JUDGMENT OF THE COURT (Full Court)
23 March 2004 *

In Case C-233/02,

French Republic, represented by R. Abraham, G. de Bergues and P. Boussaroque, acting as Agents, with an address for service in Luxembourg,

applicant,

v

Commission of the European Communities, represented by P.J. Kuijper and A. van Solinge, acting as Agents, with an address for service in Luxembourg,

defendant,

supported by

United Kingdom of Great Britain and Northern Ireland, represented by J. Collins, acting as Agent, together with M. Hoskins, Barrister, with an address for service in Luxembourg,

intervener,

* Language of the case: French.

APPLICATION for annulment of the decision by which the Commission concluded an agreement with the United States of America on Guidelines on Regulatory Cooperation and Transparency,

THE COURT (Full Court),

composed of: V. Skouris, President, P. Jann, C.W.A. Timmermans (Rapporteur), C. Gulmann and J.N. Cunha Rodrigues (Presidents of Chambers), A. La Pergola, J.-P. Puissochet, R. Schintgen, F. Macken, N. Colneric and S. von Bahr, Judges,

Advocate General: S. Alber,
Registrar: R. Grass,

having regard to the report of the Judge-Rapporteur,

after hearing the Opinion of the Advocate General at the sitting on 25 September 2003,

gives the following

Judgment

1 By application lodged at the Court Registry on 21 June 2002, the French Republic brought an action under Article 230 EC for annulment of the decision by which

the Commission of the European Communities concluded an agreement with the United States of America entitled 'Guidelines on Regulatory Cooperation and Transparency' (hereinafter 'the contested decision' and 'the Guidelines', respectively).

Legal and factual framework

The EC Treaty

Article 133(1) to (4) of Part III, Title IX, of the EC Treaty, entitled 'Common commercial policy', provides:

'1. The common commercial policy shall be based on uniform principles, particularly in regard to changes in tariff rates, the conclusion of tariff and trade agreements, the achievement of uniformity in measures of liberalisation, export policy and measures to protect trade such as those to be taken in the event of dumping or subsidies.

2. The Commission shall submit proposals to the Council for implementing the common commercial policy.

3. Where agreements with one or more States or international organisations need to be negotiated, the Commission shall make recommendations to the Council, which shall authorise the Commission to open the necessary negotiations.

The Commission shall conduct these negotiations in consultation with a special committee appointed by the Council to assist the Commission in this task and within the framework of such directives as the Council may issue to it.

The relevant provisions of Article 300 shall apply.

4. In exercising the powers conferred upon it by this Article, the Council shall act by a qualified majority.'

3 Pursuant to Article 300(1) to (3) EC:

'1. Where this Treaty provides for the conclusion of agreements between the Community and one or more States or international organisations, the Commission shall make recommendations to the Council, which shall authorise the Commission to open the necessary negotiations. The Commission shall conduct these negotiations in consultation with special committees appointed by the Council to assist it in this task and within the framework of such directives as the Council may issue to it.

In exercising the powers conferred upon it by this paragraph, the Council shall act by a qualified majority, except in the cases where the first subparagraph of paragraph 2 provides that the Council shall act unanimously.

. . . . . .

2. Subject to the powers vested in the Commission in this field, the signing, which may be accompanied by a decision on provisional application before entry into force, and the conclusion of the agreements shall be decided on by the Council, acting by a qualified majority on a proposal from the Commission. The Council shall act unanimously when the agreement covers a field for which unanimity is required for the adoption of internal rules and for the agreements referred to in Article 310.

...

3. The Council shall conclude agreements after consulting the European Parliament, except for the agreements referred to in Article 133(3), including cases where the agreement covers a field for which the procedure referred to in Article 251 or that referred to in Article 252 is required for the adoption of internal rules....'

The joint statement on the Transatlantic Economic Partnership between the European Union and the United States of America

At the London summit of 18 May 1998, the European Union and the United States of America (hereinafter 'the partners') adopted a joint statement on the Transatlantic Economic Partnership.

5 In paragraph 10 of that joint statement, the partners essentially state that they will concentrate their efforts on removing barriers which significantly restrict transatlantic trade and investment, and in particular regulatory barriers which hinder market opportunities for goods or services.

6 In paragraph 17 of the joint statement, the partners announce their intention to:

— establish as soon as possible a plan identifying areas for common actions, both bilaterally and multilaterally, with a timetable for achieving specific results;

— take all necessary steps to allow the early implementation of that plan, including any necessary authority to start negotiations.

7 A footnote to the joint statement points out that nothing in the above text constitutes a negotiating mandate for the European Union.

The Transatlantic Economic Partnership Action Plan

8 The partners adopted an Action Plan for the Transatlantic Economic Partnership, which was approved by the Council of the European Union on 9 November 1998

(hereinafter 'the Action Plan'). In that framework, the Council authorised the Commission to undertake negotiations with a view to concluding bilateral agreements with the United States of America, inter alia in the area of technical barriers to trade (Council press release No 12560/98 of 9 November 1998).

Paragraph 3.1 of the third section of the Action Plan, concerning bilateral action, deals with technical barriers to trade in goods. Paragraph 3.1.1 of the Plan, entitled 'Regulatory cooperation', provides that the partners are to take various measures including, inter alia:

— identification and implementation of jointly defined general principles/guidelines for effective regulatory cooperation;

— joint review of mutually agreed issues, notably access to each others' regulatory procedures with respect to transparency and public participation — including the opportunity for all interested parties to 'have meaningful input' in those procedures and to receive reasonable consideration of their views;

— on the basis of that review, identification of ways and means to improve access to each other's regulatory procedures and development of jointly agreed general principles/guidelines on such procedures, while preserving the independence of domestic regulatory authorities.

The Guidelines

Negotiation of the Guidelines

10 Discussions on the Guidelines began in July 1999 between the relevant services of the Commission and their colleagues in the services of the United States Trade Representative and the Department of Commerce.

11 Throughout those discussions, the Commission's services insisted that the guidelines will not create any rights or obligations at the international level between the European Community and the United States of America.

12 The Guidelines were finalised in February 2002 by agreement between the Commission's negotiators and their United States colleagues. The document was not signed.

13 The text was notified to the Commission, which took formal note of it at a meeting on 9 April 2002. The text was not published in the *Official Journal of the European Communities*.

The memorandum of 9 April 2002 from the Commission's services concerning the Guidelines

4 On 9 April 2002, the Commission's services sent a memorandum to the committee established pursuant to Article 133(3) EC, to which it appended the text of the Guidelines in the final version, of 13 February 2002.

5 In that memorandum, the Commission services stated, in particular:

'The Action Plan decided on under the Transatlantic Economic Partnership (TEP) provides for bilateral development with the United States administration of guidelines on regulatory cooperation and transparency. We have been negotiating those guidelines since the end of 1999. Several times in the past, and most recently in January 2001, we informed you of the progress of those negotiations. I am today pleased to inform you that we have reached agreement with the United States Trade Representative on the attached text, at the expert level.'

6 The memorandum also points out that the Guidelines, as they themselves state, will be applied by the partners on a voluntary basis, in accordance with the rules and policies pursued by each of the partners, and that the Guidelines do not constitute an international agreement, but rather a result agreed by the competent services of the partners and to be sent forward to the next European Union — United States of America summit.

Text of the Guidelines

17 The Guidelines contain six sections: (I) Introduction, (II) Objectives, (III) Field of application, (IV) Operational elements of regulatory cooperation, (V) Operational elements of transparency and (VI) Procedural aspects.

18 Section I of the Guidelines describes the context in which they were adopted, in particular the Transatlantic Economic Partnership and its Action Plan.

19 Section II states that the objectives of the Guidelines are to improve cooperation between the partners' regulatory authorities and to promote transparency to the public when drawing up legislation, in order to minimise and resolve trade conflicts between the partners and to facilitate trade in goods. For that purpose, cooperation should seek, inter alia, to improve the planning and development of regulatory proposals and the quality and level of regulations and to minimise or eliminate divergences between regulation through a more systematic dialogue between regulators (paragraph 4(a) of the Guidelines) and to obtain, through the exchange of information, increased predictability in the development of regulations (paragraph 4(b)). As regards transparency, the Guidelines' objectives are first to promote public participation in the regulatory process by affording access to relevant supporting documents, analyses and data and a timely opportunity for all interested parties, both domestic and non-domestic, to provide meaningful comments concerning regulatory proposals (paragraph 4(d)); next, to provide public explanations and information relating to the various considerations which led to the regulations being adopted (paragraph 4(f)); and finally to

improve public understanding of the purpose and effect of regulatory proposals, as well as acceptance of the regulations adopted (paragraph 4(g)).

20 Section III of the Guidelines provides that their field of application covers the technical regulations referred to in the World Trade Organisation's Agreement on Technical Barriers to Trade. It states that the regulatory activity to which the document refers is the development of technical regulations for submission as legislative proposals. Paragraph 7 of the Guidelines states that the regulatory authorities to which it refers are regulators of the United States Federal Government and the services of the Commission, and that those authorities intend to apply the Guidelines 'on a voluntary basis as broadly as possible'.

21 Paragraphs 10 to 12 of Section IV of the Guidelines, on the operational elements of regulatory cooperation, set out provisions relating to consultation and the exchange of information, inter alia as regards proposed regulations or those which are being drafted. The Guidelines contain provisions concerning the collection and analysis of data relating to problems which potentially warrant regulatory action and setting priorities in dealing with these (paragraph 11); provisions relating to the coordination of research and development programmes that support rule-making (paragraph 13); provisions concerning the comparison and convergence of regulatory methods and approaches (paragraph 14); provisions on the examination of opportunities to minimise unnecessary divergences in technical regulations by seeking harmonised or compatible solutions or by the use of mutual recognition, as appropriate (paragraph 15) and provisions on the review of the implementation of regulations (paragraph 16).

22 Section V of the Guidelines, on the operational elements of transparency, sets out detailed rules for regulators to provide information to and consult early with the public while planning and developing technical regulations. It specifies that regulators should provide information about current and future activities relating to the development of regulations, consult with the public and give it the opportunity to comment on proposed regulations within a reasonable period of time, provide public information and explanations in that regard and take public comments into account, providing explanations of how those comments were dealt with.

23 Finally, Section VI of the Guidelines, concerning their procedural aspects, sets out rules for reviewing their implementation and development. In particular, paragraph 18 states that the implementation of the Guidelines and progress on identified regulatory projects will be reviewed on an on-going basis by the working group on technical barriers set up under the Transatlantic Economic Partnership. According to paragraph 19 of the Guidelines, the two sides will work jointly to identify areas in which cooperation could be improved as well as new areas for cooperation between regulators. Paragraph 20 of the Guidelines states that the two sides will continue their efforts to identify means to improve operational transparency in their respective regulatory systems, review ways to improve public access to regulatory procedures and continue to consult the public. According to paragraph 21 of the Guidelines, conformity assessment bodies and standards development organisations will be encouraged to follow the Guidelines relating to transparency when they interpret technical regulations. Paragraph 22 states that the two sides will endeavour to identify specific regulatory proposals for the initial application of the Guidelines.

Admissibility

4 The Commission raises two objections as to admissibility. First, it contends that both as an institution and as a collegiate body, it has never agreed to be bound by the Guidelines, which are merely an administrative arrangement agreed at the services level. Therefore, there is no Commission measure which could be the subject-matter of an action for annulment.

5 Secondly, the Commission maintains that even if the Guidelines could be considered binding on it, they do not constitute a measure which is open to challenge, since they cannot be characterised as a measure which lays down or produces legal effects.

6 In that regard, the Court takes the view that given the circumstances in the present case, it is not necessary to rule on the objections as to admissibility raised by the Commission, since the form of order sought by the French Republic must in any event be dismissed on the substance.

Substance

7 The French Government relies on two pleas in law in support of its application, relating, first, to the Commission's lack of competence to adopt the contested measure and, secondly, infringement of the sole right to initiate legislation conferred upon the Commission by the EC Treaty.

First plea in law

Arguments of the parties

28 By its first plea, the French Government claims that the Commission is not competent to adopt the contested measure, inasmuch as the Guidelines amount to a binding international agreement the conclusion of which, under the division of powers pursuant to Article 300 EC, lies within the competence of the Council (Case C-327/91 *France* v *Commission* [1994] ECR I-3641).

29 According to the French Government, despite the measure of care taken in choosing the language used in the Guidelines, they are complete and operational in nature, setting out very precisely the objectives pursued, the field of application and the measures to be taken in order to achieve the objectives set. As a result, they amount to a legal instrument which is sufficiently detailed to reflect a commitment entered into by bodies subject to international law and which has binding force for the latter. In that regard, the Court has held that an agreement which contains a 'standard', that is to say, a rule of conduct covering a specific field and determined by precise provisions, which is binding upon the participants, is of that status (Opinion 1/75 [1975] ECR 1355, 1360).

30 Among the indicia which determine classification as an international agreement, considerations relating to the content of the agreement must prevail, so that the fact that the Commission continually told its partners that the instructions did not constitute such an international agreement, or that its partners were convinced that such was the case, cannot be decisive in determining such a classification.

31 According to the French Government, the Guidelines contain, at the very least, a commitment for the parties to cooperate, as demonstrated inter alia by the fact that paragraph 18 states that their implementation and progress on certain regulatory projects will be reviewed on an on-going basis by a joint working group, or the fact that the parties note in paragraph 22 that they will endeavour to identify specific regulatory proposals for the initial application of the Guidelines.

32 The Commission, on the other hand, takes the view that the Guidelines do not constitute a legally binding agreement, as confirmed by analysis of the intention of the parties, which is the only decisive criterion in international law for the purpose of establishing the existence of binding effect.

33 In this case, the intention not to be bound in law is made clear first by the text of the Guidelines. The statement in paragraph 7 of the Guidelines that they will be applied on a voluntary basis and the fact that the actions which the parties propose to adopt voluntarily as a result are described by use of the English terms 'should' and 'will' rather than 'shall' are decisive in that regard.

34 That intention also emerges from certain aspects of the Guidelines' structure, such as the absence of final clauses relating to signature, entry into force, possible amendment, termination or dispute settlement.

35 Finally, that intention is apparent from the context in which the Guidelines were concluded, the Commission maintaining in this regard that neither the Transatlantic Economic Partnership nor its Action Plan constitutes a framework

for the adoption of treaties or other legally binding instruments, while the history of the negotiations in turn demonstrates that the two sides in no way intended to create 'rights and obligations'. It is for that reason that the Guidelines were never notified to the United States Congress, as would be required in the case of a binding international agreement.

36 The Commission maintains that the case-law of the Court also demonstrates that it is only the competence to conclude legally binding international agreements which the Commission is denied (*France* v *Commission*, cited above).

37 The Commission accordingly infers that, inasmuch as the Guidelines are merely an agreement for practical cooperation, devoid of binding legal effect, it had the power to agree such a document with the United States authorities.

Findings of the Court

38 By its first plea, the French Government merely submits that the Guidelines should have been concluded by the Council rather than by the Commission, in accordance with Article 300 EC, since they constitute a legally binding agreement.

39 On the other hand, the French Government in no way claims that a measure exhibiting the characteristics of the Guidelines must, even if it has no binding force, come under the sole competence of the Council. There is therefore no need for the Court to extend the subject-matter of the action of which it is seised.

40 Nevertheless, this judgment cannot be construed as upholding the Commission's argument that the fact that a measure such as the Guidelines is not binding is sufficient to confer on that institution the competence to adopt it. Determining the conditions under which such a measure may be adopted requires that the division of powers and the institutional balance established by the Treaty in the field of the common commercial policy be duly taken into account, since in this case the measure seeks to reduce the risk of conflict related to the existence of technical barriers to trade in goods.

41 Moreover, both the Transatlantic Economic Partnership and the Action Plan were approved by the Council, as is made clear in the memorandum of 9 April 2002 sent by the Commission to the committee set up pursuant to Article 133(3) EC, and the committee was regularly informed of the progress of the negotiations relating to the drafting of the Guidelines by the Commission's services.

42 In the light of that clarification, the intention of the parties must in principle be the decisive criterion for the purpose of determining whether or not the Guidelines are binding, as the Commission rightly contends.

43 In the present case, that intention is clearly expressed, as the Advocate General observed in paragraphs 56 and 57 of his Opinion, in the text of the Guidelines itself, paragraph 7 of which specifies that the purpose of the document is to establish guidelines which regulators of the United States Federal Government and the services of the Commission 'intend to apply on a voluntary basis'. In those circumstances, and without its being necessary to consider the specific importance which the use of the terms 'should' or 'will' rather than 'shall' could assume in an international agreement concluded by the Community, it need only be stated that on the basis of that information, the parties had no intention of entering into legally binding commitments when they concluded the Guidelines.

44 As pointed out by the Commission, without contradiction by the French Government, the history of the negotiations confirms that the intention of the parties not to enter into binding commitments was expressly reiterated throughout the negotiations on the Guidelines.

45 It follows that the Guidelines do not constitute a binding agreement and therefore do not fall within the scope of Article 300 EC.

46 Accordingly, the first plea in law is unfounded.

Second plea in law

By its second plea, the French Government claims that the Guidelines infringe the EC Treaty in that they restrict the exercise of the Commission's right of initiative under the Community's legislative process and thereby affect that process as a whole.

First, the Commission is obliged to take the Guidelines into account at the stage of the legislative process for which it is responsible and they therefore restrict the Commission's right of initiative.

Secondly, that restriction on the Commission's right of initiative gives rise to consequences for the Community's entire legislative process, since the nature of the proposals made by the Commission affects the freedom of action of the Council, which can reject those proposals only by unanimity.

In that regard, it must first be pointed out that it was determined in the examination of the first plea that the Guidelines are devoid of binding effect. It follows that, contrary to what the French Government claims, the Guidelines cannot impose obligations on the Commission in carrying out its role of initiating legislation.

51 Secondly, as the Commission and the Government of the United Kingdom have rightly pointed out, the power to initiate legislation includes the possibility of engaging in prior consultation and gathering all necessary information before submitting appropriate proposals. Therefore, the mere fact that a measure such as the Guidelines provides for such possibilities cannot be alleged to undermine the Commission's power of initiative.

52 In the light of all the foregoing, it follows that the second plea in law is unfounded.

53 Since none of the pleas in the action is founded, it must be rejected.

Costs

54 According to 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 Commission has applied for costs and the French Republic has been unsuccessful in its pleas, the French Republic must be ordered to pay the costs.

On those grounds,

THE COURT

hereby:

1. **Dismisses the application;**

2. **Orders the French Republic to pay the costs.**

Skouris Jann Timmermans

Gulmann Cunha Rodrigues La Pergola

Puissochet Schintgen Macken

Colneric von Bahr

Delivered in open court in Luxembourg on 23 March 2004.

R. Grass V. Skouris

Registrar President