

OPINION OF ADVOCATE GENERAL

TRSTENJAK

delivered on 13 December 2007<sup>1</sup>

**I — Introduction**

**II — Legal framework**

*A — Community law*

1. The Commission of the European Communities has brought an action pursuant to Article 226 EC for a declaration that, by adopting national legislation which prohibits the affixing of tinted film to the windows of passenger or goods vehicles, the Portuguese Republic has failed to fulfil its obligations under Articles 28 EC and 30 EC and under Articles 11 and 13 of the Agreement of 2 May 1992 on the European Economic Area<sup>2</sup> ('the EEA Agreement').

1. Primary Community law

2. Article 28 EC prohibits quantitative restrictions on imports between Member States and all measures having equivalent effect.

3. Under Article 30 EC, prohibitions or restrictions on imports are permitted if they are justified in particular on grounds of public security and the protection of health and life of humans, provided they do not constitute a means of arbitrary discrimination or a disguised restriction on trade between Member States.

<sup>1</sup> — Original language: German.

<sup>2</sup> — OJ 1994 L 1, p. 3.

2. Directives 2001/92/EC and 92/22/EEC

to tinted film which is affixed to the windows of passenger or goods vehicles after they have been brought into service.

4. Directive 2001/92/EC<sup>3</sup> ('Directive 2001/92') adapts to technical progress Council Directive 92/22/EEC on safety glazing and glazing materials on motor vehicles and their trailers and Council Directive 70/156/EEC relating to the type-approval of motor vehicles and their trailers.

7. The third recital in the preamble and Annex IIB to Directive 2001/92 refer in turn to the provisions governing the general and individual specifications, tests and technical requirements set out in Regulation No 43 of the United Nations Economic Commission for Europe, in the most recent version adopted by the European Community<sup>5</sup> ('Regulation No 43'), according to which safety glazing must have a regular transmission of at least 70%, whilst the transmission of windscreens may be no less than 75%.<sup>6</sup>

5. Directive 92/22/EEC<sup>4</sup> ('Directive 92/22') itself seeks to introduce, by means of harmonisation, a type-approval procedure for safety glazing and materials for glazing intended to be fitted in the form of a windscreen or other glazing or separating panels on motor vehicles and their trailers.

8. By contrast, no minimum transmission factor is laid down for rear windows. This

6. Directive 92/22, in the form amended by Directive 2001/92, applies to glazing which is intended to offer protection against the effects of the sun (tinted windows), but not

5 — Since the end of the 1950s the technical regulations for motor vehicles have been harmonised at international level in order to remove barriers to trade in motor vehicles and accessories for the benefit of consumers. The basis is an Agreement concluded on 20 March 1958 in the United Nations Economic Commission for Europe (UNECE) and amended with effect from 16 October 1995. The Agreement ('Revision 2 of the Agreement concerning the adoption of uniform technical prescriptions for wheeled vehicles, equipment and parts which can be fitted and/or be used on wheeled vehicles and the conditions for reciprocal recognition of approvals granted on the basis of these prescriptions') currently has 47 contracting parties, including the European Community (see Sündermann, B., 'Internationale Harmonisierung der technischen Vorschriften für Kraftfahrzeuge und Übernahme in deutsches Recht', *Straßenverkehrsrecht — Zeitschrift für die Praxis des Verkehrsjuristen*, 2006, pp. 49 and 50). On the basis of that Agreement, Regulation No 43 was adopted, laying down uniform provisions concerning the approval of safety glazing materials and their installation on vehicles. Under the provisions concerning the scope of the regulation, it applies to safety glazing materials intended for installation as windscreens or other panes, or as partitioning, on power-driven vehicles and their trailers, and to the fitting thereof, to the exclusion, however, of glazing for lighting and light-signalling devices and instrument panels, and of special bulletproof glazings. The regulation does not concern double-glazed windows.

3 — Commission Directive 2001/92/EC of 30 October 2001 adapting to technical progress Council Directive 92/22/EEC on safety glazing and glazing materials on motor vehicles and their trailers and Council Directive 70/156/EEC relating to the type-approval of motor vehicles and their trailers (OJ 2001 L 291, p. 24).

4 — Council Directive 92/22/EEC of 31 March 1992 on safety glazing and glazing materials on motor vehicles and their trailers (OJ 1992 L 129, p. 11).

6 — Regulation No 43, U niform provisions concerning the approval of safety glazing materials and their installation on vehicles, Annex 21, paragraph 4: 'Specific provisions applicable to vehicles of categories M and N' (see paragraphs 4.1.1, 4.2.1.1 and 4.2.2.1).

means that a vehicle may be fitted with tinted glazing or tinted film with very weak light transmission on the rear windows, including the rear screen, provided that the vehicle has two external mirrors.

11. Article 5 of Decree-Law No 40/2003 provides that from the entry into force of that rule the Direcção-Geral de Viação (Directorate-General for Road Traffic) must refuse to grant EC type-approval and national type-approval to vehicle models which do not comply with the provisions of Decree-Law No 40/2003 regarding safety glazing.

## B — National law

9. Directive 2001/92 is transposed into Portuguese law by Decreto-Lei (Decree-Law) No 40/2003 of 11 March 2003<sup>7</sup> ('Decree-Law No 40/2003').

10. Article 2(1) of Decree-Law No 40/2003 provides: 'The affixing of tinted film to the windows of passenger or goods vehicles shall be prohibited with the exception of lawful stickers and dark, non-reflective film to the goods compartment of goods vehicles'.

## III — Pre-litigation procedure

12. On 1 April 2004, the Commission sent a letter of formal notice to the Portuguese Government, in which it stated that, by prohibiting the affixing of tinted film to the windows of passenger or goods vehicles through the bringing into force of Article 2 of Decree-Law No 40/2003 without communicating a draft of that national provision to it in advance, the Portuguese Republic had failed to fulfil its obligations under Articles 28 EC and 30 EC and Articles 11 and 13 of the EEA Agreement, together with Article 8 of Directive 98/34/EC ('Directive 98/34').<sup>8</sup>

<sup>7</sup> — Decreto-Lei No 40/2003, *Diário da República* I, Series A, No 59, of 11 March 2003.

<sup>8</sup> — Directive 98/34/EC of the European Parliament and of the Council of 22 June 1998 laying down a procedure for the provision of information in the field of technical standards and regulations (OJ 1998 L 204, p. 37).

13. In its letter of 28 June 2004, the Portuguese Government replied that the above-mentioned prohibition constituted a measure to protect internal security, in particular public policy and road safety, which was permitted under Article 30 EC.

14. By letter of 22 December 2004, the Commission sent the Portuguese Government a reasoned opinion. In that reasoned opinion, the Commission stated that it was in no doubt that the Portuguese Republic had failed to fulfil its obligations under Articles 28 EC and 30 EC and Articles 11 and 13 of the EEA Agreement, because the prohibition contained in Article 2 of Decree-Law No 40/2003 hindered trade in tinted film lawfully manufactured and marketed in another Member State or a Contracting State to the EEA Agreement. Furthermore, the Commission once again alleged a breach of the duty of communication laid down by Article 8 of Directive 98/34.

15. The Commission also required the Portuguese Government to take the measures necessary to comply with the reasoned opinion within a period of two months of its notification.

16. Subsequently, by letter of 22 July 2005, the Portuguese Government gave notice of its intention to repeal Article 2 of Decree-Law No 40/2003. It also gave notification of the preparation of a draft technical standard

which was expected to be completed and ready for communication to the Commission pursuant to Directive 98/34 within two months of the end of the summer holidays.

17. After the draft decree laying down technical rules concerning the affixing of tinted film to the windows of motor vehicles had been communicated to the Commission on 21 December 2005,<sup>9</sup> the Commission decided to withdraw the complaint concerning an infringement of Article 8 of Directive 98/34.

18. None the less, in its application the Commission has maintained the complaint concerning the incompatibility with Article 28 EC and Article 11 of the EEA Agreement of the prohibition under Article 2 of Decree-Law No 40/2003 on affixing tinted film to the windows of passenger or goods vehicles, since, to its knowledge, the Portuguese Republic has not yet repealed the contested national provision.

<sup>9</sup> — Draft decree laying down technical rules concerning the affixing of tinted film to the windows of motor vehicles (Projecto de decreto regulamentar que estabelece condições técnicas para a afixação de películas coloridas nos vidros dos veículos automóveis).

**IV — Proceedings before the Court and forms of order sought by the parties**

19. In its application, which was lodged at the Court Registry on 16 June 2006, the Commission claims that the Court should:

- (1) declare that, by prohibiting pursuant to Article 2(1) of Decree-Law No 40/2003 of 11 March 2003 the affixing of tinted film to the windows of motor vehicles, the Portuguese Republic has failed to fulfil its obligations under Articles 28 EC and 30 EC and under Articles 11 and 13 of the EEA Agreement, as that prohibition hinders the marketing in Portugal of tinted film lawfully manufactured and/or marketed in another Member State or in a State signatory to the EEA Agreement;

- (2) order the Portuguese Republic to pay the costs.

20. In its defence, lodged on 11 September 2006, the Portuguese Government claims that the Court should:

- (1) dismiss the action for a declaration that, by prohibiting pursuant to Article 2(1) of Decree-Law No 40/2003 of 11 March 2003 the affixing of tinted film to the windows of motor vehicles, the Portuguese Republic has failed to fulfil its obligations under Articles 28 EC and 30 EC and under Articles 11 and 13 of the EEA Agreement, as that prohibition hinders the marketing in Portugal of tinted film lawfully manufactured and/or marketed in another Member State or in a State signatory to the EEA Agreement, given that such a declaration is devoid of purpose since the Portuguese Republic has decided generally to permit the affixing of tinted film to the windows of motor vehicles;

- (2) order the Commission to pay the costs.

21. After receipt of the Commission's reply of 21 November 2006 and the Portuguese Government's rejoinder of 5 February 2007, the written stage of the procedure was concluded.

22. By way of measures of organisation of procedure, the Court asked the parties two questions, which they have answered.

23. At the hearing on 7 November 2007, the representatives of the Commission and of the Portuguese Government confirmed their respective positions.

are necessary and proportionate with regard to the aim pursued in so far as those rules are capable of hindering trade between the Member States, directly or indirectly, actually or potentially.

## V — Main arguments of the parties

24. The Commission takes the view that the contested Portuguese rule, which prohibits the affixing of tinted film to the windows of motor vehicles, constitutes a measure having equivalent effect to a quantitative restriction on imports which infringes Article 28 EC and Article 11 of the EEA Agreement, since that prohibition hinders the marketing in Portugal of tinted film lawfully manufactured and/or marketed in another Member State or in a State signatory to the EEA Agreement. It is also to be expected that potential customers, traders or individuals would also not purchase such film in the knowledge that they could not affix it to the windows of motor vehicles.

26. The Commission takes the view that the Portuguese Republic has failed to provide the appropriate information, in the form of studies, reports or statistics, to allow it to be concluded that restrictions on the free movement of goods such as the contested measure are justified on the grounds set out in Article 30 EC and Article 13 of the EEA Agreement or for overriding reasons relating to the public interest and that the use of tinted film, irrespective of its colour and properties, in particular as regards light transmission, constitutes a threat to public policy and/or road safety.

25. The Commission acknowledges that in the absence of rules on harmonisation at Community level it is for the Member States to decide the extent to which they wish to ensure the protection of road traffic safety in their national territory. However, they have a duty to demonstrate that their rules

27. The Portuguese Government does not dispute the facts set out in the application. On the other hand, it objects to the assessment of certain facts by the Commission. It considers the contested prohibition to be justified because under Article 30 EC the Member States have the power to adopt the necessary rules to guarantee internal security, public policy and road safety.

28. The aim of the prohibition imposed by Article 2(1) of Decree-Law No 40/2003 was to ensure that the possibility of observing and identifying persons and goods inside motor vehicles is preserved. To that end, it was necessary to prohibit any modification of the optical properties of the glazing in passenger vehicles or of the space occupied by persons in goods vehicles.

29. The Portuguese Government regards the contested prohibition as a measure to protect internal security. It argues that it is important for vehicle occupants and goods in motor vehicles to be clearly visible with a view to countering and combating crime and for road safety, since it makes it easier to verify that the vehicle seats are correctly occupied and that safety belts are being used as required by the law. There are no less restrictive measures to ensure the attainment of the aims of internal security and road traffic safety.

## VI — Legal assessment

### A — *Introductory remarks*

30. According to the recitals in the preamble to Directive 92/22, the adoption of that

Community legislation forms part of the measures adopted with the aim of progressively establishing the internal market of the European Community over a period expiring on 31 December 1992 using the total-harmonisation method. The aim of that legislative initiative was to eliminate the existing differences, which could have raised barriers to trade, by introducing a harmonised procedure for component type-approval and the accompanying harmonisation of national rules on safety glazing.

31. With the affixing of an EEC component type-approval mark (or an 'EC type-approval mark', to use the terminology introduced by Directive 2001/92) to any type of safety glazing that conforms to the type that has been type-approved, the official testing of that type of glazing in other Member States was no longer justified. In addition to the aim of achieving the internal market, however, account was also to be taken of road safety requirements in view of the variety of risks the use of such glazing could give rise to.

32. Article 5 of Decree-Law No 40/2003 instructs the Portuguese General Directorate for Road Traffic to refuse to grant EC type-approval to vehicle models which do not comply with the provisions of Decree-Law No 40/2003 regarding safety glazing. This clearly covers infringements of the prohi-

bition under Article 2(1) of Decree-Law No 40/2003 on affixing tinted film to the windows of passenger or goods vehicles.

light of which the Court must assess the compatibility with Community law of the contested Portuguese provisions therefore extends to the rules of primary law laid down in the EC Treaty and in the EEA Agreement concerning the free movement of goods.<sup>11</sup>

33. In view of the fact that the grant of EC type-approval is governed by the provisions of Directive 92/22, it would seem reasonable to start by using that Community legislation as the yardstick for assessing any possible infringement of the Treaty in the present case. However, as was mentioned above, that directive applies to tinted windows, but not to tinted film. The national measures in this field have not therefore been harmonised at Community level. Nevertheless, in the absence of common or harmonised rules, the Member States are required to protect the fundamental freedoms established in the Treaty, of which the free movement of goods comprises a basic principle.<sup>10</sup>

34. In the absence of harmonisation in this field, the substantive law framework in the

35. As regards the allocation of the burden of establishing a case and the burden of proof, it should be pointed out that in Treaty infringement proceedings under Article 226 EC the Commission must prove the existence of such an infringement. On the other hand, it is incumbent on the defendant Member State to contest substantively and in detail the information produced and the consequences thereof.<sup>12</sup>

10 — Under Article 3(1)(c) EC, the activities of the European Community include an internal market characterised by the abolition, as between Member States, of obstacles to the free movement of goods. Furthermore, Article 14(2) EC provides: 'The internal market shall comprise an area without internal frontiers in which the free movement of goods ... is ensured in accordance with the provisions of this Treaty'. Those provisions are contained in particular in Article 28 et seq. EC. See, in that respect, Case C-265/95 *Commission v France* [1997] ECR I-6959, paragraph 24 et seq. Article 1(1) of the EEA Agreement provides that its aim is 'to promote a continuous and balanced strengthening of trade and economic relations between the Contracting Parties with equal conditions of competition, and the respect of the same rules, with a view to creating a homogeneous European Economic Area'. Under Article 1(2)(a), in order to attain those objectives, the association is to entail inter alia the free movement of goods. That area is regulated by the provisions laid down in Article 8 et seq. See the judgment of the EFTA Court in Case E-1/94 *Restamark* [1994-1995] EFTA Court Report 14, paragraph 46 et seq.

11 — This follows a *contrario* from the case-law of the Court of Justice, according to which, where a sphere has been the subject of exhaustive harmonisation at Community level, any national measure relating thereto must be assessed in the light of the provisions of the harmonising measure and not those of the Treaty. See Case C-37/92 *Vanacker and Lesage* [1993] ECR I-4947, paragraph 9; Case C-324/99 *DaimlerChrysler* [2001] ECR I-9897, paragraph 32; Case C-322/01 *Deutscher Apothekerverband* [2003] ECR I-14887, paragraph 64; and Case C-309/02 *Radlberger and Spitz* [2004] ECR I-11763, paragraph 53. See also, to that effect, Dubois, L. and Blumann, C., *Droit matériel de l'Union européenne*, 4th edition, Paris, 2006, Section 430, p. 275, according to which a harmonisation measure restricts the Member States' powers under Article 30 EC. Whilst full harmonisation prohibits them from restricting the free movement of goods, partial harmonisation gives them some margin of discretion within the limits defined by the harmonised law.

12 — Case 272/86 *Commission v Greece* [1988] ECR 4875, paragraph 21.

B — *Restriction on the free movement of goods*

between the Member States, what is essential is its effect on intra-Community trade, whether actual or potential.<sup>15</sup>

36. The free movement of goods is guaranteed in particular by the prohibition of quantitative restrictions on imports and all measures having equivalent effect between the Member States of the European Community under Article 28 EC. Article 11 of the EEA Agreement is identical to that provision of Community law in terms of its legislative content.<sup>13</sup>

37. According to the established case-law of the Court, the prohibition of measures having equivalent effect to restrictions which is set out in Article 28 EC covers all rules enacted by the Member States which are capable of hindering, directly or indirectly, actually or potentially, intra-Community trade.<sup>14</sup> Even if a measure is not intended to regulate trade

38. Assessing all the facts submitted to the Court, there can be no doubt, in my opinion, that the contested prohibition in Article 2(1) of Decree-Law No 40/2003 constitutes a measure having equivalent effect within the meaning of that definition. Even if such a prohibition is applicable without distinction and is thus not discriminatory in nature, it is essentially aimed towards and capable of hindering or even making impossible the marketing in Portugal of tinted film lawfully manufactured and/or marketed in another Member State or in a State signatory to the EEA Agreement.

13 — See the judgments of the EFTA Court in *Restamark* (cited in footnote 10), paragraph 46, and in Case E-6/96 *Tore Willemssen* [1997] EFTA Court Report 3, paragraph 43, according to which Article 11 of the EEA Agreement and Article 28 EC are identical in substance. See also Case C-143/06 *Ludwigs-Apotheke* [2007] ECR I-9623, paragraph 43, according to which 'the rules regarding restrictions on the free movement of goods set out in Articles 11 and 13 of that agreement are essentially identical to those laid down by Articles 28 EC and 30 EC'.

14 — See Case 8/74 *Dassonville* [1974] ECR 837, paragraph 5; Joined Cases C-267/91 and C-268/91 *Keck and Mithouard* [1993] ECR I-6097, paragraph 11; Case C-217/99 *Commission v Belgium* [2000] ECR I-10251, paragraph 16; Case C-420/01 *Commission v Italy* [2003] ECR I-6445, paragraph 25; Case C-192/01 *Commission v Denmark* [2003] ECR I-9693, paragraph 39; Case C-41/02 *Commission v Netherlands* [2004] ECR I-11375, paragraph 39; Case C-147/04 *De Groot en Slot Allium and Bejo Zaden* [2006] ECR I-245, paragraph 71; Case C-65/05 *Commission v Greece* [2006] ECR I-10341, paragraph 27; Case C-54/05 *Commission v Finland* [2007] ECR I-2473, paragraph 30; and Case C-297/05 *Commission v Netherlands* [2007] ECR I-7467, paragraph 53.

39. The Portuguese Government recognises that such a prohibition has the effect of placing the trade in Portugal in the tinted film in question at a disadvantage or making it less favourable than during the period prior to the entry into force of Decree-Law No 40/2003. The restrictive nature of that provision is not therefore disputed.

15 — See point 39 of the Opinion of Advocate General Mazák in Case C-254/05 *Commission v Belgium* [2007] ECR I-4269.

40. In fact, a comprehensive prohibition like that provided for in Article 2(1) of Decree-Law No 40/2003 is liable to deter potential buyers from buying, and not only from simply using, such tinted film. As the Commission rightly states, it is realistically to be expected that potential customers, including traders and private users, will refrain from purchasing such film in the knowledge that they may not affix the film to the windows of motor vehicles.<sup>16</sup>

41. This applies all the more since the submissions of the parties show that there is no other possible appropriate use for the film in question, for example, on large glass areas in the home, in conservatories or in greenhouses. According to the Commission, the film differs from the protective film normally used in the home or in buildings in general both in its material composition and in the method of its industrial manufacture. The two kinds of film also have different technical properties with respect to their form, colour and light transmission so that they cannot be regarded as interchangeable in any way. This finding is not refuted by the argument put forward by the Portuguese Government, according to which it is for the manufacturer to determine its intended use in each individual case. In determining the use to be made of a product, a manufacturer will generally

take into account essential elements such as aesthetics, weather conditions and distinctive features in the surface structure and thus has to design and produce the product in such a way that it has the desired properties. Consequently, the contested prohibition is capable of closing all sales channels to manufacturers and dealers.

42. The objection raised by the Portuguese Government that because the Portuguese State subsequently abandoned that prohibition there is no longer any legal restriction capable of hindering trade in such tinted film in Portugal must be rejected. Admittedly, it is true that the Portuguese Republic was initially prepared to comply with the demand made by the Commission in the reasoned opinion for the repeal of that prohibition when it decided to convert the draft decree laying down technical rules concerning the affixing of tinted film to the windows of motor vehicles,<sup>17</sup> which permitted the granting of type-approval to such tinted film,

<sup>16</sup> — See paragraph 20 of the Commission's application.

<sup>17</sup> — Draft decree laying down technical rules concerning the affixing of tinted film to the windows of motor vehicles (Projecto de decreto regulamentar que estabelece condições técnicas para a afixação de películas coloridas nos vidros dos veículos automóveis).

into a draft decree-law.<sup>18</sup> According to the Portuguese Government, by converting its legal form the measure would have the status of a law under the Portuguese legal system, as a result of which the repeal of the prohibition under Article 2(1) of Decree-Law No 40/2003 would be clearly and formally put into effect. As that government itself concedes, however, that proposal has not yet been implemented, since the Commission has not defined its position on the redrafted text of the contested legal provision.

43. In this respect, it should be noted that the Court has consistently held that the question whether a Member State has failed to fulfil its obligations must be determined by reference to the situation in the Member State as it stood at the end of the period laid down in the reasoned opinion, with the result that the Court cannot take account of any subsequent changes.<sup>19</sup> However, it cannot therefore be

ruled out that a fundamental change to the relevant national provisions between the expiry of the period laid down for compliance with the reasoned opinion and the lodging of the application may render the judgment to be given by the Court otiose, with the result that it may be reasonable for the Commission not to bring an action but to issue a new reasoned opinion precisely identifying the complaints which it intends pursuing, having regard to the changed circumstances.<sup>20</sup> In the present case, such a fundamental subsequent change to the legal situation has clearly not occurred, however, because the Portuguese Republic did not repeal the prohibition imposed by Article 2(1) of Decree-Law No 40/2003, as originally promised, through the adoption of the decree-law, but has maintained it in force.<sup>21</sup>

44. Given the hesitancy of the Portuguese Republic with respect to the announced

18 — The recitals to the draft decree-law (Annex VI to the application), which Portugal's Permanent Representation to the European Union communicated to the European Commission by letter of 21 December 2005, record that the European Commission had taken the view that the Portuguese Republic had introduced restrictions on the free movement of goods which infringed the Treaty. They also record the readiness of the Portuguese Republic to comply with the Commission's demand by adopting minimum technical rules concerning the affixing of tinted film to the windows of motor vehicles which will take account of both road safety requirements and the free movement of goods. Article 8(1) of the draft provides that film which complies with those rules must be granted national type-approval. Under Article 8(1), approvals granted in other Member States must be recognised as equivalent. Article 9 provides that that film must visibly display the relevant type-approval mark.

19 — Case C-254/05 *Commission v Belgium* (cited in footnote 15), paragraph 39; Case C-119/04 *Commission v Italy* [2006] ECR I-6885, paragraph 27; Case C-211/02 *Commission v Luxembourg* [2003] ECR I-2429, paragraphs 6 and 28; Case C-29/01 *Commission v Spain* [2002] ECR I-2503, paragraph 11; Case C-147/00 *Commission v France* [2001] ECR I-2387, paragraph 26; Case C-119/00 *Commission v Luxembourg* [2001] ECR I-4795, paragraph 14; Case C-384/99 *Commission v Belgium* [2000] ECR I-10633, paragraph 16; Case C-60/96 *Commission v France* [1997] ECR I-3827, paragraph 15; Case C-289/94 *Commission v Italy* [1996] ECR I-4405, paragraph 20; and Case C-302/95 *Commission v Italy* [1996] ECR I-6765, paragraph 13.

20 — Case C-177/03 *Commission v France* [2004] ECR I-11671, paragraph 21, and Case C-203/03 *Commission v Austria* [2005] ECR I-935, paragraphs 27 to 32.

21 — This is not affected by the fact that, as argued at the hearing, on 31 October 2007 the Portuguese Government approved a legislative proposal which provides for the repeal of Article 2(1) of Decree-Law No 40/2003. According to the Portuguese Government, that law will not enter into force until its publication in the official journal of the Portuguese Republic.

repeal of the contested prohibition and the Portuguese Government's partially contradictory pleas on the current state of the legislative process, I am of the view that the present legal position in Portugal does not satisfy the requirements of legal certainty and clarity.

ties.<sup>24</sup> Article 2(2) of Decree-Law No 40/2003 provides for a fine of between EUR 30 and EUR 150, whilst negligent conduct is also punishable under Article 2(3).

45. It is established case-law that the need to ensure that Community law is fully applied requires Member States not only to bring their legislation into conformity with Community law but also to do so by adopting rules of law capable of creating a situation which is sufficiently precise, clear and transparent to allow individuals to know the full extent of their rights and rely on them before the national courts.<sup>22</sup> As I have already stated in my Opinion in Case C-319/06 *Commission v Luxembourg*,<sup>23</sup> that principle must apply in particular where national law imposes obligations on individuals and threatens penalties in the event of infringement. It is clear in the present case that under Article 5 of Decree-Law No 40/2003 the Portuguese General Directorate for Road Traffic must refuse to grant EC type-approval in the event of infringement. Furthermore, breaches of the prohibition on using tinted film are subject to police or administrative penal-

### C — *Justification*

46. It must be examined, however, whether despite its restrictive effect on trade between Member States that legislation can be justified by one of the grounds set out in Article 30 EC or by one of the overriding requirements relating to the public interest referred to in the Court's case-law, and, if necessary, whether such a restriction is appropriate

22 — See, with regard to directives, Case C-360/87 *Commission v Italy* [1991] ECR I-791, paragraph 12, and Case C-220/94 *Commission v Luxembourg* [1995] ECR I-1589, paragraph 10. See also Case C-162/99 *Commission v Italy* [2001] ECR I-541, paragraphs 22 to 25; Case C-478/01 *Commission v Luxembourg* [2003] ECR I-2351, paragraph 20; and judgment of 14 October 2004 in Case C-275/03 *Commission v Portugal*, paragraph 33.

23 — See point 75 of my Opinion of 13 September 2007 in Case C-319/06 *Commission v Luxembourg*, currently pending before the Court.

24 — As Lanord Farinelli, M., 'La norme technique: une source du droit légitime?', *Revue française de droit administratif*, 2005, No 4, p. 738 et seq., rightly explains a technical standard aims to control human behaviour, but is not able to enforce that behaviour itself. That is possible only if such a standard acquires legally binding character as a result of being incorporated into a rule of law and that rule of law provides for penalties in the event of infringement. Such penalties may be administrative, civil or criminal.

for attaining the objective pursued and does not go beyond what is necessary in order to attain it.<sup>25</sup>

47. In the present case, the Portuguese Government claims that the contested prohibition under Article 2(1) of Decree-Law No 40/2003 is justified on grounds of internal public security and road safety. It argues that the prohibition was imposed with the aim of ensuring that it was possible to inspect the interior of the motor vehicle from outside. The aim of the prohibition was not, therefore, to achieve reasonably clear visibility for the driver by preserving the light transmission of the window, but to allow the competent authorities to verify directly that road traffic legislation was being complied with simply by observing motor vehicles and their occupants. It argues that it is essential for the occupants of vehicles and goods in motor vehicles to be clearly visible in order to counter and combat crime and for road safety, since it makes it easier to verify that the vehicle seats are correctly occupied and that safety belts are being used as required by the law.

25 — Even if the prohibition in question falls within the scope of Article 28 EC, the Court has consistently held that a national rule which constitutes a measure having equivalent effect to a quantitative restriction may be justified by one of the reasons relating to public interest set out in Article 30 EC or by overriding requirements (see, in this regard, Case C-420/01 *Commission v Italy* (cited in footnote 14), paragraph 29, and Case C-270/02 *Commission v Italy* [2004] ECR I-1559, paragraph 21. In both cases, the national provision must be appropriate for securing the attainment of the objective pursued and must not go beyond what is necessary in order to attain it (see, inter alia, Joined Cases C-388/00 and C-429/00 *Radiosistemi* [2002] ECR I-5845, paragraphs 40 to 42; Case C-14/02 *ATRAL* [2003] ECR I-4431, paragraph 64; Case C-40/04 *Yonemoto* [2005] ECR I-7755, paragraph 55; and Case C-432/03 *Commission v Portugal* [2005] ECR I-9665, paragraph 42.

48. The Portuguese Government therefore relies on two different grounds of justification: first, the need to prevent and combat crime and, second, the requirements of road safety which, even though they have their origins in the field of public policy and public security,<sup>26</sup> must be examined separately for schematic reasons.

#### 1. The need to prevent and combat crime

49. The State's interest in combating crime effectively falls within the field of public policy and public security, both concepts

26 — According to Leibler, S., Grabitz, E. and Hilf, M., *Das Recht der Europäischen Union*, Vol. I, Article 30 EC, Sections 12 and 15, the Member States have a particularly broad margin of discretion in applying the concepts of public policy and public security. An impairment of public security arising from movement of goods will generally also lead to a threat to life and health and may easily fall within that concept. The same applies to threats to road safety (see Case 406/85 *Goffette* [1987] ECR 2525, in which traffic safety was held to fall within Article 30 EC even before it was recognised as a specific overriding reason relating to the public interest).

being expressly mentioned as justifications in Article 30 EC and Article 13 of the EEA Agreement.

50. The protection of public policy and public security has been recognised in the Court's case-law as a justification for national measures which restrict the fundamental freedoms primarily in connection with freedom of movement for workers,<sup>27</sup> freedom of establishment, freedom to provide services, the Community's law governing associations with third countries<sup>28</sup> and, albeit more rarely, in connection with the free move-

ment of goods.<sup>29</sup> The legitimate purposes which justify a restriction of the free movement of goods on grounds of public policy under Article 30 EC include, for example, the need to detect or prevent dealing in stolen vehicles,<sup>30</sup> the retention of silver coins taken out of circulation with a view to being melted down by the State,<sup>31</sup> and combating fraud in connection with export refunds.<sup>32</sup>

51. In principle, the Member States remain essentially free to decide according to their national needs what is required by public policy and public security. However, it must always be borne in mind that the concepts

27 — The Court has always emphasised that the public policy exception is a derogation from the fundamental principle of freedom of movement for persons, which must be interpreted strictly, and that its scope cannot be determined unilaterally by the Member States (Case 36/75 *Rutili* [1975] ECR 1219, paragraph 27; Case 30/77 *Bouchereau* [1977] ECR 1999, paragraph 33; Case C-441/02 *Commission v Germany* [2006] ECR I-3449, paragraph 34; and Case C-50/06 *Commission v Netherlands* [2007] ECR I-4383, paragraph 42).

28 — For example in relation to the concept of public policy in Article 14(1) of Decision No 1/80 of the EEC-Turkey Association Council. The Court has consistently held that the principles laid down in Articles 39 EC to 41 EC must be extended, so far as possible, to Turkish nationals who enjoy the rights conferred by that decision. It follows that, when determining the scope of the public policy exception provided for in Article 14(1) of Decision No 1/80, reference should be made to the interpretation given to that exception in the field of freedom of movement for workers who are nationals of a Member State of the Community. Such an approach is all the more justified because Article 14(1) is formulated in almost identical terms to Article 39(3) EC. See judgment of 4 October 2007 in Case C-349/06 *Polat*; Case C-502/04 *Torun* [2006] ECR I-1563; Case C-340/97 *Nazli* [2000] ECR I-957, paragraph 56; and Case C-467/02 *Cetinkaya* [2004] ECR I-10895, paragraph 43.

29 — With regard to the concept of public policy in Community law, see my Opinion of 13 September 2007 in the pending Case C-319/06 *Commission v Luxembourg*, points 40 to 44. In Case C-36/02 *Omega* [2004] ECR I-9609, paragraph 26, the Court examined the justification for a national prohibition measure adopted on grounds of protecting public policy by reason of the fact that the economic activity was an affront to human dignity only on the basis of the provisions of the Treaty concerning freedom to provide services and the relevant derogation clauses (Article 55 EC in conjunction with Article 46(1) EC), even though it considered the provisions concerning the free movement of goods to be essentially relevant. In the view of Müller-Graff, P.-C., *Kommentar zum Vertrag über die Europäische Union und zur Gründung der Europäischen Gemeinschaft* (edited by Angela Bardenhewer-Rating et al.), 6th edition, Baden-Baden, 2003-04, Article 30 EC, Section 49, the concept of public policy — generally in conjunction with the concept of public security — is to be construed as a concept having 'all-embracing character'. That protective interest may therefore be relied on only in cases where none of the other legal interests mentioned in Article 30 EC is relevant. According to the author, the Member States have thus far been reticent to reply on disruptions to public policy as a justification for obstacles to trade. Fischer, P., Köck, H. and Karollus, M., *Europarecht*, 4th edition, Vienna, 2002, p. 756, Section 1579, also point out that public policy is relatively rare as an area of application of Article 30 EC.

30 — Case 154/85 *Commission v Italy* [1987] ECR 2717, paragraph 13 et seq., and Case C-239/90 *Boscher* [1991] ECR I-2023, paragraph 23.

31 — Case 7/78 *Thompson* [1978] ECR 2247, paragraphs 32 and 34.

32 — Case C-426/92 *Deutsche Milchkontor* [1994] ECR I-2757, paragraph 44.

of public policy and public security are independent concepts under Community law which contribute towards determining the scope of the fundamental freedoms and must therefore be defined autonomously and not, for example, on the basis of one or more national legal systems.<sup>33</sup> Reliance on the meaning of the concepts in the national legal orders is precluded above all in the case of concepts which permit the Member States to restrict the fundamental freedoms or other individual rights. It would therefore be wrong, for example, to draw parallels with the concept of public security and public policy in the national law relating to the powers of the police without taking account of the peculiar features of Community law and the aims of the Treaty.<sup>34</sup> In my view, there is no objective reason to transfer to Community law the traditional national law distinction between measures taken by the police in the field of crime prevention, which represent measures for the protection of security, on the one hand, and punitive measures in the context of criminal prosecution, on the other, and therefore the police crime prevention measures referred to by the Portuguese Government must also be held to fall within the concept of public policy in Article 30 EC and Article 13 of the EEA Agreement, especially where they are expressed as vaguely and indeterminately as in the present case.

33 — Case C-296/95 *EMU Tabac* [1998] ECR I-1605, paragraph 30; Case 53/81 *Levin* [1982] ECR 1035, paragraphs 10 to 12; and Case 64/81 *Corman* [1982] ECR 13, paragraph 8. Community law concepts may not be defined on the basis of the legal provisions of the Member States. Reliance on the meaning of the concepts in the national legal orders is precluded above all in the case of concepts which permit the Member States to restrict the fundamental freedoms or other individual rights (see Schütz, H.-J., Bruha, T. and König, D., *Casebook Europarecht*, Munich, 2004, pp. 451 and 452).

34 — In the view of Bröhmer, J., in Calliess and Ruffert (eds), *Kommentar zu EUV/EGV*, 3rd edition, 2007, Article 46, Section 4, p. 801, for example, parallels with the concept of public security and public policy under the national law relating to the powers of the police are only partially helpful in defining the Community law concepts of 'public security and public policy'. According to Piska, C., *Kommentar zu EU- und EG-Vertrag*, Vienna, 2003, 3rd part, Article 30 EC, Section 26, the Community law concept of public policy is not a concept which bears any relationship to that of the powers of the police within the meaning of national law.

52. The concepts of public policy and public security must be interpreted by the Court of Justice,<sup>35</sup> so that their scope cannot be determined unilaterally by each Member State without being subject to control by the Community institutions. As derogations from the fundamental freedoms they must be interpreted strictly. This does not mean that particular circumstances cannot justify recourse to the concepts of public policy and public security, and it is therefore necessary in this matter to allow the Member States an area of discretion within the limits imposed by the Treaty.<sup>36</sup>

53. According to settled case-law, reliance by a national authority on the concept of public policy presupposes, in any event, the existence, in addition to the perturbation of the social order which any infringement of the law involves, of a genuine and suffi-

35 — See *Rutili* (cited in footnote 27), paragraph 27; *Bouchereau* (cited in footnote 27), paragraph 33; Joined Cases C-482/01 and C-493/01 *Orfanopoulos and Oliveri* [2004] ECR I-5257, paragraphs 64 and 65; Case C-503/03 *Commission v Spain* [2006] ECR I-1097, paragraph 45; *Commission v Germany* (cited in footnote 27), paragraph 34; and Case C-50/06 *Commission v Netherlands* (cited in footnote 27), paragraph 42.

36 — See Case 41/74 *Van Duyn* [1974] ECR 1337, paragraphs 18 and 19.

ciently serious threat to one of the fundamental interests of society.<sup>37</sup> In the present case, however, the Portuguese Government has not submitted any evidence to indicate a serious threat to public policy in Portugal. As a result, reliance on Article 30 EC and Article 13 of the EEA Agreement for the purposes of maintaining the prohibition under Article 2(1) of Decree-Law No 40/2003 on grounds of preventing and combating crime is precluded.

Community law.<sup>38</sup> According to settled case-law, it is also recognised as an overriding reason relating to the public interest which may justify an impairment of the free movement of goods.<sup>39</sup>

55. Moreover, it should be noted that the grounds of justification mentioned in

## 2. Road safety requirements

54. In so far as the Portuguese Government claims that the contested prohibition was adopted with the aim of ensuring the safety of the drivers of motor vehicles, it must be stated that that ground is not expressly mentioned in Article 30 EC or Article 13 of the EEA Agreement. Nevertheless, road safety is undeniably an aim pursued by

37 — *Rutili* (cited in footnote 27), paragraph 28; *Bouchereau* (cited in footnote 27), paragraph 35; Case C-54/99 *Scientology* [2000] ECR I-1335, paragraph 17; Case C-355/98 *Commission v Belgium* [2000] ECR I-1221, paragraph 28; Case C-348/96 *Calfa* [1999] ECR I-11, paragraphs 21 and 23; *Orfanopoulos and Oliveri* (cited in footnote 35), paragraph 66; Case C-503/03 *Commission v Spain* (cited in footnote 35), paragraph 46; *Commission v Germany* (cited in footnote 27), paragraph 35; and Case C-50/06 *Commission v Netherlands* (cited in footnote 27), paragraph 43.

38 — Improvements to road safety are particularly important in the European Union against the background of 1.3 million accidents annually, with more than 40 000 fatalities a year and 1.7 million injured. In the White Paper of 12 September 2001 on European transport policy (COM(2001) 370 final), the Commission proposed that the European Union set itself the goal of halving the number of road deaths by 2010. All the Member States are faced with the same road safety problems: excessive speed, alcohol consumption, failure to wear safety belts, inadequate impact protection, accident black spots, failure to observe driving and rest times in the road transport industry, and poor visibility. Article 71(1)(c) EC contains a specific legal basis for the adoption of traffic safety measures. They are closely connected with the alignment of technical standards and thus with the harmonisation of competitive conditions. The Community has adopted a considerable number of provisions in this field. They concern inter alia vehicle registration, type-approvals for steering devices, brake systems, engine performance and conditions for vehicles transporting hazardous goods. They also relate to emission values for polluting substances, calculations of fuel consumption and CO<sub>2</sub> discharges, permissible noise levels, and dimensions and weights for certain vehicles. This is a focal point for legal harmonisation at Community level. In a broader sense the legal framework for a European driving licence falls under road safety. There are Community-wide rules governing the compulsory use of safety belts in certain vehicles and measures inspired by environmental policy, such as the compulsory sale of unleaded petrol. The Europe-wide regulation of summer time was also introduced on grounds of transport policy (see Oppermann, T., *Europarecht*, 3rd edition, § 22, Section 21, p. 470).

39 — See, inter alia, *Commission v Finland* (cited in footnote 14), paragraph 40; Case C-55/93 *Van Schaik* [1994] ECR I-4837, paragraph 19; Case C-314/98 *Snellers* [2000] ECR I-8633, paragraph 55; and Case C-451/99 *Cura Anlagen* [2002] ECR I-3193, paragraph 59. See the Opinion of Advocate General Léger of 5 October 2006 in Case C-110/05 *Commission v Italy*, currently pending before the Court, point 44.

Article 30 EC and Article 13 of the EEA Agreement also include protection of the health and life of humans. The protection of those interests lies at the heart of the Community-wide prevention of road accidents.<sup>40</sup> Since the concept of road safety covers, amongst other things, the protection of both the health and the life of humans in connection with road traffic conditions, what follows will be based on the premiss of a special relationship between those interests with the result that the legal analysis to be undertaken must be based primarily on the justification of road safety.

56. A higher light transmission of safety glazing and windscreens in motor vehicles makes it easy to carry out police checks and contributes to road safety since it allows police officers to verify, simply by observing road traffic, whether the maximum occupancy of vehicles has been exceeded and/or whether the compulsory use of safety belts required by law<sup>41</sup> has been observed. In this respect, a prohibition on affixing tinted film on vehicle windscreens is plainly appropriate for attaining the aim of road safety.

57. Nevertheless, my conclusion is that the contested prohibition in Article 2(1)

40 — See also the Opinion of Advocate General Léger in Case C-110/05 *Commission v Italy* (cited in footnote 39), point 46.

41 — Compulsory use of safety belts is regulated throughout the Community by Council Directive 91/671/EEC of 16 December 1991 on the approximation of the laws of the Member States relating to compulsory use of safety belts in vehicles of less than 3.5 tonnes (OJ 1991 L 373, p. 26), as amended by Directive 2003/20/EC of the European Parliament and of the Council of 8 April 2003 (OJ 2003 L 115, p. 63).

of Decree-Law No 40/2003 does not withstand a legal analysis of its compatibility with Community law, since it infringes the principle of proportionality.

#### D — *The principle of proportionality*

58. On the one hand, it cannot be denied that, in the absence of harmonising rules, the Member States are free to decide, within the limits imposed by the Treaty, on their intended level of protection of the health and life of humans.<sup>42</sup> It also cannot be denied that the effective protection of highly important legal interests, such as the right to health and the right to life or road safety, in particular, requires a wide range of preventive measures to be taken by the national authorities, with the result that the Member States have in principle complete discretion to determine how strict the checks to be carried out are to be.<sup>43</sup>

59. On the other hand, this does not alter the fact that an exception to the principle

42 — Case C-293/94 *Brandsma* [1996] ECR I-3159, paragraph 11; Case C-432/03 *Commission v Portugal* (cited in footnote 25), paragraph 44; and Case C-254/05 *Commission v Belgium* (cited in footnote 15), paragraph 35.

43 — *Deutscher Apothekerverband* (cited in footnote 11), paragraph 103, and Case C-432/03 *Commission v Portugal* (cited in footnote 25), paragraph 44.

of the free movement of goods may be justified under Article 30 EC or for overriding reasons relating to the public interest only if the national authorities show that the exception is necessary in order to attain one or more objectives mentioned in that article and that it is in conformity with the principle of proportionality.<sup>44</sup> I also believe that it is essential to point out in this connection that the reasons which may be invoked by a Member State by way of justification must be accompanied by appropriate evidence or by an analysis of the appropriateness and proportionality of the restrictive measure adopted by that State, and precise evidence enabling its arguments to be substantiated.<sup>45</sup>

60. The Portuguese Republic has failed to provide the Court with the appropriate

44 — Case 227/82 *Van Bennekom* [1983] ECR 3883, paragraph 40; Case C-358/95 *Morellato* [1997] ECR I-1431, paragraph 14; *ATRAL* (cited in footnote 25), paragraph 67; and Case C-270/02 *Commission v Italy* (cited in footnote 25), paragraph 22. With regard to the importance of proportionality of measures restricting the free movement of goods taken by the Contracting States in order to protect public health in the legal order created by the EEA Agreement, see the judgments of the EFTA Court of 27 June 1997 in Case E-6/96 *Tore Wilhelmsen AS v Oslo kommune* [1997] EFTA Court Report 53, paragraphs 79, 87, 91 and 92, and of 25 February 2005 in Case E-4/04 *Pedicel v Sosial-og helsedirektoratet* [2005] EFTA Court Report 1, paragraphs 55 and 56.

45 — Case C-42/02 *Lindman* [2003] ECR I-13519, paragraph 25; Case C-8/02 *Leichtle* [2004] ECR I-2641, paragraph 45; Case C-147/03 *Commission v Austria* [2005] ECR I-5969, paragraph 63; Case C-137/04 *Rockler* [2006] ECR I-1441, paragraph 25; Case C-185/04 *Öberg* [2006] ECR I-1453, paragraph 22; and Case C-254/05 *Commission v Belgium* (cited in footnote 15), paragraph 36. According to Kingreen, T., in Calliess and Ruffert (eds), *Kommentar zu EUV/EGV*, 3rd edition, 2007, Articles 28 EC to 30 EC, Section 199, in protecting the health and life of humans the Member States may not rely only on assumptions and assertions. The extent of the duty to substantiate will depend, in accordance with the principle of proportionality, in particular on the intensity of the threat in the individual case and the likelihood of that threat materialising. It is true that it is not necessary for damage already to have occurred, because effective protection requires preventive measures in many cases. However, the obligation arises as a rule, in cases where the necessity of a measure is at issue, to prove comprehensibly the need for action with reference to scientific knowledge or European and/or international standards.

information, in the form of studies, reports or statistics, to allow it to be concluded that restrictions on the free movement of goods such as the contested measure are justified on the grounds set out in Article 30 EC and Article 13 of the EEA Agreement or for overriding reasons relating to the public interest and that the use of tinted film, irrespective of its colour and properties, in particular as regards light transmission, constitutes a threat to road safety.

61. The proof of such a threat to road safety would have been all the more necessary because the Portuguese Republic does not prohibit the use of tinted windows even though such windows, which are comparable to the contested tinted film, do not guarantee complete visibility. The different treatment of essentially identical situations requires a high level of justification for a restriction on the free movement of goods. As a result, the Portuguese Republic has not complied with its duty to make out a case or to produce evidence either during the pre-litigation procedure or during the proceedings before the Court of Justice.

62. That point apart, a total prohibition of the film in question would appear to be a disproportionate measure to guarantee road safety since, as the Commission rightly argues, the Member States may in any event require on the basis of Directive 2001/92 that the minimum light transmission of

glazing ahead of the B-pillar is 70% and on the windscreen is 75%. Regulation No 43 is effective within the Community legal order and thus also in the legal orders of all the Member States. First of all, Regulation No 43 was incorporated into Community law with effect from 24 March 1998 by Council Decision 97/836/EC of 27 November 1997 with a view to accession by the European Community to the Revised Economic Commission for Europe Agreement of 20 March 1958.<sup>46</sup> Under Article 300(7) EC, the Agreement and Regulation No 43 are binding on the Community and on its Member States. Furthermore, Directive 2001/92 refers in its third recital and in Annex IIB to Regulation No 43, which lays down various technical specifications governing the properties and the fitting of glazing, including the above-mentioned minimum light transmission values, with the result that those technical specifications must be taken into due consideration in the context of a type-approval test under Directive 92/22.

63. Since the introduction of these minimum light transmission values throughout the

Community is guided by the aim of ensuring road safety,<sup>47</sup> it would have been perfectly sufficient, in order to attain that aim, to require that those limit values were not to be exceeded where the film in question was used in accordance with the legislation, that is to say, after being affixed to the windows of vehicles. This would ultimately amount to a restriction of the prohibition which applies at present to the effect that only the use of film which cannot guarantee the observance of the prescribed limit values because of insufficient light transmission may be prohibited. In addition, a further spatial restriction of that prohibition would be appropriate, that is to say, to glazing which actually allows the police to monitor road traffic. This would extend both to the windscreen of a motor vehicle and to the glazing alongside the seats of the occupants of the vehicle, but not to the rear windscreen. Not only would this allow the police to check the occupants of vehicles through observation alone, but such a measure would also have no material effect on the free movement of goods, unlike the contested prohibition. By imposing a total prohibition on using the film in question under Article 2(1) of Decree-Law No 40/2003, the Portuguese Government clearly goes beyond what is necessary in order to attain the aim pursued. Consequently, that national measure to maintain road safety cannot be regarded as either necessary or appropriate.

46 — Council Decision 97/836/EC of 27 November 1997 with a view to accession by the European Community to the Agreement of the United Nations Economic Commission for Europe concerning the adoption of uniform technical prescriptions for wheeled vehicles, equipment and parts which can be fitted to and/or be used on wheeled vehicles and the conditions for reciprocal recognition of approvals granted on the basis of these prescriptions (the 'Revised 1958 Agreement') (OJ 1997 L 346, p. 78). Annex II to that decision states that at the date of its accession to the Revised Agreement with regard to wheeled vehicles, equipment and parts, the European Community intends to restrict its accession to the recognition and approvals of the UNECE Regulations set out in a list, with the series of amendments as indicated, as they are in force at the date of accession. The list includes UNECE Regulation No 43 relating to safety glazing. According to Sündermann, B., loc. cit. (footnote 5), pp. 51 and 54, under Article 300(7) EC in conjunction with Article 1(4) (in the case of new regulations) and Article 1(7) (in the case of existing regulations in the second amended version of the Revised 1958 Agreement), no additional legal act is required in order to incorporate such regulations or amendments to regulations into national law. The Agreement and Regulation No 43 are therefore binding on both the Community and its Member States.

47 — The harmonisation of technical requirements for motor vehicles under the auspices of the United Nations Economic Commission for Europe (UNECE) and at Community level essentially pursues three aims: road safety, environmental protection and the safeguarding of market access for trade in motor vehicles by eliminating technical trade restrictions. See Sündermann, B., loc. cit. (footnote 5), pp. 49, 50 and 55; Oppermann T., loc. cit. (footnote 38), § 22, Section 21, p. 470 and § 18, Section 43, p. 388; and Langner, 'Technische Vorschriften und Normen', in Dausen (ed.), *Handbuch des EU-Wirtschaftsrechts*, C. VI., paragraphs 1, 4 and 118).

64. It is clear that the Portuguese Government does not seriously deny this when it states in its rejoinder that other possible solutions are not inconceivable, possibly including measures that do not have binding legal effect. Nevertheless, it has failed to substantiate its argument that such alternative measures are not appropriate for maintaining traffic safety.

No 40/2003 of 11 March 2003 the affixing of tinted film to the windows of motor vehicles, the Portuguese Republic has failed to fulfil its obligations under Articles 28 EC and 30 EC and Articles 11 and 13 of the EEA Agreement, as that prohibition hinders the marketing in Portugal of tinted film lawfully manufactured and/or marketed in another Member State or in a State signatory to the EEA Agreement.

65. The national provision laid down in Article 2(1) of Decree-Law No 40/2003 cannot be justified on grounds connected with road safety because it infringes the principle of proportionality. That provision must therefore be declared incompatible with Article 28 EC and Article 11 of the EEA Agreement.

## VII — Costs

66. I therefore conclude that, by prohibiting pursuant to Article 2(1) of Decree-Law

67. Under Article 69(2) of the Rules of Procedure, the unsuccessful party is to be ordered to pay the costs. Since the Portuguese Republic has failed in its submissions, it must be ordered to pay the costs.

## VIII — Conclusion

68. In the light of the foregoing, I propose that the Court should:

- (1) declare that, by prohibiting pursuant to Article 2(1) of Decree-Law No 40/2003 of 11 March 2003 the affixing of tinted film to the windows of motor vehicles, the

Portuguese Republic has failed to fulfil its obligations under Articles 28 EC and 30 EC and Articles 11 and 13 of the Agreement of 2 May 1992 on the European Economic Area, as that prohibition hinders the marketing in Portugal of tinted film lawfully manufactured and/or marketed in another Member State or in a State signatory to the EEA Agreement;

(2) order the Portuguese Republic to pay the costs.