

JUDGMENT OF THE COURT (Third Chamber)

6 November 2008*

In Case C-155/07,

ACTION for annulment under Article 230 EC, brought on 19 March 2007,

European Parliament, represented by R. Passos, A. Baas and D. Gauci, acting as Agents, with an address for service in Luxembourg,

applicant,

v

Council of the European Union, represented by M. Arpio Santacruz, M. Sims and D. Canga Fano, acting as Agents,

defendant,

* Language of the case: French.

supported by:

Commission of the European Communities, represented by A. Aresu and F. Dintilhac, acting as Agents, with an address for service in Luxembourg,

intervener,

THE COURT (Third Chamber),

composed of A. Rosas, President of the Chamber, A. Ó Caoimh (Rapporteur), J.N. Cunha Rodrigues, J. Klučka and A. Arabadjiev, Judges,

Advocate General: J. Kokott,
Registrar: M.-A. Gaudissart, Head of Unit,

having regard to the written procedure and further to the hearing on 14 May 2008,

after hearing the Opinion of the Advocate General at the sitting on 26 June 2008,

gives the following

Judgment

- 1 By its action, the European Parliament asks the Court of Justice, first, to 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 (OJ 2006 L 414, p. 95, 'the contested decision') and, second, in the event that the Court annuls that decision, to order that its effects be maintained until the Council has adopted a new decision.

Background to the dispute and procedure before the Court

- 2 On 22 June 2006, the Commission of the European Communities adopted the proposal which led to the contested decision. That proposal cited Article 181a EC as a legal basis.
- 3 On 30 November 2006, the Parliament adopted a resolution setting out its opinion in respect of that proposal, Amendment 1 of which sought to add Article 179 EC as a legal basis. It called on the Commission to amend the proposal accordingly, in accordance with Article 250(2) EC.

- 4 The Commission did not amend its proposal in that respect and, on 19 December 2006, the Council of the European Union adopted the contested decision on the sole legal basis of Article 181a EC.
- 5 Considering that the contested decision should have been adopted also on the basis of Article 179 EC, the Parliament brought this action for annulment.
- 6 By order of the President of the Court of Justice of 10 October 2007, the Commission was granted leave to intervene in support of the form of order sought by the Council.
- 7 By order of the President of the Court of 25 October 2007, the request of the European Investment Bank (EIB) for leave to intervene was refused on the ground that the EIB is not one of the institutions of the European Community exhaustively listed in Article 7(1) EC.

Legal context

- 8 Recital 3 in the preamble to the contested decision is worded as follows:

‘With a view to supporting EU external action without affecting the EIB’s credit standing, the EIB should be offered a Community budgetary guarantee for operations carried out outside the Community...’

9 Recital 4 of that decision states that the Community guarantee should cover losses under loans and loan guarantees for EIB eligible investment projects carried out in countries covered by Council Regulation (EC) No 1085/2006 of 17 July 2006 establishing an Instrument for Pre-Accession Assistance (IPA) (OJ 2006 L 210, p. 82), 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) and 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) where the loan financing or guarantee has been granted according to a signed agreement which has neither expired nor been cancelled.

10 According to recital 7 of the contested decision:

‘From 2007, the EU’s external relations will also be supported by the new financial instruments, i.e. the IPA, the [European Neighbourhood and Partnership Instrument], the [Development Cooperation Instrument] and by the Instrument for Stability [established by Regulation (EC) No 1717/2006 of the European Parliament and of the Council of 15 November 2006 (OJ 2006 L 327, p. 1)].’

11 Recital 8 of the contested decision states the following:

‘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...’

12 Recitals 12 to 14 of the decision are worded as follows:

- (12) EIB financing in the Asian and Latin American countries will be progressively aligned with the EU cooperation strategy in those regions and be complementary to instruments financed by Community budgetary resources. The EIB should endeavour to progressively expand its activities across a larger number of countries in those regions, including in the less prosperous countries...
- (13) In Central Asia, the EIB should focus on major energy supply and energy transport projects with cross-border implications...
- (14) To complement the EIB activities under the Cotonou Agreement for the [African, Caribbean and Pacific States (the ACP countries)], in South Africa the EIB should focus on infrastructure projects of public interest ... and private sector support, including [small and medium-sized enterprises]...'

13 Article 1 of the contested decision, headed 'Guarantee and ceilings', states in paragraph 1:

'The Community shall grant 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 ... and has been granted ... in support of the relevant external policy objectives of the European Union.'

14 Article 2 of that decision, headed ‘Countries covered’, states:

‘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 “g” 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 [EC] Treaty.

...

4. In the event of serious concerns over the political or economic situation in a specific country, the Council may decide to suspend new EIB financing under Community guarantee in that country in accordance with the procedure provided for in Article 181a(2) of the Treaty.’

15 Article 3 of the contested decision is headed ‘Consistency with policies of the European Union’. Under Article 3(1), ‘[t]he consistency of EIB external actions with the external policy objectives of the European Union shall be strengthened with a view to maximising synergies of EIB financing and budgetary resources of the European Union’.

16 Article 3(2) of the contested decision is worded as follows:

‘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.’

17 Annex I to the contested decision contains, in accordance with Article 2 of that decision, a list of countries eligible for EIB financing covered by the Community guarantee, set out as follows:

'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

Asia (without Central Asia):

...

Central Asia:

...

D. *SOUTH AFRICA*

South Africa.’

The action

Arguments of the parties

Arguments of the Parliament

- ¹⁸ According to the Parliament, it is clear from the terms of the contested decision that it is an external policy instrument which covers cooperation with both developing and other countries. Since cooperation with developing countries falls exclusively

under Title XX of the Treaty, headed 'Development cooperation', it is necessary to add Article 179 EC as a legal basis for that decision.

- 19 The Parliament notes, in particular, that the majority of the regions covered by the contested decision are comprised of countries which are 'developing countries' according to the classifications of the Organisation for Economic Cooperation and Development (OECD) and of the World Bank and that the majority of the countries concerned — in particular, the Mediterranean neighbourhood and partnership countries, the Asian and Latin American countries and South Africa — are developing countries. The contested decision thus falls within the objectives of Article 177 EC, which include the 'sustainable economic and social development of the developing countries'.
- 20 The fact that the contested decision also concerns third countries which are not developing countries does not mean that that decision had to be adopted on the sole legal basis of Article 181a EC. The purpose of that article, introduced by the Treaty of Nice, is to establish a specific legal basis for autonomous programmes in the financial and technical fields and for horizontal agreements with third countries which are not developing countries.
- 21 The Parliament also claims that the absence of Article 179 EC as a legal basis for the contested decision allows the Council, pursuant to Article 2(2) and (4) of the decision, to adopt individual decisions concerning one or more developing countries on the basis of Article 181a EC, which would constitute a breach of the Treaty.
- 22 According to the Parliament, to exclude economic, financial and technical cooperation measures from the scope of development cooperation would amount to excluding the majority of the instruments based on Article 179 EC, with the result that that provision would be rendered largely redundant.

23 Furthermore, the Parliament is of the view that the choice of legal basis must be made in the light of a geographical criterion, having regard to the countries with which the Community cooperates pursuant to the Community measure concerned. Thus, Articles 179 EC and 181a EC are applicable according to the countries benefiting from that measure, irrespective of whether there is a main objective and a secondary objective. Inasmuch as the pursuit of the objectives set out in Article 177 EC in practice takes the form of economic and financial cooperation with developing countries, it is possible for Articles 179 EC and 181a EC to seek similar objectives while relating to different target countries.

24 In the alternative, the Parliament maintains that the contested decision simultaneously pursues the objectives referred to in Articles 181a EC and 179 EC, since it constitutes an economic cooperation measure both with developing countries and with other third countries. The use of a dual legal basis is, thus, justified inasmuch as cooperation with developing countries is an inseparable part of the objective of that decision.

Arguments of the Council

25 According to the Council, Article 181a EC constitutes the appropriate and sufficient legal basis for the contested decision. Moreover, one institution's wish to participate more fully in the adoption of a particular measure has no impact on the choice of its legal basis.

26 The Council considers that it is clear, from an examination of its aim and content, that the sole purpose of the contested decision is to establish a financial cooperation measure with third countries, by means of a Community instrument.

27 The contested decision falls within the scope of Article 181a EC since, in that regard, it does not distinguish between the third countries covered according to whether or not they are developing countries. The fact that EIB financing operations have to be consistent with the external policies of the European Union and to complement aid policies means, according to the Council, that they are consistent with the development policy of the Community, as required by the first subparagraph of Article 181a(1) EC.

28 In contrast, the fact that the contested decision envisages that it is to be applied in a way which is consistent with development policy or the fact that it produces effects which encourage development is insufficient to justify its adoption on the basis of Article 179 EC too. The same is also true in respect of the fact that the list of eligible or potentially eligible countries which appears in Annex I to the decision includes developing countries, since Article 179(1) and (2) EC provides that the EIB's contributions pursuant to that article are to be implemented without prejudice to the other provisions of the Treaty.

29 The Council stated at the hearing that, in its opinion, the indirect nature of the relationship between the Community guarantee and the developing country constitutes the decisive reason why the contested decision should not additionally be based on Article 179 EC.

Arguments of the Commission

30 The Commission contends that the respective scopes of Articles 179 EC and 181a EC are based both on a geographical criterion (developing countries for Title XX of the Treaty and third countries for Title XXI) and on a material criterion (the three objectives laid down in Article 177(1) EC for Title XX of the Treaty and economic, financial and technical cooperation measures for Title XXI).

31 It challenges what it considers to be the strictly geographical interpretation of the scope of Article 181a EC put forward by the Parliament. That interpretation is not justified in the light of the wording of Titles XX and XXI of the Treaty. So far as concerns Title XXI, the geographical criterion refers to all third countries, including, potentially, developing countries. Article 181a EC may thus apply to developing countries in the absence of a more restrictive wording of the title under which it appears and of Article 181a(1) EC. According to the Commission, the Parliament's argument fails to take account of the phrase '[w]ithout prejudice to the other provisions of this Treaty' included in Article 179(1) EC.

32 The Commission also contends that the contested decision is a financial instrument which applies primarily at an internal Community level. It is not that decision but primarily Article 18(1) of the Protocol on the Statute of the EIB, annexed to the Treaty, which is the legal basis for EIB financing operations for the benefit of third countries.

33 The Commission, like the Council, notes that Article 181a EC lays down that economic, financial and technical cooperation measures outside the Community undertaken on the basis of that article 'shall be... consistent with the development policy of the Community'. According to the Commission, therefore, the authors of the Treaty were of the view that measures based on Article 181a EC may have a positive effect on development, including that of developing countries. In reply to a question asked by the Court at the hearing, the Commission stated that, even for the grant of a guarantee to the EIB that relates to operations concerning countries which are all developing countries within the meaning of the Treaty, the correct legal basis is Article 181a EC, since that guarantee benefits those countries only indirectly, through loans which are granted by the EIB under its own internal procedures and on the basis of the Protocol on the Statute of the EIB.

Findings of the Court

Preliminary observations

- ³⁴ According to settled case-law, the choice of the legal basis for a Community measure must rest on objective factors amenable to judicial review, which include the aim and content of that measure (see, to that effect, inter alia, Case C-300/89 *Commission v Council* (*Titanium dioxide*) [1991] ECR I-2867, paragraph 10, and Case C-338/01 *Commission v Council* [2004] ECR I-4829, paragraph 54), and not on the legal basis used for the adoption of other Community measures which might, in certain cases, display similar characteristics (see, to that effect, Case 131/86 *United Kingdom v Council* [1988] ECR 905, paragraph 29, and Case C-91/05 *Commission v Council* [2008] ECR I-3651, paragraph 106). In addition, where the Treaty contains a more specific provision that is capable of constituting the legal basis for the measure in question, the measure must be founded on that provision (see, to that effect, Case C-338/01 *Commission v Council*, paragraph 60, and Case C-533/03 *Commission v Council* [2006] ECR I-1025, paragraph 45).
- ³⁵ If examination of a measure reveals that it pursues two aims or that it has two components and if one of those aims or components is identifiable as the main one, whereas the other is merely incidental, the measure must be founded on a single legal basis, namely that required by the main or predominant aim or component (see, to that effect, inter alia, Case C-155/91 *Commission v Council* [1993] ECR I-939, paragraphs 19 and 21; Case C-36/98 *Spain v Council* [2001] ECR I-779, paragraph 59; Case C-338/01 *Commission v Council*, paragraph 55; and Case C-91/05 *Commission v Council*, paragraph 73).
- ³⁶ With regard to a measure that simultaneously pursues a number of objectives, or that has several components, which are inseparably linked without one being incidental to the other, the Court has held that, where various provisions of the Treaty

are therefore applicable, such a measure will have to be founded, exceptionally, on the various corresponding legal bases (see, to that effect, Case C-211/01 *Commission v Council* [2003] ECR I-8913, paragraph 40, and Case C-91/05 *Commission v Council*, paragraph 75).

37 None the less, the Court has previously held, in particular in paragraphs 17 to 21 of the judgment in *Titanium dioxide*, that recourse to a dual legal basis is not possible where the procedures laid down for each legal basis are incompatible with each other (see also, to that effect, Joined Cases C-164/97 and C-165/97 *Parliament v Council* [1999] ECR I-1139, paragraph 14; Case C-338/01 *Commission v Council*, paragraph 57; Case C-94/03 *Commission v Council* [2006] ECR I-1, paragraph 52; and Case C-178/03 *Commission v Parliament and Council* [2006] ECR I-107, paragraph 57).

38 It is in the light of the foregoing that it is necessary to establish whether it was possible to adopt the contested decision validly on the sole legal basis of Article 181a EC. To that end, it is necessary to analyse, initially, the relationship between Article 179 EC, which appears in Title XX of the Treaty, and Article 181a EC, which falls under Title XXI, before examining whether the content and the aim of that decision fall, as the Parliament contends, within the scope of those two articles. If that proves to be the case, it will be necessary to examine what was the appropriate legal basis for the adoption of the decision.

Definition of the respective scopes of Titles XX and XXI of the Treaty

39 It is true that, as the Commission states, in its literal sense the term ‘third countries’ used in Article 181a EC is sufficiently wide to encompass both developing countries and other third countries. It cannot, however, be implied from this, without restricting the scope of Article 179 EC, that all economic, financial and technical cooperation measures with developing countries within the meaning of Article 177 EC may be undertaken on the sole basis of Article 181a EC.

40 Although Article 181a EC alone expressly envisages ‘economic, financial and technical cooperation’, while Article 179 EC refers, in a general way, only to ‘measures’, the fact remains that such cooperation may, depending on its specific details, constitute a typical form of development cooperation. It is common ground that the EIB acts essentially within the framework of economic, financial and technical cooperation. Article 179 EC, read in conjunction with Article 177 EC, lays down that the EIB is to contribute, under the terms laid down in its Statute, to the implementation of the measures necessary to further the objectives of the Community’s development cooperation policy. Thus, point 119 of 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 [on Development]’ (OJ 2006 C 46, p. 1) states that the EIB ‘is playing an increasingly important role in the implementation of Community aid, through investments in private and public enterprises in developing countries’.

41 In addition, Article 181a EC is introduced by the words ‘[w]ithout prejudice to the other provisions of this Treaty, and in particular to those of Title XX’. Those words indicate that Title XX applies specifically to development cooperation.

42 It is true that, as the Council and the Commission point out, Article 179 EC also starts with the words ‘[w]ithout prejudice to the other provisions of this Treaty’.

43 It must, however, be noted, first, as the Parliament states in its pleadings, that Article 179 EC was drafted at a time before Article 181a EC existed, since Title XXI, of which the latter article forms part, was not inserted into the Treaty until it was revised by the Treaty of Nice. Before Article 181a EC entered into force, provided that Community instruments falling under other policy areas were not involved, the Community, for want of a specific legal basis, adopted measures and concluded cooperation agreements with third countries which were not developing countries on the basis of Article 235 of the EC Treaty (now Article 308 EC). The insertion into the Treaty of Title XXI thus created a specific legal basis for that cooperation and

eased the procedure for adopting Community initiatives in that field by substituting a qualified majority in the Council for the unanimity required by Article 308 EC.

44 Second, the proviso contained in Article 179 EC is less specific than that contained in Article 181a EC, which refers expressly to Title XX of the Treaty.

45 In those circumstances, the proviso contained in Article 181a EC concerning Title XX of the Treaty applies with priority over the proviso in Article 179 EC.

46 That interpretation cannot be undermined by the Commission's argument, set out in paragraph 33 above, to the effect that measures concerning policy in the development cooperation field may be based on Article 181a EC alone, provided that they are consistent with that policy as resulting from Title XX of the Treaty. In stating that economic, financial and technical cooperation measures 'shall be... consistent with the development policy of the Community', Article 181a(1) EC means simply that, when adopting measures on the basis of Article 181a(1) EC, the Community must ensure that consistency is maintained with what has been or may be decided on the basis of Article 179 EC. Such an analysis is supported by Article 178 EC, under which the Community is to take account of the objectives referred to in Article 177 EC in the policies that it implements which are liable to affect developing countries.

47 It follows that, since Article 181a EC is to apply without prejudice to Title XX of the EC Treaty on development cooperation, that article is not intended to constitute the legal basis for measures pursuing the objectives of development cooperation within the meaning of Title XX which are set out in Article 177 EC.

48 Without it being necessary, in the present case, to rule on the question whether an economic, financial and technical cooperation measure with developing countries may, to the extent that it does not pursue such objectives, have Article 181a EC as its sole legal basis, it is appropriate to proceed to an examination of the content and aim of the contested decision.

The content of the contested decision

49 In accordance with Article 1(1), the contested decision grants the EIB a budgetary guarantee relating to defaults on payments in connection with the financing operations which it carries out in countries covered by that decision, where, inter alia, the financing concerned has been granted to support the external policy objectives of the European Union.

50 As provided in Article 2(1) of the contested decision, the list of countries eligible or potentially eligible for EIB financing under Community guarantee is laid down in Annex I. That list is subdivided into four groups relating, respectively, to pre-accession countries, to neighbourhood and partnership countries, to Asia and Latin America and, lastly, to South Africa.

51 The Parliament contends that the majority of the countries mentioned in that annex are 'developing countries', according to the classifications made in that regard by the OECD and the World Bank. The Council and the Commission have not objected to those categorisations.

52 In that connection, it should be pointed out at the outset that the concept of 'developing country' which appears in Title XX of the Treaty is left undefined. It is true that, as is apparent both from the parties' oral replies to a question asked by the

Court at the hearing and from footnote 2 of the joint declaration referred to in paragraph 40 above, particular importance is accorded in Community practice to the list of Official Development Assistance recipients adopted by the Development Assistance Committee of the OECD. Nevertheless, the fact remains that the concept of 'developing country' must be given an autonomous Community interpretation. That is equally true in view also of the dynamic nature of the developing country category, in the sense that it is liable to evolve in response to events which are difficult to predict.

53 This notwithstanding, in the present case it is sufficient to point out that it is common ground that a significant number, even the majority, of countries appearing in the list of eligible countries annexed to the contested decision are capable of falling within that concept, whatever its precise definition.

54 In those circumstances, contrary to the contentions of the Council and the Commission, it cannot be ruled out that the establishment of a financial cooperation measure with third countries by means of the contested decision is capable of falling under development cooperation within the meaning of Title XX of the Treaty.

55 As the Parliament and the Commission state, the EIB's project partners receive, by virtue of the Community guarantee, loans at more favourable rates, which may constitute aid measures. Article 179(2) EC lays down that the EIB is to support the Community's development cooperation policy. Accordingly, the fact that the EIB's activity consists essentially in advancing repayable loans, rather than making grants, cannot preclude the classification of certain of its financing operations as development aid.

56 In this context, it should also be noted that, under Article 2(2) of the contested decision, the Council may decide, on a case by case basis, to grant the Community guarantee for EIB financing in respect of certain countries, including countries which do not appear in Annex I to that decision. Also, in accordance with Article 2(4) of

the contested decision, the Council may decide to suspend new EIB financing under that guarantee when certain conditions are present. It is by no means inconceivable that developing countries may be concerned by Council decisions taken pursuant to Article 2(2) or (4) of the contested decision. None the less, according to those provisions, such decisions are adopted in accordance with the procedure provided for in Article 181a EC, regardless of whether they relate to developing countries within the meaning of Title XX of the Treaty.

The aim of the contested decision

⁵⁷ Although it is common ground that the contested decision falls within the context of financial cooperation with third countries by means of a Community financial instrument, the Parliament does not agree with the Council and the Commission as to the consequences of that finding.

⁵⁸ The Parliament contends that the contested decision, in so far as it concerns developing countries, pursues the objectives of Article 177 EC, in particular the fostering of sustainable economic and social development. The Council disputes that contention, without, however, indicating what aim is otherwise pursued by the decision in relation to developing countries within the meaning of Title XX of the Treaty.

⁵⁹ Contrary to the view held by the Council and the Commission, it is the content of the contested decision rather than its aim which emerges from the description in paragraph 57 above. It follows from that decision that the grant of the Community guarantee pursues objectives going beyond a measure which is directed merely incidentally at development cooperation. Thus, it is apparent in particular from recital 3 that the contested decision seeks to support EU external action without affecting the

EIB's credit rating. Moreover, under Article 1 of that decision, the Community guarantee is granted only where, *inter alia*, the financing operations in question have been decided upon 'in support of the relevant external policy objectives of the European Union'.

60 As the Parliament stated at the hearing, it is possible that, in the absence of such a guarantee, the EIB may be unable to undertake financing operations in the countries concerned. In view of the heightened risks connected with the grant of financing in certain third countries, the EIB's credit rating might be affected by carrying out such operations in those countries, with the result that, in order to prevent damage to its credit rating, the EIB would be deterred from going ahead with those operations or at least be obliged to impose in their respect appreciably less favourable terms for borrowers. Thus, EIB investment in third countries is fostered or made possible as a result of the Community guarantee, through its favourable effect on the EIB's credit rating. Accordingly, maintaining that credit rating is necessary in order to fulfil the fundamental objective of the contested decision, which is to contribute to the external policy of the Community.

61 Moreover, assuming, as the Council and the Parliament have maintained, that, in respect of third countries concerned by the contested decision, the Community guarantee produces only indirect effects, by enabling the EIB to grant finance for those countries subject to more favourable terms, this circumstance does not preclude that measure from forming part of Community policy in the development cooperation field.

62 Furthermore, contrary to the view put forward by the Commission, the contested decision cannot be considered essentially to be an internal Community measure. Admittedly, at first, the Community guarantee produces its effects primarily within the Community, namely in the relationship between the EIB and the Community budget. None the less, as is clear from paragraph 59 above, the guarantee does not

constitute the objective of the contested decision, but the means chosen in order to attain that objective, which consists of supporting the external policy of the Community by facilitating and strengthening financial cooperation with third countries, through the EIB.

63 Community policy in the field of development cooperation forms an integral part of Community external action. Furthermore, recital 8 of the contested decision states that EIB financing operations should be consistent with and support EU external policies including specific regional objectives. Also, Article 3(2) of that decision expressly provides that cooperation is to 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.

64 It is clear from recital 4 of the contested decision that the Community guarantee is intended to cover EIB financing operations carried out, in particular, in countries covered by the Development Cooperation Instrument and the European Neighbourhood and Partnership Instrument. Recital 7 of the decision also mentions the Instrument for Stability introduced by Regulation No 1717/2006. The decision thus seeks to strengthen action undertaken, in particular, by means of those three instruments which concern, at least in part, development cooperation within the meaning of Title XX of the Treaty. That analysis finds support in recital 15 of the decision, which relates, inter alia, to possible opportunities to 'combine EIB financing with EU budgetary resources as appropriate, in the form of grant support, risk capital and interest rate subsidies, alongside technical assistance for project preparation, implementation or enhancement of the legal and regulatory framework'.

65 Moreover, the specific objectives cited in the preamble to the contested decision regarding the different regions concerned by the decision correspond, at least in part, to typical objectives of development cooperation. Thus, it is apparent from recital 12 of the decision, cited by the Parliament at the hearing, that in Asia and Latin America — regions in which the 'EIB should endeavour to progressively expand its activities across a larger number of countries ... including in the less prosperous countries' — EIB financing should focus on environmental sustainability and

energy security projects, as well as the continued support of the EU's presence in those regions through foreign direct investment and the transfer of technology and know-how. Furthermore, it is apparent from recitals 13 and 14 respectively of the contested decision that the EIB should focus in Central Asia on major energy supply and energy transport projects with cross-border implications and in South Africa on infrastructure projects of public interest and private sector support, including small and medium-sized enterprises.

⁶⁶ It follows that the financial cooperation which the contested decision implements through the Community guarantee granted to the EIB also pursues, in so far as developing countries are concerned, the socio-economic objectives referred to in Article 177 EC, particularly the sustainable economic and social development of such countries.

⁶⁷ It is apparent from the foregoing that, in so far as the contested decision concerns developing countries within the meaning of Title XX of the Treaty, it falls under that title, and thus under Article 179 EC. Accordingly, that decision has two components, one of which concerns development cooperation falling under Article 179 EC, while the other concerns economic, financial and technical cooperation with third countries other than developing countries, falling under Article 181a EC.

The relationship between the components of the contested decision

⁶⁸ Contrary to the Parliament's contention, the finding that the contested decision has the two components set out in the paragraph above is not sufficient to conclude that it should have been adopted on a dual legal basis consisting of Articles 179 EC and 181a EC. In the light of the case-law cited in paragraphs 35 and 36 above, it

is necessary to determine whether one of the components of the decision is identifiable as the main or predominant one, whereas the other is merely incidental, or, conversely, whether the two components are inseparably linked, without one being incidental to the other.

69 It should, at the outset, be noted that the legal bases at issue in this case, namely Articles 179 EC and 181a EC, both concern cooperation with third countries, at the financial level among others, and that, as is apparent particularly from paragraph 55 above, the EIB's involvement in the context of financial cooperation with third countries forms an integral part of development cooperation within the meaning of Title XX of the Treaty.

70 It should, in this case, also be noted that, although the Council and the Commission contend that the contested decision has, first, a main aim and component linked almost exclusively to Article 181a EC and, second, an incidental aim and component linked to Article 179 EC, they have, however, not been able to establish how the economic, financial and technical cooperation between the Community and third countries which are developing countries is so alien to development cooperation within the meaning of Title XX of the Treaty that that decision, even where the cooperation which it envisages concerns developing countries, has a main or predominant aim and component unrelated to development cooperation within the meaning of Title XX.

71 The contested decision seeks to strengthen financial cooperation both with developing countries and with other third countries by means of the Community guarantee granted to the EIB. That decision thus concerns actions of a similar nature, distinguished only in relation to the regions and countries concerned. As is clear from points 77 and 78 of the Advocate General's Opinion, it would be hazardous,

even arbitrary, to try to identify a predominant geographical component in the decision. That is particularly true in view of the evolving nature of the category of developing countries within the meaning of Title XX of the Treaty and of the possibility, provided for in Article 2(2) of that decision, for the Council to decide, on a case by case basis, on the eligibility of countries which are not even mentioned in Annex I to the decision to receive EIB financing coupled with a Community guarantee.

72 It follows from the foregoing that, from the point of view of its content and aim, the contested decision has components which are inseparably linked, falling, first, under Article 179 EC and, second, under Article 181a EC, without it being possible to identify a main or predominant aim or component. Consequently, pursuant to the case-law cited in paragraph 36 above, it is clear that the decision, in principle, had to be adopted on the basis of those two articles, unless such a combination of legal bases is not possible in accordance with the case-law cited in paragraph 37 above, which is the question which now falls to be examined.

Compatibility of the procedures

73 Invited by the Court to comment, at the hearing, on whether the procedures laid down in Articles 179 EC and 181a EC respectively are compatible, all the parties replied in the affirmative, stating that certain measures have already been adopted by the Community legislature on the dual basis of those articles.

74 In that regard, it is necessary, however, to point out that, as is clear from the case-law cited in paragraph 34 above, it is not possible to determine the legal basis for a measure in the light of the legal basis used for the adoption of other Community measures which might, in certain cases, display similar characteristics.

75 As stated in paragraph 37 above, recourse to a dual legal basis is not possible where the procedures laid down for each legal basis are incompatible with one another.

76 In the present case, it should be noted that, unlike the situation that gave rise to the judgment in *Titanium dioxide*, the Council acts by a qualified majority both under the procedure referred to in Article 179 EC and under that laid down in Article 181a EC.

77 Admittedly, in the context of Article 179 EC, the Parliament exercises the legislative function through co-decision with the Council, while Article 181a EC — the sole legal basis used for the adoption of the contested decision — provides only for consultation of the Parliament by the Council.

78 However, the importance of the Parliament's role in the Community legislative process should be noted. As the Court has already stated, participation by the Parliament in that process is a reflection, at the Community level, of the fundamental democratic principle that the people should participate in the exercise of power through the intermediary of a representative assembly (see, to that effect, *Titanium dioxide*, paragraph 20 and the case-law cited, and Case C-65/93 *Parliament v Council* [1995] ECR I-643, paragraph 21).

79 In that regard, in contrast to the situation in *Titanium dioxide*, in the circumstances of the present case the use of a dual legal basis consisting of Articles 179 EC and 181a EC would not encroach upon the Parliament's rights (see, to that effect, Case C-94/03 *Commission v Council*, paragraph 54, and *Commission v Parliament and Council*, paragraph 59). The use of Article 179 EC involves greater participation by the Parliament since it provides for the adoption of the measure by the 'co-deci-

sion' procedure. Moreover, it was not stated before the Court that such a dual legal basis would not be possible, from the point of view of legislative technique.

80 Furthermore, a number of factors support the conclusion that the concurrent use of Articles 179 EC and 181a EC would have been both possible and appropriate in relation to the contested decision.

81 Firstly, as is clear from paragraphs 69 to 72 above, the components of the contested decision concerning, first, developing countries and, second, other third countries are inseparably linked. In the light of the evolving nature of the category of developing countries within the meaning of Title XX of the Treaty and the requirements of legal certainty, it would hardly be possible, in practice, to favour the parallel adoption of two measures, one concerning developing countries and based exclusively on Article 179 EC, and the other concerning third countries which are not developing countries and based exclusively on Article 181a EC. Secondly, as is also clear from those paragraphs of this judgment, it is not possible to contend that one of those components is incidental to the other.

82 In those circumstances, a solution which, in the light of the differences between the 'co-decision' and 'consultation' procedures laid down in Articles 179 EC and 181a EC respectively, favoured Article 179 EC as the sole legal basis, since it involves greater participation by the Parliament, would result in economic, financial and technical cooperation with third countries which are not developing countries not being expressly covered by the chosen legal basis. In such a situation, the legislative role of the Council would, in any event, be affected in the same way as by the use of a dual legal basis consisting of Articles 179 EC and 181a EC. In addition, in the same way that, as is apparent from paragraph 47 above, Article 181a EC is not intended to constitute the legal basis of measures pursuing the objectives, referred to in Article 177 EC, concerning development cooperation within the meaning of Title XX of the Treaty, Article 179 EC equally cannot, in principle, be the basis for cooperation measures which do not pursue such objectives.

83 It follows that, in the specific circumstances of this case, characterised, *inter alia*, by the complementary relationship which exists between Titles XX and XXI of the Treaty and by the quasi-interdependence of Articles 179 EC and 181a EC, the procedures respectively laid down in those two articles cannot be classed as incompatible.

84 Consequently, it must be held that the contested decision should have been founded, exceptionally, on the dual legal basis of Articles 179 EC and 181a EC.

85 Having regard to all the foregoing, it is thus necessary to annul the contested decision since it is based on Article 181a EC alone.

Request for the effects of the contested decision to be maintained

86 The Parliament, supported in this respect by the Council and the Commission, requests the Court, in the event that it annuls the contested decision, to order that the effects of the decision be maintained until a new decision is adopted.

87 Under the second paragraph of Article 231 EC, the Court may, if it considers this necessary, state which of the effects of a regulation which it has declared void are to be considered definitive. That provision is also capable of being applied, by analogy, to a decision where there are important grounds of legal certainty, comparable to those which arise in the case of annulment of certain regulations, justifying exercise by the Court of the power conferred on it, in this context, by the second paragraph

of Article 231 EC (see to that effect, inter alia, Case C-271/94 *Parliament v Council* [1996] ECR I-1689, paragraph 40; Case C-106/96 *United Kingdom v Commission* [1998] ECR I-2729, paragraph 41; and Case C-22/96 *Parliament v Council* [1998] ECR I-3231, paragraphs 41 and 42).

88 In accordance with Article 10 thereof, the contested decision entered into force on the third day after its publication in the *Official Journal of the European Union*, which occurred on 30 December 2006. It is common ground that annulling that decision without maintaining its effects would be liable to have adverse consequences for the EIB's credit rating and would lead to damaging uncertainties for current and future EIB financing operations.

89 Accordingly, there are important grounds of legal certainty justifying the grant by the Court of the parties' request for the effects of the contested decision to be maintained. It is thus appropriate to suspend the effects of the annulment of that decision pending the entry into force, within a reasonable period, of a new decision. In that regard, a period of 12 months from the date of delivery of this judgment may be considered to be reasonable.

Costs

90 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 costs and the Council has been unsuccessful, the Council must be ordered to pay the costs. The Commission, which intervened in support of the form of order sought by the Council, must be ordered, in accordance with the first subparagraph of Article 69(4) of the Rules of Procedure, to bear its own costs.

On those grounds, the Court (Third Chamber) hereby:

- 1. Annuls 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. Orders that the effects of Decision 2006/1016 be maintained for European Investment Bank financing arrangements entered into before the entry into force, within a period of 12 months from the date of delivery of this judgment, of a new decision adopted on the appropriate legal basis, namely Articles 179 EC and 181a EC together;**

- 3. Orders the Council of the European Union to pay the costs except those of the Commission of the European Communities;**

- 4. Orders the Commission of the European Communities to bear its own costs.**

[Signatures]