

OPINION OF ADVOCATE GENERAL

RUIZ-JARABO COLOMER

delivered on 16 December 2004¹

1. The Kingdom of Belgium has applied to the Court of Justice for annulment of Commission Regulation (EC) No 2204/2002 of 12 December 2002 on the application of Articles 87 and 88 of the EC Treaty to State aid for employment,² on the ground that it infringes not only Council Regulation (EC) No 994/98 of 7 May 1998³ but also the general Community law principles of legal certainty, subsidiarity, proportionality, consistency and non-discrimination, in addition to having been adopted on an incorrect legal basis.

legislative background. This consists of three successive levels, namely the EC Treaty, Regulation No 994/98 and Regulation No 2204/2002.

A — The EC Treaty

I — Legal background

2. In examining the grounds for contesting the regulation which are relied on in this action, it is important to set out the

3. In a Community which seeks harmonious and balanced development of economic activities, sustainable non-inflationary growth and a high degree of convergence and economic cohesion (Article 2 EC), competition is of primary importance in achieving those goals. It affects, first, the activities of the Community, which include a system ensuring that competition in the internal market is not distorted (Article 3 (1)(g) EC) and, second, the economic policy of the Community and the Member States, which must be conducted in accordance with the principle of free competition (Article 4(1) EC).

¹ — Original language: Spanish.

² — OJ 2002 L 337, p. 3. Corrigendum OJ 2002 L 349, p. 126.

³ — On the application of Articles 92 and 93 of the Treaty establishing the European Community (now, after amendment, Articles 87 EC and 88 EC) to certain categories of horizontal State aid (OJ 1998 L 142, p. 1).

4. Title VI, Chapter 1 of the EC Treaty sets out the relevant rules, making a distinction between those applying to undertakings (Section 1) and those relating to aid granted by States (Section 2). The latter section contains three rules:

(1) Article 87 EC:

- Article 87(1) states that any aid which affects trade between Member States and distorts competition or threatens to do so by favouring certain undertakings or the production of certain goods is incompatible with the common market.

- Article 87(3) recognises other situations which 'may be considered to be compatible' where aid is intended to promote the economic development of areas where the standard of living is abnormally low or where there is serious underemployment or in other specifically defined circumstances.

(2) Article 88 EC:

- Article 88(1) requires the Commission to review the Member States' systems of aid.

- By virtue of Article 88(2), when the Commission finds that any such aid is not compatible with the common market, it must require the State to abolish or alter it and may refer the matter to the Court of Justice direct. In exceptional circumstances the Council may override the Commission's decision.

There are two exceptions to that general rule, which are set out in the subsequent paragraphs of Article 87.

- Article 87(2) recognises that certain types of aid which are of a social character, are related to exceptional occurrences or are intended to benefit certain areas of Germany are acceptable by stating that, in all cases, such aid 'shall be compatible'.

- Article 88(3) requires the Member States to inform the Commission of any plans to grant or alter aid so that, in the event that such aid distorts the common market, it may initiate the procedure laid down in Article 88(2).

(3) Article 89 EC:

- This article allows the Council to make any appropriate regulations for the application of Articles 87 EC and 88 EC and, in particular, to determine the conditions in which Article 88(3) EC is to apply and the categories of aid exempted.

6. The justification for this delegation of authority is that the assessment of compatibility with the common market essentially rests with the Commission (second recital), which has demonstrable experience in such matters (fourth recital), and that 'group exemption regulations will increase transparency and legal certainty', so that they can be directly applied by national courts (fifth recital).

7. However, the delegation is only partial, being subject to various conditions:

B — *Regulation No 994/98*

5. Acting under the powers conferred by Article 89 EC, the Council adopted Regulation No 994/98. Article 1 of that regulation provides that the Commission may, in areas where it has sufficient experience to define general criteria, declare that certain categories of State aid are consistent with the common market and exempt them from the notification requirements set out in Article 88(3) EC.⁴

(1) Only the following categories are covered (Article 1(1)):

(a) aid in favour of small and medium-sized enterprises, research and development, environmental protection and employment and training;

⁴ — Article 2 enables the Commission to adopt regulations, stating that 'having regard to the development and functioning of the common market, certain aids do not meet all the criteria of Article 92(1) and that they are therefore exempted from the notification procedure provided for in Article 93(3), provided that [they do] not exceed a certain fixed amount'. That was the legal basis for Commission Regulation (EC) No 69/2001 of 12 January 2001 on so-called *de minimis* aid (OJ 2001 L 10, p. 30).

(b) aid that complies with the map approved by the Commission for each Member State for the grant of regional aid.

(2) The regulations comprise a compulsory and an optional element. Hence:

common market so requires, although in that case the new regulation must set a period of adjustment of six months for the adjustment of aid payments governed by the previous regulation.

(a) they must specify the purpose, beneficiaries, thresholds of aid intensities, conditions governing cumulation and conditions of monitoring (Article 1(2));

8. Acting under the powers granted by Regulation No 994/98, the Commission adopted Regulations (EC) No 68/2001 and No 70/2001, both of 12 January 2001, on the application of Articles 87 EC and 88 EC to training aid and to State aid to small and medium-sized enterprises respectively.⁵ It also adopted Regulation No 2204/2002 which is now being contested.

(b) in addition, they may, in particular, set thresholds or other special conditions in individual cases, exclude certain sectors and attach further conditions for the compatibility of exempted payments (Article 1(3)).

(3) Certain procedural rules, such as the hearing of interested parties (Article 6) and the consultation of the Advisory Committee set up for that purpose (Articles 7 and 8), must be complied with before the aid is approved.

C — Regulation No 2204/2002

9. The scheme of Regulation No 2204/2002, excluding the reasons and explanations given in its preamble, can be analysed as follows:

(4) The regulations are to have a limited period of validity, although this may be extended (Article 4(1) and (3)).

1. Scope

(5) Such regulations should be amended or repealed where circumstances have changed with respect to any important element that constituted grounds for their adoption or where the progressive development or the functioning of the

10. On the one hand, Article 1 provides that the regulation applies to three schemes,

⁵ — OJ 2001 L 10, pp. 20 and 33 respectively.

which constitute State aid within the meaning of Article 87(1) EC, provided that they promote, in any sector:

- (a) the creation of employment,
- (b) the recruitment of disadvantaged or disabled workers,
- (c) covering the additional costs of employing disabled workers.

11. On the other hand, the following are excluded:

— aid to export-related activities [Article 1 (3)(a)],

— aid contingent upon the use of domestic goods (Article 1(3)(b)), and

— the cases listed in Article 9, which include aid schemes targeted at particular sectors (Article 9(1)), aid granted

to a single enterprise or establishment exceeding a gross aid amount of EUR 15 million over any three-year period (Article 9(2)), aid to maintain jobs (Article 9(5)) and aid for the conversion of temporary employment contracts into contracts of indeterminate duration (Article 9(6)).

2. Definitions

12. As is the case in many Community acts, definitions are given of the terms used, such as ‘aid’, ‘small and medium-sized enterprises’, ‘gross’ and ‘net’ aid intensity, ‘number of employees’, ‘disadvantaged’ and ‘disabled’ worker, ‘sheltered employment’, ‘wage cost’, links to the ‘carrying out of a project of investment’ and investment in ‘tangible’ or ‘intangible’ assets.

3. Conditions

(a) General conditions

13. Article 3 provides that for any type of aid scheme to be exempted from the notification requirements of the Treaty it must:

- fulfil all the conditions of the regulation, and
- those relating to the additional costs of employing disabled workers, in Article 6.
- expressly refer to the regulation.

4. Validity

14. It should be noted that although there are specific provisions on cumulation, the ceilings for the different types of aid apply regardless of whether the support is financed entirely from State resources or is partly financed by the Community (Article 8).

16. Pursuant to Article 11, the regulation is to remain in force until 31 December 2006, although the following three transitional provisions apply:

(b) Specific conditions

15. These are set out according to the objectives pursued, namely:

- those relating to the creation of employment, in Articles 4 and 7,
- Provided that they fulfil the conditions set out in the regulation, aid schemes which have already been implemented prior to the entry into force of the regulation and aid granted thereunder in breach of the obligation in Article 88 (3) EC and in the absence of a Commission authorisation are exempted.
- those relating to the recruitment of disadvantaged and disabled workers, in Article 5, and
- At the end of the period of validity of the regulation, exempted aid will remain exempted for a period of six months.

II — Procedure before the Court of Justice III — Analysis of the pleas in law

17. On 10 March 2003 the Kingdom of Belgium lodged an application at the Registry of the Court of Justice, seeking the annulment of Regulation No 2204/2002 and a declaration that Regulation No 994/98 is inapplicable.

18. In its defence, the Commission of the European Communities contended that the Court should dismiss the application and order the applicant to pay the costs.

19. Although the United Kingdom of Great Britain and Northern Ireland had sought, and been granted, leave to intervene in the proceedings, it waived its right to do so.

20. Following the reply and the rejoinder the written procedure was closed without further formalities.

21. The hearing requested by the applicant was held on 29 September 2004 and was also attended by the defendant.

22. As the admissibility of the application is not in dispute,⁶ the applicant's pleas in law should be considered in the order in which they appear in the application, that is: (a) infringement of Regulation No 994/98, (b) breach of general principles of law, and (c) breach of the Treaty by reason of an incorrect choice of legal basis.

23. However, since the applicant is asking for the whole of Regulation No 2204/2002 to be annulled and not just one of its provisions, and has described numerous hypothetical results of its practical application in the future, we should first remind ourselves of the structure of this type of action.

6 — The pleadings of both the Belgian Government and the Commission nevertheless address the issue of admissibility on a number of occasions. This argument was not formally put forward and does not arise out of the proceedings because (although this was disputed) the fact that no objections were raised when Regulation No 2204/2002 was adopted does not mean that it cannot be challenged subsequently, provided that the time-limits and other conditions are observed. In this regard, Case 166/78 *Italy v Council* [1979] ECR 2575, cited in the reply, should be mentioned. In that judgment it was stated that 'the first paragraph of Article 173 of the EEC Treaty [now, after amendment, Article 230 EC] confers on every Member State the right to challenge, by an application for annulment, the legality of every Council regulation, without the exercise of this right being conditional upon the positions taken up by the representatives of the Member States of which the Council is composed when the regulation in question was adopted'.

24. According to the case-law, the Treaty established a system of legal remedies and procedures designed to permit the Court of Justice to review the legality of Community measures.⁷ That function comprises, first, establishing legality in the limited sense of assessing the conformity of measures adopted by the institutions with the rules on which they are based. However, it also includes a secondary aspect of assessing constitutionality with a view to establishing whether general measures comply with the Treaties which, although legally in the form of international instruments, have been interpreted and applied as if they were a Community constitution.⁸

25. That is done mainly by means of three forms of action, namely the action for annulment, the action for failure to act and the objection of illegality. The reference for a preliminary ruling on legality also plays its part and is the final component of the system, while applications for compensation allow indirect review.⁹

26. The action for annulment was created with the dual aim of ensuring compliance by the institutions with Community law and

safeguarding the rights of applicants (natural and legal persons, Member States and the institutions) vis-à-vis the institutions.¹⁰

27. Its scope is limited to acts adopted jointly by the European Parliament and the Council, acts of the Council, of the Commission and of the European Central Bank, other than recommendations and opinions, and of acts of the European Parliament 'intended to produce legal effects vis-à-vis third parties'.¹¹ Furthermore, Article 237(b) and (c) EC contemplate the possibility of instituting proceedings for annulment against measures adopted by the Board of Governors and the Board of Directors of the European Investment Bank.¹²

28. The fact that locus standi is restricted is one of the main features of the action for annulment. Unlike the privileged applicants (the Member States, the European Parlia-

7 — Case 294/83 *Les Verts v Parliament* [1986] ECR 1339. Along similar lines is Case C-50/00 *P Unión de Pequeños Agricultores v Council* [2002] ECR I-6677.

8 — Rodríguez Iglesias, G.C., 'El Tribunal de Justicia de las Comunidades Europeas', in *El derecho comunitario europeo y su aplicación judicial*, Civitas, Madrid, 1993, p. 384.

9 — Liñán Nogueras, D., and Mangas Martín, A., *Instituciones y Derecho de la Unión Europea*, 4th edition, Tecnos, Madrid, 2004, p. 459.

10 — As I stated in my Opinion in Case C-315/99 *P Ismeri Europa v Court of Auditors* [2001] ECR I-5281. See also Waelbroeck, M., and Waelbroeck, D., 'Article 173', in Louis, J.-V., Vandersanden, G., Waelbroeck, D., and Waelbroeck, M., *Commentaire Mégret: Le droit de la Communauté Économique Européenne*, vol. 10 (*La Cour de Justice. Les actes des institutions*), Éditions de l'Université de Bruxelles, Brussels 1993, p. 98, and Vandersanden, G. and Barav, A., *Contentieux communautaire*, Bruylant, Brussels 1977, p. 127.

11 — Liñán Nogueras, D., and Mangas Martín, A., op. cit., p. 460.

12 — Castillejo Manzanares, R., 'El recurso de anulación', in Mariño, F., Moreno Catena, V. and Moreiro, C. (eds.), *Derecho procesal comunitario*, Tirant lo Blanch, Valencia 2001, p. 151.

ment, the Commission and the Council), the Court of Auditors and the European Central Bank can only use that route to protect their prerogatives,¹³ and legal and natural persons are only permitted to dispute decisions addressed to them or those that, although in the form of a regulation or a decision addressed to another person, are of direct and individual concern to them.¹⁴

29. The grounds on which an action can be brought are also limited. These are: lack of competence, infringement of an essential

procedural requirement, infringement of the Treaty or of any rule of law relating to its application, and misuse of power. The first two refer to external legality and can be raised of the Court's own motion,¹⁵ while the last two concern internal legality and must be invoked by the applicant. The list is exhaustive (although infringement of the Treaty constitutes a general ground into which the others are subsumed), so that any other ground will fall outside the scope of the action unless it can be linked in with one of those listed, given that a strict classification is not necessary, provided that the infringement can be inferred from the application.¹⁶ Nevertheless, it is worth taking into account the considerable measure of discretion enjoyed by the institutions in carrying out their activities.¹⁷

30. If the action is well founded, the Court of Justice declares the act concerned to be void (Article 231 EC), although the annulment may affect only some of its provisions if they are capable of being separated from the whole. In any event, in contrast to the case of an action for failure to fulfil an obligation, where it is only declaratory, the judgment in such an action has absolute effect as a final

13 — Restricting locus standi according to the objective sought by the proceedings is not unusual in the legal world. One example can be found in the 1985 European Charter of Local Self-Government which requires local authorities to have available to them a mechanism specifically safeguarding local autonomy in the context of the territorial distribution of State powers. In the case of Spain this has meant granting provinces and municipalities the right to bring disputes relating to legislative provisions which have the rank of national or regional law before the Tribunal Constitucional (Constitutional Court) if they consider that such provisions have an adverse effect on local autonomy (Article 75a(1) of Ley Orgánica 2/1979 del Tribunal Constitucional of 3 October (Organic Law 2/1979 on the Constitutional Court)). This procedural mechanism can be used only for safeguarding such autonomy.

14 — The locus standi of individuals to bring an action for annulment has given rise to restrictive case-law of the Court of Justice, which has been the subject of much criticism on the part of commentators (for example, Sarmiento, D., 'La sentencia UPA (C-50/2000), los particulares y el activismo inactivo del Tribunal de Justicia', in *Civitas, Revista Española de Derecho Europeo*, no. 3, July-September 2002, pp. 531 to 577; see also Ortega, M., *El acceso de los particulares a la justicia comunitaria*, Ariel Practicum, Barcelona 1999, particularly chapter 6, 'Hacia una mejora del sistema de protección jurisdiccional de los particulares' ('Towards an improved system of legal protection for individuals'). In his Opinion in *Unión de Pequeños Agricultores v Council*, cited, Advocate General Jacobs suggested a broad interpretation which recognises that 'an applicant is individually concerned by a Community measure where the measure has, or is liable to have, a substantial adverse effect on his interests' (point 102(4)). The Treaty establishing a Constitution for Europe adopts a position consistent with this broader approach in that Article III-365(4) sets out two alternatives by allowing any natural or legal person to challenge 'an act addressed to that person or which is of direct and individual concern to him or her' and also 'a regulatory act which is of direct concern to him or her and which does not entail implementing measures'.

15 — For example, the judgment in Case 19/58 *Germany v High Authority of the ECSC* [1960] ECR 225 noted, in relation to lack of competence, that, although it was true that that ground had not been formally set out in the application or in the reply, it was appropriate to examine it.

16 — Case 4/73 *Nold v Commission* [1974] ECR 491.

17 — Case 57/72 *Westzucker* [1973] ECR 321 and Case 55/75 *Balkan-Import-Export* [1976] ECR 19. See also Bernad, M., Salinas, S., and Tirado, C., *Instituciones y Derecho de la Unión Europea*, Realizaciones, Informes y Ediciones Europa, Zaragoza 2003, p. 402.

and conclusive decision in form and substance and as such seeks to recreate the legal position prior to its having been affected by the illegality of the Community measure.

satisfy the requirements of the second of the abovementioned principles which, in the context of State aid for employment, is of the utmost importance.

A — *Infringement of Regulation No 994/98*

31. The Belgian Government includes two groups of arguments under this heading, claiming that Regulation No 2204/2002: (1) fails to guarantee the transparency and legal certainty required by the enabling provision in relation to aid for employment, and (2) makes the system in question stricter, thereby infringing the terms of the authority granted.

33. The Commission, after first observing that the applicant is complaining of an infringement of a recital without identifying a substantive rule, maintains that, by making certain aid consistent with the common market, the regulation at issue has a positive effect. It also claims that, because it does so without affecting the Member States' ability to make a prior notification, the regulation has no negative effects. Lastly, it denies the existence of any lack of clarity or breach of legal certainty.

1. Transparency and legal certainty

(a) References in Regulation No 994/98

32. Belgium claims that the fifth recital in the preamble to Regulation No 994/98 requires exemption regulations to 'increase transparency and legal certainty' but that the regulation at issue is completely lacking in clarity in terms of both context and content. Furthermore, according to Belgium, it fails to

34. Legislative provisions describe facts, situations or circumstances and attribute certain consequences to them. The factual situation and the legal result are therefore the two essential elements of a legal rule.¹⁸ But the statement of legal grounds, preamble or introductory recitals, which merely seek to illustrate, give a basis for or explain, do not form part of these essential elements, since, although they accompany, and usually precede, the enacting terms of the measure, forming a physical part of it, they have no

¹⁸ — Guasp, J., *Derecho* (no publisher), Madrid 1971, p. 7 et seq., defines law as the sum of the relationships between human beings which a society deems necessary, and identifies the two factors that encapsulate the essence of this concept, namely the substance, comprising the relationships between human beings, and the form, which is the necessity for such relationships.

binding force, notwithstanding their usefulness as criteria for interpretation.

principles, despite the fact that they have not been formally presented as such.

35. The applicant's argument focuses on the breach of two principles mentioned in the fifth recital in the preamble to the enabling regulation — that is to say, in a part of it which is not binding. Therefore, any failure to take them into account cannot entail the sanction of annulment. The reference in the preamble serves the purpose of explaining the objective by which the Council was guided in adopting the enabling measure.

38. That was also how the Commission interpreted them, and it formulated its arguments from that standpoint.

(b) Transparency

36. However, both the principle of transparency and that of legal certainty must be respected by the legislature as sources of Community law,¹⁹ and a failure to do so would, under Article 230 EC,²⁰ constitute an infringement, irrespective of whether they are referred to in the preamble to Regulation No 994/98.

39. The applicant claims that there is a lack of clarity in two respects: (i) in terms of its legal context, and (ii) in terms of the provisions of the regulation.

(i) Lack of clarity of legal context

37. The Belgian Government's arguments relating to transparency and legal certainty should therefore be seen as falling under the heading of infringement of Community legal

40. In the applicant's view, the scope of the regulation in question partially overlaps with that of the Guidelines on national regional aid,²¹ the Multisectoral framework on regional aid for large investment projects²² and Regulation No 70/2001.²³ That overlap

19 — On the other hand, Case C-150/94 *United Kingdom v Council* [1998] ECR I-7235, paragraph 37, suggests that general principles must be respected even if they are not referred to in the preamble.

20 — Case 112/77 *Töpper v Commission* [1978] ECR 1019, paragraph 19.

21 — OJ 1998 C 74, p. 9.

22 — OJ 2002 C 70, p. 8 (not OJ 2000 as mistakenly stated in footnote 24 of the application).

23 — Referred to at point 8 of this Opinion.

could give rise to various conflicts and shows that the text is confused and inconsistent.

(ii) Lack of clarity of the provisions of the regulation

41. It should be noted that, as a matter of law, such a conflict could only arise in respect of other legal provisions of equal rank, since the principle of the hierarchy of norms resolves conflicts which arise in relation to higher or lower-ranking provisions. Consequently, the abovementioned guidelines cannot be invoked even though the Court of Justice has acknowledged that they are binding on the Commission.²⁴

44. Transparency is concerned with the quality of being clear, obvious and understandable without doubt or ambiguity. The application of this principle in the field of law is something of an aspiration, as the translation of the law into everyday life is not straightforward and does not always offer clear answers.

42. In the case of Regulation No 70/2001 a clash cannot be ruled out since the various provisions do not apply to mutually exclusive fields. However, this situation can usually be resolved by looking to general principles relating to the application of laws over time, their specificity in terms of subject-matter and other relevant principles in the event that both sets of rules apply to any particular case.

45. Although the preciseness of a legal rule can be inferred from its wording, it is only when it comes to applying it that its degree of complexity becomes more apparent. Many factors are relevant, among which the extent of the discretion granted to the legislature is foremost.

43. Lastly, the fact that the provisions of one regulation may contradict those of another does not mean that the first regulation can be treated as being unclear or incoherent, and certainly not in its totality.

46. An examination of the applicant's arguments relating to the lack of clarity of the contested regulation prompts two observations. The first is that the discrepancies in the manner in which the Community provisions are set out stem from the potential consequences of their application. Second, the applicant appears to be asking the Court to give an interpretative judgment in order to

²⁴ — Case C-313/90 *CIRFS and Others v Commission* [1993] ECR I-1125, paragraph 35, and Case C-311/94 *Ijssel-Vliet* [1996] ECR I-5023, paragraph 42.

resolve doubts which the applicant has on a theoretical level.²⁵

49. The allegation of lack of transparency should therefore be rejected.

(c) Legal certainty

47. In this action, the annulment is sought of an entire regulation. However, as I have previously indicated, this form of action has a limited and very precisely defined scope, which would be exceeded if each and every one of the applicant's complaints of inconsistency and ambiguity were to be addressed.

50. One of the main grounds invoked for annulment of this measure is that it contravenes the principle of legal certainty. That principle is often linked with other general principles of law and given that, as I have noted above, it is not relevant to the delegation of authority, it is convenient to address this point at a later stage in the section dealing with the breach of such principles.

48. No evidence of the alleged confusion has been produced.²⁶ Only if, on a straightforward analysis, it can be established that the measure as a whole lacks clarity, is excessively obscure or meaningless, or is irreconcilable with other provisions would it be appropriate to declare it void. It would not be appropriate in a case such as this, where the allegation is based on conjecture, although the conclusion might be different in the case of implementing acts, which are also subject to judicial review.

2. Application of a stricter regime for aid

51. The applicant Government considers that adopting stricter rules for aid for employment goes beyond the authority given by the Council, which is limited to simply codifying existing practice. In that regard it points out the differences which, in its opinion, exist between the old and the new regimes.

52. The defendant argues that the purpose of the enabling legislation was not only to

²⁵ — It is a case of seeking to solve the problem before it arises, and overlooking the fact that if difficulties occur there are several remedies available, such as disapplication, contesting the implementing acts or seeking amendment of the regulation or a preliminary ruling on interpretation.

²⁶ — The European Parliament reached the same conclusion in its resolution on the draft Commission Regulation (OJ 2003 C 272, p. E/405), taking the view that the proposed text 'substantially improves administrative transparency and also makes it easier to monitor the criteria laid down ...' (paragraph 2).

reflect existing practice but also to keep open the possibility of introducing more rigorous requirements. It also emphasises that the applicant is not alleging a breach of any legal rule but only of the fourth recital in the preamble to Regulation No 994/98.

53. The legal context of the contested regulation explains why this plea should be rejected.

54. The Treaty entrusts the task of ensuring that aid is compatible with the common market to the Commission and therefore requires the Member States to notify such aid to the Commission in advance. It also permits the Council to adopt rules for implementation of the system, as in the case where the Commission is authorised to adopt general provisions exempting from the prior notification requirement aid schemes which fulfil the compatibility criteria.

55. The justification for granting that power to the Commission is that it has 'considerable experience', but it would not be correct to say that the Council authorised only codification of the existing regime and ruled out the possibility of any stricter regulation. Previous practice does not have to be documented in legal rules; it is sufficient if it is put to good use. It should be noted that the seventh recital in the preamble to the

delegating regulation states that 'it is appropriate to enable the Commission, when it adopts regulations exempting certain categories of aid from the obligation to notify ... , to attach further detailed conditions to ensure ... compatibility ...'. Furthermore, in order to assess such compatibility it is necessary to apply general criteria to the facts of each particular case, taking into account the circumstances obtaining at that time, and practice may well change over time for good reason.

56. None of the rules contained in Regulation No 994/98 prevents the Commission from adopting rules which differ from those previously applying or obliges it simply to carry out a redrafting exercise. That institution has a duty to monitor compliance and, in the same way as it can adopt guidelines at a given point in time, it can amend them or withdraw them at a later date, provided always that it respects the limits laid down by Community law.²⁷

²⁷ — By way of example, the Commission communication concerning the guidelines on State aid for employment (2000/C 371/05, OJ 2000, p. 12) states that such schemes will continue to be assessed 'against the criteria set out in the existing guidelines, which will therefore remain in force, until the entry into force of revised guidelines on aid for employment or of an exemption regulation on aid for employment'.

57. The objection relating to the absence of a transitional period for adjustment is also unfounded, since Article 11 of Regulation No 2204/2002 contains provisions on the matter, which one may disagree with but cannot ignore.²⁸

58. A different question (and one which has not been raised in these proceedings) is whether the regulation adopted by the Commission on the basis of the enabling legislation complies with the general and specific conditions contained therein.²⁹

60. First, it should be noted that Regulation No 2204/2002 does not detract from legal certainty, according to the defendant's understanding,³⁰ since that principle, which is of very wide scope in so far as it encapsulates other principles, assumes the existence of a reasonably founded expectation concerning the behaviour of the Community institutions in applying the law. The statement in the fifth recital in the preamble to the enabling provision that 'exemption regulations will increase transparency and legal certainty' should therefore be understood in that light since it implies that, by means of the regulations adopted by the Commission on the basis of the authority given, the Member States are made aware of the requirements for the exemption from the obligation of prior notification of proposed State aid.

B — *Breach of general principles of law*

1. The principle of legal certainty

59. The application contains repeated references to the principle of legal certainty, even though in terms of formal presentation the alleged infringement is linked to that of a recital in the preamble to Regulation No 994/98. I have covered this aspect earlier and explained the need to examine this complaint individually at the same time as those relating to the general principles of Community law.

61. The contested regulation seeks to satisfy the demands of legal certainty by clearly setting out the conditions of compatibility required by the institution to which the Treaty entrusts the duty of supervision. However, it is only possible to assess in a general, theoretical way the greater or lesser extent to which that aim has been achieved when it is apparent from an overall view of its provisions that there is clearly some uncertainty.

²⁸ — See point 16 of this Opinion.

²⁹ — See point 7 of this Opinion.

³⁰ — The European Parliament took the same view, stating its opinion in the resolution on the draft regulation referred to in footnote 26 that the proposal established a 'coherent system for authorising aid, ... encouraging the principle of legal certainty' (paragraph 3).

62. Uncertainty is not the impression which emerges on a close examination of the content of the disputed regulation, which describes its scope in both positive and negative terms, defines the concepts used, sets out the conditions for exemption and the particular conditions applying to each type of aid scheme and includes rules on cumulation, transparency, monitoring and period of validity.³¹

section I will deal with subsidiarity, which affects the constitutional arrangements of the Member States, as is the case with Belgium, where matters of employment fall exclusively within the competence of the regions. It is claimed that the exemption from the notification requirements is ineffective because it fails to take that fact into account.

63. The charge of uncertainty is further weakened because, under the Treaty system, the requirement to notify is a general rule, whereas exemption is more limited and is consequently subject to stricter interpretation. Therefore, should any doubt about its scope arise, the basic rule applies. In any event the regulation is not intended to govern the whole field but only to apply to particular areas.

65. In the Commission's view, the principle of subsidiarity is meaningless in this case.

66. The second paragraph of Article 5 EC embodies the principle of subsidiarity and limits it to those areas that are not allocated to the exclusive competence of the Community.³²

2. The principle of subsidiarity

64. Although formally the applicant State refers to a breach of the principle of subsidiarity, in the relevant part of its submissions it mentions the principles of legal certainty and proportionality. These will be examined separately and in this

67. The legal context of Regulation No 2204/2002 shows that it is concerned with an area whose regulation has been entrusted to the Community alone because of the way in which State aid is monitored in order to assess its compatibility with the common market.³³

32 — This idea is reiterated in point 3 of the Protocol on the application of the principles of subsidiarity and proportionality annexed to the Treaty establishing the European Community.

33 — Without prejudice to the option granted to Member States in the third subparagraph of Article 88(2), to apply to the Council for a declaration that aid is compatible with the common market if exceptional circumstances justify it.

31 — See points 9 to 16 of this Opinion.

68. Consequently, the principle of subsidiarity is both irrelevant and inapplicable in this case and therefore cannot be said to have been breached.

71. According to the case-law, the principle of proportionality requires that the means employed by a Community provision be appropriate to attain the objective pursued and must not go beyond what is necessary to achieve it.³⁴ Proportionality therefore suggests an accord and a harmony between the aim pursued and the measures adopted to achieve it.

3. The principles of proportionality and consistency

(a) The principle of proportionality

69. According to the applicant, the contested regulation gives rise to a state of uncertainty. Furthermore, the fact that Article 2(f) contains an exhaustive list of the categories of disadvantaged workers means that the regional circumstances and social policy of the Member States cannot be taken into account. This, taken together with the possibility of having to notify the Commission of measures promoting employment of types other than those mentioned in that provision, is disproportionate having regard to the objective of reducing unemployment.

72. However, that relationship is undermined unless it is analysed bearing in mind the true purpose of the regulation. The Belgian Government has not followed this logic in formulating its pleas for annulment since, although promoting employment is of vital importance in the economic and social policy of both the Community and its Member States (it is even mentioned in the sixth recital in the preamble to Regulation No 2204/2002), it does not have the same status in relation to the disputed measure, although it has a bearing on it. The regulation was adopted under the authority given by the Council to the Commission for the purposes — and I emphasise this — of assisting in the application of Articles 87 EC and 88 EC.

73. Furthermore, in an area which, as indicated above, falls exclusively within the

70. The Commission underlines the importance of the context of the regulation and maintains that the requirement of prior notification of aid not covered by the regulation stems from the Treaty.

34 — Case 122/78 *Buitoni* [1979] ECR 677, paragraph 16; Case 137/85 *Maizena* [1987] ECR 4587, paragraph 15; Case C-491/01 *British American Tobacco (Investments) and Imperial Tobacco* [2002] ECR I-11453, paragraph 122; and Case C-15/00 *Commission v EIB* [2003] ECR I-7281, paragraph 161.

competence of the Community, the legislature must be allowed wide discretionary powers so that only if the measures adopted are manifestly inappropriate having regard to the objective sought could their legality be affected.³⁵ That is not the case here, and any defects which came to light as a result of the application of the rules would not affect their proportionality.³⁶

tested provision, maintains that as part of the broad discretion which the Community institutions enjoy in developing common policies, established case-law has recognised that the institutions have the power to bring into harmony different Community objectives.

74. The applicant State's claim that the principle of proportionality has been infringed should therefore be rejected.

(b) The principle of consistency

75. In the applicant's view, the principle of consistency of Community acts has been infringed because the ability of Member States to formulate a real employment policy has been restricted.

77. In examining this plea, the context of the contested regulation should be emphasised. Thus, as a general rule, payments made by Member States which distort or threaten to distort competition are declared to be incompatible with the common market, although in certain circumstances they may be considered compatible. In any event the Commission must be notified of proposed schemes to grant or amend such aid so that it can decide whether or not they are compatible. In the interests of facilitating that task, the Council empowered the Commission to list the conditions upon which certain aid, including that relating to 'employment and training', would be exempted from prior notification, provided that certain requirements were met (Regulation No 994/98, Article 1(1)).

76. The defendant, on the other hand, after again expounding the meaning of the con-

78. The requirement of prior notification derives, therefore, not from the contested measure but, as the Commission points out, from the Treaty itself. The contested regulation sets out, in accordance with the powers conferred, the conditions for the exemption of certain aid schemes from the notification requirement.

35 — In this regard see *British American Tobacco (Investments) and Imperial Tobacco*, paragraph 123, and *Commission v EIB*, paragraph 162.

36 — *Commission v EIB*, paragraph 165.

79. The employment policies of the Member States are not directly affected by the disputed Community measure, which operates in a different area.

82. The case-law established long ago that the Community legislature is in breach of the non-discrimination rule if it treats comparable situations differently³⁷ or different situations in a similar manner,³⁸ unless the difference is objectively justified.³⁹

4. The principle of non-discrimination

80. The Belgian Government takes the view that maintaining the aid schemes previously authorised but introducing a stricter system for new schemes breaches the principle of non-discrimination as between undertakings which received aid prior to the entry in force of the regulation and those applying for it afterwards.

83. In these proceedings, it is the opinion of the applicant State that the change in legal regime would lead to inequality. However that is just an objective explanation of the different effects brought about. If the argument of the Kingdom of Belgium were to be followed through, this would lead to the legal system becoming paralysed and obsolete because no new measures different from those previously in force would ever be passed. The impact on the regulation of other general principles of law such as non-retroactivity, respect for acquired rights, the protection of legitimate expectations or those mentioned above, particularly that of legal certainty, is another question.

81. In that respect the defendant points out that, in accordance with its legal basis, the regulation seeks only to remove the prior notification requirement in respect of aid which satisfies the conditions set out. It does nothing more, since, if it had cancelled aid previously authorised or made it subject to the currently applicable regime, it would have infringed Regulation No 994/98 as well as the Treaty itself.

84. The difference in treatment complained of does not therefore appear unjustified.

37 — Amongst the first cases was Case 6/71 *Rheinmühlen Düsseldorf* [1971] ECR 823.

38 — Case 147/79 *Hochstrass v Court of Justice* [1980] ECR 3005 and subsequent cases.

39 — Case 245/81 *Edeka* [1982] ECR 2745, amongst others.

C — *Incorrect choice of legal basis*

85. The final plea in law which Belgium puts forward relies on Article 241 EC. It argues that the addition by the Treaty of Amsterdam of paragraph 3 to Article 137 EC entrusts the Council with the task of adopting, on a unanimous basis, measures in the area of 'financial contributions for promotion of employment and job creation', and that this has the effect of excluding all Commission competence in that area. That amendment means that Regulation No 994/98 ceased to be the correct legal basis for Regulation No 2204/2002, as the authorisation given therein breaches the above-mentioned Treaty rule, in its amended form.

88. The Court of Justice has held that the choice of legal basis for a measure must be based on objective factors which are amenable to judicial review, such as the aim and content of the measure.⁴⁰ If there are several aims then regard must be had to the main aim.⁴¹

89. Achieving a high level of employment is a fundamental objective of the Community (Article 2 EC), which the coordination between the policies of the Member States in this area must promote (Article 3(1)(i) EC). The Member States also regard that area as a matter of great concern and introduce economic measures to try to achieve that objective.

90. The granting of this type of aid affects the operation of the common market and distorts competition.⁴² The system therefore provides for various means of regulation, which no doubt do affect employment, amongst which is Regulation No 994/98, on which the contested regulation is based. The legal basis of that regulation is not Article 137 EC or any other Article in Title XI of the EC Treaty (social policy, education, vocational training and youth) or in Title VIII (employment), but Article 89 EC, which is part of Title VI (competition, taxation and approximation of laws). That is the correct

86. The Commission contends that Article 137(3) EC became law after the entry into force of Regulation No 994/98 and does not have retroactive effect. Furthermore, according to its understanding, that Treaty rule is not applicable to these proceedings.

87. There is no alternative but to accept that analysis in its entirety.

40 — Case C-300/89 *Commission v Council* [1991] ECR I-2867, paragraph 10.

41 — Case C-377/98 *Netherlands v Parliament and Council* [2001] ECR I-7079, paragraph 27.

42 — See points 3 and 4 of this Opinion.

choice of legal basis because its main objective is the application of Articles 87 EC and 88 EC, even though, I repeat, it does affect employment.

92. Consequently, Article 137 EC is not helpful in this case. There is no breach of Community law resulting from Regulation No 2204/2002 being legally founded on the Treaty provisions on competition since its fundamental aim is to simplify the procedure provided for in Article 88(3) EC by means of the authorisation given by the Council to the Commission.

91. It should be noted, moreover, that the enabling regulation also covers other types of aid, such as aid for small and medium-sized enterprises, for research and development and for the protection of the environment (Article 1(1)), so that, if the Kingdom of Belgium's argument were accepted, the enabling regulation would have to have as its legal basis all the Treaty provisions allowing the Community to act in those areas.

IV — Costs

93. In accordance with Article 69(2) of the Rules of Procedure, the applicant, having been unsuccessful, should be ordered to pay the costs.

V — Conclusion

94. In accordance with the foregoing analysis, I propose that the Court:

(1) Dismiss the action for annulment brought by the Kingdom of Belgium against Commission Regulation (EC) No 2204/2002 of 12 December 2002 on the application of Articles 87 EC and 88 EC to State aid for employment;

(2) Order the Kingdom of Belgium to pay the costs.