



Reports of Cases

OPINION OF ADVOCATE GENERAL
MENGOZZI
delivered on 21 December 2016¹

Case C-17/16

**Oussama El Dakkak
Intercontinental SARL**

v

**Administration des douanes et droits indirects
(Request for a preliminary ruling**

from the Cour de cassation (Court of Cassation, France))

(Preliminary reference — Controls of cash entering or leaving the European Union — Regulation (EC) No 1889/2005 — Article 3(1) — Scope of the obligation to make a declaration — International transit area of an airport of a Member State)

II – Introduction

1. This case concerns a request for a preliminary ruling made by the Cour de cassation (Court of Cassation, France) relating to the interpretation of Article 3(1) of Regulation (EC) No 1889/2005 of the European Parliament and of the Council of 26 October 2005 on controls of cash entering or leaving the Community² and of Article 4(1) of Regulation (EC) No 562/2006 establishing a Community Code on the rules governing the movement of persons across borders (Schengen Borders Code).³

2. That request was submitted in the proceedings brought by Mr Oussama El Dakkak and Intercontinental SARL ('Intercontinental') against the Administration des douanes et droits indirects (French Customs and Indirect Taxes Authority) seeking compensation for the losses they claim to have suffered following the seizure, by that Authority, of cash sums carried by Mr El Dakkak when passing through the Roissy-Charles-de-Gaulle Airport (France), on the ground that he had failed to declare those sums.

3. The question at the heart of this case is whether the obligation, imposed by Article 3(1) of Regulation No 1889/2005 on 'any natural person entering or leaving the [European Union] and carrying cash of a value of EUR 10 000 or more' to declare that sum to the competent authorities of the Member State through which he is entering or leaving also applies to passengers on a flight from a third country who, after landing, remains in the international transit area of the airport of a Member State before taking a flight to another third country.

¹ — Original language: French.

² — OJ 2005 L 309, p. 9.

³ — OJ 2006 L 105, p. 1. That regulation was repealed and replaced, from 11 April 2016, by Regulation (EU) 2016/399 of the European Parliament and of the Council of 9 March 2016 on a Union code on the rules governing the movement of persons across borders (Schengen Borders Code) (OJ 2016 L 77, p. 1).

III – The dispute in the main proceedings and the question referred for a preliminary ruling

4. Intercontinental instructed Mr El Dakkak to transport United States dollars (USD) from Cotonou (Benin) to Beirut (Lebanon) by air with a transit stop at Roissy-Charles-de-Gaulle Airport.⁴

5. On 9 December 2010, during his transit stop at that airport, Mr El Dakkak was checked by customs officials at the boarding gate for Beirut. The documents before the Court show that, during that check, Mr El Dakkak stated that he was carrying cash and produced a declaration made to the Benin customs authorities. The customs officials asked him to accompany them and, when the cash was counted, he was found to be carrying USD 1 607 650 as well as EUR 3 900.⁵

6. Mr El Dakkak was detained by the customs authority and was subsequently formally charged by an examining magistrate with failing to make the declaration provided for in Article 464 of the Customs Code⁶ and with money laundering and fraud. The sums he was carrying were seized pursuant to paragraph II of Article 465 of the Customs Code,⁷ and then officially sealed by the French Customs and Indirect Taxes Authority.

7. By judgment of 11 May 2011, the examining chamber of the cour d'appel de Paris (Court of Appeal, Paris, France) annulled the entire proceedings owing to an irregularity and ordered the sealed items to be returned. It is apparent from the documents before the Court that the annulment was pronounced on the grounds that Mr El Dakkak was held for a period of seven hours and 45 minutes by the customs officials quite illegally since that length of time was not necessary, that those initial proceedings were unlawful and that their annulment meant the annulment of any subsequent measures which were necessarily dependent on it.

8. By letter of 2 April 2012, the competent authority informed Mr El Dakkak that it was going to transfer the amount in euros and the amount in euros of the United States dollars seized, and a pro rata proportion of the handling charges.

9. Mr El Dakkak and Intercontinental brought an action before the Tribunal d'instance d'Aulnay-sous-Bois (District Court, Aulnay-sous-bois, France) and then before the cour d'appel de Paris (Court of Appeal, Paris) seeking compensation for their losses, claiming that the French Customs and Indirect Taxes Authority was not entitled to invoke an infringement by Mr El Dakkak of an obligation to make a declaration because he was not bound by any such obligation.

10. It is apparent from the documents in the file that, before the cour d'appel de Paris (Court of Appeal, Paris), Mr El Dakkak maintained that only persons crossing the external borders of the European Union are subject to the obligation to declare laid down by Article 3(1) of Regulation No 1889/2005, and by the provisions of French law which transpose it. Basing his argument on the

4 — It is apparent from the documents before the Court that the money was being transferred in order to pay a supplier of Intercontinental, which specialises in the motor vehicle trade.

5 — The French Customs and Indirect Taxes Authority, in its observations on Mr El Dakkak's appeal in cassation, and also the French Government, in its written observations before the Court, point out that the declaration made by Mr El Dakkak in Benin covered only the sum of USD 983 000.

6 — That article, in the version applicable to the facts in the main proceedings, was worded as follows: 'natural persons who transfer money or securities to or from a Member State of the European Union, other than through a credit institution or a body or service referred to in Article L. 518-1 of the Code monétaire et financier (Monetary and Financial Code) must make a declaration in accordance with conditions laid down'. Under the first subparagraph of Article R.152-6, I, 'the declaration provided for under Article 3 of Regulation ... No 1889/2005 ... and the declaration of the money or securities transferred to a Member State of the European Union or from such a State, ... must be made in writing by natural persons, on their own behalf or on behalf of someone else, to the customs authority at the latest on entering or leaving the European Union or on transferring them to or from a Member State of the European Union'.

7 — Article 465, I of the Customs Code in the version applicable to the facts in the main proceedings provides that failure to fulfil the obligations to declare laid down in Articles 464 and in Regulation ... No 1889/2005 ... 'shall be punished by a fine equal to one quarter of the sum to which the infringement or attempted infringement relates'. Under paragraph II of that article, in the version applicable to the facts of the case, 'if the infringement referred to in paragraph I is established by the customs officials, they shall seize the whole of the sum to which the infringement or attempted infringement relates, for a period of three months, renewable ... up to a total of six months.

wording of Article 4 of Regulation No 562/2006, Mr Dakkak claimed that such a crossing occurs only if the person arrives at and crosses a border crossing point and that, since the border crossing point declared by France in respect of the Roissy-Charles-de-Gaulle Airport is situated on the way out of the international transit area, a person in that area never crosses that crossing point and therefore never enters Union territory.

11. As the cour d'appel de Paris (Court of Appeal, Paris), by judgment of 25 March 2014, dismissed his appeal on that point, Mr El Dakkak brought an appeal in cassation.

12. In those circumstances, the Cour de cassation (Court of Cassation) decided to stay proceedings and refer the following question to the Court:

'Must Article 3(1) of Regulation No 1889/2005 and Article 4(1) of Regulation No 562/2006 be interpreted as meaning that a national of a third State who is in the international transit area of an airport is not subject to the obligation to make a declaration under Article 3(1) of Regulation No 1889/2005 or, on the contrary, must those provisions be interpreted as meaning that that national is subject to that obligation by virtue of having crossed an external border of the [European Union] at one of the border crossing points referred to in Article 4(1) of Regulation No 562/2006?'

IV – Analysis

13. By the question it has referred, the Cour de cassation (Court of Cassation) asks essentially whether a passenger who is in the international transit area of the airport of a Member State — that is, in the area extending from the embarkation and disembarkation points to the immigration and customs checkpoints — after disembarking from a flight from one third country and before taking a flight to another third country, has crossed an external border of the Union within the meaning of Regulation No 562/2006 and is therefore subject to the obligation to declare laid down in Article 3(1) of Regulation No 1889/2005.

14. The referring court starts from the premiss that the concept of 'entering the Union' as referred to in Article 3(1) of Regulation No 1889/2005 is to be interpreted in the light of the concept of 'crossing of borders' in Article 4(1) of Regulation No 562/2006.

15. I share the view of the French Government that that premiss is incorrect.

16. Regulation No 562/2006 was adopted on the basis of Article 62 of the EC Treaty and in particular on paragraphs 1 and 2(a) thereof, which authorised the Council of the European Union to adopt measures to ensure the absence of any controls on persons when crossing the internal borders of the EU and to establish the rules and procedures with which controls of persons crossing the external borders of the Member States must comply. Regulation No 1889/2005, on the other hand, was adopted on the basis of Article 95 EC, relating to measures for the approximation of provisions laid down by law, regulation or administrative action in Member States which have as their object the establishment and functioning of the internal market, and on the basis of Article 135 EC, concerning customs cooperation.

17. Although they help to attain the same objective stated in Article 14 EC, namely to establish an area without internal frontiers in which the free movement of goods, persons, services and capital is ensured, those two measures, in accordance with their respective legal bases, have different objects and different purposes, the former laying down common measures on the crossing of borders by

persons, designed to consolidate and develop the Schengen *aquis*⁸ and the latter introducing a control system on cash entering or leaving the Union in order to supplement Directive 91/308 on prevention of the use of the financial system for the purpose of money laundering.⁹

18. The terms in Regulation No 1889/2005 should not therefore be interpreted in the light of those in Regulation No 562/2006. The Court is therefore not required to rule on the interpretation of the expression ‘crossing of borders’ within the meaning of Regulation No 562/2006 in connection with this case.

19. It follows that the question raised by the referring court should be reworded so as to mean that it asks essentially whether the obligation to declare laid down in Article 3(1) of Regulation No 1889/2005, also applies to a national of a third country in the circumstances of the main proceedings, and to interpret the concept of ‘entering the Union’ within the meaning of that provision on the basis of its wording, its scheme and its spirit and also of the system and aims of the measure of which it forms part.

20. If only the ordinary meaning of the words used by that provision is taken into account, that term appears to designate the fact, for a natural person, of moving from a territory which is not part of the Union area to a territory which is.

21. Since the Union area must, for the purposes of the present case, be delimited by the Territorial scope of the treaties, as defined in particular by Article 52 TEU and Article 355 TFEU,¹⁰ such a movement takes place when that person crosses, in the physical sense of the term, the geographical border of a Member State and enters territory of that Member State to which the treaties apply. On the basis of that interpretation, a person who, like Mr El Dakkak, after disembarking from an aircraft from a third country, reaches the international transit area of an airport situated in the territory of a Member State (as stated above) and remains there before taking a flight to a third country, must be regarded as having entered the Union within the meaning of the provision at issue, even though he has not crossed a border control point.

22. However, the expression ‘entering the Union’ may also designate a legal concept other than the crossing of a geographical border. As Advocate General Fennelly stated in point 24 of his Opinion in *Commission v Council* (C-170/96, EU:C:1998:43) two aspects of border crossing must be distinguished. The first is that of entering the territory of a country in the physical sense, without necessarily crossing a border control point; the second is that of entering the territory in the legal sense of crossing a border control point.

23. It might therefore be considered that a person who has crossed the geographical border of the Member State enters the Union only if he is authorised to do so at the time he crosses a border control point. According to this interpretation, a person in Mr El Dakkak’s situation cannot be regarded as having *entered* the Union within the meaning of the provision at issue.

24. Which of these two interpretations should be adopted?

⁸ — See, in particular, recitals 3, 4 and 5 of Regulation No 562/2006.

⁹ — OJ 1991 L 166, p. 77. That directive was repealed by Directive 2005/60/EC of the European Parliament and of the Council of 26 October 2005 on the prevention of the use of the financial system for the purpose of money laundering and terrorist financing (OJ 2005 L309, p. 15), which was in turn replaced by Directive (EU) 2015/849 of the European Parliament and of the Council of 20 May 2015 on the prevention of the use of the financial system for the purposes of money laundering or terrorist financing, amending Regulation (EU) No 648/2012 of the European Parliament and of the Council, and repealing Directive 2005/60/EC of the European Parliament and of the Council and Commission Directive 2006/70/EC (OJ 2015 L 141, p. 73).

¹⁰ — As defined by the Court in the judgment of 15 December 2015, *Parliament and Commission v Council* (C-132/14 to C-136/14, EU:C:2015:813, paragraphs 75 to 77) the territorial scope of an act of secondary legislation must be determined on the basis of Articles 52 TEU and 355 TFEU.

25. The former is favoured, as well as by the wording of Article 3(1) of Regulation No 1889/2005, by the fact that that regulation does not expressly exclude airport transit areas from the scope of the obligation to declare to which that article refers.

26. Airport international transit areas form part of the territory of the State in which they are situated and, even if they are assumed to have a special legal status, they are not ‘without law’, but are under the legal and administrative control of that State. In that regard, it is interesting to note that, as regards immigration, the French Republic, by means of a legal fiction, accords to the so-called ‘waiting areas’,¹¹ which include airport international transit areas, a certain extraterritorial status.¹² However, as the French Cour de cassation (Court of cassation) pointed out, that does not prevent a person who has been placed in one of those areas being in fact on French territory and being subject to the provisions of French law.¹³

27. Indeed, as the French Government points out in its written observations, attention was drawn to the non-extraterritorial nature of international transit areas by the European Court of Human Rights in the case giving rise to the judgment of 25 June 1996 in *Amuur v. France* (ECLI:CE:ECHR:1996:0625JUD001977692, paragraph 52), in which that Court had to decide whether it was compatible with Article 5 of the European Convention on the Protection of Human Rights and Fundamental Freedoms, signed in Rome on 4 November 1950, to ‘hold’ a number of Somalian asylum seekers in the ‘waiting area’ of Roissy-Charles-de-Gaulle Airport. Moreover, the French Government also endorses the non-extraterritorial nature of those areas in the present case, pointing out that the international transit area at the Roissy-Charles-de-Gaulle Airport belongs to France and is subject to French law and to EU law.

28. The preparatory works for Regulation No 1889/2005 provide limited guidance for interpreting the scope of the obligation to declare laid down in Article 3(1) of that regulation.

29. The Proposal for a Regulation of the European Parliament and the Council on the prevention of money laundering by means of customs cooperation (‘the Proposal for a Regulation’),¹⁴ initially based only on Article 135 EC, provided, in Article 1, that the obligation to declare applies to any natural person entering or leaving the ‘Community customs territory’,¹⁵ including those parts of that territory

11 — Under the first subparagraph of Article L221-1 of the Code de l’entrée et du séjour des étrangers et du droit d’asile (Code of Entry and Residence of Aliens and the Right to Asylum), ‘an alien arriving in France by ... air who either is not authorised to enter French territory or seeks entry on grounds of asylum may be detained in a waiting area situated ... in an airport, for the time strictly necessary for his departure or, if he is applying for asylum, for an examination to determine whether his application is manifestly unfounded’.

12 — The first subparagraph of Article L221-2 of the Code of Entry and Residence of Aliens and the Right to Asylum states that ‘the waiting area is defined by the competent administrative authority. It extends from the embarkation and disembarkation points to the checkpoints’.

13 — Cour de cassation of 25 March 2009, No 08-14.125, in which it is held, in respect of a minor placed in a waiting area at the Paris-Charles de Gaulle airport, ‘that the cour d’appel, which pointed out that the young boy X ..., an unaccompanied minor, since arriving in France, had been questioned at Roissy-Charles-de-Gaulle Airport, kept in custody for having tried to avoid a police check, then, following the period in custody, put in the airport waiting area, should have deduced from its own findings that the person concerned was on French territory, so that as an unaccompanied minor, of Iraqi nationality, he was necessarily in a hazardous situation requiring the children’s judge to implement the protection measures laid down by Article 375 et seq. of the Civil Code’. See P. Klötgen, *La frontière et le droit, esquisse d’une problématique*, Scientia Juris, 2011, p. 45 et seq. Furthermore, the administration of those ‘waiting areas’ does not escape criticism from human rights associations; see the Anafé report of 20 January 2016, available at <http://www.anafe.org/spip.php?article 317>

14 — COM(2002) 328 final.

15 — The first subparagraph of Article 1(1) of the Proposal for a Regulation was worded as follows: ‘Any natural person entering or leaving the Community customs territory and carrying a sum of EUR 15 000 or more in cash shall be obliged to declare that sum in accordance with this Regulation’.

to which Directive 91/308, which, as we shall see in greater detail below, is supplemented by Regulation No 1889/2005, did not apply. Under Article 2 of the Proposal for a Regulation, ‘Community customs territory’ meant, for the purposes of that Proposal, the territory of the Member States referred to in Article 3(1) of Council Regulation (EEC) No 2913/92.¹⁶

30. However, the reference to the Union customs territory permits the conclusion that the Commission was referring rather to the geographical aspect of external border crossing and that the Proposal for a Regulation was designed, at least initially, to cover also situations in which the person concerned passes through the international transit area of an airport situated in a Member State. In its report to the Council accompanying the Proposal for a Regulation,¹⁷ the Commission stated, furthermore, that in the Union customs territory and in those parts of the territory not covered by Directive 91/308, ‘cash movements must normally be declared’.

31. However, during the approval process for Regulation No 1889/2005, the Council adjusted, by an amendment, the geographical scope of the measure. It pointed out, *inter alia*, in the explanations accompanying its proposal for an amendment, that ‘for the sake of transparency for travellers and in order to facilitate the application of the Regulation by the competent authorities, the control of cash movements should be carried out when the natural person is entering or leaving the Community territory’.¹⁸

32. Although the reasons connected with transparency which guided the Council are understandable — since the expression ‘entering the Community’, with its immediate reference to Article 299 EC, applicable at the time, is easier to understand than the expression ‘Community customs territory’, to be interpreted, moreover, in the light of the information given in the second subparagraph of Article 1(1) of the Proposal for a Regulation — it is much more difficult to identify the problems of implementation which, according to the Council, the ‘competent authorities’ would have had if the Commission’s text had been adopted without amendment. Since the controls provided for by the Proposal for a Regulation were to be carried out principally by the customs authorities of the Member States, which are presumably very familiar with the concept of Union customs law, it is reasonable to consider that the Council was not referring to the task of identifying the territories affected by the obligation to declare. Was it thinking of the difficulties those authorities might have experienced in ensuring the control of transit passengers, who were also to be regarded as subject to the obligation to declare on the basis of the Proposal for a Regulation? The preparatory works do not lead to that conclusion — nor, however, do they preclude it — but, if that had been so, the final text of Regulation No 1889/2005 might have been expected to contain an express exclusion of those passengers from the obligation to declare; however, this is not the case.

33. The amendment to the geographical scope of the Proposal for a Regulation also reflected the Council’s concern to ensure a parallel geographical application of Directive 91/308 and the future regulation.

34. Those two measures are closely connected.

16 — Regulation of 12 October 1992 establishing the Community Customs Code (OJ 1992 L 302, p. 1), repealed by Regulation (EU) No 450/2008 of the European Parliament and of the Council of 23 April 2008 laying down the Community Customs Code (Modernised Customs Code) (OJ 2008 L 145, p. 1). Recital 10 of the Proposal for a Regulation explained that ‘As far as geographical scope is concerned, in conformity with the requirements of the Treaty, and in particular Article 299(3), (4) and (6)(c) thereof, Directive 91/308/EEC does not apply to certain European countries and territories ...’ and that ‘attention should therefore be paid to the risk of money laundering attaching to such countries and territories, and special arrangements should be made in their regard’. Accordingly, the second subparagraph of Article 1(1) of the Proposal for a Regulation provided that ‘any natural person entering or leaving those parts of the Community customs territory to which Directive 91/308/EEC does not apply and carrying a sum of EUR 15 000 or more in cash shall also be obliged to declare that sum in accordance with this Regulation’.

17 — Report of 25 June 2002, COM(2002) 328 final; see paragraph 2, commentary on Article 1.

18 — Common position adopted by the Council with a view to the adoption of a Regulation of the European Parliament and of the Council on controls of cash entering or leaving the Community, of 18 January 2005, No 14843/04, paragraph 3(a).

35. It was decided to adopt Regulation No 1889/2005 on the basis of the results contained in the ‘Moneypenny’ report,¹⁹ which sought to measure the impact of cross-border cash movements on the effectiveness of the controls carried out in accordance with Directive 91/308. It is apparent *inter alia* from recital 2 of that regulation, and from Article 1(1) thereof, that its aim is to *supplement* the provisions of that directive by laying down harmonised rules for the control of cash entering or leaving the Union.²⁰

36. Details which may help to determine the scope of the obligation to declare incorporated in Article 3 of Regulation No 1889/2005 may be drawn from the relationship between those two measures.

37. Directive 91/308, based on the first and third sentences of Article 57(2) and Article 100 A of the EEC Treaty, imposed on credit institutions, financial institutions and certain legal or natural persons obligations involving controls of transactions carried out by service-providers, where those transactions were of an amount of EUR 15 000 or more. Its principal objective was to prevent the use of the financial system to launder proceeds from criminal activities, jeopardising the stability and reliability of that system and facilitating the rise of organised crime in general and drug trafficking in particular.²¹ It sought to coordinate the action of the Member States in this field in order to prevent the adoption of national measures incompatible with the objectives of the internal market and to ensure greater effectiveness in combating money laundering, which is often carried out in an international context.²²

38. The measures which that directive prescribed, just like those now provided for by Directive 2015/849²³ and, before that, by Directive 2005/60,²⁴ are set in the context of international cooperation.²⁵

39. In that regard, it should be pointed out that, in the judgment of 25 April 2013, *Jyske Bank Gibraltar* (C-212/11, EU:C:2013:270), the Court observed that, whilst Directive 2005/60, which replaced Directive 91/308, sought also to ensure the proper functioning of the internal market, its main aim was the prevention of the use of the financial system for the purposes of money laundering and terrorist financing, as was apparent *inter alia* from the fact that it had been adopted, like Directive 91/308, in an international context, in order to apply and make binding in the European Union the recommendations of the Financial Action Task Force (FATF).²⁶

40. Regulation No 1889/2005, which was designed to supplement Directive 91/308, has that same objective. Moreover, like the directive, that regulation was adopted, as is apparent from recital 4 thereof, to implement a recommendation of the FATF, Special Recommendation IX of 22 October 2004 on cash couriers, which, following the 2012 revision, became Recommendation 32.²⁷

19 — Council Document 9630/2/00 of 7 September 2000. ‘Operation Moneypenny’ was carried out from September 1999 to February 2000 by the Member States’ customs services with the aim of monitoring cross-border cash movements in excess of EUR 10 000, in order to determine whether the scale of such movements posed a threat to the effectiveness of the controls applied by financial institutions to prevent money laundering.

20 — Other references to Directive 91/308 are contained *inter alia* in recitals 5, 9 and 11 and Articles 5 and 6 of Regulation No 1889/2005.

21 — See *inter alia* recitals 1, 2 and 3.

22 — See *inter alia* recitals 2 and 6.

23 — Cited in footnote 9 of this Opinion.

24 — Cited in footnote 9 of this Opinion.

25 — See *inter alia* recital 7.

26 — See paragraph 46. The FATF is an intergovernmental body set up in 1989 to set standards and support the effective implementation of laws, regulations and operational measures to combat money laundering the financing or terrorism and proliferation and the other related threats to the integrity of the international financial system.

27 — The text of that recommendation may be found on the FATF website: http://www.fatf-gafi.org/media/fatf/documents/recommendations/pdfs/FATF_Recommendations.pdf

41. Under that Recommendation, ‘countries should have measures in place to detect the physical cross-border transportation of currency and bearer negotiable instruments, including through a declaration system and/or disclosure system’ and ‘should ensure that their competent authorities have the legal authority to stop or restrain currency or bearer negotiable instruments that are suspected to be related to terrorist financing, money laundering or predicate offences, or that are falsely declared or disclosed’.²⁸

42. In an interpretive note to that Recommendation, it is stated that the recommendation was developed with the objective of ‘ensuring that terrorists and other criminals cannot finance their activities or laws of the proceeds of their crimes through the physical cross-border transportation of currency and bearer negotiable instruments’.²⁹ In that same note, the expression ‘physical cross-border transportation’ is defined as ‘any *in-bound or out-bound physical transportation* of currency or BNIs from one country to another country’.³⁰

43. The recommendation at issue therefore appears to refer to a broad concept of ‘entering’ and ‘leaving’ which suggests that the declaration or disclosure system which that recommendation proposes should be applied as soon as the currency or bearer negotiable instruments cross a national geographical border. However, the FATF documentation gives no express guidance on the matter with which we are concerned. Nor is the procedure for controlling cross-border cash movements in the international transit areas of airports addressed in the ‘International Best Practices: detecting and preventing the illicit cross-border transportation of cash and bearer negotiable instruments’, a 2010 document which is considered to give a glimpse of the difficulties encountered by the States when implementing Special Recommendation IX, while giving possible solutions.³¹

44. That being so, and as the French Government maintains, the context of international cooperation to combat money laundering and cross-border criminal activity in which Regulation No 1889/2005 is set calls for a broad interpretation of the concept of entering the Union within the meaning of Article 3(1) of that regulation, not for a restriction of the scope of the obligation to declare laid down by that article only to cross-border cash movements destined to enter the Union’s financial circuit.

28 — The Recommendation continues by stating that ‘countries should ensure that effective, proportionate and dissuasive sanctions are available to deal with persons who make false declaration(s) or disclosure(s). In cases where the currency or bearer negotiable instruments are related to terrorist financing, money laundering or predicate offences, countries should also adopt measures, including legislative ones consistent with Recommendation 4, which would enable the confiscation of such currency or instruments’.

29 — The text of the interpretive note to Special Recommendation IX may also be found on the FATF website at the address given in footnote 27 above.

30 — Emphasis added. In a 2009 document entitled ‘Methodology for Assessing Compliance with the FATF 40 Recommendations and the FATF 9 Special Recommendations’, it is stated, in connection with a supranational approach for Special Recommendation IX, that the term ‘cross-border’ ‘shall refer to *movements that cross the external borders* of the supranational jurisdiction’ (emphasis added). The document is available on the website:

<http://www.fatf-gafi.org/publications/fatfrecommendations/documents/methodologyforassessingcompliancewiththefatf40recommendationsandfatf9specialrecommendations.html>

31 — This document, which predates the 2012 revision, may be consulted on the website: <http://www.fatf-gafi.org/publications/fatfrecommendations/documents/methodologyforassessingcompliancewiththefatf40recommendationsandfatf9specialrecommendations.html>

45. There is no doubt that the extension of the obligation to declare to airport transit passengers contributes to the attainment of the objectives mentioned above at international level, since that obligation is both a dissuasive measure and, together with the corresponding controls, a measure for detecting suspect movements.³²

46. It is necessary, at this stage, to examine whether the Convention on International Civil Aviation, signed in Chicago (United States) on 7 December 1944³³ conflicts with that broad interpretation.

47. The Union is not a party to that Convention and, as has been stated in the judgment of 21 December 2011, *Air Transport Association of America and Others* (C-366/10, EU:C:2011:864, paragraphs 57 to 71) it is not bound by it.

48. However, that Convention was ratified by all the Member States on the Union and must therefore be taken into account for the interpretation of secondary provisions of Union law.³⁴ The same applies to the annexes to that Convention which contain Standards and Recommended Practices (SARP)³⁵ adopted by the Council of the International Civil Aviation Organisation (ICAO)³⁶ in accordance with Article 54(l)³⁷ of that Convention and binding, to a greater or lesser degree, on the contracting States.³⁸

49. Under Article 22 of the Chicago Convention ‘each contracting State agrees to adopt all practicable measures ... to facilitate and expedite navigation by aircraft between the territories of contracting States, and to prevent unnecessary delays to aircraft, crews, passengers and cargo, especially in the administration of the laws relating to immigration, quarantine, customs and clearance’. Article 23 of that Convention states that each contracting State undertakes, ‘so far as it may find practicable, to establish customs and immigration procedures affecting international air navigation in accordance with the practices which may be established or recommended from time to time, pursuant to this Convention’.

32 — I note, however, that, in its report to the Parliament and to the Council on the application of Regulation No 1889/2005 (COM(2010) 0455 final), the Commission advocated, on the basis of a cost-benefit analysis, an amendment to Article 3(1) of Regulation No 1889/2005 in order to align the procedures for controls on cash movements with those established for controls of passengers’ baggage as set out in Articles 192 to 194 of Commission Regulation No 2454/93 of 2 July 1993 laying down provisions for the implementation of Council Regulation (EEC) No 2913/92 establishing the Community Customs Code (OJ 1993 L 253, p. 1), repealed by Commission Implementing Regulation (EU) 2016/481 of 1 April 2016 (OJ 2016 L 87, p. 24). Such an alignment, recommended for remedying the practical difficulties encountered by the Member States with regard to transit passengers, involves excluding systematic controls in international transit areas and, therefore, abolishing the obligation to declare for passengers remaining in those areas (see paragraph 5 of the report). In paragraph 3.2 of that report, the Commission states that ‘for air transit passengers the obligation to declare cash at the first point of entering or the last point of leaving the EU is difficult to comply with due to the variations in airport transit infrastructure. There are few or different facilities provided for declaring cash in transit zones and there is not enough time in between flights. For the competent authorities of the States, it is also difficult to ensure harmonised controls on transit passengers. Insufficient time, lack of appropriate control facilities ... and separate channels for hand and hold luggage hamper these controls’. Furthermore, a ‘specific project group of cash control experts’ supported an amendment to Article 3(1) of Regulation No 1889/2005.

33 — *United Nations Treaty Collection*, Vol. 15, p. 295, which may be consulted at the following address: <http://www.icao.int/publications/pages/doc7300.aspx>

34 — Judgment of 3 June 2008, *Intertanko* (C-308/06, EU:C:2008:312, paragraph 52).

35 — The adoption of those measures is provided for by Article 37 of the Chicago Convention.

36 — The ICAO was established in accordance with Article 43 et seq. of the Chicago Convention.

37 — That provision states that the SARP are designated, ‘for convenience’, as ‘Annexes to this Convention’.

38 — These standards are specifications the content of which reflects what has been deemed *practicable* and *necessary* to facilitate and improve certain aspects of international air navigation. Failure to comply with them must be notified by the contracting States in accordance with Article 38 of the Convention. The recommended practices, on the other hand, are specifications the content of which reflects what has been deemed *generally practicable* and *highly desirable*. The contracting States endeavour to comply therewith in accordance with the Convention.

50. Annex 9 to the Chicago Convention (The Standards and Recommended Practices — *Facilitation*; ‘Annex 9’)³⁹ was adopted inter alia to specify the obligations of the contracting States under the aforementioned articles of the Convention. The purpose of this Annex is to attain effective management of the process of border controls, while seeking an appropriate balance between security and simplification of procedures.

51. As pointed out by the French Government, under Chapter 3.L, paragraph 3.57, of that Annex, contracting States shall make provision, inter alia by means of direct transit areas, whereby passengers and their baggage, arriving from another State and continuing their journey to a third State on the same flight or another flight from the same airport on the same day may remain temporarily within the airport of arrival without undergoing border control formalities to enter the State of transit. The ‘direct transit area’ is defined by Chapter I.A as a special area established in or near an international airport under the direct supervision or control of the public authorities concerned, where passengers can stay during transit or transfer without applying for entry to the State.

52. It is apparent from the very wording of the rule stated in the aforementioned paragraph 3.57 that this refers to the formalities relating to immigration controls to establish possession of the documents authorising entry to the territory of the contracting State. That is confirmed by the following rule (paragraph 3.58 in Chapter 3.L), which requires Member States to keep to a minimum the requirement for passengers remaining in the direct transit area to have direct transit visas.⁴⁰

53. Indeed, more generally, Annex 9, seeks to reduce as far as possible the formalities and controls to which transit passengers are subject, since not only does an obligation to declare require them, in principle, to take active steps, but verification of compliance with that obligation may require competent authorities, pursuant to Article 4(1) of Regulation No 1889/2005, to carry out controls on persons, their baggage and their means of transport.

54. However, on the one hand, as pointed out by the French Government in its written observations, under Chapter 3.B, paragraph 1.5 of Annexe 9, the provisions of the Annex do not prevent the application of national legislation as regards the implementation of controls considered ‘necessary’,⁴¹ and on the other, the policy of facilitation implemented within the ICAO also seeks to coordinate the objectives of Annex 9 with other objectives, in particular that of combating international drug trafficking — which is one of the aims pursued by the measures introduced by Regulation No 1889/2005 — in order to find a fair balance between the requirements of security of those of simplification.

55. An obligation to declare such as that provided for in Article 3(1) of Regulation No 1889/2005, extended to passengers in the ‘direct transit area’, as defined by Annexe 9, does not therefore seem incompatible with the rule in paragraph 3.57 of that Annexe 9, provided that the formalities connected with the fulfilment of that obligation and the controls for verifying compliance with it involve the least possible inconvenience for transit passengers and not risk causing undue delay to air traffic.

56. In the light of all the foregoing considerations, I am inclined to take the view, on the basis of a literal interpretation of the wording of Article 3(1) of Regulation No 1889/2005, and of the objectives pursued by that measure and in view of the fact that airport transit situations are not expressly excluded from the scope of the obligation to declare laid down by the article, that that obligation also

39 — The text of this Annex may be consulted at: www.ifrc.org/docs/IDRL/ChicagoConventionAnnex9.pdf

40 — Namely, visas required from passengers arriving on an international flight and continuing their journey to a third State by the same flight or another flight from the same airport on the same day. Regulation (EC) No 810/2009 of the European Parliament and of the Council of 13 July 2009 establishing a Community Code on Visas (Visa Code) (OJ 2009 L 243, p. 8) provides that nationals of a number of third countries are required to hold such a visa ‘by way of derogation from ... Annex 9 to the Chicago Convention’.

41 — Incidentally, I should mention that the recommended practices relating to the imposition by the contracting States of restrictions on the importation or exportation of currencies are contained in Chapter 6.F, paragraphs 6.47 and 6.48.

applies to passengers who are in the international transit area of an airport situated in the territory of a Member State to which the treaties apply in accordance with Article 52 EU and Article 355 TFEU, after disembarking from a flight from a third country and before boarding a flight to a third country, without crossing a border control point in order to be allowed to enter that Member State.

V – Conclusion

57. On the basis of the foregoing considerations, I propose that the Court reply to the question referred by the Cour de cassation (Court of Cassation, France) as follows:

Article 3(1) of Regulation (EC) No 1889/2005 of the European Parliament and of the Council of 26 October 2005 on controls of cash entering or leaving the Community is to be interpreted as meaning that the obligation of any natural person entering or leaving the European Union and carrying cash of a value of EUR 10 000 or more to declare that sum to the competent authorities of the Member State through which he is entering or leaving the Union applies also to passengers who are in the international transit area of an airport situated in the territory of a Member State to which the treaties apply in accordance with Article 52 TEU and Article 355 TFEU, after disembarking from a flight from a third country and before boarding a flight to a third country, without crossing a border control point in order to be allowed to enter that Member State.