

Judgment of the Court of Justice, Commission v EIB, Case 15/00 (10 July 2003)

Caption: In a judgment delivered on 10 July 2003, the Court of Justice emphasises that the independence granted by the EC Treaty to the European Investment Bank for the purpose of carrying out the tasks assigned to it by the treaty is not intended to set it completely apart from the European Community and exempt it from every rule of Community law.

Source: Court of Justice of the European Communities (CJEC), "Judgment of 10 July 2003, Commission of the European Communities v European Investment Bank, Case 15/00", dans Reports of Cases before the Court. 2003, p. I-07281.

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JUDGMENT OF 10. 7. 2003 — CASE C-15/00

JUDGMENT OF THE COURT

10 July 2003 *

In Case C-15/00,

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

applicant,

supported by

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

by

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

and by

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

interveners,

* Language of the case: French.

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v

European Investment Bank, represented initially by A. Morbilli and subsequently by E. Uhlmann, acting as Agents, and A. Barav, lawyer and Barrister,

defendant,

APPLICATION for annulment of the Decision of the Management Committee of the European Investment Bank of 10 November 1999 concerning cooperation with the European Anti-Fraud Office (OLAF),

THE COURT,

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

Advocate General: F.G. Jacobs,

Registrar: R. Grass,

having regard to the Report for the Hearing,

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JUDGMENT OF 10. 7. 2003 — CASE C-15/00

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

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

gives the following

Judgment

- 1 By application lodged at the Court Registry on 19 January 2000, the Commission of the European Communities brought an action under Article 237(b) EC and, in the alternative, under Article 230 EC for annulment of the Decision of the Management Committee of the European Investment Bank of 10 November 1999 concerning cooperation with the European Anti-Fraud Office (OLAF) ('the contested decision').
- 2 By orders of the President of the Court of 7 September 2000, the Kingdom of the Netherlands, the European Parliament and the Council of the European Union were granted leave to intervene in support of the form of order sought by the Commission.

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Legal framework

Primary legislation

3 Article 237(b) and (c) EC provides:

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

...

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

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

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4 Paragraphs 1 to 4 of Article 280 EC provide:

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

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

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

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

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5 Article 183a EA provides:

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

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

6 Article 203 EA provides:

‘If action by the Community should prove necessary to attain one of the objectives of the Community and this Treaty has not provided the necessary powers, the Council shall, acting unanimously on a proposal from the Commission and after consulting the European Parliament, take the appropriate measures.’

7 Article 9 EC provides:

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

8 The first and second paragraphs of Article 266 EC provide:

‘The [EIB] shall have legal personality.

The members of the [EIB] shall be the Member States.’

9 Article 267 EC provides:

‘The task of the [EIB] shall be to contribute, by having recourse to the capital market and utilising its own resources, to the balanced and steady development of the common market in the interest of the Community. For this purpose the [EIB] shall, operating on a non-profit-making basis, grant loans and give guarantees which facilitate the financing of the following projects in all sectors of the economy:

...

In carrying out its task, the [EIB] shall facilitate the financing of investment programmes in conjunction with assistance from the Structural Funds and other Community financial instruments.’

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10 Article 248(1) and (3) EC provides:

‘1. The Court of Auditors shall examine the accounts of all revenue and expenditure of the Community. It shall also examine the accounts of all revenue and expenditure of all bodies set up by the Community insofar as the relevant constituent instrument does not preclude such examination.

...

3. The audit shall be based on records and, if necessary, performed on the spot in the other institutions of the Community, on the premises of any body which manages revenue or expenditure on behalf of the Community and in the Member States, including on the premises of any natural or legal person in receipt of payments from the budget....

The other institutions of the Community, any bodies managing revenue or expenditure on behalf of the Community, any natural or legal person in receipt of payments from the budget, and the national audit bodies or, if these do not have the necessary powers, the competent national departments, shall forward to the Court of Auditors, at its request, any document or information necessary to carry out its task.

In respect of the [EIB's] activity in managing Community expenditure and revenue, the Court's rights of access to information held by the [EIB] shall be

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governed by an agreement between the Court, the [EIB] and the Commission. In the absence of an agreement, the Court shall nevertheless have access to information necessary for the audit of Community expenditure and revenue managed by the [EIB].’

11 Article 4(1) of the EIB Statute provides:

‘The capital of the [EIB] shall be..., subscribed by the Member States as follows...

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

12 Article 8 of the EIB Statute provides:

‘The [EIB] shall be directed and managed by a Board of Governors, a Board of Directors and a Management Committee.’

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13 Article 14 of the Statute provides:

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

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

14 Article 20 of the Statute provides:

‘In its loan and guarantee operations, the [EIB] shall observe the following principles:

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

It may grant loans or guarantees only:

...

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

...’

Secondary legislation

- ¹⁵ The European Anti-Fraud Office (‘OLAF’) was established by Commission Decision 1999/352/EC, ECSC, Euratom of 28 April 1999 establishing the European Anti-fraud Office (OLAF) (OJ 1999 L 136, p. 20), adopted on the basis of Article 162 of the EC Treaty (now Article 218 EC), Article 16 of the ECSC Treaty and Article 131 of the Euratom Treaty.
- ¹⁶ Article 2 of Decision 1999/352, which sets out OLAF’s functions, provides at paragraph 1:

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

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[OLAF] shall be responsible for carrying out internal administrative investigations intended:

- (a) to combat fraud, corruption and any other illegal activity adversely affecting the Community's financial interests,
- (b) to investigate serious facts linked to the performance of professional activities which may constitute a breach of obligations by officials and servants of the Communities likely to lead to disciplinary and, in appropriate cases, criminal proceedings or an analogous breach of obligations by Members of the institutions and bodies, heads of the bodies or members of staff of the institutions and bodies not subject to the Staff Regulations of Officials of the European Communities and the Conditions of Employment of Other Servants of the Communities.

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

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

17 Article 3 of Decision 1999/352 provides:

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

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18 Article 4 of Decision 1999/352 provides:

‘A Surveillance Committee shall be established, the composition and powers of which shall be laid down by the Community legislature. This Committee shall be responsible for the regular monitoring of the discharge by [OLAF] of its investigative function.’

19 Under Article 5 of Decision 1999/352:

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

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

20 Article 6 of Decision 1999/352 provides:

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

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of Other Servants of the Communities on the authority authorised to conclude contracts of employment....

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

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

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

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

22 Regulation (EC) No 1073/1999 of the European Parliament and of the Council of 25 May 1999 concerning investigations conducted by the European Anti-Fraud Office (OLAF) (OJ 1999 L 136, p. 1) and Council Regulation (Euratom) No 1074/1999 of 25 May 1999 concerning investigations conducted by the European Anti-Fraud Office (OLAF) (OJ 1999 L 136, p. 8) were adopted on the basis of Article 280 EC and Article 203 EA respectively.

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- 23 The first four recitals in the preamble to Regulations Nos 1073/1999 and 1074/1999 make the following statements:

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

(2) ... the protection of the Communities’ financial interests extends not only to the management of budget appropriations but also to all measures affecting or liable to affect their assets;

(3) ... all available means must be deployed fully to attain this objective, notably in the context of investigative duties devolving upon the Community...;

(4) ... to reinforce the means available for combating fraud, while respecting the principle of each institution’s internal organisational autonomy, the Commission has established among its own departments... [OLAF] with responsibility for conducting administrative fraud investigations;... it has given [OLAF] full independence to exercise its investigative function’.

- 24 The seventh recital to Regulations Nos 1073/1999 and 1074/1999 states that: ‘given the need to step up the fight against fraud, corruption and any other illegal activities detrimental to the Communities’ financial interests, [OLAF] must be able to conduct internal investigations in all the institutions, bodies, offices and agencies established by, or on the basis of, the EC and Euratom Treaties’.

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- 25 The 10th recital to the regulations states that investigations undertaken by OLAF ‘must be conducted in accordance with the Treaty and in particular with the Protocol on the privileges and immunities of the European Communities, while respecting the Staff Regulations of officials and the conditions of employment of other servants of the European Communities (referred to as “the Staff Regulations” [in that regulation]), and with full respect for human rights and fundamental freedoms, in particular the principle of fairness, for the right of persons involved to express their views on the facts concerning them and for the principle that the conclusions of an investigation may be based solely on elements which have evidential value’. The recital goes on to state that ‘to that end the institutions, bodies, offices and agencies must lay down the terms and conditions under which such internal investigations are conducted’.
- 26 The 12th recital to Regulations Nos 1073/1999 and 1074/1999 states that ‘to ensure that [OLAF] is independent in carrying out the tasks conferred on it by this Regulation, its Director must be given the power to open an investigation on his own initiative’.
- 27 The 18th recital to the regulations states that ‘administrative investigations should be conducted under the authority of... [OLAF’s] Director..., in full independence from the institutions, bodies, offices and agencies and from the Supervisory Committee.’
- 28 The 21st recital to Regulations Nos 1073/1999 and 1074/1999 states that ‘entrusting to an independent [European Anti-Fraud Office] the task of conducting external administrative investigations in this area is accordingly in full compliance with the subsidiarity principle’ and that ‘the operation of [a European Anti-Fraud Office] is likely to step up the fight against fraud, corruption and any other illegal activities affecting the Communities’ financial interests and is therefore compatible with the proportionality principle’.

- 29 Article 1 of Regulation No 1073/1999 provides, as does Article 1 of Regulation No 1074/1999 in relation to the European Atomic Energy Community, that:

‘1. In order to step up the fight against fraud, corruption and any other illegal activity affecting the financial interests of the European Community,... [OLAF] shall exercise the powers of investigation conferred on the Commission by the Community rules and Regulations and agreements in force in those areas.

...

3. Within the institutions, bodies, offices and agencies established by, or on the basis of, the Treaties (... “the institutions, bodies, offices and agencies”), [OLAF] shall conduct administrative investigations for the purpose of:

- fighting fraud, corruption and any other illegal activity affecting the financial interests of the European Community,
- investigating to that end serious matters relating to the discharge of professional duties such as to constitute a dereliction of the obligations of officials and other servants of the Communities liable to result in disciplinary or, as the case may be, criminal proceedings, or an equivalent failure to

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discharge obligations on the part of members of institutions and bodies, heads of offices and agencies or members of the staff of institutions, bodies, offices or agencies not subject to the Staff Regulations...’.

30 Article 2 of Regulations Nos 1073/1999 and 1074/1999 provides that:

‘Within the meaning of this Regulation, “administrative investigations” (... “investigations”) shall mean all inspections, checks and other measures undertaken by employees of [OLAF] in the performance of their duties, in accordance with Articles 3 and 4, with a view to achieving the objectives set out in Article 1 and to establishing, where necessary, the irregular nature of the activities under investigation. These investigations shall not affect the powers of the Member States to bring criminal proceedings.’

31 Article 4 of Regulations Nos 1073/1999 and 1074/1999, headed ‘Internal Investigations’, provides:

‘1. In the areas referred to in Article 1, [OLAF] shall carry out administrative investigations within the institutions, bodies, offices and agencies (“... internal investigations”).

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

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

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

...

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

5. Where investigations reveal that a member, manager, official or other servant may be personally involved, the institution, body, office or agency to which he belongs shall be informed.

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In cases requiring absolute secrecy for the purposes of the investigation or requiring recourse to means of investigation falling within the competence of a national judicial authority, the provision of such information may be deferred.

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

- (a) a duty on the part of members, officials and other servants of the institutions and bodies, and managers, officials and servants of offices and agencies, to cooperate with and supply information to [OLAF's] servants;
- (b) the procedures to be observed by [OLAF's] employees when conducting internal investigations and the guarantees of the rights of persons concerned by an internal investigation.'

32 The second paragraph of Article 5 of Regulations Nos 1073/1999 and 1074/1999 provides that:

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

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33 Headed 'Investigations procedure', Article 6 of the regulations provides:

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

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

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

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

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

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

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- 34 Under Article 7 of Regulations Nos 1073/1999 and 1074/1999, headed ‘Duty to inform [OLAF]’:

‘1. The institutions, bodies, offices and agencies shall forward to [OLAF] without delay any information relating to possible cases of fraud or corruption or any other illegal activity.

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

...

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

- 35 Article 8 of Regulations Nos 1073/1999 and 1074/1999 sets out certain rules intended to ensure that information obtained in the course of investigations is subject to confidentiality and the relevant provisions on data protection.

36 Article 9 of the regulations provides:

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

2. In drawing up such reports, account shall be taken of the procedural requirements laid down in the national law of the Member State concerned. Reports drawn up on that basis shall constitute admissible evidence in administrative or judicial proceedings of the Member State in which their use proves necessary, in the same way and under the same conditions as administrative reports drawn up by national administrative inspectors. They shall be subject to the same evaluation rules as those applicable to administrative reports drawn up by national administrative inspectors and shall be of identical value to such reports.

...

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

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37 Article 11 of Regulations Nos 1073/1999 and 1074/1999 provides:

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

...

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

...

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

...

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

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

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

38 Article 12 of Regulations Nos 1073/1999 and 1074/1999 deals with the Director of OLAF. It reproduces certain statements from Decision 1999/352 and also provides at paragraph (3) that:

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

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

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

39 Under Article 14 of the regulations:

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

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

40 On 25 May 1999, the Parliament, the Council and the Commission concluded an interinstitutional agreement concerning internal investigations by the European Anti-Fraud Office (OLAF) (OJ 1999 L 136, p. 15; 'the interinstitutional agreement'). By that agreement, the institutions agreed '[t]o adopt common rules consisting of the implementing measures required to ensure the smooth operation of the investigations carried out by [OLAF] within their institution' and '[t]o draw up such rules and make them immediately applicable by adopting an internal decision in accordance with the model attached to this Agreement and not to deviate from that model save where their own particular requirements make such deviation a technical necessity'.

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

The contested decision

- 42 The contested decision has not been published. An English version of it was none the less communicated to the Presidents of the Parliament, the Council and the Commission by the President of the EIB on 16 November 1999.
- 43 Having referred to Decision 1999/352, the preamble to the contested decision states that whilst '[r]eaffirming its commitment to maintaining a strong and comprehensive internal control framework, including measures against fraud', the EIB 'welcom[es] the objectives of OLAF and the possibility of cooperating with it'. The preamble further states that the contested decision was adopted '[t]aking into account the legal framework of the EIB as laid down in the EC Treaty and the [EIB Statute]'.
- 44 The contested decision is divided into two parts. Part I, entitled 'Investigations relating to fraudulent activity in connection with operations managed by the EIB under mandate and involving expenditure of Community budget funds', applies 'in respect of operations that are carried out by the Bank under mandate from the Community and have given, or will, in the normal course of events, give rise to expenditure of Community budget funds' and 'to operations carried out by the [EIB] with resources from the European Development Fund, subject to satisfactory confirmation being provided to the [EIB] that the Fund is within the remit of OLAF' ('category I operations'). Part II of the contested decision deals with

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investigations relating to fraudulent activity ‘in connection with EIB operations other than those covered by Part I’ (‘category II operations’).

45 Paragraph 4 of Part I of the contested decision is worded as follows:

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

46 Paragraph 5 of Part I of the contested decision states:

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

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47 Paragraph 6 of Part I of the contested decision provides:

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

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

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

48 Paragraph 7 of Part I of the contested decision provides:

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

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49 Paragraph 9 of Part I of the contested decision provides:

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

50 Paragraph 10 of Part I of the contested decision states:

‘Measures. Depending on the request, and on the circumstances of each case, the President [of the EIB] will:

— authorise the provision of specified documents or other information by the [EIB’s] services; and /or

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

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

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

51 Paragraph 11 of Part I of the contested decision provides:

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

52 As regards category II operations, Part II of the contested decision provides:

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

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

The subject-matter of the application

- 53 In its application, the Commission claims that the Court should annul the contested decision on the ground that it infringes Regulations Nos 1073/1999 and 1074/1999, in particular Article 4 thereof.
- 54 Its essential submission is that the contested decision is contrary to the powers conferred on OLAF in relation to the conduct of administrative investigations in that it confines the ability to carry out investigations of the EIB to the latter's internal services. The decision likewise violates OLAF's right of access to information held by the EIB by making such access subject, in any given case, to authorisation from the President of the EIB and to conditions which are to be defined by him.
- 55 In the Commission's submission, the rules put in place by the contested decision thus entail a negation of OLAF's powers and, more fundamentally, a negation of the applicability of Regulations Nos 1073/1999 and 1074/1999 to the EIB. In addition, the decision does not constitute an adequate implementing measure in respect of Article 4(6) of those regulations.

Jurisdiction of the Court and admissibility

- ⁵⁶ The Commission's application is based primarily on Article 237(b) EC, which provides that measures of the Board of Governors of the EIB ('the Board of Governors') may form the subject-matter of an action for annulment before the Court. Although it was adopted by the Management Committee of the EIB ('the Management Committee'), the contested decision, in the Commission's submission, falls within the competence of the Board of Governors. On the assumption, therefore, that the decision was adopted on the basis of powers delegated by the Board of Governors, the Commission contends that the measure is imputable to the Board of Governors and must, therefore, be open to challenge under Article 237(b) EC.
- ⁵⁷ In the alternative, the Commission takes Article 230 EC as the basis for its application. It submits that by virtue of the Court's case-law, Article 237 EC does not exhaustively list the powers of the Court with regard to the EIB. Observing that the EIB is an integral part of the Community legal order, the Commission argues that it would be incompatible with the fact that the European Community is governed by the rule of law if the Court's power of review did not apply to a measure such as the contested decision, which disregards the intention of the Community legislature in the sphere of the protection of the Communities' financial interests and gives expression to a major conflict of a 'quasi-constitutional' nature.
- ⁵⁸ The EIB denies that the Court has jurisdiction, on various grounds. It also contends that the application is inadmissible.

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Jurisdiction of the Court to hear and determine an action under Article 237(b) EC

- 59 The EIB contends, first, that the application cannot properly be founded on Article 237(b) EC.
- 60 In the EIB's submission, the fact that decisions of the Management Committee are not mentioned in Article 237(b) EC reflects the intention of the draftsmen of the EC Treaty to exclude such measures from the Court's power of review. Furthermore, the contested decision was adopted by the Management Committee in the proper exercise of its powers.
- 61 The EIB refers in that regard to paragraphs 3 and 8 of Article 13 of the EIB Statute, under which:

'The Management Committee shall be responsible for the current business of the [EIB], under the authority of the President and the supervision of the Board of Directors.

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

...

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

⁶² It is particularly important to note that the Board of Governors was regularly informed of developments in the work preparatory to the adoption of the contested decision and that the Board of Governors at no time claimed for itself competence to adopt the decision. Nor did the Board of Directors, which under Article 11 of the EIB Statute is responsible for ensuring that the EIB is managed in accordance with the EC Treaty, express any doubts as to the Management Committee's competence to adopt the decision.

⁶³ As the Commission has failed to establish misuse of powers or abuse of process on the part of the EIB's managing organs, there is no basis for its claim that the EIB has sought to evade the system of judicial protection laid down by the EC Treaty. Further, even if the Management Committee had misused its powers, that would be purely a matter for the higher authorities within the EIB, in the context of the system of self-governance established by the EIB Statute.

⁶⁴ The EIB also contends that the Commission's proposition that the contested decision was adopted pursuant to a delegation of power from the Board of Governors to the Management Committee is not substantiated either in the light of the EIB Statute or in the light of its Rules of Procedure.

⁶⁵ The EIB's arguments cannot be accepted.

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- 66 The Court finds that a measure such as the contested decision cannot form part of the ‘current business of the [EIB]’ for the purposes of Article 13.3 of the EIB Statute, or, more generally, fall within the ambit of the Management Committee’s own competence.
- 67 As the Commission points out, Article 9.3(h) of the EIB Statute makes clear that it is the responsibility of the Board of Governors to approve the EIB’s Rules of Procedure. The purpose of the Rules of Procedure is to organise the internal operation of the services in the interests of good administration (see, *inter alia*, Case C-69/89 *Nakajima v Council* [1991] ECR I-2069, paragraph 49). It follows that, within the EIB, it is in principle the Board of Governors on which power is conferred to organise internal matters and which is, therefore, authorised to take the appropriate measures in order to ensure the internal operation of the EIB in conformity with the interests of its good administration (see, by analogy, Case C-58/94 *Netherlands v Council* [1996] ECR I-2169, paragraph 37).
- 68 The development by a Community institution or body of procedures for monitoring whether its internal operations are in order is designed, *inter alia*, to ensure that it functions smoothly. The adoption of such measures consequently forms part of the institution’s or body’s internal organisation (see, in relation to measures intended to ensure the correct utilisation of funds made available to political groups in the Parliament, Case 294/83 *Les Verts v Parliament* [1986] ECR 1339, paragraph 47), subject to the limits imposed by Community law in that regard (see, by analogy, Joined Cases C-213/88 and C-39/89 *Luxembourg v Parliament* [1991] ECR I-5643, paragraph 34).
- 69 It may, moreover, be pointed out in that regard that the EIB’s Rules of Procedure include Chapter V, whose purpose is precisely to describe the composition, operational rules and investigative powers of the EIB Audit Committee, whose

task is, pursuant to Article 14 of the EIB Statute, to verify annually that the EIB's operations have been conducted, and its books kept, in a proper manner.

- 70 In light of the foregoing, the Commission is therefore right in arguing that the contested decision, whose purpose is to lay down the procedures for cooperation with OLAF as regards the transmission of information relating to potentially fraudulent activities and the conduct of investigations into such activities within the EIB, falls within the sphere of competence of the Board of Governors and not that of the Management Committee.
- 71 In those circumstances, no doubt can be cast on the Court's jurisdiction to hear and determine this application for annulment on the basis of Article 237(b) EC.
- 72 In particular, it is irrelevant, for the purpose of deciding the issue of competence, (i) whether, as the Commission suggests, the contested decision may be imputable to the Board of Governors because power was delegated, formally or informally, to the Management Committee or (ii) whether in this instance the Management Committee acted without being authorised to do so. For the purposes of deciding that issue, it is also irrelevant that Article 237(b) EC does not refer to acts of the Management Committee and that Article 13.8 of the EIB Statute provides that the Management Committee is responsible only to the EIB.
- 73 By providing that the measures of the Board of Governors may be subject to review by the Court, Article 237(b) EC seeks, in particular, to ensure that all the acts adopted by the EIB falling within the Board's sphere of competence may be referred to the Court.

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- 74 It follows that if Article 237(b) EC were to be interpreted as excluding such a measure from those amenable to challenge on the basis of that provision purely on the ground that the measure was adopted by a different organ of the EIB, such as the Management Committee, the result would be contrary to the spirit of Article 237(b); and that would be so whether or not the adoption of the measure at issue was the consequence of a deliberate arrangement by the EIB of its decision-making procedures.
- 75 Such an interpretation would also ignore the fact that the European Community is 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 EC Treaty, which 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 (see, *inter alia*, Case C-314/91 *Weber v Parliament* [1993] ECR I-1093, paragraph 8, and the case law cited). It is appropriate to bear in mind in that regard that although it is not a European Community institution, the EIB none the less is a Community body established and endowed with legal personality by the EC Treaty (see, in particular, Case 110/75 *Mills v EIB* [1976] ECR 955, paragraph 14, Case 85/86 *Commission v EIB* [1988] ECR 1281, paragraph 24, and Case C-370/89 *SGEEM and Etroy v EIB* [1992] ECR I-6211, paragraph 13) and it is on that account that the EIB is subject to judicial review by the Court, in particular as provided for in Article 237(b) EC.

Article 230 EC

- 76 Second, the EIB denies that the Court has jurisdiction to determine an application challenging its acts under Article 230 EC. It relies principally in that regard on the need to ensure the practical effect of the *lex specialis* which Article 237 EC constitutes in relation to that provision.

- 77 However, since Article 230 EC has been invoked by the Commission only in the alternative and since the contested decision is, as is apparent from paragraphs 66 to 75 of this judgment, an actionable measure under Article 237(b) EC, there is no need to examine, in this case, whether proceedings might be brought against a measure of the Management Committee on the basis of Article 230 EC.

The Court's jurisdiction to hear and determine an application alleging infringement of Regulation No 1074/1999

- 78 Third, the EIB submits that, since the Euratom Treaty in general and Article 146 EA in particular, relating to the Court's jurisdiction, do not refer to the EIB, the Court is not competent to hear and determine this application in so far as it seeks annulment of the contested decision on the ground of infringement of Article 1074/1999.

- 79 That argument cannot be accepted either.

- 80 As the Court found above, Article 237(b) EC confers jurisdiction on the Court to annul a measure such as the contested decision.

- 81 It is indeed the case that Article 237(b) EC provides that the Commission, any Member State or the Board of Directors of the EIB may institute such proceedings under the conditions laid down in Article 230 EC and that the latter provision

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confers jurisdiction on the Court to adjudicate on actions for ‘infringement of this Treaty or any rule of law relating to its application.’

- 82 It is, however, sufficient to observe in relation to the last point that it is clear from the Court’s case-law that the need for a complete and consistent review of legality requires Article 230 EC to be construed as not depriving the Court of jurisdiction to consider, in proceedings for the annulment of a measure based on a provision of the EC Treaty, a submission concerning the infringement of a rule of the Euratom Treaty (Case C-62/88 *Greece v Council* [1990] ECR I-1527, paragraph 8).

Argument that the application seeks to establish a failure to act by the EIB

- 83 Fourth, the EIB contends that the application is inadmissible in that in reality it seeks to establish that the EIB has failed to act by omitting to adopt a decision ensuring that Regulations Nos 1073/1999 and 1074/1999 are correctly implemented.
- 84 In that regard, it is sufficient to state, as the Commission has indicated in its reply, that the application is seeking annulment of the contested decision in so far as the latter establishes a system distinct from what is required by Regulations Nos 1073/1999 and 1074/1999 and which, contrary to those regulations, in particular Article 4 thereof, excludes OLAF’s power to conduct internal investigations within the EIB and is incompatible with OLAF’s right to have access to the documents and information held by the EIB.

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- 85 It is clear from all of the foregoing considerations that the Court has jurisdiction to hear and determine the present application under Article 237(b) EC and that the application is admissible.

The applicability of Regulations Nos 1073/1999 and 1074/1999

- 86 The EIB contends that the Commission's application should be dismissed. In its submission, Regulations Nos 1073/1999 and 1074/1999 must be declared inapplicable on various grounds.
- 87 It makes a number of submissions: that the regulations undermine the autonomous status which it enjoys under the EC Treaty, that they were not adopted on a proper legal basis and that they are in breach of the principle of proportionality and the obligation to state reasons.

Autonomy of the EIB

Arguments of the EIB

- 88 By its first ground of defence, the EIB contends that the autonomous status which it enjoys under the EC Treaty is apt to put it beyond the reach of Regulations Nos 1073/1999 and 1074/1999.

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- 89 The EIB maintains essentially that the fact it is endowed, witness Article 266 EC and the EIB Statute, with legal personality distinct from that of the European Community, with managing and administrative bodies and with its own resources and budget indicates that the draftsmen of the EC Treaty intended to ensure that it would have autonomy of management and action. That autonomy is a pre-condition for the conduct of the EIB's business and for its efficient operation, and also for its credibility on the markets. It also prevents the European Community from incurring liability and limits the liability of the Member States to their shareholder contribution.
- 90 Article 248(1) and (3) EC and Article 14 of the EIB Statute also bear witness to the EIB's autonomy. Those provisions state that control by the Court of Auditors is restricted to the EIB's management of Community revenue and expenditure, which, in the EIB's submission, amounts to only 10% of its business, whilst its other management activities are a matter for the EIB Audit Committee alone. Under Article 248(3) EC, even the right of access of the Court of Auditors to information held by the EIB concerning its management of Community revenue and expenditure is subject to conditions which are to be laid down in an agreement between the Commission, the Court of Auditors and the EIB.
- 91 In the EIB's submission, its autonomous status precludes the Community legislature, in the absence of any enabling provision in the Treaties, from making the EIB subject to OLAF's investigative powers.
- 92 Instead, both its status and the fact that it conducts banking business make it imperative for the EIB to be able to establish its own system for combating fraud. In particular, it is essential that the EIB should be in a position to ensure investors that it is acting with complete independence.

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- 93 The powers conferred on OLAF as regards the opening of an internal investigation, its right of access to premises, its right to make copies of, and obtain extracts from, any document held by Community institutions, bodies, offices or agencies and the obligation of those entities' staff to cooperate with OLAF and to supply it with information held by the institutions, bodies, offices or agencies entails, as regards the EIB, the outright negation of the autonomy which it enjoys under the EC Treaty.
- 94 Although special status is conferred upon it, OLAF nevertheless forms part of the Commission's internal departments and falls within the sphere of competence of the Commissioner responsible for the Community budget.

Findings of the Court

- 95 It must be stated at the outset that the EIB has not made clear whether it is submitting that, on account of its special status, Regulations Nos 1073/1999 and 1074/1999 must be interpreted as not applying to it or whether it is claiming that the regulations must be declared inapplicable pursuant to Articles 241 EC and 156 EC inasmuch as they are incompatible with that status.
- 96 In the light of that ambiguity, it is appropriate to examine the EIB's ground of defence from each of the perspectives referred to in the preceding paragraph.
- 97 As regards, first, the question of the scope of Regulations Nos 1073/1999 and 1074/1999, it must be found, as the Commission has rightly maintained, that the

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expression ‘institutions, bodies, offices and agencies established by, or on the basis of, the Treaties’ in Article 1(3) of Regulation No 1073/1999 must indeed be interpreted as including the EIB.

- 98 As has been observed at paragraph 75 of this judgment, the EIB is a Community body established and endowed with legal personality by the EC Treaty; and it is not apparent from either the preamble to, or the provisions of, Regulations Nos 1073/1999 and 1074/1999 that the Community legislature intended to draw any distinction between the various institutions, bodies, offices and agencies established by, or on the basis of, the Treaties.
- 99 The seventh recital of Regulations Nos 1073/1999 and 1074/1999 specifically draws attention to the need to extend the scope of OLAF’s internal investigations to ‘all’ the institutions, bodies, offices and agencies.
- 100 As regards, second, the argument that the regulations fail to take account of the status conferred on the EIB by the EC Treaty and should consequently be declared inapplicable on the basis of Articles 241 EC and 156 EA, it is appropriate to make the following remarks.
- 101 It is true that under Article 266 EC the EIB has legal personality distinct from that of the Community, that it is administered and managed by organs of its own and that it has its own resources and its own budget. As the case-law of the Court makes clear, the EIB must, in order to perform the tasks assigned to it by Article 267 EC, be able to act in complete independence on the financial markets, like any other bank (*Commission v EIB*, paragraph 28).

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- 102 Nevertheless, as the Court has also stated, the fact that the EIB has that degree of operational and institutional autonomy does not mean that it is totally separated from the Communities and exempt from every rule of Community law. It is clear in particular from Article 267 EC that the EIB is intended to contribute towards the attainment of the European Community's objectives and thus by virtue of the Treaty forms part of the framework of the Community. It follows that the position of the EIB is therefore ambivalent inasmuch as it is characterised, on the one hand, by independence in the management of its affairs, in particular in the sphere of financial operations, and, on the other, by a close link with the European Community as regards its objectives (*Commission v EIB*, paragraphs 29 and 30).
- 103 In this instance, the Court finds that the EIB has not established how the fact that it is subject to measures adopted by the Community legislature in the area of fraud prevention and the prevention of any other unlawful activities detrimental to the European Community's financial interests, such as the measures provided for in Regulations Nos 1073/1999 and 1074/1999, is incompatible with its special status.
- 104 As the Advocate General has rightly pointed out at paragraph 120 of his Opinion, the EIB has, in particular, failed to establish that the investigative powers conferred on OLAF by the Community legislature are such as to affect its management and its power to take independent decisions as regards the grant of loans and guarantees and the financing thereof, in particular by recourse to capital markets. Nor has the EIB established that the existence of those powers has any effect on its reputation or its credibility as an independent body on the financial markets (see, by analogy, in relation to the application of Community tax to salaries paid by the EIB, *Commission v EIB*, paragraph 30).
- 105 In that regard, it is appropriate, first, to point out that the provisions of Article 248(1) and (3) EC and Article 14 of the EIB Statute, which in essence concern the audit of accounts and the examination of financial management, are

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without prejudice to the applicability to the EIB of a system of investigation which, like that established under Articles 280 EC and 203 EA by Regulations Nos 1073/1999 and 1074/1999 respectively, is specifically designed to permit the investigation of suspicions relating to acts of fraud or corruption or other illegal activities detrimental to the financial interests of the Communities. As the Council has submitted, such a system of investigation bears no similarity to the audit of the accounts or the examination of the financial management of the entity concerned.

106 Next, it must be noted that neither the fact that OLAF was established by the Commission and is incorporated within the Commission's administrative and budgetary structures on the conditions laid down in Decision 1999/352 nor the fact that the Community legislature has conferred on such a body external to the EIB powers of investigation on the conditions laid down in Regulations Nos 1073/1999 and 1074/1999, is *per se* capable of undermining the EIB's operational autonomy and its reputation on the financial markets.

107 As is apparent, in particular, from the fourth, 10th, 12th and 18th recitals in the preamble to, and Articles 4, 5 (second paragraph), 6, 11 and 12 of, Regulations Nos 1073/1999 and 1074/1999, the rules put in place by the regulations reflect the settled intention of the Community legislature to subject the powers conferred on OLAF, first, to guarantees intended to ensure OLAF's complete independence, in particular from the Commission, and, second, to strict observance of the rules of Community law, including, in particular, the Protocol on the Privileges and Immunities of the European Communities, human rights and fundamental freedoms and the Staff Regulations of Officials of the European Communities and the Conditions of Employment of other servants of the European Communities.

108 Furthermore, under Regulations Nos 1073/1999 and 1074/1999 the exercise of those powers is subject to various specific rules and guarantees, whilst the purpose for which they may be used is clearly delineated. In that respect, Article 2 of Regulations Nos 1073/1999 and 1074/1999 provides that OLAF's adminis-

trative investigations are to be conducted with a view to achieving the objectives set out in Article 1 of the regulations and to establishing, where necessary, the irregular nature of the activities under investigation. The means which OLAF has at its disposal for the purpose of pursuing those objectives are specifically listed, notably in Articles 4, 7 and 9 of the regulations.

109 Finally, it is appropriate to point out, as have the Commission and the Netherlands Government, and also the Advocate General at paragraph 122 of his Opinion, that the internal investigations which OLAF may carry out must, as is clear from the second subparagraph of Article 4(1) of Regulations Nos 1073/1999 and 1074/1999, also be carried out under the conditions and in accordance with the procedures provided for in decisions adopted by each institution, body, office and agency. Thus it is conceivable that any matters specific to its banking business will, where appropriate, be taken into account by the EIB when it adopts such a decision and it is incumbent on the EIB to establish that any restrictions in that regard are necessary.

110 It follows from the foregoing considerations that the EIB's first ground of defence must be rejected.

Legal basis of Regulation No 1073/1999

111 By its second ground of defence, the EIB contends that Regulation No 1073/1999 must be declared inapplicable on the ground that it could not be adopted on the basis of Article 280 EC.

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- 112 First, the expression ‘financial interests of the Community’ in Article 280 EC relates solely to expenditure and revenue coming within the budget of the European Community. It therefore does not allow measures to be adopted on the basis of that provision for the purpose of combating fraud within the EIB, since the EIB has its own budget.
- 113 Second, and more generally, Article 280 EC does not allow measures to be adopted for the purpose of combating fraud within the institutions, bodies, offices and agencies established by, or on the basis of, the Treaties.

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

Arguments of the EIB

- 114 In the EIB’s submission, Article 280 EC allows the adoption of anti-fraud measures only for the purposes of safeguarding the Community budget. It follows that Community provisions adopted on the basis of Article 280 EC with a view to combating fraud cannot apply to the EIB, since the EIB has its own resources, which are separate from those of the Communities.
- 115 The fact that 10% of the EIB’s business relates to the management of Community revenue and expenditure, including in particular the Community tax on salaries, wages and emoluments of the staff and members of the bodies of the EIB, is not an adequate reason for making the EIB’s own resources and its business as a

whole subject to OLAF's powers. The EIB has none the less stated that it would be prepared to enter into an agreement with OLAF concerning its management of Community funds.

- 116 In the EIB's submission, its proposed interpretation is borne out by Article 248(1) and (3) EC. That provision limits control by the Court of Auditors to revenue and expenditure of the Community and to revenue and expenditure of any body set up by the Community in so far as the constituent instrument of the body does not preclude such control. Moreover, it provides for on-the-spot audits only in the case of the 'premises of any body which manages revenue or expenditure on behalf of the Community'.
- 117 That interpretation is consonant with earlier legislative practice, which accepted the link between 'the financial interests of the Community', on the one hand, and the general budget of the Communities and the budgets managed by them, on the other. In that regard, the EIB refers in particular to the definition of 'irregularity' in Article 1(2) of Council Regulation (EC, Euratom) No 2988/95 of 18 December 1995 on the protection of the European Communities financial interests (OJ 1995 L 312, p. 1) and the concept of 'fraud affecting the European Communities' financial interests', as defined in Article 1 of the Convention on the protection of the European Communities' financial interests established by the Council Act 95/C 316/03 of 26 July 1995 (OJ 1995 C 316, p. 49).

Findings of the Court

- 118 It must be stated at the outset that the EIB has not made clear whether it is submitting that Regulation No 1073/1999 must be interpreted as not applying to

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it because the regulation was adopted on the basis of Article 280 EC or whether it is contending that the regulation must be declared inapplicable pursuant to Article 241 EC inasmuch as it infringes Article 280 EC.

- 119 In those circumstances, it is appropriate, first, to observe that, as may be seen from paragraphs 97 to 99 of this judgment, Regulation No 1073/1999 must indeed be interpreted as applying, in particular, to the EIB.
- 120 Second, it must be found that, contrary to the EIB's submission, the expression 'financial interests of the Community' in Article 280 EC must be interpreted as encompassing not only revenue and expenditure covered by the Community budget but also, in principle, revenue and expenditure covered by the budget of other bodies, offices and agencies established by the EC Treaty.
- 121 Among the factors bearing out such a finding is, first, the fact that the expression is peculiar to Article 280 EC and is different from the terms used in other provisions of Title II of Part Five of the EC Treaty, entitled 'Financial Provisions', which refer invariably to the 'budget' of the European Community. The same may be said of the fact, pointed to by the Netherlands Government, that the expression 'financial interests of the Community' seems wider than the expression 'items of revenue and expenditure of the Community' found *inter alia* in Article 268 EC.
- 122 Second, the fact that a body, office or agency owes its existence to the EC Treaty suggests that it was intended to contribute towards the attainment of the European Community's objectives and places it within the Community legal order, so that the resources that it has at its disposal by virtue of the Treaty have by their nature a particular and direct financial interest for the Community.

- 123 As regards more specifically the EIB, it may be noted in that respect that it was established by the EC Treaty and is a Community body whose task, as the first paragraph of Article 267 EC provides, is ‘to contribute... to the balanced and steady development of the common market in the interest of the Community’. It follows that the EIB, by virtue of the EC Treaty, forms part of the framework of the Community (*Commission v EIB*, paragraph 29).
- 124 Various other Community legal provisions afford further confirmation that the EIB’s resources and their use are thus of evident financial interest to the European Community and its objectives: they include the second paragraph of Article 267 EC which provides that, in carrying out its task, the EIB is to facilitate the financing of investment programmes in conjunction with assistance from the Structural Funds and other Community financial instruments, and Article 20 of the EIB Statute, which states that in its loan and guarantee operations, the EIB must, *inter alia*, ‘ensure that its funds are employed as rationally as possible in the interests of the Community’. The same may be said of Article 21 of the EIB Statute, which provides in particular that applications for loans may be made to the EIB through the Commission and that the Commission is to be consulted about other applications for loans, which, if the Commission delivers an unfavourable opinion, may not be granted unless the EIB Board of Directors takes a unanimous decision, the director nominated by the Commission abstaining.
- 125 It is clear from the foregoing considerations that the expression ‘financial interests of the Community’ in Article 280 EC is not restricted exclusively to the budget of the European Community in the strict sense but also covers the resources and expenditure of the EIB (see, by analogy, in relation to the applicability to the EIB of Article 179 of the EC Treaty (now Article 236 EC), *Mills v EIB*, cited above, paragraph 14).
- 126 That finding is not affected by Article 248 EC which, unlike Article 280 EC, is not specifically designed to counter fraud and any other illegal activities affecting the financial interests of the European Community.

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127 Nor is that finding affected by the mere fact, on the assumption that it is correct, that a particular legislative practice had given a different meaning to the expression 'financial interests of the Community'.

128 It follows that the fact that Regulation No 1073/1999 also concerns the EIB, which, having been established by the EC Treaty, by virtue of that Treaty has its own resources distinct from those of the Community budget, does not provide grounds for finding the regulation inapplicable on the basis of Article 241 EC.

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

129 In view of the wording of Article 280(4) EC, which provides that the European Community is to adopt measures 'with a view to affording effective and equivalent protection in the Member States' and that such measures cannot concern 'the application of national criminal law or the national administration of justice', the EIB submits that the powers of the Community legislature are limited to adopting measures intended to improve the mechanisms for combating fraud at the level of the Member States. In the EIB's submission, measures intended to combat fraud or irregularities within the institutions, bodies, offices and agencies established by, or on the basis of, the Treaties cannot be adopted under that provision.

130 That argument cannot be accepted.

- 131 By introducing into Article 280 EC the statements in paragraphs 1 and 4, the draftsmen of the Treaty of Amsterdam clearly intended to step up the fight against fraud and irregularities affecting the financial interests of the European Community, in particular by expressly conferring on the Community the specific task of ‘combating’, like the Member States, such fraud and irregularities by adopting ‘measures’ which act as a ‘deterrent’ and afford ‘effective protection in the Member States’.
- 132 In that regard, the fact that Article 280(1) EC specifies that the measures are to be taken in accordance with that article does not mean that the scope of the Community’s competence in this sphere is to be determined exclusively by reference to the remaining paragraphs of Article 280 EC, in particular paragraph 4.
- 133 Article 280(4) EC must be construed as providing a fuller explanation of the Community’s competence and specifying certain of the conditions on which it is exercised. It thus lays down the procedural requirements governing the adoption of Community measures and likewise states that action by the European Community is as much aimed at preventing fraud as at combating it. It also states that the Community’s powers are subject to certain limits in that the measures adopted cannot concern the application of national criminal law or the administration of justice in the Member States.
- 134 In that context, the fact that Article 280(4) EC refers in particular to the need to afford effective and equivalent protection in the Member States cannot be taken to mean that the draftsmen of the Treaty of Amsterdam implicitly intended to make any action taken by the Community subject to a supplementary restriction as basic as a prohibition on combating fraud and other irregularities affecting its

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financial interests by adopting legislative measures covering the institutions, bodies, offices and agencies established by, or on the basis of, the Treaties.

¹³⁵ Quite apart from the fact that such a restriction of the Community's competence is not apparent from the wording of Article 280 EC, it would, as the Commission and all the interveners rightly maintain, scarcely be compatible with the objectives pursued by that article. It is not disputed that if the protection of the European Community's financial interests is to be rendered effective, it is essential that the deterrence of, and the fight against, fraud and other irregularities operate at all levels at which those interests are liable to be affected by such phenomena. Furthermore, it is often the case that phenomena fought in that way simultaneously involve actors at various levels.

¹³⁶ It follows from the foregoing considerations that the EIB's second ground of defence must be rejected.

Legal basis of Regulation No 1074/1999

¹³⁷ By its third ground of defence, the EIB contends that Regulation No 1074/1999 must be declared inapplicable under Article 156 EA on the ground that it could not be adopted on the basis of Article 203 EA.

138 The EIB submits that, since it does not form part of the institutional structure of the European Atomic Energy Community and is not covered by the Euratom Treaty, no provision of that Treaty, nor any measure adopted under it, can apply to it.

139 Furthermore, the fact that Regulation No 1073/1999 was adopted under Article 280(4) EC and the fact that that provision was inserted into the EC Treaty specifically in order to confer competence to adopt such measures on the Community legislature mean that, had that provision not existed, the Council would have been unable to act, particularly on the basis of Article 308 EC. It follows, in the EIB's submission, that the Council was also unable to adopt Regulation No 1074/1999 on the basis of Article 203 EA, which is equivalent to Article 308 EC.

140 Furthermore, recourse could be had to Article 203 EA only in so far as the fight against fraud is one of the 'objectives' of the European Atomic Energy Community. However, it is clear from the wording of Article 1 EA and Article 183a EA, which relate respectively to the task of the Community and to the countering of fraud by the Member States alone, that that is not the case. In addition, the measures found in Regulation No 1074/1999 are not 'appropriate' for the purposes of Article 203 EA.

141 Those arguments cannot be accepted.

142 First, it is a fact, as the Advocate General has stated at paragraph 139 of his Opinion, that the mere circumstance that the EIB is not mentioned in the Euratom Treaty cannot prevent the provisions of that Treaty, or the measures adopted under it, from applying, where appropriate, to the EIB.

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- 143 Second, contrary to the EIB's assertion, Article 183a EA does encapsulate an independent objective of protecting the financial interests of the European Atomic Energy Community (see, by analogy, Case C-209/97 *Commission v Council* [1999] ECR I-8067, paragraph 29).
- 144 The EIB is therefore wrong to maintain that a measure such as Regulation No 1074/1999, which indisputably has the aim of combating fraud affecting the European Atomic Energy Community's interests, was not adopted for the purpose of attaining one of the objectives of that Community.
- 145 Third, the fact that, unlike the Euratom Treaty, the EC Treaty has, since the entry into force of the Treaty of Amsterdam, expressly conferred competence on the European Community in the area of combating fraud affecting its financial interests has no impact on the findings made by the Court at paragraphs 143 and 144 of this judgment. The same is true of the fact that Regulation No 1073/1999 was adopted on the basis of Article 280 EC and not that of Article 308 EC.
- 146 It is appropriate, moreover, to observe in relation to the last point that, as is clear from settled case-law, Article 308 EC may be used as the legal basis for a measure only where no other provision of the EC Treaty confers on the Community institutions the necessary power to adopt it (see, in particular, Case 165/87 *Commission v Council* [1988] ECR 5545, paragraph 17, and Case C-84/94 *United Kingdom v Council* [1996] ECR I-5755, paragraph 48). As is apparent from this judgment, the Community legislature was empowered to adopt Regulation No 1073/1999 on the basis of Article 280 EC.

- 147 Fourth, the Court finds that the EIB has not explained how the measures contained in Regulation No 1074/1999 are not ‘appropriate’ for the purposes of Article 203 EA. Nor has it stated how that contention may be distinguished from the one seeking a declaration that the regulation was in breach of the principle of proportionality.
- 148 Consequently, it is sufficient, at this point, to note that it is not disputed that the EIB manages, as an agent, certain loans contracted by the Commission in the field of the Euratom Treaty and to conclude that such an activity indisputably concerns the financial interest of the European Atomic Energy Community. Moreover, the question as to whether Regulation No 1074/1999 constitutes an appropriate measure must be dealt with in the context of an examination of the EIB’s fourth ground of defence.
- 149 It follows from the foregoing that the EIB’s third ground of defence must be rejected.

The principle of proportionality

Arguments of the EIB

- 150 By its fourth ground of defence, the EIB contends that Regulations Nos 1073/1999 and 1074/1999 should be declared inapplicable, in accordance with Article 241 EC and Article 156 EA, on the ground that they fail to observe the principle of proportionality. Those regulations exceed what is appropriate and necessary for attaining the end pursued.

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- 151 The powers conferred on OLAF are excessive and allow an unwarranted intrusion and an unlawful interference in the EIB's affairs, contrary to the EIB Statute, to its autonomy and to its nature as a financial institution.
- 152 That is notably the case of the power which the second paragraph of Article 5 of Regulations Nos 1073/1999 and 1074/1999 confers on the Director of OLAF to open an internal investigation on his own initiative without having to indicate the reasons or the basis of that decision. The same applies to the unlimited power of access, unannounced and without prior authority, and to the right to seize any document of any type which, in the EIB's submission, follows from Article 4(2) of those regulations, which are incompatible with the very nature of the EIB as a financial institution.
- 153 The EIB also refers to the duty of members, managers, officials and other servants of Community institutions, bodies, offices and agencies to cooperate with and supply information to OLAF's servants and the duty to afford them assistance, and to the duty of those institutions, bodies, offices and agencies to communicate to OLAF any information or document they hold which relates to cases of fraud, corruption or any other illegal activity, as laid down in Articles 4(6)(a), 6(6) and 7 of Regulations Nos 1073/1999 and 1074/1999. It contends in that regard that whereas under those provisions the duty to provide information and the duty to cooperate are to be exercised, in the case of Member States, in conformity with the requirements of national law, it is not provided that they must be exercised, in the case of the Community institutions, bodies, offices and agencies, in accordance with their statutes.
- 154 In its rejoinder, the EIB also states that, in its Progress Report for July 1999 to July 2000, OLAF's Supervisory Committee found various shortcomings in the current organisation of OLAF in terms of the requirements for transparency, legitimacy and efficiency.

- 155 Second, the EIB questions whether it is necessary to confer on OLAF the powers referred to at paragraphs 152 and 153 of this judgment in its particular case, since various adequate measures already exist for the purpose of preventing and combating fraud within the EIB.
- 156 In that regard, it refers, first of all, to the task of auditing the accounts conferred on the Audit Committee by Article 14 of the EIB Statute, and also to the fact that in that connection the Audit Committee has access to the books, vouchers and other relevant documents and that the departments of the EIB are to be at its disposal for any assistance, as provided for in Article 24 of the Rules of Procedure of the EIB. The EIB likewise observes that, when it manages Community revenue and expenditure, its activities may be audited by the Court of Auditors, in accordance with Article 248(3) EC.
- 157 The EIB also refers to the Charter of Internal Audit and to a document entitled 'General Office Procedures Manual', which, according to the explanations provided by the EIB, shows that Internal Audit is responsible for evaluating the adequacy of the internal audit procedures of the EIB and checking that they have been properly applied, and also for ensuring that the EIB's resources are properly managed. For those purposes, Internal Audit has the right to approach any person within the EIB, and also an unrestricted right to examine statements, procedures and the archives. It is also empowered to carry out investigations where there is any suspicion of fraud detrimental to the financial interests of the EIB and of a third party and involving members of the staff or the management organs of the EIB.
- 158 According to the explanations provided by the EIB, any member of its staff who is aware of a fact of that nature is required to inform the Director of Human Resources or the Head of Internal Audit. Following a preliminary investigation, the Head of Internal Audit must decide to close the case if no evidence has been obtained. Where evidence is obtained, he must report his findings to the President

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of the EIB, who decides whether it is necessary to carry out a more detailed investigation, in particular where the investigation requires the support of external bodies, the terms of which must then be agreed. The final report of the Head of Internal Audit, together with his recommendations, is submitted to the President and to the Secretary-General of the EIB and also to the Audit Committee. The President of the EIB decides on the action to be taken.

- 159 Third, the EIB refers to various obligations or prohibitions laid down in the Staff Regulations of the EIB and also to various rules of professional conduct set out in the Code of Conduct applicable to members of its staff, breach of which may lead to disciplinary measures or to termination of contract and which are calculated to contribute to the prevention of fraud. For example, members of staff are prohibited from applying for or accepting from any source outside the EIB any advantage in any way connected with their employment with the EIB or from misusing its resources in pursuing an external activity, and they are required to declare any conflict of interests in relation to an operation of the EIB.

Findings of the Court

- 160 It should be pointed out, by way of preliminary observation, that the EIB's argument that Regulations Nos 1073/1999 and 1074/1999 are illegal on the ground that they undermine its autonomous status and its nature as a financial institution has already been rejected in the context of the examination of its first ground of defence.
- 161 That having been said, it should be borne in mind that the principle of proportionality, which is one of the general principles of Community law, requires that measures implemented through Community provisions should be

appropriate for attaining the objective pursued and must not go beyond what is necessary to achieve it (see, *inter alia*, Case 137/85 *Maizena* [1987] ECR 4587, paragraph 15, and Case C-491/01 *British American Tobacco (Investments) and Imperial Tobacco* [2002] ECR I-11453, paragraph 122).

- ¹⁶² With regard to judicial review of the conditions referred to in the previous paragraph, the Community legislature must be allowed a broad discretion in an area such as that involved in the present case, so that the legality of a measure adopted in that sphere can be affected only if the measure is manifestly inappropriate having regard to the objectives which the competent institution is seeking to pursue (see, to that effect, *British American Tobacco (Investments) and Imperial Tobacco*, paragraph 123, and the case-law cited there).
- ¹⁶³ In the present case, it must be stated, first, that in merely complaining of the allegedly excessive nature of the powers conferred on OLAF by Article 4(2) and (6)(a), the second paragraph of Article 5 and Article 7 of Regulations Nos 1073/1999 and 1074/1999, the EIB has not stated and, *a fortiori*, has not established in what way those provisions are not appropriate or necessary for the purpose of attaining the objectives pursued by those regulations.
- ¹⁶⁴ It is also appropriate to point out in that regard that if the scope of the provisions mentioned in the preceding paragraph is to be correctly assessed, account must be taken of all the matters relevant for the purpose of interpretation, including those mentioned at paragraphs 107 and 108 of this judgment. Thus, contrary to the EIB's submission, a decision by OLAF's Director to open an investigation, like the decision of an institution, body, office or agency established by, or on the basis of, the Treaties to request that an investigation be opened, cannot be taken unless there are sufficiently serious suspicions relating to acts of fraud, corruption or other illegal activities likely to be detrimental to the financial interests of the Communities. Furthermore, it is clear from the wording of Article 6(3) of Regulations Nos 1073/1999 and 1074/1999 that the written authority with which the OLAF inspectors must be equipped must indicate the subject-matter of the investigation.

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- 165 It is sufficient to state that any defects in the way in which the provisions of the regulations are applied, on the assumption that they are proved, cannot entail the illegality of the regulations.
- 166 Second, the EIB has not established that the Community legislature made a manifest error of assessment. The legislature was entitled to take the view that notwithstanding the existence of control mechanisms specific to the various institutions, bodies, offices and agencies established by, or on the basis of, the Treaties, including those to which the EIB refers with regard to itself, it was necessary, for the purposes of strengthening the prevention of, and the fight against, fraud, corruption and other irregularities detrimental to the financial interests of the European Community, to set up a control mechanism which is simultaneously centralised within one particular organ, specialised and operated independently and uniformly with respect to those institutions, bodies, offices and agencies.
- 167 It is appropriate to bear in mind that, as can be seen from paragraph 105 of this judgment, the investigative function conferred on OLAF is different, as regards its specific nature and its specific subject-matter, from general auditing tasks such as those entrusted to the Court of Auditors, and, as regards the EIB, to its Audit Committee.
- 168 In addition, the Community legislature was entitled to take the view that disparate control mechanisms adopted within the institutions, bodies, offices or agencies established by, or on the basis of, the Treaties, with the existence of such control mechanisms and the procedures followed by them being left to the discretion of those entities, did not, given the objectives pursued, constitute a solution presenting a degree of effectiveness equivalent to that which might be expected of a system designed to centralise the investigative function within one and the same specialised and independent body. It is appropriate to bear in mind that Regulations Nos 1073/1999 and 1074/1999 were intended in particular to

confer on OLAF an investigative function to be exercised both within those institutions, bodies, offices and agencies by means of ‘internal’ investigations and outside those same entities by means of ‘external’ investigations.

169 Furthermore, it should be observed in that regard that Regulations Nos 1073/1999 and 1074/1999 specifically provided, as is clear from the second subparagraph of Article 4(1), that OLAF’s internal investigations must be carried out under the conditions and in accordance with the procedures provided for in the regulations and in the decisions adopted by each institution, body, office and agency.

170 As stated at paragraph 109 of this judgment, it is therefore not inconceivable that certain matters specific to the EIB’s banking business will, where appropriate, be taken into account by the EIB when it adopts the decision referred to in the second subparagraph of Article 4(1) of Regulations Nos 1073/1999 and 1074/1999 and it is incumbent on the EIB to establish that any restrictions in that regard are necessary.

171 It follows from the foregoing that the EIB’s fourth ground of defence must be rejected.

The obligation to state reasons

172 By its fifth ground of defence, the EIB maintains that Regulations Nos 1073/1999 and 1074/1999 were adopted in breach of the obligation to state the reasons on which they are based laid down in Articles 253 EC and 162 EA.

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- 173 More precisely, the regulations did not state the reasons why it was necessary to confer on OLAF the powers which it derives from the regulations and to subject the institutions, bodies, offices and agencies, in particular the EIB, to the obligations which they lay down. Nor did the regulations state in what way the measures already taken by those institution, bodies, offices and agencies for the purpose of combating fraud were insufficient or inappropriate for that purpose.
- 174 In that regard, it has consistently been held that the statement of reasons required by Article 253 EC must be adapted to the nature of the act in question. Whilst that statement of reasons must show clearly and unequivocally the reasoning of the Community institution which adopted the measure in such a way as to enable the persons concerned to ascertain the reasons for it and the competent court to exercise its power of review, the institution is not required to go into every relevant point of fact and law. The question as to whether the statement of reasons for a measure satisfies the requirements of Article 253 EC must be assessed with reference not only to the wording of the measure but also to its context and to the whole body of legal rules governing the matter in question. Consequently, if the contested measure clearly discloses the essential objectives pursued by the institution, it would be excessive to require a specific statement of reasons for each of the technical choices made by the institution (see, in particular, Joined Cases C-27/00 and C-122/00 *Omega Air and Others* [2002] ECR I-2569, paragraphs 46 and 47, and also *British American Tobacco (Investments) and Imperial Tobacco*, paragraphs 165 and 166).
- 175 Those requirements are clearly satisfied as regards Regulations Nos 1073/1999 and 1074/1999. As the Advocate General has observed at paragraph 166 of his Opinion, the preambles to those regulations include, in particular, a statement of the purpose to be achieved, the means chosen and the reasons why the Community legislature considers them to be adequate and necessary as regards the aims pursued.
- 176 As regards, in particular, the powers of internal investigation conferred on OLAF, it thus follows in particular from the second to fourth, seventh and 21st recitals to

Regulations Nos 1073/1999 and 1074/1999, read together, that the conferral of those powers derives from the intention of the Community legislature to put into effect all the means available to attain the objective of protecting Community financial interests and that such conferral was, with that end in view, deemed necessary in order to strengthen the effectiveness of the procedures for combating fraud and any other illegal activity prejudicial to those interests.

- 177 Contrary to the EIB's contention, the community legislature cannot be required, by virtue of the obligation to state reasons, to provide in the preambles to measures such as the regulations in question a list of the measures already existing within the various institutions, bodies, offices or agencies and to state why those measures are not apt to prevent the adoption of such regulations.

Infringement of Regulations Nos 1073/1999 and 1074/1999

- 178 As stated at paragraphs 53 to 55 of this judgment, the Commission is seeking annulment of the contested decision on the ground that it infringes Regulations Nos 1073/1999 and 1074/1999, in particular Article 4 of each of them.
- 179 Although the EIB has not expressly alleged that, on the assumption that those regulations are applicable to it and are consistent with Community law, the contested decision does not infringe them, certain of the assertions made in its defence may none the less be interpreted in that sense. That is the case, in particular, of the argument, examined above, that the Commission's action seeks in reality to establish that the EIB failed to implement Article 4(1) of the regulations, rather than that it infringed them by the contested decision. In its rejoinder, the EIB emphasised in that regard that the preamble to the contested

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decision does not in any way refer to those regulations and maintained that the decision represented instead the EIB's intention to establish an effective internal control mechanism which would take account of its own legal framework.

180 In that regard, it must be pointed out, as the Commission has claimed, that the contested decision infringes Article 4 of Regulations Nos 1073/1999 and 1074/1999 in a number of ways.

181 First, although Article 4(1) of the regulations provides that OLAF is to carry out administrative investigations within the institutions, bodies, offices and agencies established by, or on the basis of, the Treaties, it follows, first, from paragraph 4 of Part I of the contested decision that internal investigations at the EIB are carried out only by Internal Audit, in accordance with the Rules of Procedure of the EIB, and, second, from paragraphs 5 to 8 of Part I of that decision that cooperation with OLAF is limited in that regard to having an internal investigation carried out by Internal Audit at the request of the Director of OLAF and communicating the results of the investigation to him.

182 Second, although Article 4(2) of Regulations Nos 1073/1999 and 1074/1999 provides, in particular, that OLAF is to have the right of immediate and unannounced access to any information held by the institutions, bodies, offices and agencies, provided only that it so advises them, paragraphs 9 and 10 of Part I of the contested decision provide that access by OLAF to information held by the EIB depends, in each individual case, on the authorisation of the President of the EIB and that the President is to determine the rules governing such access.

183 Third, Part II of the contested decision, relating to Category II operations, likewise infringes Article 4(1) and (2) of Regulations Nos 1073/1999 and

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1074/1999, in so far as it provides that only the EIB's own system of internal investigation, as described at paragraphs 157 and 158 of this judgment, is to apply and that, in that context, the EIB may have recourse to the assistance of OLAF according to the appropriate modalities which the EIB will seek to establish with OLAF.

184 Read in the light of the preamble to the contested decision, which states expressly that the decision was adopted taking into account the legal framework of the EIB as laid down by the EC Treaty and the EIB Statute, moreover, the various provisions described above clearly reflect a decision on the part of the EIB to regard Regulations Nos 1073/1999 and 1074/1999 as not applicable to it.

185 It follows that in adopting the contested decision, which is based on the incorrect premiss that Regulations Nos 1073/1999 and 1074/1999 do not apply to the EIB and which consequently gives expression to the EIB's intention to assume sole responsibility for combating fraud within it whilst developing certain forms of reduced operational cooperation with OLAF, the EIB failed to apply the system set up by the regulations and, instead of adopting the decision referred to in Article 4(1), second subparagraph, and (6) of the regulations, established a separate system peculiar to the EIB.

186 In failing to apply Regulations Nos 1073/1999 and 1074/1999 and refusing to adapt its internal procedures in such a way as to satisfy the requirements laid down by the regulations, the EIB infringed the regulations, in particular Article 4 thereof, and exceeded the margin of autonomy of organisation which it retains for the purpose of combating fraud.

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

Costs

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

On those grounds,

THE COURT

hereby:

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

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

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

Delivered in open court in Luxembourg on 10 July 2003.

R. Grass

G.C. Rodríguez Iglesias

Registrar

President