the Act of Accession which amend Regulation No 1259/1999 with provisions amending Regulation No 1782/2003, so as to take account of changes made to the CAP by the latter regulation adopted after signature of the accession instruments. The contested provision extends the mechanism for introducing gradual direct payments in the new Member States to new direct payments. It therefore 'applies to objectively determined situations and produces legal effects with regard to categories of persons described in a generalised and abstract manner', [60] namely all farmers in the new Member States who grow agricultural crops which are eligible for new direct payments. It is therefore a measure of general application. The fact that the Republic of Poland is expressly mentioned in the contested provision cannot call in question its general application: the other new Member States are also mentioned in the provision which applies without distinction to all the new Member States and to all farmers established there. [61] Nor is the legislative nature of the contested measure a bar to an action for annulment brought by a legal or natural person where that person is directly and individually concerned by it. [62]

43. In that connection the evidencing of an individual link between the applicant and the

58 — See *Nederlandse Antillen* v *Council*, cited above, paragraphs 47 to 50.

59 — Case 307/81 *Alusuisse Italia* v *Council and Commission* [1982] ECR 3463, paragraph 8; *Nederlandse Antillen* v *Council*, cited above, paragraph 52.

60 — To repeat the formula habitually recalled by the case-law to describe a legislative act: see, for example, Joined Cases 789/79 and 790/79 *Calpak and Societa Emiliana Lavorazione Frutta* v *Commission* [1980] ECR 1949, paragraph 9; order in Joined Cases 233/86 to 235/86 *Champlor and Others* v *Commission* [1987] ECR 2251, paragraph 9; and Case T-398/94 *Kahn Scheepvaart* v *Commission* [1996] ECR II-477, paragraph 39.

61 — See on this *Commission* v *Nederlandse Antillen*, cited above, paragraph 6; order in *Região autónoma dos Açores* v *Council*, cited above, paragraph 113.

62 — See *Codorniu* v *Council*, cited above, paragraph 19.

contested measure is subject always [63] to meeting the *Plaumann* test. Under that test, an act of general application can concern natural or legal persons only if it 'affects them by reason of certain attributes which are peculiar to them or by reason of circumstances in which they are differentiated from all other persons and by virtue of these factors distinguishes them individually just as in the case of the person addressed'. [64] The important question is therefore whether the Republic of Poland is affected by the contested provision by reason of certain attributes peculiar to it or by reason of circumstances which differentiate it from all other persons. The case-law on the capacity of overseas countries and territories, regions and autonomous communities provides valuable insights in this connection as well. Thus, differentiation of a regional authority cannot be inferred from the unfavourable socio-economic repercussions of the contested measure on undertakings based in that region. Accordingly, the Court held that 'the general interest which an OCT, as an entity responsible for economic and social affairs within its jurisdiction, may have in obtaining a result that is favourable for its economic prosperity is not sufficient on its own to enable it to be regarded as being ... individually concerned'. [65] Even the obligation imposed on the rule-making body under the enabling measure to take account of the negative repercussions which the measure in contemplation is likely to have on the economy of the region concerned and the undertakings in question are not sufficient to establish that that region is individually concerned. So the Court held, in relation to the Netherlands Antilles, in a situation where the protective measures challenged by that OCT in annulment proceedings had been adopted under a provision requiring the rule-making body to take account of the socio-economic consequences which such measures may entail for the OCTs concerned. [66]

44. Doubtless that case-law can be subjected to criticism. [67] However, this does not seem to me to be an appropriate occasion to question and challenge it. To use this case to change the case-law on whether certain regional authorities are individually affected would be to relax the assessment of the requirements as to admissibility in order to oppose the admissibility of this application on the ground that the applicant had locus standi to bring an action as from publication of the contested decision and, since it did not act within the time-limits, was out of time. That would be like refusing to administer

63 — It is well known how firmly the Court, in *Unión de Pequeños Agricultores* v *Council* (cited above, paragraphs 36 and 37), recalled that, unless the conditions laid down in the case of *Plaumann* v *Commission* are satisfied (Case 25/62 [1963] ECR 95), there can be no differentiation.

64 — *Plaumann* v *Commission*, cited above, p. 223.

65 — *Nederlandse Antillen* v *Council*, paragraph 64, and *Commission* v *Nederlandse Antillen*, paragraph 69. Similar solutions are found with regard to actions brought by regions: see orders in Cases T-238/97 *Comunidad Autónoma de Cantabria* v *Council* [1998] ECR II-2271; T-609/97 *Regione Puglia* v *Commission and Spain* [1998] ECR II-4051, and order in *Região autónoma dos Açores* v *Council*, cited above, paragraph 118.

66 — See *Nederlandse Antillen* v *Council*, paragraphs 66 to 72, and *Commission* v *Nederlandse Antillen*, paragraphs 71 to 76.

67 — See critique of this case-law by Wakefield, J., 'The plight of the regions in a multi-layered Europe', *ELR*, 2005, p. 406.

medical treatment to a sick person on the ground that a means of preventing the disease has just been discovered.

45. The third objection, again raised in particular by the Council, is essentially this: the fact that the applicant acquired the status of a privileged applicant attaching to the status of a Member State only on 1 May 2004, the date on which the Treaty of Accession entered into force, and with it locus standi, did not deprive it of the right to bring an action even if the period for bringing proceedings started to run on the date of publication of the contested decision. The Republic of Poland became a Member State on 1 May 2004. In fact, as a privileged applicant, from that date it still had 55 days until the expiry of the period for bringing proceedings on 24 June 2004 to bring an application for annulment without even having to demonstrate an interest in bringing proceedings. That period was easily sufficient for it to prepare its application. The Republic of Poland was aware of the content of the contested decision well before publication. For it was associated with the Council's preparatory work and indeed had opposed the draft decision at every stage of the legislative procedure that led to the adoption of the decision. Furthermore, it knew that it would acquire the status of Member State in due time. It is therefore legitimate to ask whether it is necessary in this case to depart from the letter of the EC Treaty in the name of the principle of the right to effective judicial protection.

46. In any event it may be objected that the time-limits for bringing actions were introduced to ensure clarity and certainty in legal situations and avoid any discrimination or arbitrary treatment in the administration of justice.[68] Thus the Court has repeatedly stated that, in order to satisfy the requirements with a view to which they were enacted, the Community rules on procedural time-limits are subject to 'strict application'[69] and must be 'strictly observed'.[70] They may not be derogated from 'save where the circumstances are quite exceptional, in the sense of being unforeseeable or amounting to force majeure, in accordance with the second paragraph of Article 45 of the Statute of the Court of Justice'.[71] Above all, to counter the argument that fixing the point at which the time-limit for bringing an action starts to run as the date of publication of the contested decision undermines the appli-

68 — See, in particular, Case 42/85 *Cockerill-Sambre* [1985] ECR 3749, paragraph 10, and Case 152/85 *Misset* v *Council* [1987] ECR 223, paragraph 11; order in Case C-59/91 *France* v *Commission* [1992] ECR I-525, paragraph 8; Case C-246/95 *Coen* [1997] ECR I-403, paragraph 21; order in Case C-369/03 P *Forum des migrants* v *Commission* [2004] ECR I-1981, paragraph 16; joined Cases T-121/96 and T-151/96 *Mutual Aid Administration Services* v *Commission* [1997] ECR II-1355, paragraph 38; order in Case T-126/00 *Confindustria and Others* [2001] ECR II-85, paragraph 21.

69 — *Misset* v *Council*, cited above, paragraph 11; order in *France* v *Commission*, cited above, paragraph 8; order in *Confindustria and Others*, cited above, paragraph 21.

70 — Case T-174/95 *Svenska Journalistförbundet* v *Council* [1998] ECR II-2289, paragraph 50.

71 — Order in *Forum des Migrants* v *Commission*, cited above, paragraph 16; see also, order in *France* v *Commission*, cited above, paragraph 8.

cant's right to effective judicial protection, it may be stated that the right to effective judicial protection 'is in no way undermined by the strict application of Community rules concerning procedural time-limits which ... meets the requirements of legal certainty'. [72]

47. The latter objection is a serious one. Arguably observance of the *dies a quo* laid down by the EC Treaty does not deny the applicant access to the Community Courts in breach of the right to effective judicial protection. However, such an approach would jeopardise the legal certainty which the rules on calculating the period for bringing proceedings are intended to safeguard and which justify the importance normally attached by the Court to their observance. How, in fact, is one to determine what period of time, as from 1 May 2004, when the applicant acquired locus standi, would be sufficient to enable it to prepare and lodge its application? If 55 days are sufficient, can one say the same of 40, 30, 10 or 5 days? To rule the Republic of Poland's application inadmissible on the ground that Poland could still make effective use of its right to bring an action within 55 days would create a degree of legal uncertainty such as to encourage constant challenges. Certainly, in order to avert these, the view may be taken, as the Council asserts, that one day beyond 1 May 2004 is in any event sufficient, since the applicants had ample time from publication of the contested measure to prepare their application in order to hold it in readiness and lodge it at the appropriate time with the Court Registry. But this solution does not address the situation where acts are adopted more that two months before the entry into force of the Treaty of Accession. As the applicant and the intervening States rightly pointed out, to fix the *dies a quo* as the date of publication of the contested measures leaves the institutions free to adopt contested measures under the Act of Accession more than two months before the entry into force of the Treaty of Accession and thus to deprive future Member States of any possibility of a remedy. It does not seem to me to be in the interests of the sound administration of justice to hand down a judgment which, whilst resolving this case, would encourage subsequent litigation. Most of all, it does not seem to me to be acceptable that the effectiveness and even the existence of the fundamental right to judicial protection in the Member States should be dependent on the arbitrary selection by the Community institutions of the date of publication of the contested measure.

48. It therefore seems to me to be appropriate to fix the *dies a quo* of the period for bringing proceedings as the date of entry into force of the Treaty of Accession. This is the only solution that maintains legal certainty, which is the purpose of the rules on time-limits for bringing proceedings, and guarantees all the future Member States effective judicial protection of their rights as against Community measures adopted between signature of the Treaty of Accession and its entry into force. It need hardly be recalled that effective judicial protection of the rights

72 — Order in Case C-406/01 *Germany* v *Parliament and Council* [2002] ECR I-4561, paragraph 20.

of persons subject to Community law requires the removal of such procedural rules for court actions as render the protection of those rights excessively difficult or practically impossible. [73]

49. Against that proposition it may, it is true, be argued that if future Member States regard their rights as having been infringed by an act adopted by the institutions between the signature and entry into force of the Treaty of Accession, it is still open to them to refuse to ratify or apply that treaty. But, apart from the fact that the compatibility of such an approach with international law would be dubious, and therefore such as to call into question their international obligations, re taliation on that scale is so disproportionate that its use and therefore its effectiveness would in the end be entirely nugatory: one does not shoot sparrows with a canon.

50. Only the judicial route therefore appears to be appropriate for safeguarding their rights, since in fact the candidate States enjoy rights under Community law. Once the Treaty of Accession is signed their status changes. They can no longer be regarded simply as legal persons but become future Member States. The agreement between the Member States and the candidate States enshrined by signature of the accession instruments contains a set of rights and obligations for the benefit of the candidate States. They must be allowed to defend this balance of rights and obligations, that is to say their interests as future Member States, against measures adopted during the period between the date of signature of the Treaty of Accession and the date when accession takes effect. Similarly, to that end, the future Member States enjoy observer status at the Council which gives them the right to be informed and consulted and also allows them in the course of the adoption process in relation to such measures to defend, where necessary, their interests. [74] But as the Republic of Poland, supported in this regard by the Republic of Lithuania, argues, observer status does not effectively secure their interests since it confers no right to vote in the Council. For future Member States legitimately to defend their interests they must have access to the Community Courts. Any other solution could only result in this paradox: where a decision clearly affects the interests of the future Member States, those Member States, which have no right to vote, would not have standing to bring proceedings for annulment, whereas the existing Member States, which do have the right to vote, would be able to bring proceedings for annulment, regardless of whether they have an interest in them or not.

51. The need to ensure solidarity between the Member States also requires that future

73 — See *Unibet*, cited above, paragraph 43.

74 — See, to that effect, Joined Cases 39/81, 43/81, 85/81 and 88/81 *Halyvourgiki* v *Commission* [1982] ECR 593, paragraph 10; Case C-413/04 *Parliament* v *Council* [2006] ECR I-11221, paragraphs 66 to 68; and Case C-414/04 *Parliament* v *Council* [2006] ECR I-11279, paragraphs 43 to 45.

Member States be allowed to submit to the Court's scrutiny measures adopted between the signature and the entry into force of the Treaty of Accession, by fixing the point at which the time-limit for bringing an action begins to run as the date when the treaty takes effect. There too, observer status is not sufficient to guarantee that adequate justice is done to solidarity between the Member States in the course of adopting the measures. Yet the duty of solidarity is a principle [75] which by acceding to the Community the Member States have accepted. [76] If, as the Court has already held, [77] it prohibits a Member State from upsetting the balance between the benefits and burdens of its membership of the Community based on its unilateral perception of its national interest, it also certainly prohibits the older Member States within the Council from arbitrarily upsetting the balance of benefits and burdens established by the accession instruments in favour of the future Member States.

52. Finally, the effectiveness of the principle of good faith also militates in favour of determining the *dies a quo* as the date of entry into force of the Treaty of Accession. As made clear by Article 18 of the Vienna Convention on the law of treaties of 23 May 1969, which codifies that principle, this principle of international customary law dictates, inter alia, that '[a] State is obliged to refrain from acts which would defeat the object and purpose of a treaty when:

(a) it has signed the treaty or has exchanged instruments constituting the treaty subject to ratification, acceptance or approval, until it shall have made its intention clear not to become a party to the treaty'.

As we know, the principle of sound administration is binding on the Community institutions and has as its corollary in the Community legal order the principle of the protection of legitimate expectations. [78] Therefore, it must be possible for future Member States to request the Court to verify that by adopting measures in the period between the signature and the taking effect of accession agreements, the Community institutions have not infringed the principle of good faith by destabilising the balance of rights and obligations laid down by those agreements and thus depriving them of their purpose and intent.

75 — See cases cited above C-413/04 *Parliament* v *Council*, paragraph 68, and C-414/04 *Parliament* v *Council*, paragraph 45.

76 — See on this Case 39/72 *Commission* v *Italy* [1973] ECR 101, paragraph 24; Case 128/78 *Commission* v *United Kingdom* [1979] ECR 419, paragraph 12.

77 — Idem.

78 — See *Opel Austria* v *Council*, cited above, paragraphs 90 and 91; Joined Cases T-186/97, T-187/97, T-190/97 to T-192/97, T-210/97, T-211/97, T-216/97 to T-218/97, T-279/97, T-280/97, T-293/97 and T-147/99 *Kaufring and Others* v *Commission* [2001] ECR II-1337, paragraph 237, and Case T-231/04 *Greece* v *Commission* [2007] ECR II-63, paragraphs 86 and 87.

53. Plainly, time for actions for annulment cannot be made to start running for the new Member States from the date on which accession takes effect in respect of all Community measures adopted from the very beginning. One can only agree with the Council that a derogation of such breadth from the *dies a quo* laid down by the EC Treaty would occasion unwarranted interference with the legal certainty safeguarded by the definitive nature of the measures and the prescription resulting from expiry of the periods for bringing proceedings; such interference cannot be justified by considerations militating in favour of not taking as the starting point the date of publication provided for by the letter of the fifth paragraph of Article 230 EC. Nor have the applicant or the intervening States supporting it claimed that it should. However this derogation ought unquestionably to come into play where a measure, like that contested in this case, is adopted between the date of signature and the date of entry into force of the Treaty of Accession and on the basis thereof. To my mind it should also apply more broadly to all Community measures adopted in the interval between those two dates, that is to say not only those adopted on the basis of the Act of Accession, but also those adopted under the treaties, at least inasmuch as, as I shall state in more detail later, such measures affect the balance of rights and obligations laid down in the Treaty of Accession for the benefit of the future Member States. By signing an agreement with the exisiting Member States the future Member States certainly accept the Community *acquis* comprising the totality of Community legislation adopted from the beginning. It is certainly also true that in the interval between signature and entry into force of the Act of Accession the Community institutions must be able to continue to legislate. But they must not be allowed to upset the balance of rights and obligations for future Member States stemming from the *acquis* as it existed on the date of signature of the accession instruments without the future Member States being able to defend their interests by way of access to the Community Courts. The fact that the interests of the future Member States must also be secured in relation to measures adopted under the treaties in the period between signature and the taking effect of accession is further borne out by the observer status conferred on them, since the rights to be informed and consulted attaching thereto are first and foremost intended to come into play in the process leading up to adoption of those measures.[79]

54. Two possible approaches, it seems to me, may be adopted by the Court in order to adjudge that for the future Member States the period for bringing proceedings runs only as from entry into force of the Treaty of Accession in regard to Community measures adopted between the date of signature and the date of entry into effect of the Treaty of Accession.

55. The first is to operate *praeter legem*, outside the framework of Article 230 EC. That route was already taken in the Case C-70/88 *Parliament* v *Council*. It will be recalled that the Court had initially refused to recognise that the Parliament had capacity to bring an action for annulment based both

79 — See cases cited above, C-413/04 *Parliament* v *Council*, paragraphs 66 to 68, and C-414/04 *Parliament* v *Council*, paragraphs 43 to 45.

on the first paragraph of Article 173 and the second paragraph of that provision [80] since 'the applicable provisions ...' [81] did not allow it, the Parliament not having legal personality or being listed as a privileged applicant. Two years later it considered that it ought to close this 'procedural gap' on the basis of 'the fundamental interest in the maintenance and observance of the institutional balance laid down in the Treaties establishing the European Communities'; the Parliament's prerogatives were amongst the matters supporting the right conferred on that institution to bring annulment proceedings 'provided that the action seeks only to safeguard its prerogatives and that it is founded only on submissions alleging their infringement'. [82] In other words, the Court showed sensitivity to the need for judicial protection of the Parliament's prerogatives, as an aspect of institutional stability. [83] In accordance with this precedent it would be open to the Court to proceed on this basis: since the candidate States must be allowed to defend their rights as future Member States under the balance of benefits and burdens agreed on signature of the accession documents, they must be recognised as having the capacity to bring annulment proceedings under the principle of effective judicial protection of Community law rights.

56. In this scenario their right to bring proceedings cannot be unlimited. It can be exercised only to the extent necessary to safeguard their rights, otherwise it loses its justification. Such a restriction would clearly entail declaring admissible only applications concerning acts having an unfavourable effect on the balance of benefits and burdens agreed on signature of the accession instruments. It may be that there should also be a limitation on the range of annulment pleas that can be raised. The only pleas in law that would be admissible in support of their actions would be those which in one way or another show that their rights as future Member States have been adversely affected. For example, future Member States would not be entitled to submit an act to the Court's scrutiny on the ground that it was adopted in breach of the prerogatives of the Parliament. The distinction between pleas in law that may be raised and those which are inadmissible would certainly not always be easy to draw. But the difficulty does not seem to me to be greater than that which the Court had to overcome in order to identify, in the context of Case C-70/88 *Parliament* v *Council* referred to above, which of the pleas

80 — See Case 302/87 *Parliament* v *Council* [1988] ECR 5615.

81 — Ibid., paragraph 28.

82 — *Parliament* v *Council*, cited above.

83 — This is clear in particular from paragraphs 22, 24 and 25 of the judgment in *Parliament* v *Council* which are worded as follows:
'22. Observance of the institutional balance means that each of the institutions must exercise its powers with due regard for the powers of the other institutions. It also requires that it should be possible to penalise any breach of that rule which may occur.
...
24. In carrying out that task the Court cannot, of course, include the Parliament among the institutions which may bring an action under Article 173 of the EEC Treaty or Article 146 of the Euratom Treaty without being required to demonstrate an interest in bringing an action.
25. However, it is the Court's duty to ensure that the provisions of the Treaty concerning the institutional balance are fully applied and to see to it that the Parliament's prerogatives, like those of the other institutions, cannot be breached without it having available a legal remedy, among those laid down in the Treaties, which may be exercised in a certain and effective manner'

in law relied on by the Parliament entailed an infringement of parliamentary prerogatives, which are the only ones that are admissible. [84]

57. It may be objected that to give future Member States a limited right to bring an action on the basis of the right to effective judicial protection of rights under Community law does not prima facie warrant a departure from the *dies a quo* laid down by the EC Treaty: future Member States would be entitled to bring an action as from the date of publication of the contested measure and would therefore have two months to do so as from that date since failure to do so would needlessly jeopardise legal certainty. In the present case, the Republic of Poland would therefore be out of time even though its right to bring an action would be founded on that basis. But in reality the rights of future Member States can be adversely affected only by measures adopted after signature of the Treaty of Accession and they can therefore acquire standing to bring proceedings against such measures only subject to and with effect from the applicability to them of those measures, that is to say subject to and as from the entry into force of the Treaty of Accession.

84 — For some illustrations of this case-law see Case C-65/90 *Parliament* v *Council* [1992] ECR I-4593; Joined Cases C-181/91 and C-248/91 *Parliament* v *Council and Commission* [1993] ECR I-3685, paragraph 32; Case C-388/92 *Parliament* v *Council* [1994] ECR I-2067; Case C-156/93 *Parliament* v *Commission* [1995] ECR I-2019; Case C-360/93 *Parliament* v *Council* [1996] ECR I-1195; Case C-303/94 *Parliament* v *Council* [1996] ECR I-2943, paragraphs 17 to 20, and Case C-392/95 *Parliament* v *Council* [1997] ECR I-3213.

58. In the present case, the provision contested by the Republic of Poland clearly affects its rights adversely since it results, at least for a transitional period, in a reduction in direct payments to Polish farmers. The pleas raised in support of Poland's application, whether they relate to the lack of competence of the Council, infringement of the principle of non-discrimination or breach of the principle of good faith, all essentially seek to challenge the legality of extending the system of partial payments to the new direct aids to be paid to farmers from the new Member States. Poland's application and all the pleas raised in its support seem to me therefore to be admissible.

59. The second path open to the Court is to operate *secundum legem* based on a constructive interpretation of Article 230 EC in a manner that favours the spirit over the wording of that provision. That means taking as a starting point the purpose of Article 230 EC, which falls squarely within the right to effective judicial protection, which is to provide a remedy to all legal subjects concerned, that is to say the institutions and Member States which are presumed to have an interest in bringing an action, or to legal persons who are addressees or who are directly and individually concerned by the contested measure. It is true that this interest in bringing an action is circumscribed by a period of two months from notification or publication of the contested measure. But Article 230 EC presupposes that the person subject to the law is, at the time when the event constituting the *dies a quo* occurs, concerned by the contested measure; or he is not so concerned, and in that case does not have locus standi to bring an action for annulment. In other words the starting point for the time-limit for bringing proceedings is

laid down by the fifth paragraph of Article 230 EC as the date of notification or publication of the measure under challenge because, as at that date, the applicant's situation with regard to the measure and therefore his locus standi to bring an action for annulment are deemed to be able to be determined in a certain and definitive manner. However this is a situation where a future Member State may be affected by a Community act adopted after signature of the accession instruments only if the Treaty of Accession which determines that the measure is to apply to it enters into force and only with effect from that date. It is only at that time that it is possible to determine whether that State is concerned by the measure challenged by it. The future Member State must therefore be able to seek annulment of Community measures adopted during the period between signature and entry into force of the Treaty of Accession within two months of accession taking effect. Since on the latter date it becomes a Member State and thus acquires the status of privileged applicant, it must be able to challenge such measures without having to show an interest in bringing proceedings and to base its application on any annulment plea.

60. The possibilities of judicial challenge which would thereby be afforded to the future Member States could be regarded as too extensive. To my mind they are. I would therefore be more inclined to favour the first route.

III — Substance

61. The applicant submits that by the contested provision the Council wrongly extended the scope of the phasing-in mechanism, by going beyond mere adjustment to actual amendment of the accession conditions. In so doing it caused the contested decision to be vitiated on the ground of unlawfulness on three grounds: lack of jurisdiction because it went beyond the scope of Article 23 of the Act of Accession which was the basis for the measure; infringement of the principle of equal treatment as a result of discrimination not provided for in the Treaty of Accession; breach of the principle of good faith, in that the compromise resulting from the accession negotiations was called into question unilaterally.

62. The central question determining the merits of the application and the fate of the three pleas in law is, as has been seen, whether, by extending the system of partial payments to new direct payments, the contested provision remained within the limits of the authority conferred on the Council by Article 23 of the Act of Accession by merely adjusting the provisions of that act, or whether it altered the accession conditions laid down in that act.

63. In order to reply to that question, it is important to establish whether the Act of Accession had already determined that the phasing-in mechanism should apply to all direct payments. In other words, did Article 1a of Regulation No 1259/1999, inserted into that regulation by Point 27 of

Chapter 6 A, of Annex II to the Act of Accession, which establishes the mechanism for the gradual introduction of direct payments 'granted under the support regimes mentioned in Article 1', apply to all direct payments as defined by Article 1 of that regulation? If that were the case, the change in wording in the contested provision, which provides that the phasing-in mechanism is thenceforth to apply to 'direct payments', would merely take account of the introduction by Regulation No 1782/2003 of direct payments for nuts and energy crops and supplementary payments in the dairy sector, and thus would remain within the limits of the concept of 'adaptations ... necessary as a result of a modification in Community rules' within the meaning of Article 23 of the Act of Accession. If, conversely, the system of partial payments introduced by Article 1a of Regulation No 1259/1999 were limited ratione materiae to the support instruments exhaustively listed in the annex to that regulation and referred to in Article 1 thereof, the change in wording arising from the contested provision would actually extend the system of partial payments in a way not provided for ab initio by the Act of Accession and would therefore amount to an actual modification of the accession conditions.

64. In fact it cannot be disputed that the concept of 'necessary adaptations' for the purposes of Article 23 of the Act of Accession only covers measures not in any case affecting the scope of the provision of the Act of Accession which they are adapting and not altering its substantive content. Community case-law tells us as much. The Court has held that the adjusting provisions provided for by the Acts of Accession as a matter of principle only authorise adjustments intended to apply existing Community measures in the new Member States, and not any other amendment. [85] Advocate General Geelhoed correctly deduced from an analysis of this case-law that the concept of 'adaptations' cannot be construed 'as encompassing substantive amendments to Community acts or measures permitting derogations to these acts'. [86] It is true that those cases related to provisions for the adaptation of Community measures which had not been adapted by the Act of Accession itself. [87] Yet the very circumscribed concept of 'adaptation' applies whatever the provision of the Act of Accession providing the basis of the adaptation adopted, and therefore there is all the more reason for it to be used where, as in this case, what is being adapted are provisions of the Act of Accession itself in order to take account of an amendment to the Community rules with which those provisions were concerned.

65. More importantly, if the provisions of the Act of Accession which the measures in

85 — See Case C-259/95 *Parliament* v *Council* [1997] ECR I-5303, paragraphs 14 and 19, and Case C-413/04 *Parliament* v *Council*, cited above, paragraphs 31 to 38, and Case C-414/04 *Parliament* v *Council*, cited above, paragraphs 29 to 36.

86 — See Opinion in Case C-414/04 *Parliament* v *Council*, cited above, point 57.

87 — Cases C-413/04 *Parliament* v *Council* and C-414/04 *Parliament* v *Council*, cited above, related to Article 57 of the Act of Accession and Case C-259/95 *Parliament* v *Council*, cited above, to a similar provision in Article 169 of the Act concerning the conditions of accession of the Republic of Austria, the Republic of Finland and the Kingdom of Sweden and the adjustments to the Treaties on which the European Union is founded (OJ 1994 C 241, p. 21, and OJ 1995 L 1, p. 1).

question seek to adapt amount to derogations from the Community rules normally applicable, they cannot, a fortiori, extend the scope thereof, especially since the derogations in the Acts of Accession must be limited to what is strictly necessary and be interpreted strictly. [88] However, in the present case Article 1a of Regulation No 1259/1999, laid down in Chapter 6 A, of Annex II to the Act of Accession which the contested provision seeks to replace, is a temporary derogation from the principle of full payment of direct aid. The contested provision therefore only replicates the system of partial payments laid down by Article 1a in the context of the rules on direct aid introduced in Regulation No 1259/1999 in order to apply it under the rules provided for by subsequent amending Regulation No 1782/2003, but without increasing its scope. [89] In the same vein the Court, mutatis mutandis, criticised adaptation measures adopted under Article 57 of the 2003 Act of Accession which sought to grant the Republic of Estonia and the Republic of Slovenia a transitional period before opening their electricity markets as provided for and arranged under a Community directive and regulation on the ground that 'temporary derogations from the application of the provisions of a Community act, whose sole object and purpose is to delay temporarily the effective application of the Community act concerned as regards a new Member State, cannot, in principle, be described as "adaptations", within the meaning of Article 57 of the 2003 Act of Accession'. [90]

66. The parties to the dispute are, moreover, well aware that it is on the scope of the mechanism for the gradual introduction of direct aids instituted by the Act of Accession that the outcome of this case turns, since they are at variance on this point.

67. According to the Republic of Poland, Article 1a of Regulation No 1259/1999 was substantively limited to the support instruments exhaustively listed in the annex to that regulation. It backs up that interpretation by pointing out that the Act of Accession 'is based on the principle that the provisions of Community law apply ab initio and in toto to new Member States'. [91] The following rules of interpretation flow from that: [92] derogations provided for in the Acts of Accession must be provided for in express terms, they must be interpreted strictly, and since it is their task to facilitate the adaptation of the new Member States to Community rules, they must be interpreted in such a way as to secure attainment of the purposes of the founding treaties and the unabridged application of their rules.

68. Whilst this reasoning based by the applicant on the case-law is correct, it does

88 — See Case 231/78 *Commission* v *United Kingdom* [1979] ECR 1447; Joined Cases 194/85 and 241/85 *Commission* v *Greece* [1988] ECR 1037; Case C-3/87 *Agegate* [1989] ECR 4459, paragraph 39, and Case C-233/97 *KappAhl* [1998] ECR I-8069, paragraph 18.

89 — See on the same point, mutatis mutandis, Case C-413/04, cited above, paragraphs 39 to 52.

90 — Cases C-413/04 *Parliament* v *Council*, paragraph 38, and C-414/04 *Parliament* v *Council*, paragraph 36, cited above.

91 — See Cases 258/81 *Metallurgiki Halyps* v *Commission* [1982] ECR 4261, paragraph 8, and *KappAhl*, cited above, paragraph 15.

92 — Recalled by Advocate General Cosmas in his Opinion in the *KappAhl* case, cited above, point 37 and the case-law therein cited.

not entail the interpretation of Article 1a of Regulation No 1259/1999 contended for by it. On the contrary, it is clear from a literal, systematic and teleological interpretation that, as the Council and the Commission also argue, the system of partial payments of direct aids inserted into Article 1a of Regulation No 1259/1999 by the Act of Accession was applicable to all direct payments and not to a limited class of direct aids listed in the annex to that Regulation.

69. It is clear first of all from the actual wording of Article 1a of that regulation that the mechanism for the gradual introduction of direct aids applied generally to 'direct payments granted under the support regimes mentioned in Article 1'. Article 1, for its part, gave a general definition of direct aid as aid 'granted directly to farmers under support schemes in the framework of the common agricultural policy which are financed in full or in part by the "Guarantee" section of the EAGGF'. Therefore, any agricultural aid, whether existing or to be introduced in the future, satisfying the definition must be regarded as a direct payment for the purposes of Regulation No 1259/1999. [93] It is true that the second paragraph of Article 1 stated that 'These support schemes are listed in the Annex'. But, as the Commission correctly points out, if the Treaty drafters had in fact intended to limit the group of products subject to the phasing-in mechanism they would merely have referred to the support systems mentioned in the Annex to Regulation No 1259/1999. Moreover, as will be borne out by a systematic interpretation, that annex was merely declaratory in nature.

70. That literal interpretation is corroborated by the intention of the authors of the Treaty of Accession. Indeed it is apparent from the preparatory works for the accession conference that it was the intention of the institutions and of the existing Member States to impose the phasing-in mechanism in the new Member States for all direct payments. Accordingly, in its issues paper of 30 January 2002, [94] the Commission advocated the progressive introduction of 'direct payments', without ever qualifying those terms in such a way as to limit their scope. Subsequently, a common position of the European Union dated 31 October 2002 laying down the negotiating position of the fifteen Member States in relation to Poland stated the intention of progressively introducing 'direct payments' in Poland over a transitional period without any qualification to the general terms in which that intention

93 — The fact that Regulation No 1259/1999 was intended to apply to all direct payments is also borne out by the preamble thereto (see paragraph 1 of the recitals of the grounds: 'Whereas for direct payments under the various income support schemes in the [CAP] some common conditions should be established').

94 — Op. cit., paragraph 4.3.

was couched such as to limit the scope thereof. [95] The applicant replies, it is true, that it agreed to the system of partial payments with great difficulty and only in consideration of the fact that this was an exceptional mechanism which was limited as to subject-matter and period of time. But it is particularly topical to note that, given Poland's consistently firm opposition, the conclusions of the European Council at Copenhagen of 12 and 13 December 2002 relating the outcome of the accession negotiations indicate that the question of the progressive introduction of direct payments in the new Member States was resolved in line with the terms of the common position of 31 October 2002. Plainly, therefore, the Polish position on this point was not accepted, nor was there even a compromise reached to limit the scope of the phasing-in mechanism.

71. Above all, it is also apparent from a systematic reading of the provision that the mechanism for gradual introduction had been agreed for all direct payments meeting the general definition laid down in Article 1 of Regulation No 1259/1999, since the list of direct aids appearing in the annex is merely declaratory in nature. It is to be noted, first, that Article 1 of Regulation No 1259/1999 excludes from the scope of that regulation only direct payments 'provided for under Regulation (EC) No 1257/1999'. Thus, if Regulation No 1257/1999 was to apply only to the direct support instruments listed in its annex, it would have been illogical to exclude from its scope items not enumerated therein. If, moreover, one broadens the legislative context, the Commission's competence under the second indent of Article 11(4) of Regulation No 1259/1999 to determine, in accordance with the management committee procedure, such 'amendments to the Annex as may become necessary taking into account the criteria set out in Article 1' cannot authorise it to alter the scope of the regulation, since a 'basic element' is involved which is a matter falling within the legislative competence of the Council. [96] There is therefore no doubt that the scope of Regulation No 1259/1999 was determined by the general definition of direct payments under Article 1 or, in the words of that provision, by the 'criteria' laid down therein; only the Commission is entitled to amend the annex to insert therein direct payments introduced or amended by the Community legislature and complying with that definition. It was even obliged to do so and in January 2004, before accession, it did indeed amend the annex to Regulation No 1259/1999 to include therein not only direct payments

95 — Point 10a.

96 — See on this concept of 'basic element' which may only be laid down by the Community legislature Case 25/70 *Köster* [1970] ECR 1161, paragraph 6, and Case C-240/90 *Germany* v *Commission* [1992] ECR I-5383, paragraph 37.

created after the adoption of the latter regulation but also other payments which, although they met the definition in Article 1 of Regulation No 1259/1999, had been overlooked when the annex was drafted. [97]

72. Finally, on a teleological interpretation of Article 1a of Regulation No 1259/1999, the underlying purpose of a system for the gradual introduction of direct payments lends support to a view of it as being general in scope. The concern not to slow down the necessary restructuring of the agricultural sector in the new Member States and not to create serious income disparities and social distortions by granting disproportionate aid compared to the income levels of farmers and of the general population had universal validity for the whole agricultural sector and therefore for all direct existing or future aid. Furthermore, if the mechanism for gradual introduction were to apply only to certain crops, namely those for which direct payments had already been introduced, there would be a risk that Polish farmers might abandon them in favour of crops for which they can get 100% direct payments.

73. Thus, it can be seen that the principle of applying the phasing-in mechanism to all direct aid was agreed at the accession negotiations and provided for expressly in the Act of Accession which introduced Article 1a into Regulation No 1259/1999. Therefore the pleas in annulment raised by the applicant against the contested provision cannot succeed.

74. As to the plea of lack of competence, the general applicability of the system of partial payments was already provided for in the Act of Accession, which introduced Article 1a into Regulation No 1259/1999. Therefore the fact that provision was expressly made, in Regulation No 1782/2003, by the contested provision, for the system to apply to all 'direct payments', in particular new direct aid instituted by that regulation, does not constitute an amendment but simply an adjustment to the Act of Accession which does not call into question 'the fundamental character and principles of the negotiation results'. [98] The adjustment was made necessary by the amendment of the CAP rules owing to the repeal of Regulation No 1259/1999 by Regulation No 1782/2003. As a result, the provisions of Annex II to the Act of Accession amending Regulation No 1259/1999 had become obsolete. Accordingly, the contested decision remains within

97 — See Commission Regulation (EC) No 41/2004 of 9 January 2004 amending and correcting the Annex to Council Regulation (EC) No 1259/1999 (OJ 2004 L 6, p. 19).

98 — As the preamble to the contested decision, cited above, points out (see paragraph 3 of the grounds).

the limits of the authority conferred on the Council by Article 23 of the Act of Accession.

75. With regard to the plea alleging breach of the principle of non-discrimination, the applicant is essentially arguing that the derogation from the principle of equal treatment intrinsic to the phasing-in mechanism was arbitrarily extended beyond the limits laid down by the Act of Accession. However, as we have seen, the contested provision did not confer on that mechanism wider scope. If there is an infringement of the principle of non-discrimination by reason of nationality laid down in Article 12 of the EC Treaty and of the principle of non-discrimination as between Community producers laid down in the second paragraph of Article 34 EC, it stems at all events from the Act of Accession itself, that is to say from a provision having the status of primary law and enjoying as such immunity from litigation. [99] Furthermore, it is doubtful whether any infringement of the principle of equality as a result of the Act of Accession can be made out. It is settled case-law that the fundamental principle of equal treatment only guarantees relative equality and prohibits, in the absence of objective justification, the different treatment of similar situations or the same treatment of different situations. [100] Yet it is uncontested that the agricultural situation in the new Member States was radically different and justified the progressive application of Community aid, in particular the direct support systems, so as not to disturb the necessary restructuring underway in the agricultural sector of those States.

76. With regard, finally, to the alleged infringement of the principle of good faith, that principle of international law does, it is true, have legal validity in the Community legal order. [101] Article 18 of the Vienna Convention on the law of treaties of 23 May 1969 codifies that principle under which a Member State may not adopt acts which would deprive a treaty it has signed of its aim and purpose. However, as the principle of the application to direct payments of the phasing-in mechanism was written into the Act of Accession, the contested provision does not extend the scope thereof and cannot therefore, contrary to the applicant's assertion, be deemed to call in question the compromise arising out of the accession negotiations.

99 — See Joined Cases 31/86 and 35/86 *LAISA and CPC España* v *Council* [1998] ECR 2285, paragraphs 6 to 18. The door to some judicial review of provisions of primary law is not yet entirely closed (Bieber, R., 'Les limites matérielles et formelles à la révision des traités établissant la Communauté européenne', *RMC* 1993, p. 343; Da Cruz Vilaça, J.L., and Piçarra, N., 'Y a-t-il des limites matérielles à la révision des traités instituant les Communautés européennes?', *CDE*, 1993, p. 3), but there is no need to push that door here.

100 — See Case 13/63 *Italy* v *Commission* [1963] ECR 165, 178. Then, for example, Case 203/86 *Spain* v *Council* [1988] ECR 4563, paragraph 25.

101 — See *Opel Austria* v *Council*, paragraphs 90 and 91; *Kaufring and Others* v *Commission*, paragraph 237, and Case T-231/04 *Greece* v *Commission*, paragraphs 86 and 87, cited above.

IV — Conclusion

77. In light of the above considerations, I therefore propose that the Court should declare the application admissible and dismiss it on its merits.