JUDGMENT OF THE COURT

4 April 2000 *

In Case C-269/97,

Commission of the European Communities, represented by Pieter van Nuffel and G. Berscheid, of its Legal Service, acting as Agents, with an address for service in Luxembourg at the office of Carlos Gómez de la Cruz, of its Legal Service, Wagner Centre, Kirchberg,

applicant,

supported by

European Parliament, represented by J. Schoo, Head of Division in its Legal Service, and E. Waldherr, administrator in the same Service, acting as Agents, with an address for service in Luxembourg at the General Secretariat of the European Parliament, Kirchberg,

intervener,

* Language of the case: French.

Council of the European Union, represented by J.-C. Piris, Director-General of its Legal Service, J. Carbery and M. Sims, Legal Advisers, acting as Agents, with an address for service in Luxembourg at the office of A. Morbilli, Manager of the Legal Affairs Directorate of the European Investment Bank, 100 Boulevard Konrad Adenauer,

defendant,

APPLICATION for annulment of Council Regulation (EC) No 820/97 of 21 April 1997 establishing a system for the identification and registration of bovine animals and regarding the labelling of beef and beef products (OJ 1997 L 117, p. 1),

THE COURT,

composed of: G.C. Rodríguez Iglesias, President, D.A.O. Edward, L. Sevón (Rapporteur) (Presidents of Chambers), P.J.G. Kapteyn, C. Gulmann, J.-P. Puissochet, P. Jann, H. Ragnemalm and M. Wathelet, Judges,

Advocate General:A. Saggio,
Registrar: R. Grass,

having regard to the report of the Judge-Rapporteur,

after hearing the Opinion of the Advocate General at the sitting on 18 May 1999,

gives the following

Judgment

1 By application lodged at the Court Registry on 22 July 1997, the Commission of the European Communities brought an action under Article 173 of the EC Treaty (now, after amendment, Article 230 EC) for the annulment of Council Regulation (EC) No 820/97 of 21 April 1997 establishing a system for the identification and registration of bovine animals and regarding the labelling of beef and beef products (OJ 1997 L 117, p. 1, 'the contested regulation').

2 On 2 October 1996 the Commission submitted two proposals for regulations, one establishing a system for the identification and registration of bovine animals (OJ 1996 C 349, p. 10) and the other regarding the labelling of beef and beef products (OJ 1996 C 349, p. 14). Those two proposals were based on Article 43 of the EC Treaty (now, after amendment, Article 37 EC).

3 On 19 February 1997 those proposals were the subject of a general debate of a plenary session of the European Parliament, which adopted in the proposal concerning labelling an amendment designed to substitute for Article 43 of the EC Treaty Article 100a of the EC Treaty (now, after amendment, Article 95 EC).

By contrast, in the proposal concerning the identification and registration of bovine animals, no amendment was adopted to that effect, but the Rapporteur, supported by other participants, asked the Commission to agree to change the legal basis of that proposal and to replace it by Article 100a of the Treaty.

4 The two proposals for regulations were then merged by the Commission which on 7 March 1997 put forward a single amended proposal on the basis of Article 100a of the Treaty (OJ 1997 C 100, p. 22).

5 On 21 April 1997 the contested regulation was adopted unanimously by the Council, after it had amended, *inter alia*, the legal basis of the regulation and had decided in favour of Article 43 of the Treaty.

6 Title I of the contested regulation organises a system for the identification and registration of bovine animals. In accordance with Article 3 of the regulation, that system comprises ear-tags to identify animals individually, computerised data bases, animal passports and individual registers on each holding. The provision concerning that system replaced, so far as concerns bovine animals, the provisions contained in Council Directive 92/102/EEC of 27 November 1992 on the identification and registration of animals (OJ 1992 L 355, p. 32).

7 Title II of the contested regulation concerns labelling of beef and beef products. The regulation authorises operators or organisations wishing to do so to label beef in accordance with a system of approval by the Member States, and Article 16 sets out the information which may appear on the labels. Article 19(1) of that regulation provides for the introduction of the compulsory Community labelling system as from 1 January 2000, not however excluding the possibility for a Member State to apply that system merely on an optional basis to beef sold

within that State. Article 19(4) of that regulation authorises Member States, where there is a sufficiently developed identification and registration system for bovine animals, to impose a labelling system before 1 January 2000.

8 The Commission maintains that the adoption of the contested regulation on the basis of Article 43 of the Treaty and in accordance with the procedures referred to therein amounts to infringement of essential procedural requirements within the meaning of the second subparagraph of Article 173 of the Treaty. Primarily, it considers that the correct legal basis for the contested regulation is Article 100a of the Treaty and, in the alternative, that that regulation ought to have been based on Article 43 and 100a of the Treaty. In either case, it ought to have been adopted in accordance with the co-decision procedure.

9 According to the Commission, recourse to Article 100a of the Treaty was justified by the fact that the principal objective of the contested decision is the protection of human health, referred to in Article 129 of the EC Treaty (now, after amendment, Article 152 EC), and that the Parliament must, in such an important field, be able to participate in the legislative process.

10 It was, the Commission states, within the context of the bovine spongiform encephalopathy ('BSE') crisis that the contested regulation was adopted with a view to the protection of human health. The traceability measures were specifically designed in the light of the campaign against BSE and respond to the request expressed by the Council at its extraordinary meeting held from 1 to 3 April 1996 which was devoted to BSE. Furthermore, the information provided by the labelling system is intended to reassure consumers that the meat which they buy presents no health risk.

11 That specific health protection objective, expressed in particular in the first and third recitals in the preamble to the contested regulation, explains why the regulation does not apply to the animals of the porcine, ovine and caprine species which are not affected by the BSE crisis.

12 According to the Commission, it is not because the contested regulation concerns products covered by Annex II to the Treaty that it had to be adopted on the basis of Article 43. Other Community rules, a major part of which covers products referred to in Annex II to the Treaty, are based on provisions other than Article 43, for example Council Directive 79/112/EEC of 18 December 1978 (OJ 1979 L 33 p. 1), on the basis of Articles 100 of the EC Treaty (now Article 94 EC) and 227 of the EC Treaty (now, after amendment, Article 299 EC), the directives amending which have been, since the entry into force of the Single European Act, based on Article 100a of the Treaty.

13 The Commission claims that the authors of the Treaty intended to impose the co-decision procedure for the matters referred to in Articles 129 and 100a of the Treaty. To preserve an exception for measures intended to protect public health when those measures concern agricultural products would be anomalous.

14 With regard to the third subparagraph of Article 129(1) of the Treaty, according to which the requirements for health protection are an element of the other policies of the Community, the Commission maintains that it cannot be deduced from that provision that a measure the principal objective of which is protection of public health falls within the common agricultural policy because it concerns production and marketing of agricultural products.

15 The Commission acknowledges that the Court has on many occasions held that Article 43 of the Treaty constitutes the appropriate legal basis for all rules concerning the production and marketing of the agricultural products listed in Annex II to the Treaty, which contributes to the implementation of one or more objectives of the common agricultural policy listed in Article 39 of the EC Treaty (now Article 33 EC), and that such rules may entail harmonisation of national provisions in that sphere without any need to have recourse to Article 100 of the Treaty (see Case 68/86 *United Kingdom* v *Council* [1988] ECR 855, paragraph

14; Case 131/86 *United Kingdom* v *Council* [1988] ECR 905, paragraph 19; Case C-131/87 *Commission* v *Council* [1989] ECR 3743, paragraph 10, and Case C-331/88 *Fedesa and Others* [1990] ECR I-4023, paragraph 23). Nevertheless, it considers that a distinction must be made because, since those judgments, the Treaty has evolved and, in particular, Article 129 has been introduced into the EC Treaty by the Treaty on European Union.

16 In that connection the Commission points out that the directives which were in issue in the abovementioned cases and the legal basis of which was challenged were of an earlier date than the entry into force of the Single European Act and were based on Article 100 of the Treaty. It infers from this that, since the case-law mentioned in the previous paragraph, the development of the Treaty provisions concerning public health makes it possible to reconsider the interpretation made by the Court at that time of the relationship between Articles 43 and 100 of the Treaty. It notes that its point of view is given support by the wording of the Treaty of Amsterdam, since Article 152 EC constitutes, according to Article 152(4)(b), the legal basis for the adoption by the Council 'by way of derogation from Article 37, [of] measures in the veterinary and phytosanitary fields which have as their direct objective the protection of public health'.

17 The Commission concludes that it is not inconsistent with the case-law cited above to consider that measures the principal object of which is public health but which also concern the common agricultural policy may be based on a provision other than Article 43 of the Treaty.

18 In the alternative, the Commission maintains that the contested regulation had to be based on Articles 43 and 100a of the Treaty jointly. It contends that in a sphere as important as that of public health the Parliament must be able to participate in the legislative process.

19 Finally, the Commission submits that if the Court were to decide to uphold its application, there are important reasons, in particular those of public health and

legal certainty, which justify the Court in maintaining for the time being, pursuant to the second subparagraph of Article 174 of the Treaty (now, after amendment, Article 231 EC), all the effects of the contested regulation until the Community legislature has adopted new rules in that area, on the appropriate legal basis.

20 The Parliament submits that the relevant legal basis for the adoption of the contested regulation is Article 100a of the Treaty, applicable by reason of the reference made to it by Article 129a(1)(a) of the Treaty (now, after amendment, Article 153(3)(a) EC), which refers to the protection of consumers, including protection against risk to health.

21 It maintains that the context in which the contested regulation was adopted, which is an objective factor, makes possible a better determination of the objective pursued by the legislature. In the present case, that objective went beyond the mere motive of re-establishing the market in beef and veal and was to protect consumers and their health through greater transparency created by the registration of bovine animals and the labelling of meat.

22 With regard to the case-law cited by the Commission, the Parliament contends that in those cases the principal object of the legislation put before the Court was the marketing of agricultural products within the internal market and that that legislation had only an ancillary and complementary connection with public health.

23 Like the Commission, the Parliament contends that those decisions are no longer applicable since they were given before the date of the entry into force of the Treaty on European Union which introduced Article 129 and 129a, designed to increase protection for public health and for consumers.

24 The Parliament also puts forward a line of argument derived from the systematic interpretation of the Treaty. In its submission, the fact that Article 129, 129a and 100a of the Treaty provide for the co-decision procedure must be construed as being the expression of the general will of the authors of the Treaty to make the Parliament, as co-legislator, participate in the adoption of acts which are of direct importance for the well-being of citizens. It points out that it has played a guiding role in the investigation into the problems of the BSE crisis and has taken initiatives aimed at the better protection of citizens against the dangers arising from the consumption of beef. It would run counter to the new direction of the Treaty in favour of increased protection for citizens and qualified participation by the Parliament in the decision-making process if rules concerning public health and consumer protection were still to be adopted on the exclusive basis of Article 43 of the Treaty. In support of its argument, the Parliament refers to Case C-300/89 *Commission* v *Council* [1991] ECR I-2867.

25 In the alternative, the Parliament maintains that the contested regulation ought to have been based on Articles 43 and 100a of the Treaty since it pursues two inseparable objectives.

26 Since the dispute concerns a formal issue and not the substance of the measure, the Parliament requests that, if the contested regulation were to be annulled, the Court should maintain its effect in force until the Community legislature has adopted a new measure. It desires, however, that the Court should fix a reasonable time-limit for the legislature to put an end to the illegality.

27 The Council disputes that the context within which an act was adopted must be taken into consideration in determining the legal basis of the act. It acknowledges that the context may be of some general interest for the purpose of understanding the act, but considers that it is not a crucial factor in the choice of legal basis. On that point, it recalls the case-law of the Court according to which the choice of the legal basis for a measure must rest on objective factors amenable to judicial review. Those factors include in particular the aim and content of the measure (see in particular Case C-271/94 *Parliament* v *Council* [1996] ECR I-1689, paragraph 14).

28 In that connection, the Council maintains that the principal purpose of the contested regulation is not the protection of public health but the re-establishment of stability in the beef market following the BSE crisis, that is to say a common agricultural policy objective covered by Article 39(1)(c) of the Treaty, as a corollary of which certain requirements relating to the public interest must be satisfied, such as restoring consumer confidence and protecting human and animal health. The public health protection requirement, indirectly connected to the main objective, is taken into consideration in accordance with the requirements of the third subparagraph of Article 129(1) of the Treaty.

29 The method chosen consisted of improving the transparency of the conditions for the production and marketing of the products, which was to re-establish consumer confidence in beef and veal, increase sales and relaunch the market (first to fourth recitals). Through its system for the identification and registration of animals, the contested regulation sought also to respond to the requirements defined by Community veterinary legislation (the fifth and sixth recitals) and to make it possible to manage certain Community aid schemes (seventh recital).

30 The Council maintains *inter alia* that the fact that the contested regulation was not intended to introduce specific guarantees in the health field is apparent from the express wording of Article 12 (and from the 22nd recital), which state that the provisions adopted are not to undermine existing Community legislation in the veterinary sphere which contain guarantees relating to health.

31 In particular, the part of the contested regulation relating to labelling was intended, in the Council's submission, to improve consumer knowledge of the product, and not directly to guarantee to consumers that the cut of meat on sale presented no danger from the point of view of public health.

32 The Council also contends that the traceability measures will definitely make it easier to detect animals suffering from illness, but that, given the incubation period for BSE, they cannot be regarded as appropriate public health measures capable of eradicating BSE.

33 In the light of its content and aims, the contested regulation belongs, in the Council's submission, to the category of measures intended to govern the conditions for the production and marketing of products listed in Annex II to the Treaty, as referred to in Article 2 of Council Regulation (EEC) No 805/68 of 27 June 1968 on the common organisation of the market in beef and veal (OJ, English Special Edition 1968 (1), p. 187), which provides for the adoption of measures intended to encourage better organisation of production, processing and marketing and measures intended to improve quality.

34 On the other hand, Directive 79/112, referred to by the Commission, does not belong to that category, since it does not cover production or marketing of agricultural products.

35 Referring to the case-law cited by the Commission, the Council notes that the Court, in those judgments, has in particular declared that Article 38(2) of the EC Treaty (now Article 32(2) EC) guarantees the pre-eminence of the specific provisions relating to agriculture over the general provisions concerning the functioning of the single market.

36 It states that the fact that Articles 100a and 129 of the Treaty were added to the Treaty after the date of those judgments does not constitute sufficient reason for challenging the legal principles derived from those judgments. It points out that Article 100a(1) of the Treaty provides that it is to apply 'save where otherwise provided in this Treaty'.

37 The Council also disputes that the amendment provided for by the Treaty of Amsterdam already entails recourse to Article 100a, contrary to pre-existing case-law.

38 It argues that, although the Commission altered its position regarding the legal basis for the proposal for a regulation, that was for political reasons following an undertaking given to the Parliament.

39 In that connection, the Council regards the Parliament's argument based on the scheme of the Treaty as an argument based on political necessity rather than on the pre-eminence of law. Its states that the proper decision-making process follows from the determination of the appropriate legal basis and not vice versa.

40 The solution arrived at by the case-law, according to which objective criteria must be applied in the choice of a legal basis, is the only one which fully complies with the Treaty. It makes it possible to avoid subjectivity on the part of the institutions and, therefore, the temptation to indulge in political opportunism. The result of a change in case-law would be to multiply disputes between the institutions.

41 Moreover, the Council rejects the Commission's alternative request that the act should rest on a twofold legal basis, since it is not possible to establish that that act pursues two distinct objectives.

42 None the less, if the Court were to declare the contested act void, the Council requests that its effects should be preserved until a new regulation has been adopted.

Findings of the Court

43 According to settled case-law, in the context of the organisation of the powers of the Community the choice of the legal basis for a measure must rest on objective factors which are amenable to judicial review. Those factors include in particular the aim and the content of the measure (see, in particular, Case C-271/94 *Parliament* v *Council*, cited above, paragraph 14 and Case C-42/97 *Parliament* v *Council* [1999] ECR I-869, paragraph 36).

44 In this connection, the fact that an institution wishes to participate more fully in the adoption of a given measure, the work carried out in other respects in the sphere of action covered by the measure and the context in which the measure was adopted are irrelevant.

45 Furthermore, Community measures must be adopted in accordance with the Treaty rules in force at the time of their adoption. It would be contrary to the principle of legal certainty if, in determining the legal basis of such a measure, account were to be taken of an alleged development in relations between institutions which does not yet find confirmation in any provisions of the Treaties currently in force or in the provisions of a treaty which has not yet entered into force.

46 Therefore, the question whether or not the contested regulation was correctly adopted on the basis of Article 43, as forming part of the common agricultural policy, or whether it ought to have been adopted on the basis of Article 100a, on the basis that the aim and content of that regulation were the protection of public health and/or consumer protection within the meaning of Articles 129 and 129a of the Treaty, or yet again whether it should have been adopted on the basis of Articles 43 and 100a of the Treaty, must be determined by reference to the EC Treaty as it was in force at the date on which the contested regulation was adopted.

47 As the Court has pointed out in Case C-180/96 *United Kingdom* v *Commission* [1998] ECR I-2265, paragraph 133, and the case-law cited therein, it is clear from settled case-law that Article 43 of the Treaty is the appropriate legal basis for any legislation concerning the production and marketing of agricultural products listed in Annex II to the Treaty which contributes to the attainment of one or more of the objectives of the common agricultural policy set out in Article 39 of the Treaty.

48 The Court has also stated that, according to the third subparagraph of Article 129(1) of the Treaty, health protection requirements form a constituent part of the Community's other policies and that, as the Court has consistently held, efforts to attain objectives of the common agricultural policy cannot disregard requirements relating to the public interest such as the protection of consumers or protection of the health and life and humans and animals, requirements which Community institutions must take into account in exercising their powers (Case C-180/96 *United Kingdom* v *Commission*, cited above, paragraph 120).

49 Moreover, the protection of health contributes to the attainment of the objectives of the common agricultural policy which are laid down in Article 39(1) of the Treaty, particularly where agricultural production is directly dependent on demand amongst consumers who are increasingly concerned to protect their health (Case C-180/96 *United Kingdom* v *Commission*, cited above, paragraph 121).

50 It is in the light of that case-law that the content and aim of the contested regulation should be examined.

51 The content of the contested regulation, which is not in dispute between the parties, consists of laying down the rules necessary, on the one hand, for the identification and registration of bovine animals and, on the other hand, for the labelling of beef.

52 The contested regulation thus concerns the production and marketing of agricultural products listed in Annex II to the Treaty.

53 As regards the aim of the contested regulation, it must be observed that, according to the first recital, it is intended to re-establish stability in the beef and beef products market, destabilised by the BSE crisis, by improving the transparency of the conditions for the production and marketing of the products concerned, particularly as regards traceability.

54 It is not disputed that the systems for the identification and registration of bovine animals and labelling of meat prescribed by the contested regulation will make an essential contribution to the pursuit of that objective.

55 The third recital states that 'by means of the guarantees provided for such an improvement, certain public interest requirements will also be attained, such as the protection of [public] health'. The fourth recital states that 'as a result, consumer confidence in the quality of beef and beef products will be encouraged'.

56 The fifth and sixth recitals in the preamble to the contested regulation also refer to the obligation to identify and register animals intended for intracommunity trade, referred to in Article 3(1)(c) of Council Directive 90/425/EEC of 26 June 1990 concerning veterinary and zootechnical checks applicable in intracommu-

nity trade in certain live animals and products with a view to the completion of the internal market (OJ 1990 L 224, p. 29), which the Court held was correctly adopted on the basis of Article 43 of the Treaty (Case C-180/96 *United Kingdom* v *Council*, cited above, paragraph 135).

57 According to the seventh recital in the preamble to the contested regulation, the identification and registration systems must in addition make it possible to apply and monitor measures adopted in connection with the scheme of community aid in the sphere of agriculture.

58 Finally, the ninth recital states that it is necessary to adopt a specific regulation for bovine animals in order to reinforce the provisions of Directive 92/102 which, it should be pointed out, was also adopted on the basis of Article 43 of the Treaty.

59 It must therefore be held that, in regulating the conditions for the production and marketing of beef and beef products with a view to improving the transparency of those conditions, the contested regulation is essentially intended to attain the objectives of Article 39 of the Treaty, in particular the stabilisation of the market.

60 It was, therefore, rightly adopted on the basis of Article 43 of the Treaty.

61 That conclusion is not undermined by the fact that, as stated in the third recital, the system introduced by the contested regulation will have positive effects for the protection of public health.

62 The taking into account of public health in the context of measures adopted on the basis of Article 43 is compatible with the third subparagraph of Article 129(1) of the Treaty and with the case-law referred to in paragraph 48 above.

63 It must therefore be concluded that, since Article 43 of the Treaty alone constitutes the correct basis for the adoption of the contested regulation, the application must be dismissed.

Costs

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

On those grounds,

THE COURT

hereby:

1. Dismisses the application;

2. Orders the Commission of the European Communities to pay the costs;

3. Orders the European Parliament to bear its own costs.

Rodríguez Iglesias	Edward	Sevón
Kapteyn	Gulmann	Puissochet
Jann	Ragnemalm	Wathelet

Delivered in open court in Luxembourg on 4 April 2000.

R. Grass

Registrar

G.C. Rodríguez Iglesias

President