



LUXEMBOURG

TRIBUNAL DE PRIMERA INSTANCIA DE LAS COMUNIDADES EUROPEAS
SUD PRVNÍHO STUPNÉ EVROPSKÝCH SPOLEČENSTVÍ
DE EUROPÆISKE FÆLLESSKABERS RET I FØRSTE INSTANS
GERICHT ERSTER INSTANZ DER EUROPÄISCHEN GEMEINSCHAFTEN
EUROOPA ÜHENDUSTE ESIMESE ASTME KOHUS
ΠΡΩΤΟΔΙΚΕΙΟ ΤΩΝ ΕΥΡΩΠΑΪΚΩΝ ΚΟΙΝΟΤΗΤΩΝ
COURT OF FIRST INSTANCE OF THE EUROPEAN COMMUNITIES
TRIBUNAL DE PREMIÈRE INSTANCE DES COMMUNAUTÉS EUROPÉENNES
CÚIRT CHÉADCHÉIME NA GCOMHPHOBAI EORPACH
TRIBUNALE DI PRIMO GRADO DELLE COMUNITÀ EUROPEE
EIROPAS KOPIENU PIRMĀS INSTANCES TIESA

EUROPOS BENDRIJŲ PIRMSIOS INSTANCIJOS TEISMAS
EURÓPAI KÖZÖSSÉG EK ELSŐFOKÚ BÍRÓSÁGA
IL-QORTI TAL-PRIMIĠSTANZA TAL-KOMUNITAJIET EWROPEJ
GERECHT VAN EERSTE AANLEG VAN DE EUROPESE GEMEENSCHAPPEN
SĄD PIERWSZEJ INSTANCIJ WSPÓLNOT EUROPEJSKICH
TRIBUNAL DE PRIMEIRA INSTÂNCIA DAS COMUNIDADES EUROPEIAS
SÚD PRVÉHO STUPŇA EURÓPSKÝCH SPOLEČENSTEV
SODIŠČE PRVE STOPNJE EVROPSKIH SKUPNOSTI
EUROOPAN YHTEISÖJEN ENSIMMÄISEN OIKEUSASTEEN TUOMIOISTUJIN
EUROPEISKA GEMENSKAPERNAS FÖRSTAINSTANSRÄTT

REGISTERED

- 294035 -

3 April 2006

T-2/04 - 33

Mr Philip Moser
Mr Henry Miller
c/o Chambers of Véronique De Meester
3, rue des Bains
BP 848
L-2018 Luxembourg

In Case **T-2/04**

**Cemender Korkmaz
Corner House Research
The Kurdish Human Rights Project**

against

Commission of the European Communities

the Registrar of the Court of First Instance encloses herewith a certified copy of the Order of the Fourth Chamber of 30 March 2006.



E. Coulon
E. COULON
Registrar



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EUROPEISKA GEMENSKAPERNAS FÖRSTAINSTANSRÄTT

ORDER OF THE COURT OF FIRST INSTANCE (Fourth Chamber)

- 293926 -

30 March 2006 *

(Admissibility – Application for annulment – Act against which proceedings can be brought – Implied Commission decision refusing to make a proposal to the Council – Action for failure to act – Omission against which proceedings can be brought – Failure to address a proposal to the Council – Discretion – Injunction)

In Case T-2/04,

Cemender Korkmaz, residing in Flers (France),

Corner House Research, established in Sturminster Newton, Dorset (United Kingdom),

The Kurdish Human Rights Project, established in London (United Kingdom),

represented initially by P. Moser, Barrister, and A. Stock, lawyer, then by Mr Moser and H. Miller, Solicitor, with an address for service in Luxembourg,

applicants,

v

Commission of the European Communities, represented by G. Boudot and M. Wilderspin, acting as Agents, with an address for service in Luxembourg,

defendant,

APPLICATION for the annulment of the Commission's Regular Report of 5 November 2003 concerning Turkey's progress towards accession, in so far as it contains a Commission decision refusing to make a recommendation to the Council concerning pre-accession aid granted to Turkey and, in the alternative, for a finding of failure to act in that connection and, in any event, for an injunction in that regard,

* Language of the case: English.

EN

CERTIFIED A TRUE COPY,
LUXEMBOURG, 03.04.06
REGISTRAR

THE COURT OF FIRST INSTANCE
OF THE EUROPEAN COMMUNITIES (Fourth Chamber),

composed of H. Legal, President of the Chamber, P. Lindh and V. Vadapalas,
Judges,

Registrar: E. Coulon,

makes the following

Order

Legal and factual background

Legal context

- 1 The Republic of Turkey ('Turkey') has since 2001 benefited from a European Union Accession Partnership ('the Partnership').
- 2 The Partnership is provided for by Council Regulation (EC) No 390/2001 of 26 February 2001 on assistance to Turkey in the framework of the pre-accession strategy, and in particular on the establishment of an Accession Partnership (OJ 2001 L 58, p. 1). Details of the Partnership were given in Council Decision 2001/235/EC of 8 March 2001 on the principles, priorities, intermediate objectives and conditions contained in the Accession Partnership with the Republic of Turkey (OJ 2001 L 85, p. 13) and then by Council Decision 2003/398/EC of 19 May 2003 on the principles, priorities, intermediate objectives and conditions contained in the Accession Partnership with Turkey (OJ 2003 L 145, p. 40), which were adopted under Article 2 of Regulation No 390/2001. The conditions under which the Partnership deals with pre-accession financial aid for Turkey are also set out in Council Regulation (EC) No 2500/2001 of 17 December 2001 concerning pre-accession financial assistance for Turkey and amending Regulations (EEC) No 3906/89, (EC) No 1267/1999, (EC) No 1268/1999 and (EC) No 555/2000 (OJ 2001 L 342, p. 1).
- 3 The Partnership was set up by the Council as part of the pre-accession strategy established by the Union for Turkey, of which it constitutes a key element.
- 4 Its aim is to provide a single framework covering the aims of and means for Turkey's accession preparations in order to assist Turkey and to enable the Union to target its assistance towards Turkey's specific needs. It thus provides the basis for a number of policy instruments designed to help Turkey during the pre-accession period.
- 5 To that end, the Partnership covers, first, the priorities on which Turkey's preparations for accession must concentrate. Those priorities are set out in an

analysis of the situation in Turkey, based on the Regular Reports submitted by the Commission to the Council and defined in the form of short- and medium-term priorities and specific intermediate objectives. They take account of the political and economic criteria and the obligations of a Member State of the Union, as presented by the Copenhagen European Council of 21 and 22 June 1993, which laid down the conditions to be fulfilled by States seeking accession ('the Copenhagen criteria'). Those criteria require a candidate State in particular to have 'achieved stability of institutions guaranteeing democracy, the rule of law, human rights and respect for and protection of minorities'.

- 6 The Partnership covers, second, the financial resources intended to help Turkey implement those priorities during the pre-accession period. In that connection, Regulation No 399/2001 does not involve the commitment of new budgetary resources, in so far as the Community assistance granted to Turkey under the pre-accession strategy represents the aid provided for by pre-existing programmes in which the programming of resources covered by the Partnership follows the procedures laid down by the regulations relating to the financial instruments or the programmes concerned.
- 7 The pre-accession financial assistance is intended to support the priorities defined in the Partnership. It takes the form of grants, is implemented through the financing of programmes or projects intended to meet the accession criteria, and may take the form of services, supplies and works. It is available not only to the Turkish State but also to the provincial and local authorities, organisations and agencies supporting undertakings, cooperatives and civil society, in particular organisations representing the social partners, associations, foundations, non-profit organisations and non-governmental organisations.
- 8 The Community assistance and pre-accession aid to which it corresponds is subject to compliance with certain conditions. Those conditions include the commitments provided for in the agreements concluded between the European Community and Turkey and by the Partnership, and the progress achieved by Turkey towards meeting of the Copenhagen criteria. That progress is an essential element for obtaining pre-accession aid.
- 9 Article 4 of Regulation No 390/2001 provides:

'Where an element that is essential for continuing to grant pre-accession assistance is lacking, in particular when the commitments contained in the EC-Turkey Agreements are not respected and/or progress towards fulfilment of the Copenhagen criteria is insufficient, the Council, acting by a qualified majority on a proposal from the Commission, may take appropriate steps with regard to pre-accession assistance granted to Turkey.'
- 10 Article 2 of Decision 2001/235 provides:

'The implementation of the Accession Partnership shall be monitored in the Association Agreement bodies as appropriate and through the competent Council bodies to which the Commission shall report regularly.'

Factual background

- 11 By letter of 3 July 2003, a number of natural and legal persons describing themselves as 'a coalition of [non-governmental organisations] and Turkish citizens' called on the Commission to act in connection with 'Turkey's involvement with the Baku-Tbilisi-Ceyhan Pipeline Project' and 'Turkey's breaches of pre-accession criteria'.
- 12 That coalition included Corner House Research and The Kurdish Human Rights Project, which describe themselves respectively as a group for research and defence of human rights, the environment and social justice and a charitable association working for the protection of the rights of the people of the Kurdish regions.
- 13 Essentially, the authors of the letter of 3 July 2003 claimed that Turkey was failing in the obligations attaching to it as a candidate country for accession to the Union. The obligations of which they allege infringement were principally that of making sufficient progress to satisfy the Copenhagen Criteria concerning human rights, respect for and protection of minorities, on the one hand, and, on the other, that of adopting the *acquis communautaire*. The infringements which they attributed to it were connected with the implementation of a project for a pipeline linking the cities of Baku (Azerbaijan), Tbilisi (Georgia) and Ceyhan (Turkey) to enable oil to be carried from the Caspian Sea to the Mediterranean (hereinafter 'the BTC project'). The latter has been granted financing by the World Bank and by the European Bank for Reconstruction and Development (EBRD). In contrast, it has not been granted Community financing.
- 14 The authors of the letter of 3 July 2003 also claimed that the Commission should, by virtue of its duty to monitor the pre-accession process, penalise those infringements. In order to fulfil its obligation to take action in that regard, they asked it to 'propose to the Council that it should take appropriate steps against Turkey under the Accession Partnership legislation and in particular ... recommend that all pre-accession assistance be frozen by the Council' until modification or cessation of the BTC project and in the meantime that 'all further accession negotiations with Turkey be suspended.'
- 15 By letter of 4 August 2003, an official of the Commission Directorate General for Enlargement replied to them in the following terms:

'Commissioner V. has asked me to thank you for your letter of 3 July 2003 and to reply to it. I have taken note of the points you raised about Turkey's involvement in the [BTC] Project.'

Since Turkey is not yet a member of the European Union and accession negotiations are not yet opened, one cannot conclude at this stage that Turkey is in breach of any EU law or of its accession obligations.

However, as an EU candidate country, Turkey has undertaken to comply with the EU accession criteria, including the Copenhagen political criteria on democracy, the protection of human rights and of minority rights. For this reason, any human rights or national minority rights violations arising from the implementation of the [BTC] Project would have to be seen in the context of the Copenhagen political criteria.

The Commission will continue to follow closely the developments in Turkey surrounding this case and give an assessment of the human rights and minority rights situation in its Regular Report in November [2003].'

- 16 By letter of 2 September 2003, the authors of the letter of 3 July 2003 noted in particular 'the Commission's assurance that it will investigate and report on the developments in Turkey surrounding this case' 'in November 2003' in its 'Regular Report'. However, they indicated that they did not regard that as 'an adequate response to the necessary measures on pre-accession finance'. They therefore 'urged the Commission again to take urgent action' by adopting the measures requested on 3 July 2003.
- 17 By letter of 8 October 2003, an official of the Commission Directorate General for Enlargement responded as follows:

'As indicated in my previous letter of 4 August, I can confirm that the Commission will continue to follow closely the developments concerning the [BTC] project and where necessary evaluate the consequences in light of the Copenhagen political criteria.'
- 18 On 5 November 2003, the Commission adopted its Regular Report on progress made by Turkey towards accession ('the Regular Report').
- 19 As indicated by the applicants, the question of the progress to be made by Turkey in order to satisfy the Copenhagen criteria is dealt with in part B ('Accession criteria'), section 1 ('Enhanced political dialogue and political criteria') of the Regular Report. First presented there are the 'Recent developments' regarding the situation in Turkey in that area (subsection 1.1). Then certain specific aspects are dealt with, including 'Human rights and the protection of minorities' (subsection 1.3). Finally, there is a 'General evaluation' of the question (subsection 1.6).
- 20 Subsection 1.3 contains a detailed examination of the various legislative, administrative and judicial developments in Turkey in the period 2002/03 concerning human rights and protection of minorities. It examines case by case the progress achieved and its limitations. Subsection 1.6 contains an overall

assessment of the progress having regard to the Copenhagen criteria. It concludes in the following terms:

‘Overall, in the past 12 months Turkey has made further impressive legislative efforts which constitute significant progress towards achieving compliance with the Copenhagen political criteria. Turkey should address the outstanding issues highlighted in this report, with particular attention to the strengthening of the independence and the functioning of the judiciary, the overall framework for the exercise of fundamental freedoms (association, expression and religion), further alignment of civil-military relations with European practice, the situation in the Southeast and cultural rights. Turkey should ensure full and effective implementation of reforms to ensure that Turkish citizens can enjoy human rights and fundamental freedoms in line with European standards.’

- 21 Moreover, as the applicants also state, the BTC project is referred to in part B (‘Criteria for membership’), section 3 (‘Ability to assume the obligations of membership’), subsection 3.1 (‘Chapters of the acquis’), Chapter 14 (‘Energy’) of the Regular Report, which states as follows:

‘Concerning oil, the construction of the Caspian-Mediterranean pipeline started in 2003, planned to be operational in 2005.’

Procedure and forms of order sought

- 22 By application lodged at the Registry of the Court of First Instance on 2 January 2004, Mr Korkmaz, Corner Health Research and The Kurdish Human Rights Project brought the present action.
- 23 By a separate document lodged at the Registry of the Court of First Instance on 18 May 2004, the Commission asked the Court of First Instance to give a decision on admissibility without considering the substance, pursuant to Article 114(1) of its Rules of Procedure.
- 24 By a document lodged at the Registry of the Court of First Instance on 9 August 2004, the applicants submitted their observations on that request, in accordance with Article 114(2) of the Rules of Procedure.
- 25 The applicants claim that the Court of First Instance should:
- annul the Commission Regular Report of 5 November 2003 concerning the progress made by Turkey towards accession, in so far as it contains a refusal by the Commission to make a recommendation to the Council regarding Community pre-accession financing for Turkey;
 - in the alternative, find that the Commission has failed to act in that regard;

- in any event, order the Commission:
 - to propose to the Council the freezing of pre-accession assistance pending the resolution of Turkey's failures to comply with the European Union accession criteria;
 - to act through the institutions of the EU-Turkey Association Agreement;
 - to suspend the access negotiations until Turkey brings its infringements to an end;
- order the Commission to pay the costs.

26 The Commission contends that the Court of First Instance should:

- dismiss the application as inadmissible without considering the substance;
- order the applicants to pay the costs.

Law

27 Pursuant to Article 114(1) of the Rules of Procedure, if a party so requests, the Court of First Instance may give a decision on admissibility without considering the substance. Under Article 114(3), the remainder of the proceedings is to be oral unless the Court decides otherwise. The Court considers in this case that it has sufficient information from the documents before it and that it is unnecessary to open the oral procedure.

28 It is appropriate to examine successively the admissibility of the claim for annulment, the claim for a finding of failure to act and the claim for an injunction.

Annulment

Arguments of the parties

29 In their application, the applicants seek primarily annulment of the Commission Regular Report of 5 November 2003 concerning the progress made by Turkey towards accession, in so far as it contains a refusal by the Commission to make a recommendation to the Council regarding Community pre-accession financing for Turkey.

30 The Commission considers that claim to be inadmissible since it is not concerned with a measure against which proceedings for annulment may be brought. In so far as the applicants seek annulment of findings of fact made by the Commission in the Regular Report, it must be held that such findings are not capable of producing binding legal effects of such a kind as to affect the interests of the

person seeking annulment by substantially changing that person's legal situation. In so far as the claim is essentially for the annulment of a decision by which the Commission refused to propose that the Council suspend financing granted to Turkey during the pre-accession period, it must be observed that no decision of such a kind has ever been adopted. The arguments concerning the need for access to a court and for an effective judicial protection cannot change that situation.

- 31 In their observations on the objection of inadmissibility, the applicants state, among other things, that the substantive terms of their application clearly show that what they seek, as, moreover, the Commission has acknowledged, is the annulment of a Commission decision refusing to propose that the Council suspend financing granted to Turkey during the pre-accession period. The existence of that decision is disclosed by the Regular Report, read in the light of the letters of 4 August and 8 October 2003.
- 32 Moreover, they maintain that that decision does constitute a measure against which proceedings can be brought. They put forward two arguments in support of that position. First, the contested decision in itself produces binding legal effects. In substance, it confirmed that Turkey's involvement in the BTC project did not breach the conditions imposed on candidate States for membership of the Union, authorised continuation of the BTC project in its existing form and the continuing involvement of Turkey in the project, and allowed the EBRD to grant it financing on 11 November 2003. Second, the principle of democracy, upheld by Article 6(1) EU and Article 49 EU, and the need for access to a court and for effective judicial protection in any event prompt the conclusion that their claim for annulment is directed against an actionable measure and is therefore admissible.

Findings of the Court

- 33 Under the first paragraph of Article 230 EC, an action for annulment must be available against all measures adopted by the institutions, whatever their nature or form, which are intended to have legal effects (Case 22/70 *Commission v Council* [1971] ECR 263, paragraphs 39 and 42, and Case C-27/04 *Commission v Council* [2004] ECR I-6649, paragraph 44). In order to ascertain whether a measure is an act against which an action is available, it is therefore necessary to look to its substance. Any measure producing binding legal effects capable of affecting the interests of the person seeking annulment by bringing about a distinct change in his legal position is such an act (Case 60/81 *IBM v Commission* [1981] ECR 2639, paragraph 9, and Case C-249/02 *Portugal v Commission* [2004] ECR I-10717, paragraph 35).
- 34 In this case, it is clear from the applicants' pleadings that they seek the annulment not of the Regular Report as such, its purpose being to describe and evaluate the progress made by Turkey towards accession in the light of the pre-accession agreement, but of a Commission decision refusing to propose that the Council take an appropriate measure concerning the assistance granted to Turkey during

the pre-accession period on the ground that an essential element of continuing entitlement to pre-accession aid is lacking for the purposes of Article 4 of Regulation No 390/2001. By that decision, whose existence would be disclosed by the Regular Reports, read in the light of the letters of 4 August and 8 October 2003, it is alleged that the Commission refused, in particular, to accede to the applicants' request that it propose that the Council suspend the financing granted to Turkey during the pre-accession period on the ground that Turkey's involvement in the BTC project shows that it had not made sufficient progress to satisfy the Copenhagen criteria and had not adopted the *acquis communautaire*.

- 35 Thus, the applicants do not seek annulment of the Regular Report itself or of the letters of 4 August and 8 October 2003 in themselves but only that of the decision mentioned in the foregoing paragraph whose existence and content, it is claimed, are apparent from a combination of that report and those letters.
- 36 It is therefore necessary to determine whether the report and the letters disclose the existence of such a decision and, if so, whether the decision produces binding legal effects capable of affecting the applicants' interests by bringing about a distinct change in their legal situation.
- 37 It is common ground that the Regular Report contains no express Commission decision refusing to propose that the Council suspend the financing granted to Turkey during the pre-accession period or, more generally, to take an appropriate measure concerning the aid granted to Turkey by reason of its involvement in the BTC project and the inferences which may be drawn therefrom in assessing the progress made by Turkey in compliance with the Copenhagen criteria and in adopting the *acquis communautaire*, in accordance with Article 4 of Regulation No 390/2001. Such a decision can therefore only be an implied decision.
- 38 It must be pointed out, first, that mere silence on the part of an institution cannot produce binding legal effects, except where such a consequence is expressly envisaged by a provision of Community law setting a deadline and defining the content of the implied measure deemed to have come into being by reason of the passing of that deadline (Joined Cases T-189/95, T-39/96 and T-123/96 *SGA v Commission* [1999] ECR II-3587, paragraphs 26 and 27, and Joined Cases T-190/95 and T-45/96 *Sodima v Commission* [1999] ECR II-3617, paragraphs 31 and 32, and, on appeal, the order of the Court of Justice of 13 December 2000 in Case C-44/00 P *Sodima v Commission* [2000] ECR I-11231, paragraph 60; see also, to that effect, Case C-27/04 *Commission v Council*, paragraphs 31, 32 and 35).
- 39 That implied measure cannot, moreover, be actionable unless the effects it produces are capable of affecting the interests of the person seeking its annulment by bringing about a distinct change in his legal situation (see, to that effect, Case C-76/01 P *Eurocoton and Others v Council* [2003] ECR I-10091, paragraphs 65 to 67).

- 40 In this case, neither Regulation No 390/2001 nor Regulation No 2500/2001, nor Decision 2001/235, relied upon by the applicants, nor even Decision 2003/398 which succeeded it, contains any express provision whereby silence on the part of the Commission is to produce binding effects where, after being called on to do so under Article 4 of Regulation No 390/2001, the Commission has not taken action within a specified period, or any provision defining the terms of the implied decision which would be deemed to have come into being by reason of the expiry of that period.
- 41 Since the applicants base certain arguments on the terms of the letters of 4 August and 8 October 2003, it must also be stated that a unilateral commitment by the Commission, even if assumed to have been given, does not make up for the absence of an express provision of Community law of the kind referred to.
- 42 Moreover, the terms of the letters of 4 August and 8 October 2003 are not capable of bearing the inference that the Commission committed itself to regarding the Regular Report as a ‘the determinative document where “the developments in Turkey surrounding this case” would be assessed’ and that – as the applicants contend – ‘an assessment would be made by means of that Report’.
- 43 The letter of 4 August 2003 merely informs the applicants that the Commission ‘will continue to follow closely the developments in Turkey surrounding this case and give an assessment of the human rights and minority rights situation in its Regular Report in November [2003]’. As for the letter of 8 October 2003, it does no more than ‘confirm ... that the Commission will continue to follow closely the developments concerning the [BTC] project and where necessary evaluate the consequences in light of the Copenhagen political criteria’.
- 44 The Commission thus refers there to the fact that the general question of Turkey’s progress in meeting the Copenhagen criteria, with which the problem of human rights and the respect and protection of minorities is associated, will be dealt with in its Regular Report. Moreover, it states that it will monitor the particular question of the BTC project and, if necessary, will evaluate the consequences in the light of those criteria. On the other hand, it gives no commitment either to deal with that particular question in the Regular Report or to take any decision in that regard, or, a fortiori, to take such a decision by 5 November 2003.
- 45 Accordingly, the applicants having not shown, moreover, any exceptional circumstances (Case C-123/03 P *Commission v Greencore* [2004] ECR I-11647, paragraph 45), the Commission’s silence, in its Regular Report, concerning the applicants’ request cannot be regarded as tantamount to an implied refusal to act dating from 5 November 2003.
- 46 Second, it must be observed that, where a decision of which the annulment is sought amounts to a rejection, it must be appraised in the light of the nature of the request to which it constitutes a reply (Case 42/71 *Nordgetreide v Commission*

[1972] ECR 105, paragraph 5, and Joined Cases T-79/96, T-260/97 and T-117/98 *Camar and Tico v Commission and Council* [2000] ECR II-2193, paragraph 92). Thus, a refusal to adopt a measure constitutes an act in respect of which an action for annulment may be brought provided that the act which the Community institution refuses to adopt could itself have been contested (*Camar and Tico v Commission and Council*, paragraph 92).

- 47 Furthermore, where an act is adopted in several stages, in principle the only actionable measure is the one definitively stating the position of the institution on conclusion of the procedure, to the exclusion of intermediate measures whose purpose is to prepare for that final measure (*IBM v Commission*, paragraph 10, Case T-326/99 *Fern Olivieri v Commission and EMEA* [2003] ECR II-6053, paragraph 51, and order of the Court of First Instance of 15 May 1997 in Case T-175/96 *Berthu v Commission* [1997] ECR II-811, paragraph 19). The position would be different only if an intermediate measure not only displayed the legal characteristics described above, that is to say produced binding legal effects capable of affecting the interests of the person seeking its annulment, by bringing about a significant change in his legal position, but also in itself constituted the final stage of a special procedure distinct from that which is to enable the institution to give a decision on the substance (Joined Cases 8/66 to 11/66 *Cimenteries CBR and Others v Commission* [1967] ECR 75, at p. 93, and order of the Court of First Instance of 2 June 2004 in Case T-123/03 *Pfizer v Commission*, not yet published in the ECR, paragraph 23).
- 48 In this case, the applicants' aim was to persuade the Commission to propose to the Council suspension of the financing granted to Turkey under Article 4 of Regulation No 390/2001, according to which 'the Council, acting by a qualified majority on a proposal from the Commission, may take appropriate steps with regard to pre-accession assistance granted to Turkey'.
- 49 Such a proposal constitutes an intermediate measure intended to prepare for a final measure whose adoption is a matter for the Council and which does not produce binding legal effects of such a kind as to affect the applicants' interests by bringing about a distinct change in their legal position (see, by analogy, the order in *Berthu v Commission*, paragraph 21). Although the Commission proposal is not entirely without legal effect, in so far as it allows the Council to 'take appropriate steps', that effect impacts upon the Council procedure and is not binding on the latter, since, where a proposal is made for an appropriate measure, the Council, 'acting by a qualified majority' may adopt such a measure but is not required to do so. Moreover, that effect does not appear to be liable to affect the applicants' interests by bringing about a distinct change in their legal position since, until such time as the Council has taken appropriate steps, that situation remains entirely as it was before the Commission made any proposal to it in that connection.

- 50 Admittedly, it is only ‘on a proposal from the Commission’ that the Council may act, so that inaction by the Commission renders the adoption of an appropriate measure impossible. However, it is clear from the scheme of Article 4 of Regulation No 390/2001 that it is only ‘[w]here an element that is essential for continuing to grant pre-accession assistance is lacking’ in the opinion of the Commission, acting on its own initiative or when called on to do so by the Council, that the Commission proposes that the Council take appropriate steps concerning the pre-accession assistance granted to Turkey. In view of the objectives of Regulation No 390/2001, which seeks to enable the Union to help a third country prepare itself for the prospect of an accession, the question whether an essential element for continuing to grant pre-accession assistance is lacking or otherwise and, consequently, whether it is appropriate to propose that the Council apply Article 4 of Regulation No 390/2001 is a matter of discretion excluding the right, for an individual, to require the Commission to take a position in that connection or, where such a position exists, to bring an action for annulment against it. That is so, in particular, where the essential element concerned relates to the question whether the progress achieved by Turkey towards meeting the Copenhagen criteria, compliance with which constitutes a precondition for accession to the Union, is sufficient within the meaning of Article 4 of Regulation No 390/2001.
- 51 Accordingly, even if there was a refusal to submit to the Council a proposal for an appropriate measure, that refusal could not in itself be regarded as producing binding legal effects capable of affecting the applicants’ interests by bringing about a significant change in their legal position.
- 52 It follows that the claims for annulment are not directed against a measure against which an action may be brought and therefore must be dismissed as inadmissible.
- 53 The applicants’ arguments based on the principle of democracy, Article 6(1) EU and Article 49 EU, on one hand, and the principle of access to courts and, essentially, of effective judicial protection, on the other, are not such as to undermine that conclusion.
- 54 As is clear from Article 5 EU and Article 46 EU, which refer to the conditions laid down by the EC Treaty, those provisions do not enable an action for annulment not fulfilling the conditions of admissibility laid down by Article 230 EC to be considered admissible.
- 55 For its part, the principle of access to the courts is one of the elements of a Community governed by the rule of law, upheld in the legal system based on the EC Treaty in that that Treaty established a complete system of legal remedies and procedures designed to permit the Court of Justice to review the legality of measures adopted by the institutions (Case 294/83 *Les Verts v Parliament* [1986] ECR 1339, paragraph 23, and Joined Cases T-377/00, T-379/00, T-380/00, T-260/01 and T-272/01 *Philip Morris International v Commission* [2003] ECR

II-1, paragraph 121). However, individuals are not deprived of access to the courts by reason of the fact that a measure not producing binding effects capable of affecting their interests by bringing about a significant change in their legal position cannot be the subject of an action for annulment, an action to establish non-contractual liability provided for in Article 235 EC and the second paragraph of Article 288 EC being available to them if such a measure is capable of causing the Community to incur liability (*Philip Morris International v Commission*, paragraph 123).

- 56 Finally, even supposing that the applicants were unable to obtain effective judicial protection, as they allege, without, however, convincingly proving their allegation, it must be observed that, if the conditions for the availability of a remedy before the Community judicature must be interpreted in the light of the principle of effective judicial protection, such an interpretation cannot lead to the disapplication of a condition expressly provided for by the Treaty (order of the Court of 28 March 2003 in Case C-75/02 P *Diputación Foral de Alava and Others v Commission*, [2003] ECR I-2903, paragraph 34, and Joined Cases T-107/01 and T-175/01 *Lormines v Commission* not yet published in the ECR, paragraph 66) such as the condition regarding the existence of a measure against which an action may be brought under the first paragraph of Article 230 EC (order of the Court of First Instance of 19 September 2005 in Case T-247/04 *Aseprofar and Edifa v Commission*, not yet published in the ECR, paragraph 59; see also, to that effect, the judgment in *Philip Morris International v Commission*, paragraph 124), which is not fulfilled in this case.
- 57 Consequently, the action must be dismissed as inadmissible in so far as it seeks, primarily, to secure the annulment of a Commission decision refusing to propose to the Council that it suspend pre-accession assistance for Turkey, without there being any need to consider whether it satisfies the other conditions laid down by Article 230 EC and, in particular, whether the applicants have the standing to bring an action for annulment and an interest in doing so.

The claims concerning failure to act

Arguments of the parties

- 58 In the alternative, the applicants seek a declaration that the Commission has failed to act by failing to take a position concerning their request that it submit a recommendation to the Council regarding Community pre-accession assistance for Turkey.
- 59 The Commission contends that those claims are inadmissible. First, the claim of one of the applicants, Mr Korkmaz, is inadmissible because he did not previously call on the Commission to act, as required by the second paragraph of Article 232 EC. Second, the claims of all the applicants are inadmissible, in essence, because they do not accuse the Commission of having failed to address a measure to them,

as required by the third paragraph of Article 232 EC, since the adoption of the measure is a matter of discretionary authority and the measure could not be addressed to them or even be of direct and individual concern to them.

60 In their observations on the objection of inadmissibility, the applicants state, first, that Mr Korkmaz is among the individuals on whose behalf the letters of 3 July and 2 September 2003 were sent to the Commission. Next, they consider that the measure which they criticise the Commission for not addressing to them would have produced binding legal effects, was not a matter of discretion and was of direct and individual concern to them. They state, finally, that no effective remedy is available to them under national law.

Findings of the Court

61 According to the third paragraph of Article 232 EC, any natural or legal person may, under the conditions laid down in the preceding paragraphs, complain to the Court of Justice that an institution of the Community has failed to address to that person any act other than a recommendation or an opinion.

62 Articles 230 EC and 232 EC both merely prescribe one and the same method of recourse (Case 15/70 *Chevalley v Commission* [1970] ECR 975, paragraph 6, and order of the Court of 1 October 2004 in Case C-379/03 P *Pérez Escolar v Commission*, not published in the ECR, paragraph 15). It follows, in particular, that the concept of an act, as used in the third paragraph of Article 232 EC, is the same as that used in the first paragraph of Article 230 EC (*Chevalley v Commission*, paragraph 6).

63 Thus, that provision only allows a natural or legal person to seek a finding that an institution has wrongly failed to address to him an act intended to produce binding legal effects capable of affecting his interests by bringing about a distinct change in his legal position (see, to that effect, *Chevalley v Commission*, paragraphs 9 to 11; order of the Court of Justice of 17 October 1984 in Joined Cases 83/84 and 84/84 *N.M. v Commission and Council* [1984] ECR 3571, paragraph 10; orders of the Court of First Instance of 26 November 1996 in Case T-167/95 *Kuchlenz-Winter v Council* [1996] ECR II-1607, paragraph 20, and of 22 May 2000 in Case T-103/99 *Associazione delle Cantine sociali venete v Ombudsman and Parliament* [2000] ECR II-4165, paragraphs 49 to 51).

64 In this case, however, as noted earlier, the applicants seek a finding that the Commission wrongly failed to adopt a measure which could not be classified as an act of that kind and in response to which, moreover, the Council is not required to take action.

65 The judgments of the Court of Justice in Case 377/87 *Parliament v Council* [1988] ECR 4017, paragraph 16, and Case 302/87 *Parliament v Council* [1988] ECR 5615, paragraph 9, to which the applicants refer, do not undermine that conclusion. As is clear from those judgments, the remedy provided for in Article II - 14

232 EC is founded on the premiss that the unlawful inaction on the part of the Council or of the Commission enables the other institutions and the Member States and, in certain circumstances, private persons to bring the matter before the Court in order to obtain a declaration that the failure to act is contrary to the Treaty. Thus, under the first paragraph of Article 232 EC, '[s]hould the European Parliament, the Council or the Commission, in infringement of this Treaty, fail to act', the Member States and the institutions of the Community may bring an action before the Court of Justice, whereas, under the third paragraph of Article 232 EC, private individuals may only 'complain to the Court of Justice that an institution of the Community has failed to address to [them] any act other than a recommendation or an opinion'. The case-law to the effect that an action for failure to act enables the European Parliament to bring about the adoption of measures which cannot always be the subject of an action for annulment is not therefore applicable by analogy to the applicants, who, under the case-law cited above, may only challenge a failure to adopt a measure intended to produce binding legal effects capable of affecting their interests by bringing about a distinct change in their legal position.

- 66 Finally, it must be borne in mind that, although the conditions for the availability of an action before the Community judicature must be interpreted in the light of the principle of effective judicial protection, such protection cannot result in the setting aside of a condition expressly laid down by the Treaty (see paragraph 56 above).
- 67 Consequently, the action must be dismissed as inadmissible in so far as it seeks, in the alternative, a finding that the Commission has failed to act, without there being any need to give a decision on the objection that one of the three applicants did not previously call on the Commission to act.

The claims for an injunction

- 68 When exercising judicial review of legality under Article 230 EC, the Community judicature has no jurisdiction to issue directions (Case C-5/93 P *DSM v Commission* [1999] ECR I-4695, paragraph 36) and the same applies to Article 232 EC (Case T-127/98 *UPS Europe v Commission* [1999] ECR II-2633, paragraph 50).
- 69 Consequently, the action must be dismissed as inadmissible in so far as it seeks, in any event, an injunction requiring the Commission to propose to the Council suspension of pre-accession assistance until Turkey has brought to an end its failures to meet the criteria for membership of the European Union, to take action through the machinery provided for by the EC-Turkey Association Agreement and to suspend accession negotiations until Turkey has brought those infringements to an end.
- 70 It follows that the action must be dismissed as inadmissible in its entirety.

Costs

- 71 Under Article 87(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.
- 72 In this case, the applicants have been unsuccessful and the Commission has asked for costs. They must therefore be ordered to pay the costs.

On those grounds,

THE COURT OF FIRST INSTANCE (Fourth Chamber)

hereby orders:

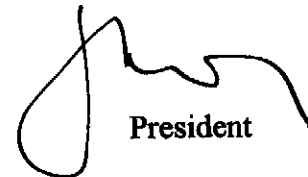
1. **The action is dismissed as inadmissible;**
2. **Cemender Korkmaz, Corner House Research and The Kurdish Human Rights Project are ordered to pay the costs.**

Luxembourg, 30 March 2006

E. Coulon


Registrar

H. Legal


President