OPINION OF ADVOCATE GENERAL KOKOTT

delivered on 26 June 2008 [1]

I — Introduction

1. By the present action for annulment, the Parliament is objecting to the legal basis chosen for the adoption of Council Decision 2006/1016/EC of 19 December 2006 granting a Community guarantee to the European Investment Bank against losses under loans and loan guarantees for projects outside the Community. [2]

2. The Council adopted that decision on the legal basis for economic, financial and technical cooperation with third countries (Article 181a EC). In the view of the Parliament, the decision should have been based additionally on Article 179 EC — the legal basis for development cooperation. In support of its view, the Parliament points out that the majority of the third countries covered by the decision are developing countries.

1 — Original language: German.

2 — OJ 2006 L 414, p. 95, 'Decision 2006/1016', 'the contested decision' or 'the decision'.

II — Legal framework

A — *Treaty provisions*

3. Title XX of the EC Treaty is entitled 'Development cooperation'. Article 177 EC sets out the objectives of the Community's policy in that field:

'1. Community policy in the sphere of development cooperation, which shall be complementary to the policies pursued by the Member States, shall foster:

— the sustainable economic and social development of the developing countries, and more particularly the most disadvantaged among them;

— the smooth and gradual integration of the developing countries into the world economy;

— the campaign against poverty in the developing countries.

2. …'

4. Article 178 EC provides:

'The Community shall take account of the objectives referred to in Article 177 in the policies that it implements which are likely to affect developing countries.'

5. Article 179 EC forms the legal basis for development cooperation measures:

'1. Without prejudice to the other provisions of this Treaty, the Council, acting in accordance with the procedure referred to in Article 251, shall adopt the measures necessary to further the objectives referred to in Article 177. Such measures may take the form of multiannual programmes.

2. The European Investment Bank shall contribute, under the terms laid down in its Statute, to the implementation of the measures referred to in paragraph 1.

3. …'

6. Article 181a EC is the sole provision in Title XXI, which is entitled 'Economic, financial and technical cooperation with third countries':

'1. Without prejudice to the other provisions of this Treaty, and in particular those of Title XX, the Community shall carry out, within its spheres of competence, economic, financial and technical cooperation measures with third countries. Such measures shall be complementary to those carried out by the Member States and consistent with the development policy of the Community.

Community policy in this area shall contribute to the general objective of developing and consolidating democracy and the rule of law, and to the objective of respecting human rights and fundamental freedoms.

2. The Council, acting by a qualified majority on a proposal from the Commission and after consulting the European Parliament, shall adopt the measures necessary for the implementation of paragraph 1. ….

…'

the EIB should be offered a Community budgetary guarantee for operations carried out outside the Community. The EIB should be encouraged to increase its operations outside the Community without recourse to the Community guarantee, particularly in the pre-accession countries and the Mediterranean as well as in investment grade countries in other regions, while the nature of the coverage of the Community guarantee should be clarified as covering risks of a political or sovereign nature.'

8. Recital 8 in the preamble to the decision also refers to the Community's external policies:

B — *Decision 2006/1016*

1. Extracts from the preamble to the decision

7. Recital 3 in the preamble to the decision states:

'With a view to supporting EU external action without affecting the EIB's credit standing,

'EIB Financing Operations should be consistent with and support EU external policies including specific regional objectives. By ensuring overall coherence with EU actions, EIB financing should be complementary to corresponding Community assistance policies, programmes and instruments in the different regions. Moreover, the protection of the environment and energy security of the Member States should form part of the EIB's financing objectives in all eligible regions. EIB Financing Operations should take place in countries complying with appropriate conditionality consistent with EU high-level

agreements on political and macro-economic aspects.'

2. The relevant provisions of the decision

9. Article 1(1) of the decision provides:

'The Community shall grant the European Investment Bank (the "EIB") a global guarantee (the "Community guarantee") in respect of payments not received by the EIB, but due to it, in respect of loans and loan guarantees for EIB eligible investment projects carried out in countries covered by this Decision, where the loan financing or guarantee has been granted according to a signed agreement which has neither expired nor been cancelled ("EIB Financing Operations") and has been granted in accordance with the EIB's own rules and procedures and in support of the relevant external policy objectives of the European Union.'

10. Article 2 of the decision, which defines the countries covered, provides as follows in paragraphs 1 and 2:

'1. The list of countries eligible or potentially eligible for EIB financing under Community guarantee is laid down in Annex I.

2. For countries listed in Annex I and marked with "*" and for other countries not listed in Annex I, the eligibility of such country for EIB financing under Community guarantee shall be decided by the Council on a case by case basis in accordance with the procedure provided for in Article 181a(2) of the Treaty.'

11. Article 3 of the decision concerns the consistency of EIB actions with the external policy objectives of the European Union. Article 3(2) states:

'The cooperation shall be carried out on a regionally differentiated basis, taking into consideration the EIB's role as well as the policies of the European Union in each region.'

12. Annex I to the contested decision contains a list of countries eligible for projects under Community guarantee. Individual countries are listed there under the following headings:

'A. PRE-ACCESSION COUNTRIES

1. Candidate countries

…

2. Potential candidate countries

…

B. NEIGHBOURHOOD AND PARTNERSHIP COUNTRIES

1. Mediterranean

…

2. Eastern Europe, Southern Caucasus and Russia

…

C. ASIA AND LATIN AMERICA

1. Latin America

…

2. Asia

…

D. SOUTH AFRICA'

III — Background, forms of order sought and procedure

A — *Background to the dispute*

13. On 22 June 2006 the Commission submitted its proposal for a Council Decision granting a Community guarantee to the European Investment Bank ('the EIB') against losses under loans and guarantees for projects outside the Community, basing that proposal on Article 181a EC. [3]

14. In its resolution of 30 November 2006 the Parliament presented its view on the proposal and called on the Commission to add Article 179 EC to Article 181a EC as the legal basis. [4]

15. However, the Commission did not amend its proposal in this regard [5] and on 19 December 2006 the Council adopted the contested decision with Article 181a EC as the sole legal basis.

B — *Forms of order sought and procedure before the Court of Justice*

16. On 19 March 2007 the Parliament brought an action before the Court of Justice. It claims that the Court should:

— annul Council Decision 2006/1016/EC of 19 December 2006 granting a Community guarantee to the European Investment Bank against losses under loans and loan guarantees for projects outside the Community, on the ground of infringement of the EC Treaty;

— order that the effects of Decision 2006/1016/EC be maintained until the adoption of a new decision;

— order the defendant to pay the costs.

3 — Proposal for a Council Decision granting a Community guarantee to the European Investment Bank against losses under loans and guarantees for projects outside the Community, COM(2006) 324 final.

4 — European Parliament legislative resolution on the proposal for a Council decision granting a Community guarantee to the European Investment Bank against losses under loans and guarantees for projects outside the Community, 30 November 2006, P6_TA(2006)0507 (OJ 2006 C 316E, p. 109).

5 — Proposal for a Council decision granting a Community guarantee to the European Investment Bank against losses under loans for projects outside the Community (Central and Eastern Europe, Mediterranean countries, Latin America and Asia and the Republic of South Africa), COM(2006) 419 final.

17. The Council claims that the Court should:

— dismiss the action;

— order the Parliament to pay the costs.

18. By order of the President of the Court of Justice of 10 October 2007, the Commission of the European Communities was granted leave to intervene in support of the form of order sought by the Council.

19. All the parties presented submissions in the written procedure and at the hearing on 14 May 2008.

IV — Legal assessment

20. The Parliament relies on a single plea in law in support of its action for annulment, alleging an incorrect choice of legal basis for the adoption of the decision. The Parliament thus alleges an infringement of the EC Treaty for the purposes of the second paragraph of Article 230 EC.

21. The Parliament considers that Decision 2006/1016 should not have been based solely on Article 181a EC, but additionally on Article 179 EC. In support of its view, the Parliament makes the submission — which the Council does not dispute — that the majority of the third countries covered by the decision are to be regarded as developing countries.

22. Both parties agree that the decision is a financial cooperation measure. In the view of the Parliament, however, Article 179 EC is the more specific legal basis for financial cooperation with developing countries and precludes the application of Article 181a EC in this regard.

23. The Council and the Commission take the view that a measure cannot be based additionally on Article 179 EC solely because it concerns developing countries. That legal basis is applicable only where the measure in question also pursues the objectives of development assistance policy, as laid down in Article 177 EC. Whilst the contested decision does also concern developing countries indirectly, it does not pursue development assistance objectives.

A — *Determination of the correct legal basis*

24. It is settled case-law that the choice of the legal basis for a Community measure must rest on objective factors amenable to judicial review, which include in particular the aim and the content of the measure. [6]

25. If examination of the aim and the content of a Community measure reveals that it pursues a twofold purpose or that it has a twofold component, falling within the scope of different legal bases, and if one is identifiable as the main or predominant purpose or component, whereas the other is merely incidental, the measure must be based on a single legal basis, namely that required by the main or predominant purpose or component. [7]

26. Before I consider the content and the objectives of the contested decision, however, it is first necessary to determine the scopes of Articles 179 EC and 181a EC in abstract terms. Only once the respective scopes of those legal bases have been defined is it possible to examine in a second stage whether the objective and the content of the decision actually fall within the scope of both legal bases and, if so, what consequences are to be inferred.

B — *Does the decision fall within the scope of more than one legal basis?*

1. The scope of Article 179 EC and Article 181a EC

27. Article 179 EC constitutes the legal basis for development cooperation measures, whilst Article 181a EC is a legal basis for 'economic, financial and technical cooperation with *third countries*'. The present case essentially hinges on how these two legal bases are to be distinguished and whether Article 181a EC can also encompass measures of the kind mentioned therein which relate to *developing countries*.

28. It should first be made clear that the nature of the measure cannot be used as a distinguishing criterion. It is true that only Article 181a EC expressly mentions

6 — See, inter alia, Case C-440/05 *Commission* v *Council* [2007] ECR I-9097, paragraph 61; Case C-178/03 *Commission* v *Parliament and Council* [2006] ECR I-107, paragraph 41; Case C-94/03 *Commission* v *Council* [2006] ECR I-1, paragraph 34; and Case C-300/89 *Commission* v *Council*, '*Titanium dioxide*', [1991] ECR I-2867, paragraph 10.

7 — See, inter alia, Case C-91/05 *Commission* v *Council* [2008] ECR I-3651, paragraph 73; Case C-178/03 *Commission* v *Parliament and Council* (cited in footnote 6, paragraph 42); Case C-94/03 *Commission* v *Council* (cited in footnote 6, paragraph 35); and Case C-211/01 *Commission* v *Council* [2003] ECR I-8913, paragraph 39.

'economic, financial and technical cooperation' and Article 179 EC refers solely in general terms to 'measure'. Economic, financial and technical assistance or cooperation is, however, among the conventional forms of development cooperation. [8]

29. The Parliament takes the view that only a *geographical criterion* distinguishes the respective scopes of the two provisions. Accordingly, Article 179 EC concerns cooperation with developing countries and Article 181a EC concerns only cooperation with other countries.

30. In support of its view, the Parliament mentions in particular the historical development of Titles XX and XXI. Title XX on development cooperation was inserted into the Treaty by the Maastricht Treaty. Measures concerning developing countries had previously been based on Article 308 EC. Following the introduction of Title XX measures concerning third countries which were not developing countries continued to be based on Article 308 EC, until Article 181a EC was created by the Treaty of Nice. The Parliament adds that it can be seen that Article 181a EC was intended to fill the gap which existed in the Treaty as regards cooperation with third countries which were not developing countries.

8 — See the joint statement by the Council and the representatives of the governments of the Member States meeting within the Council, the European Parliament and the Commission on European Union Development Policy: 'The European Consensus', 20 December 2005 (OJ 2006 C 46, p. 1), point 119.

31. The Council and the Commission, on the other hand, take the view that a geographical criterion alone may not be used in drawing a distinction between the provisions. A material criterion must also be added. A measure falls outside the scope of Article 181a EC only if it concerns a developing country and also pursues the objectives referred to in Article 177 EC, since only then is Article 179 EC relevant as a legal basis. A measure concerning developing countries which does not pursue the objectives referred to in Article 177 EC may therefore be based on Article 181a EC.

32. If consideration is given only to the wording, the term 'third countries' is sufficiently broad to include developing countries.

33. However, an examination of the scheme of the Treaty raises doubts over this understanding.

34. Article 181a EC is introduced with the words 'without prejudice to the other provisions of this Treaty, and in particular those of Title XX'. It is thus made clear that Title XX on development cooperation is more specific and takes precedence over Article 181a EC.

35. The Council points out that Article 179 EC also begins with the words 'without prejudice to the other provisions of this Treaty'. However, it must be stated, first of all, that Article 179 EC was drafted at a time when Article 181a EC did not yet exist, as the latter article was introduced into the EC Treaty only with a subsequent amendment of the Treaty. Secondly, the proviso contained in Article 179 EC is much less specific than the proviso in Article 181a EC, which expressly mentions Title XX. The proviso in Article 179 EC therefore prevails over the proviso in Article 181a EC.

36. Title XX and the legal basis formed by Article 179 EC are therefore the more specific provisions for cooperation with developing countries.

37. However, it is unclear how far the effects of the specific nature of Title XX extend. Can measures which concern developing countries never be based on Article 181a EC? Or do the effects extend no further than the scope of Article 179 EC, with the result that measures which do not fall within the scope of Article 179 EC may be based on Article 181a EC?

38. In my view, a teleological interpretation suggests that measures concerning developing countries are not in principle covered by Article 181a EC. [9]

39. Any other interpretation conceals the danger that Article 181a EC will be used to circumvent the wording and assessments in Title XX. [10] The measures governed in Article 181a EC, namely economic, financial and technical cooperation, are among the conventional forms of development assistance. [11] Under Article 179 EC, measures concerning developing countries are dependent on the precondition that they serve the objectives referred to in Article 177 EC by fostering the sustainable economic and social development of developing countries, their smooth and gradual integration into the world economy and the campaign against poverty. In contrast, Article 181a EC does not link cooperation to the pursuit of development-policy and social objectives.

40. If the legislature could base cooperation measures with developing countries on Article 181a EC where they do not pursue the objectives referred to in Article 177 EC, that would ultimately circumvent the binding objectives laid down in Article 177 EC. The legislature could then organise economic cooperation with developing countries

9 — See to this effect also the Opinion of Advocate General Mengozzi of 19 September 2007 in Case C-91/05 *Commission* v *Council* (cited in footnote 7, point 148).

10 — Article 181a EC does not only refer to Article 179 EC but expressly mentions Title XX as a whole.

11 — See footnote 8.

without taking account of the objectives imposed on it by Article 177 EC. [12] However, this is contrary to the scheme of the Treaty described above. With a view to avoiding the circumvention of Article 177 EC, there is therefore much to suggest that measures concerning developing countries should not be based on Article 181a EC. [13]

2. Interim conclusion

41. There is, however, no need to give a final ruling in the present case on whether a distinction is to be drawn between Article 179 EC and Article 181a EC solely on the basis of the *geographical criterion* or whether account must also be taken of a *material criterion*. That question would be relevant only if the contested decision did not pursue the objectives referred to in Article 177 EC. As the following analysis of the content and the objectives of the contested decision will show, however, the decision does pursue the objectives of development assistance policy for the purposes of Article 177 EC in so far as it concerns developing countries.

12 — In so far as Article 178 EC requires that the Community *takes account* of the objectives referred to in Article 177 EC in all policy areas, this is no compensation for the risk of circumvention, as merely taking the objectives into account is of secondary importance compared with the obligation under Article 177 EC to further the objectives.

13 — On the basis of this understanding, the amendment to Article 181a EC to be made by the Treaty of Lisbon would constitute a clarification. Article 212 of the Treaty on the Functioning of the European Union (TFEU) will in future explicitly exclude developing countries from its scope: '… the Union shall carry out economic, financial and technical cooperation measures… with third countries other than developing countries …'

C — *Content and objective of Decision 2006/1016*

42. I will examine below in a first step whether the contested decision falls within the scope of Article 179 EC on the basis of its content. In a second step I will show that the decision pursues the objectives referred to in Article 177 EC, in so far as it concerns developing countries.

1. Content of the decision

43. According to Article 1(1), the content of the decision is constituted by the grant of a guarantee from the Community budget for certain EIB operations. Article 1(1) also lays down the conditions relating to the scope of the guarantee. Under that provision, the guarantee applies to payments not received by the EIB, but due to it, in respect of loans and loan guarantees for EIB eligible investment projects ('EIB financing operations')

carried out in countries covered by the decision. A further condition is that the EIB financing operations in question have been granted in accordance with the EIB's own rules and procedures and in support of the relevant external policy objectives of the European Union.

44. Annex I to the decision specifies which countries fall within the scope of the decision and are eligible. The annex lists countries in four groups: 'Pre-accession countries', 'Neighbourhood and partnership countries', 'Asia and Latin America' and 'South Africa'. Individual countries are listed for each group.

45. The Parliament has argued that the majority of the countries listed are developing countries. In the absence of a definition of 'developing country' in Community law, the Parliament has relied on the classification of countries by the OECD and the World Bank. This has not been contested by the Council. In that regard it should be stated that in principle classifications by the OECD and the World Bank have only indicative effect for the purposes of Community law. The concept of 'developing country' is to be determined autonomously in Community law, with the result that classification may differ in individual cases. However, any such possible differences are not of consequence for the assessment of the list of countries in the contested decision.

46. Is the guarantee introduced by the contested decision a measure which falls within the scope of Article 179 EC on the basis of its subject-matter?

47. As has already been explained above, [14] a financial cooperation measure may also fall within the scope of Article 179 EC.

48. Classification as a development assistance measure also cannot be precluded by the fact that the EIB's payments to the project partners in developing countries are not non-refundable subsidies but loans.

49. First of all, as the Parliament and the Commission have argued, the EIB's project partners are granted loans at more favourable interest rates on the basis of the guarantee, and this must be regarded as constituting assistance. Secondly, Article 179(2) EC expressly provides that the EIB must support the Community's development assistance policy. Since the EIB's activity essentially consists in lending, the fact that it grants loans and not subsidies cannot preclude classification as development assistance.

14 — See point 28 of this Opinion.

2. Objectives of the decision

50. The Parliament takes the view that the contested decision pursues the objectives referred to in Article 177 EC in so far as it concerns developing countries, in particular the fostering of sustainable economic and social development.

51. The Council has disputed this claim, but has not stated what other objective the decision pursues in relation to developing countries. The Council has merely repeatedly stated that it is the objective of Decision 2006/1016 to establish a 'financial cooperation measure with third countries by means of a Community financing instrument'. Contrary to the view taken by the Council, however, this does not indicate the objective of the measure so much as its content. As is apparent from the decision, the grant of the guarantee is not an end in itself, but furthers more extensive objectives.

52. The objectives pursued by the decision can be seen in particular from recitals 1 and 3 in its preamble. According to those recitals, the guarantee is granted *with a view to supporting EU external action without affecting the EIB's credit standing.*

53. The guarantee is therefore intended to enable the EIB to conduct financing operations in countries outside the Community, which will often entail higher risks, without jeopardising its favourable credit rating.

54. At first sight the impression might therefore be created that the contested decision is not an external policy measure, but a purely internal measure. This also appears to be intimated by the Commission when it states that the provisions of the contested decision define a financing instrument which applies primarily to the Community's internal dimension. The Commission also points out that, unlike other financing instruments in the field of external relations, the contested decision is not itself the legal basis for the EIB's financing operations in third countries; the relevant legal basis is, first and foremost, the second subparagraph of Article 18(1) of the Protocol on the Statute of the EIB. [15] The Commission states that the third countries benefit only indirectly from the contested decision in that they obtain more favourable loans on the basis of the guarantee. The third countries benefit directly from

15 — EIB Statute, Protocol No 10 annexed to the Treaty establishing the European Community, in the version of 1 May 2004, Article 18(1): 'Within the framework of the task set out in Article 267 of this Treaty, the Bank shall grant loans to its members or to private or public undertakings for investment projects to be carried out in the European territories of Member States, to the extent that funds are not available from other sources on reasonable terms.However, by way of derogation authorised by the Board of Governors, acting unanimously on a proposal from the Board of Directors, the Bank may grant loans for investment projects to be carried out, in whole or in part, outside the European territories of Member States.'

the EIB financing operations. At the hearing the Council clarified that this *indirect* link between the guarantee and the developing countries is the decisive reason why in its view the contested decision should not be based additionally on Article 179 EC.

55. However, that view is not convincing. If the Commission's argument were taken to its logical conclusion, the result reached would have to be that *neither* Article 179 EC *nor* Article 181a EC is a possible legal basis for the contested decision, regardless of whether or not developing countries are concerned. Article 181a EC provides a legal basis for financial cooperation *with third countries* and not for purely internal measures.

56. The Commission is admittedly correct in its view that the guarantee has direct effects initially only within the Community, that is to say between the EIB and the Community budget. The guarantee in itself therefore also cannot be classified as financial cooperation with third countries. However, the *fundamental objective* of the decision is to support the Community's external policy. The guarantee is not an end in itself, but merely the means to achieve the Community's actual objective, which is to support its external policy by making financial cooperation with third countries through the EIB possible. This is made particularly clear by the fact that under Article 1(1) of the decision the guarantee applies only to EIB financing operations which have been granted in support of the relevant external policy objectives of the European Union.

57. Classification as a development assistance measure is not therefore precluded by the fact that the guarantee has effects in developing countries only indirectly through the EIB. The guarantee is the essential condition for implementation by the EIB of financing measures in third countries which, having regard to its own credit rating, it might otherwise not implement at all, or only on much less favourable terms for the EIB's borrowers in the third countries. Essentially, the guarantee thus makes possible and fosters the EIB's operations in developing countries.

58. Since the Community establishes through the decision the specific basic condition for the EIB's assistance activities, the preservation of the EIB's credit rating therefore appears, when the necessary assessment is made, to be simply the necessary intermediate link for achieving the main objective, which is to support developing countries.

59. However, does the contested decision, in so far as it concerns developing countries, also pursue the objectives referred to in Article 177 EC, that is to say sustainable economic and social development, integration of developing countries into the world economy and the campaign against poverty?

60. The decision mentions in fairly general terms that its objective is to support the Community's external policy. However, the Community's external action also includes the Community's development assistance policy. Recital 8 in the preamble to the contested decision stresses that EIB financing operations should be consistent with and support EU external policies including specific regional objectives. With regard to developing countries, the specific regional objective is to foster sustainable economic and social development. [16] Article 3(2) of the decision also expressly specifies that the cooperation must be carried out on a regionally differentiated basis, taking into consideration the EIB's role as well as the policies of the European Union in each region.

61. The contested decision moreover expressly lists the instruments of cooperation which are intended to serve the EIB's activities to which the guarantee applies. With one exception, those financing instruments are based solely or inter alia on Article 179 EC and are therefore development cooperation instruments: the European Neighbourhood and Partnership Instrument [17] (based on Article 179 EC and Article 181a EC), the Development Cooperation Instrument [18] (based on Article 179 EC) and the Instrument for Stability [19] (based on Articles 179 EC and 181a EC).

62. In addition, in its preamble the decision sets out specifically the objectives which should be pursued by the EIB financing operations in the individual regions. For the regions which include the developing countries the objectives mentioned are typical objectives of development cooperation.

63. EIB financing in Asia and Latin America should focus on environmental sustainability and energy security projects, as well as the continued support of the EU's presence in Asia and Latin America through foreign direct investment and the transfer of technology and know-how (recital 12). In Central Asia the EIB should focus on major

16 — With regard to the partnership countries listed in Annex 1 it is to support the partnership and neighbourhood policy, and with regard to the pre-accession countries it is to support the pre-accession policy.

17 — Regulation (EC) No 1638/2006 of the European Parliament and of the Council of 24 October 2006 laying down general provisions establishing a European Neighbourhood and Partnership Instrument (OJ 2006 L 310, p. 1).

18 — Regulation (EC) No 1905/2006 of the European Parliament and of the Council of 18 December 2006 establishing a financing instrument for development cooperation (OJ 2006 L 378, p. 41).

19 — Regulation (EC) No 1717/2006 of the European Parliament and of the Council of 15 November 2006 establishing an Instrument for Stability (OJ 2006 L 327, p. 1).

energy supply and energy transport projects with cross-border implications (recital 13). In South Africa the EIB should focus on infrastructure projects of public interest (including municipal infrastructure and power and water supply) and private sector support, including SMEs (recital 14).

64. The financial cooperation with third countries which the contested decision implements through the guarantee to the EIB therefore also pursues, in so far as developing countries are concerned, the socio-economic objectives referred to in Article 177 EC, in particular the sustainable economic and social development of developing countries.

3. Interim conclusion

65. In so far as the contested decision concerns developing countries, it falls within the scope of Article 179 EC. In so far as other countries are concerned, it falls within the scope of Article 181a EC. It must therefore be examined below whether the measure should therefore have been founded on both legal bases.

D — *Is it possible to identify a centre of gravity?*

66. In principle, a measure is to be founded on only one legal basis. If examination of a Community measure reveals that it pursues a twofold purpose, or that it has a twofold component, according to the Court's 'centre of gravity' case-law the measure must be founded on the legal basis required by the main or predominant purpose or component. [20]

67. Only if, exceptionally, it is established that the measure simultaneously pursues a number of objectives or has several components that are indissociably linked, without one being secondary and indirect in relation to the other, will such a measure have to be founded on the various corresponding legal bases, in so far as their procedures are compatible. [21]

68. As has been explained, the contested decision has a twofold component: on the one hand, it concerns financial cooperation with developing countries and falls within the scope of Article 179 EC, whilst, on the other, it concerns financial cooperation with other third countries and falls within the scope of Article 181a EC.

20 — *Commission* v *Parliament and Council* (cited in footnote 6, paragraph 42) and Case C-338/01 *Commission* v *Council* [2004] ECR I-4829, paragraph 55.

21 — See, inter alia, Case C-91/05 *Commission* v *Council* (cited in footnote 9, paragraph 75); *Commission* v *Parliament and Council* (cited in footnote 6, paragraph 43); and Case C-338/01 *Commission* v *Council* (cited in footnote 20, paragraph 56).

69. The Parliament takes the view that the Court's case-law on centre of gravity is not applicable in the present case. In the alternative, the Parliament argues that, even if the criterion of centre of gravity is applied, both components are indissociably linked and neither is secondary and indirect in relation to the other.

70. The present situation differs from previously decided cases in two respects.

71. First of all, the two legal bases concern the same subject, namely cooperation with third countries. However, as has been explained above, they are mutually exclusive with regard to the beneficiaries of the cooperation: Article 179 EC is a more specific provision than Article 181a EC and takes precedence over it. Where developing countries are concerned, Article 179 EC is the correct legal basis and, where other countries are concerned, Article 181a is the appropriate legal basis.

72. Secondly, the centre of gravity here cannot be determined on the basis of a content-related criterion, as the contested decision concerns financial cooperation with developing countries and with other countries. A centre of gravity can be determined at most in purely *quantitative* terms.

73. This is also the difference compared with the fisheries and trade agreements cited by the Council. [22] Even though they concern developing countries, they were founded only on the substantively relevant legal basis and not additionally on Article 179 EC. A *content-related* centre of gravity can be identified there, from between development assistance policy and fisheries policy or trade policy. Where the centre of gravity in terms of content is fisheries or trade policy, a measure must be founded solely on the relevant legal bases and not additionally on Article 179 EC, even if the measure concerns developing countries. However, the contested decision concerns, in terms of content, the same kind of actions, which differ only with respect to the beneficiaries.

74. Examination of the *quantitative centre of gravity* in the present case would give rise to the conclusion that neither the component which concerns countries other than developing countries nor the component which concerns developing countries forms the centre of gravity.

75. There is a greater number of developing countries than other countries among the countries eligible or potentially eligible for financing under the decision. If only the number of countries were taken as the basis,

22 — Council Regulation (EC) No 1801/2006 of 30 November 2006 on the conclusion of the Fisheries Partnership Agreement between the European Community and the Islamic Republic of Mauritania (OJ 2006 L 343, p. 1).

the decision should possibly even have been based solely on Article 179 EC. In determining the quantitative centre of gravity, however, the guarantee ceilings which the decision lays down for the individual regions should also be taken into account. It is uncertain whether it can be stated precisely how the guarantee ceiling is apportioned between developing countries and non-developing countries. An overall amount is merely given for each individual region and not for individual countries. However, in a region there may be countries from both categories. At the hearing the Parliament submitted that around one half of the total amount which the decision indicates as the guarantee ceiling is apportionable to developing countries. [23]

76. In any case it cannot be inferred from these findings that in quantitative terms the decision concerns countries other than developing countries mainly and predominantly and developing countries only in a secondary and incidental way. Even applying the centre of gravity theory, the conclusion is therefore reached in the present case that the contested decision could not be based solely on Article 181a EC.

77. In my view, however, a *purely quantitative criterion* is not suitable in principle for determining, for the purposes of the Court's case-law on centre of gravity, whether the centre of gravity of a measure relates to Article 179 EC or Article 181a EC. It is unclear from the outset on what basis the quantitative centre of gravity is to be determined. Is the number of the countries concerned to be taken as the basis? Does the size in terms of area or population of the countries also have to be taken into consideration in order to determine whether the centre of gravity of a measure is developing countries or other countries? The correct approach would however probably involve taking account not only of the number of countries but also of the size of the amounts that a measure makes available for cooperation.

78. These factors may possibly, depending on the way they are treated and weighted, produce arbitrary results. In the light of the principle of legal certainty, it is therefore doubtful whether the choice of legal basis should be determined on such a basis. Consequently, I believe that in situations such as that in the present case no centre of gravity can be determined for reasons of principle.

79. Ultimately, however, both views lead to the same conclusion: the contested decision could not be based solely on Article 181a EC.

23 — At the hearing Parliament made the submission, which was not disputed by the Council and the Commission, that roughly EUR 13 400 million of the EUR 27 800 million guarantee ceiling is apportionable to developing countries.

80. It follows that if both components are indissociably linked the measure is to be founded, exceptionally, on both relevant legal bases, in so far as their procedures are compatible. [24] It must therefore be examined, lastly, whether the procedures under Articles 179 EC and 181a EC are compatible.

E — *Compatibility of the procedures*

81. Recourse to a dual legal basis is not possible where the procedures laid down for each legal basis are incompatible with each other or where the use of two legal bases is liable to undermine the rights of the Parliament. [25] This must be examined below.

82. With regard to the voting rules within the Council, the two legal bases are readily compatible since the Council acts by a qualified majority in the case of both Article 179 EC and Article 181a EC.

83. However, there are differences between the two procedures in relation to participation by the Parliament. [26] Whilst Article 181a EC merely provides for the Parliament to be consulted, under Article 179 EC the Parliament exercises the legislative function together with the Council in the co-decision procedure.

84. The Court has already been called on to decide whether Article 133(4) EC, which does not provide for any formal right of participation by the Parliament, and Article 175(1) EC, which provides for co-decision with the Parliament, are compatible having regard to the different rights of participation enjoyed by the Parliament. [27] The Court proceeded on the basis that the co-decision procedure, involving that is to say greater participation by the Parliament, is to be applied to the combined procedure. The Court accepted that the two procedures are compatible on the basis of the argument that recourse to both these legal bases is not liable to undermine the Parliament's rights since recourse to Article 175 EC enables that institution to participate in the adoption of the measure under the co-decision procedure. Consequently, the Court considered the two procedures to be compatible.

85. In determining the compatibility of the procedures with regard to the respective

24 — *Commission* v *Parliament and Council* (cited in footnote 6, paragraphs 43 and 57) and Case C-94/03 *Commission* v *Council* (cited in footnote 6, paragraphs 36 and 52).

25 — See *Commission* v *Parliament and Council* (cited in footnote 6, paragraph 57), which refers to Case C-300/89 *Commission* v *Council*, '*Titanium dioxide*' (cited in footnote 6, paragraphs 17 to 21).

26 — Under the Treaty of Lisbon this problem will no longer arise because the same procedure will be applicable to both articles and the question as to compatibility can then be answered in the affirmative without any difficulty.

27 — See *Commission* v *Parliament and Council* (cited in footnote 6, paragraph 59) and Case C-94/03 *Commission* v *Council* (cited in footnote 6, paragraph 54).

forms of participation by the Parliament, the Court therefore has in view in these cases only the rights of participation enjoyed by the Parliament.

86. On the basis of these arguments, the two procedures must also be regarded as compatible in the present case. If, as the Court has already ruled, a procedure which does not provide for any participation by the Parliament and the co-decision procedure are compatible with each other, this must apply a fortiori to the compatibility of 'consultation' and 'co-decision', the procedures at issue in the present case. Article 179 EC and Article 181a EC may therefore be used as a dual legal basis for a measure.

87. However, the Court has found that a dual legal basis forms the exception, which is possible only where two equivalent objectives or components are indissociably linked. [28]

88. As a result, this means that, where a measure is divisible, two separate measures, that is to say 'twin measures', have to be adopted. A measure which concerns developing countries is to be adopted on the basis of Article 179 EC and a second measure which concerns other third countries on the basis of Article 181a EC. If a measure is not divisible, it is to be based both on Article 179 EC and on Article 181a EC. The legislature is given discretion in assessing whether a measure is divisible. In the present case there is much to suggest that the measure is not divisible, in its present form at least, since it provides for global sums, as guarantee ceilings, for the individual regions which may encompass both developing countries and other countries. This method of indicating global sums for individual regions and not ceilings for each country gives the EIB optimal flexibility in the pursuit of its activities.

89. If, on the other hand, the rights of participation of the Council were also considered to be relevant in assessing compatibility, as I suggested in my Opinion in *Commission* v *Parliament and Council*, [29] the procedures would have to be found incompatible in the present case. The Council would, as a result of the extension of the co-decision procedure to cooperation with third countries for which

28 — See *Commission* v *Parliament and Council* (cited in footnote 6, paragraph 43) and Case C-94/03 *Commission* v *Council* (cited in footnote 6, paragraph 36).

29 — *Commission* v *Parliament and Council* (cited in footnote 6, point 61).

the Treaty has not provided for any right of co-decision for the Parliament, be deprived of its exclusive legislative competence in this field and would have to share legislative competence with the Parliament. Such a result would be contrary to the deliberate decision of the Member States regarding the legislative procedure. According to this view, the contested decision could not therefore be based simultaneously on development cooperation and on cooperation with third countries.

90. Where the procedures are incompatible, the measure must, according to this view, ultimately be founded on one legal basis, and the legal basis which provides for the co-decision procedure must prevail, since, with respect to legislative procedure, the Parliament's right of co-decision is the norm. Moreover, it is consistent with the principle of transparency (Article 1(2) EU) and the principle of democracy (Article 6(1) EU) if, where two legal bases are equally possible and equally concerned but not compatible with each other, in case of doubt the basis is chosen under which the Parliament's rights of participation are greater.

91. In my Opinions in *Commission* v *Parliament and Council* and Case C-94/03 *Commission* v *Parliament* I therefore took the view that a measure which pursues both objectives referred to in Article 133 EC and objectives referred to in Article 175 EC is to be based solely on Article 175 EC. [30] Accordingly, in the present case the contested decision would have had to be based solely on Article 179 EC, which provides for the co-decision procedure.

F — *Interim conclusion*

92. As an interim conclusion, it is clear that, irrespective of whether the procedures under Article 179 EC and under Article 181a EC are considered to be compatible, the contested decision could not in any event be founded on Article 181a EC as the sole legal basis. It must therefore be annulled on account of the incorrect choice of legal basis.

V — Maintenance of effects

93. The Parliament has requested the Court to order that, if the contested decision is annulled, its effects be maintained until the adoption of a new decision. The Council and the Commission support this request by the Parliament.

30 — *Commission* v *Parliament and Council* (cited in footnote 6, point 64).

94. Under the second paragraph of Article 231 EC the Court, if it considers it necessary, is to state which of the effects of a regulation which it has declared void are to be considered definitive. Whilst, on the basis of its wording, that provision applies only to regulations, the Court has also applied it *mutatis mutandis* to other measures. [31]

95. In accordance with Article 10 thereof, the contested decision came into force on the third day following its publication in the *Official Journal of the European Union*, which took place on 30 December 2006. Since it came into force, the EIB has entered into commitments on the strength of the guarantee. If the guarantee for the financing operations already commenced by the EIB ceased to apply, this would constitute a considerable risk to the EIB's credit standing. In respect of commitments already entered into, the effects of the contested decision must therefore be maintained.

96. It is open to question whether the effects of the decision are also to continue to apply to projects on which a decision has not yet been taken. It could be argued that the EIB could preserve its credit standing by refusing to finance high-risk projects. However, this would result in undue paralysis of the EIB's operations and thus also of the pursuit of the external objectives of the Community.

97. The validity of the guarantee is thus also to be maintained for EIB financing operations which have not yet been agreed, that is to say for EIB financing operations which are agreed before the adoption of a new decision, but at the latest before the end of a reasonable period within which a new decision is to be adopted. [32] The legislature required less than six months for the adoption of the contested decision. A period of 12 months from the delivery of the judgment should therefore be reasonable for the adoption of a new decision.

VI — Costs

98. Under Article 69(2) of the Rules of Procedure, the unsuccessful party is to be ordered to pay the costs if they have been applied for in the successful party's pleadings. Since the Parliament has applied for the Council to be ordered to pay the costs and the Council is unsuccessful, the Council must be ordered to pay the costs. Under Article 69(4) of the Rules of Procedure, the Commission is to bear its own costs.

31 — With regard to the *mutatis mutandis* application to decisions, see Case C-22/96 *Parliament* v *Council* [1998] ECR I-3231, paragraph 42, and Case C-106/96 *United Kingdom* v *Commission* [1998] ECR I-2729, paragraph 41.

32 — See, in this regard, Joined Cases C-14/06 and C-295/06 *Parliament* v *Commission* [2008] ECR I-1649, paragraphs 82 to 86, and *Commission* v *Parliament and Council* (cited in footnote 6, paragraphs 61 to 65); see, in this regard, also my Opinion in Case C-217/04 *United Kingdom* v *Parliament and Council* [2006] ECR I-3771, points 47 to 50.

VII — Conclusion

99. I therefore propose that the Court should:

(1) Annul Council Decision 2006/1016/EC of 19 December 2006 granting a Community guarantee to the European Investment Bank against losses under loans and loan guarantees for projects outside the Community.

(2) Order that the effects of the annulled decision be maintained for EIB financing operations agreed before a decision adopted on the correct legal basis has entered into force, but at the latest before the end of the 12th month after delivery of the judgment.

(3) Order the Council of the European Union to pay the costs with the exception of the costs incurred by the Commission of the European Communities.

(4) Order the Commission of the European Communities to bear its own costs.