OPINION OF MR ADVOCATE GENERAL TESAURO
delivered on 19 September 1991 *

Mr President,
Members of the Court,

1. In these proceedings the French Republic seeks the annulment, pursuant to the first paragraph of Article 173 of the EEC Treaty, of a measure adopted by the Commission, entitled 'Code of conduct on the implementing provisions for Article 23(1) of Council Regulation (EEC) No 4253/88 relating to irregularities, and the organization of an information system for irregularities'. [1]

According to the French Government, the Code of conduct in question alters the nature of the obligation incumbent upon Member States under the rules in force to inform the Commission of irregularities affecting the Community budget in the field of operations financed by the structural funds; at all events, the adoption of such a set of rules is not within the competence of the Commission.

The origins of the dispute are therefore to be found in the context of the Community legislation concerning the structural funds.

2. In this regard, the first provisions to be considered are those of the Treaty on economic and social cohesion (Articles 130a to 130e), which lay down the general principles regarding the operations of the funds and the other financial instruments and entrust the Community institutions with their implementation.

Council Regulation (EEC) No 2052/88 of 24 June 1988 on the tasks of the Structural Funds and their effectiveness and on coordination of their activities between themselves and with the operations of the European Investment Bank and the other existing financial instruments [2] and Council Regulation (EEC) No 4253/88, [3] laying down provisions for implementing that regulation, contain the essential rules governing the matter.

In particular, and as far as is relevant here, the first subparagraph of Article 23(1) of Regulation No 4253/88 establishes an obligation for Member States to take all the necessary measures to (a) verify on a regular basis that operations financed by the Community have been properly carried out; (b) prevent and take action against irregularities; and (c) recover any amounts lost as

* Original language: Italian.

1 — OJ 1990 C 200, p. 3.

2 — OJ 1988 L 185, p. 9.

3 — Council Regulation (EEC) No 4253/88 of 19 December 1988 laying down provisions for implementing Regulation (EEC) No 2052/88 as regards coordination of the activities of the different Structural Funds between themselves and with the operations of the European Investment Bank and the other existing financial instruments (OJ 1988 L 374, p. 1).

a result of an irregularity or negligence. The Member State is liable in the alternative for the reimbursement of sums unduly paid unless the Member State and/or the intermediary and/or the promoter provide proof that they were not responsible for the irregularity or negligence. Pursuant to the second subparagraph of Article 23(1), Member States are required to inform the Commission of the measures taken for those purposes and, in particular, of the progress of administrative and judicial proceedings.

3. It is precisely on the basis of the provisions referred to above that the dispute in question arose. When Regulation No 4253/88 was adopted, the Commission placed in the minutes a declaration to the effect that it would take the necessary measures, *within its competence*, to ensure the application of uniform arrangements in the various Member States for the monitoring of any irregularities concerning Community assistance. Some months later the Commission announced its intention to formulate a Code of conduct; for that purpose it set up a working group charged with laying down the means of applying the provisions of Article 23(1) of Regulation No 4253/88.

On 18 December 1989 the Commission approved the resulting draft and then submitted it to the Community Committee for the Coordination of Fraud Prevention (hereinafter referred to as 'the Fraud Prevention Committee'). Both in this Committee and in the Ecofin Council, the delegations of Member States discussed the legal form that the Code in question would have to take; despite some differences of opinion as to the legality of the Code, the delegations agreed that the Code, as drafted, would be confined to laying down the means of implementing Article 23(1) of Regulation No 4253/88. However, as it emerged at the hearing, some Member States insisted that the Code should take the form of a regulation, primarily in order to have clearly mandatory rules, given the extreme importance and sensitivity of the matter, binding in the same way on all Member States. France, in particular, while declaring itself in agreement on the content of the draft Code, expressed reservations with regard to its legal form, which were explained in a telex from its Permanent Representation. Finally, the Code was officially notified to the Member States by letter dated 30 July 1990 and subsequently published in the 'C' Series of the Official Journal.

4. Given those facts and the further circumstances described in the Report for the Hearing to which reference is made, it must be observed that the applicant submits first of all that the measure to which it objects is, in substance, a regulation containing provisions implementing Article 23(1) of Regulation No 4253/88, a measure which the Commission was not competent to adopt, given that the regulation in question gives no powers to the Commission and that, under Article 3(4) of Regulation No 2052/88, the specific provisions governing operations under each structural fund, including the arrangements for the monitoring, assessment, *financial management and checking of measures*, are those laid down in the implementing decisions adopted pursuant to Article 130e of the Treaty; the latter provision grants sole competence to the Council.

5. In its defence, the Commission has raised an objection of inadmissibility, contending that the Code of conduct at issue is not a measure which can be challenged under Article 173 of the Treaty. In the alternative, it asks the Court to dismiss the application.

Admissibility

6. The Commission's objection of inadmissibility is based on the fact that the Code of conduct in question is a *non-binding act*, and therefore not open to review under the first paragraph of Article 173, which, as is well known, empowers the Court to review the legality only of 'acts . . . other than recommendations or opinions'.

In this case, however, the measure in question is one described as a Code of conduct and one not having any legal basis and not bearing the signature of any Member of the Commission, but it was adopted by the Commission on a collegiate basis, published in the 'C' Series of the Official Journal and addressed to all the Member States. Another extremely relevant element is the fact that such a measure was notified to each Member State by a letter from the competent Commissioner, in which it is stated that the measure *comes into force on the date of notification* and that, 'as the provisions of the Code of conduct are . . . the expression of the obligations stemming from Article 23(1) of Regulation No 4253/88, *compliance with that article requires*, in the opinion of the Commission, *full compliance with the said provisions*'.

7. Given those circumstances, it should be recalled that the Court's case-law on this point is in effect that the external form of the measure is of little importance as far as the admissibility of legal review is concerned, and that it is the effects and content of the measure that should be considered. [4]

In particular, with regard to the concept of measures open to review under the first paragraph of Article 173, the Court has held since the *AETR* judgment [5] that an action for annulment must be available in the case of 'all measures adopted by the institutions, whatever their nature or form, which are intended to have legal effects'. This approach was confirmed more recently in the 'internal instructions' case, [6] in which the Court held that 'internal instructions' adopted by the Commission, which were at issue in that case, were open to review in so far as they were intended to have legal effects.

8. In the Opinion which I delivered in that very case, I suggested that the Court should give an explicit answer to a preliminary question, namely whether, *in the absence of a minimum of essential formal elements* and therefore irrespective of whether, after a

4 — It was precisely in taking this view that the Court considered open to review, for example, a resolution of the European Parliament in that it produced legal effects with regard to third parties (judgment in Case 108/83 *Luxembourg* v *European Parliament* [1984] ECR 1945), proceedings of the Council in so far as they were intended to produce legal effects (judgment in Case 22/70 *Commission* v *Council (AETR)* [1971] ECR 263), and an oral decision adopted with regard to an official (judgment in Joined Cases 316/82 and 40/83 *Kohler* v *Court of Auditors* [1984] ECR 641).

5 — Judgment in Case 22/70, above, paragraphs 38-43.

6 — Judgment in Case 366/88 *France* v *Commission* [1990] ECR 3571, at paragraph 8. For a more detailed examination of the relevant case-law in this regard, see the Opinion I delivered in that case [(1990] ECR 3579, especially paragraphs 7-9).

concrete examination of the content of the measure, it is found that the measure is intended to have legal effects, it can be held that *the measure itself is capable of producing legal effects.* [7]

Whilst not ruling expressly on this question, the Court has confirmed that form is entirely irrelevant as a criterion and that the measure must therefore be classified solely and exclusively on the basis of its content.

9. It is true that in such circumstances, and despite certain peculiarities of substance that often cause the question of admissibility to be considered differently, the Court appears to have taken note of the absence of the elements indispensable for characterizing an act as contestable and, on that basis, declared the application in question to be inadmissible. However, upon closer examination it is clear that in such cases the Court has taken account both of the formal elements and of the content of the measure, concluding that *manifestly* it was not capable of producing legal effects, nor intended to do so. [8] For the same reason, the Court has taken into account the Commission's manifest lack of powers to adopt the contested measure when assessing the argument that the measure was incapable of producing legal effects.

10. In this latter regard, moreover, it must be observed that the other argument adduced by the Commission in support of its claim that the application is inadmissible, namely that it has no powers to adopt binding acts in the matter in question (see pages 3 and 4 of the rejoinder), cannot be accepted. A lack of powers is a defect which affects the substance and not the admissibility of the application.

11. That having been said, I would recall that the measure in question was notified to each Member State, and hence was brought officially to the notice of the addressees. Moreover, the letter of notification expressly stated that compliance with Article 23(1) of Regulation No 4253/88 required full compliance with the provisions of the Code, thus making it clear to Member States that an infringement of the Code would, in the opinion of the Commission, automatically entail an infringement of the article in question.

In substance, therefore, the measure which we must consider in this case was one which was drawn up and announced in a way such as to render unequivocal the intention for it to be binding on the addressees. It is therefore necessary to examine the content of the measure in order to establish whether it contains legal obligations additional to those laid down by Article 23(1) of Regulation No 4253/88; for this reason, the

7 — The need to answer this question was dictated by the belief that, although it is true that the choice of the form cannot alter the nature of the measure itself, it is equally true that the absence of a minimum of essential formal requirements, in other words those that make it possible to identify an act as binding, would mean that it could not be relied upon against third parties, even if an examination of the content of the measure revealed it to be capable of producing legal effects. In substance, such acts would in any case have no legal effects as against individuals or Member States, irrespective of the fact that the Commission was empowered to issue binding acts in the sector under consideration.

8 — See the judgment in Case 133/79 *Sucrimex* v *Commission* [1980] ECR 1299, paragraph 16; the judgment in Case 182/80 *Gauff* v *Commission* [1982] ECR 799, paragraphs 16-18; the order in Case 151/88 *Italy* v *Commission* [1989] ECR 1255, paragraphs 21-22; and, most recently, the order in Case 50/90 *Sunzest* v *Commission* [1991] ECR I-2917, paragraph 13.

question of admissibility should be considered in conjunction with the substance of the case.

Substance

12. The measure in question lays down implementing provisions for Article 23(1) of Regulation No 4253/88: the very title of the measure has this wording, the Commission and the French Government have both repeatedly maintained this, both in their written submissions and at the hearing, and an examination of the content of the measure confirms this, as we shall see.

Before moving on to such an examination, I would like to make some preliminary remarks concerning, more generally, the means of implementing a provision of law. The rationale of having provisions for implementing a rule consists, in my opinion, in the fact that a rule may be applied in different ways; it follows in principle that a measure laying down implementing provisions *at the very least* reduces the element of discretion arising from the wording of the rule in question. It is equally true that provisions for applying a rule comprise *by definition* at least a specification of the obligations entailed by the rule and thus a set of detailed rules that necessarily create a series of specific obligations. In substance, therefore, the main purpose of a measure containing implementing provisions is to specify and harmonize Member States' obligations, which are assumed to exist from the basic rule but which certainly do not derive from it automatically, and in any case not necessarily. If this were not so, there would be no need for implementing rules.

13. In the light of the above, it is now necessary to move on to examine briefly the content of the measure in question, recalling that Article 23(1) of Regulation No 4253/88 requires Member States to inform the Commission of all the measures taken to verify that operations financed by the Community have been properly carried out, to recover any amounts lost as a result of an irregularity or negligence, to prevent and to take action against irregularities, and to inform it of the progress of administrative and judicial proceedings.

The Code of conduct first defines its scope by confirming that the reporting requirement applies only to irregularities involving more than ECU 4 000 (paragraph 1); the concept of irregularity is then defined as 'any infringement of a Community or national provision by a natural or legal person and affecting the Community budget' (paragraph 2).

Paragraph 3 provides that Member States should communicate, *within three months after notification of the Code of conduct*, not only the provisions adopted with a view to preventing and taking action against irregularities (an obligation expressly laid down by Article 23(1)), but also the services responsible for preventing and taking action against irregularities and the procedural provisions of their administrative authorities.

Paragraph 4 relates more specifically to reports on cases of irregularity, which are to be made every four months both on cases of irregularity that have been discovered by administrative authorities and on those that are the subject of prosecutions. For this purpose, Member States are asked to provide a whole set of information: the identification of the operation in question, the period during which or the moment at which the irregularity was committed, the identity of beneficiaries and natural and legal persons involved in the irregularity, the practices used to commit the irregularity, the way in which the irregularity was discovered, the financial consequences and likelihood of recovery, etc.

The Code also lays down that Member States should inform the Commission immediately of irregularities that reveal the use of a new fraudulent practice or where there is reason to believe that implications could rapidly arise outside the Member State's own territory (paragraph 5). All the information passed to the Commission is to be examined jointly by the Commission and representatives of the Member States at periodic meetings, especially in order to draw lessons for preventive measures (paragraph 6); information on the number of cases notified to the Commission, the number of cases completed, the sums recovered or in the process of being recovered is to be passed to the Fraud Prevention Committee and to the consultative committees of the structural funds concerned (paragraph 8). Finally, the Code provides that Member States and the Commission must take the measures necessary to ensure the confidentiality of information exchanged between them (paragraph 7).

14. The content of the Code of conduct confirms that it does indeed consist of provisions for implementing Article 23(1) of Regulation No 4253/88. Even a superficial examination of the provisions of the Code shows, in fact, that it establishes specific obligations linked to the more general and generic obligation to provide information, as laid down in the basic rule. In substance, the Code regulates in detail the obligation to provide information by laying down, in particular, the information to be communicated, and the frequency and means of notification.

Unless it is to be considered that implementing provisions are always and in every case merely declaratory and therefore do not require the adoption of a regulation in so far as the obligations stated therein derive from the basic rule, it must be established whether, in the case in point, the obligations set out in the Code of conduct automatically follow from Article 23(1) or whether instead the Code provides an interpretation which is not limited to making clear the obligations definitely inherent in the basic rule (that is to say, the essential minimum not affecting its content) but entails an alteration or at the very least makes the obligation laid down in the basic rule more onerous for Member States. It is from that viewpoint that the following observations are made.

15. It must be observed first of all that Article 23(1) of Regulation No 4253/88 confines itself, in so far as is relevant here, to requiring Member States to inform the Commission of the measures adopted to prevent and take action against irregularities

and of the progress of administrative and judicial proceedings. The Code of conduct, on the other hand, specifies periods in which such information should be provided and requires additional information as well as details of the irregularities committed.

First, the obligation to provide information on the measures adopted to prevent and take action against irregularities does not necessarily also imply an obligation to supply a list of the services responsible for implementing such measures, nor to communicate the main procedural provisions of their administrations. Secondly, it is legitimate to ask whether notification of the progress of administrative and judicial proceedings can be equated to — or at any event can automatically include — detailed information on irregularities, in substance a sufficiently detailed description of each irregularity encountered. I refer, in particular, to information such as the identity of beneficiaries, the way in which the irregularity was discovered, and the services or bodies that made the discovery. It does not appear to me, in fact, that information of this kind can be considered to be already covered by the reporting requirement laid down in the basic rule.

It is certainly possible to maintain that such information is ancillary to the obligation to inform the Commission of the progress of administrative and judicial proceedings, but it is equally evident that such information cannot be considered a mere clarification of the obligation in question. In other words, I do not consider it possible to uphold the argument that the obligation to provide information as laid down by the basic rule is vitiated should the identity of the beneficiaries or the manner in which the irregularity was discovered not be notified. Moreover, such a conclusion has been corroborated by the Commission itself, which maintained during the hearing that a Member State can infringe the Code of conduct without thereby violating Article 23(1) of Regulation No 4253/88. This obviously amounts to an acknowledgement that the 'obligations' laid down in the Code go beyond those laid down in the regulation in question and contradicts the statement contained in the abovementioned letter of notification to Member States to the effect that compliance with Article 23(1) requires full compliance with the provisions of the Code in question.

16. In the light of the above, and in order to highlight certain problems raised by the Code of conduct, I believe that it would be useful to look briefly at other regulatory arrangements similar to those in question. I refer in particular to Regulation No 595/91,[9] which recently replaced Regulation No 283/72 (cited several times in the parties' submissions and at the hearing) and which defines the means of implementing Article 8(1) of Regulation No 729/70,[10] which is in fact almost identical to Article 23(1) of Regulation No 4253/88. Regulation No 595/91, concerning a system — similar to that introduced by the Code — for notifying irregularities committed against the EAGGF Guarantee Section, lists the information that

9 — Council Regulation (EEC) No 595/91 of 4 March 1991 concerning irregularities and the recovery of sums wrongly paid in connection with the financing of the common agricultural policy and the organization of an information system in this field and repealing Regulation (EEC) No 283/72 (OJ 1991 L 67, p. 11).

10 — Council Regulation (EEC) No 729/70 of 21 April 1970 on the financing of the common agricultural policy (OJ 1970 L 94, p. 13).

Member States are required to communicate to the Commission (the information coincides with that provided for by the Code) and goes on to provide that if national provisions provide for the confidentiality of that information, its communication is to be subject to the authorization of the competent judicial authorities. [11] The same regulation also qualifies the obligation to reveal the identity of the persons involved in the irregularity by providing, in the final indent of Article 3(1), that the obligation does not apply if such information is of no relevance in the campaign against irregularities.

17. Another aspect deserves to be emphasized. Paragraph 7 of the Code provides that 'Member States and the Commission must take all the security measures necessary to ensure that information exchanged between them remains confidential'; such a provision is understandable, given the nature of the information required, but even a superficial examination shows that it is insufficient to achieve the objective it sets. Indeed, if, as the Commission claims, the measure is non-binding and can therefore be infringed without violating Article 23 (which would certainly be true in the case of an infringement of the abovementioned provision of the Code), it follows that information of this kind may not be kept confidential, which would have important consequences, especially for the individuals involved.

The importance and delicacy of such a problem are, by contrast, always highly evident in similar legislation. For example, Article 10 of Regulation No 595/91 not only states the principle that the confidentiality of such information must be guaranteed (paragraph 1) but also regulates this aspect in detail by providing, in particular, that information communicated 'shall be covered by professional confidentiality and be protected in the same way as similar information is protected by the national legislation of the Member State that received it and by the corresponding provisions applicable to the Community institutions' (paragraph 4). The same article also provides a series of safeguards for individuals; for example, the names of natural or legal persons involved in irregularities can be disclosed to another Member State or Community institution only in so far as this is necessary in order to prevent or prosecute proven or alleged irregularities (paragraph 3); or again, if on further inquiry it is found that a person initially considered to have been implicated in a fraud was not involved, all those to whom the name had previously been disclosed must be immediately informed of this fact (paragraph 6).

18. For the sake of completeness, I would add that on the basis of paragraphs 4 and 5 of the Code of conduct, in order to

11 — The importance of such a provision is confirmed by the case-law of the Court, which its judgment in Case 267/78 *Commission* v *Italy* [1980] ECR 31 stated at paragraph 22 that: 'Rules which in the national systems of criminal law prevent the communication to certain persons of documents in the criminal proceedings may therefore be relied upon against the Commission in so far as the same restrictions may be relied upon against the national authorities', and accordingly held that Italy had not failed to meet its obligations by not communicating to the Commission information covered by the confidentiality of investigations.

facilitate the submission of the required information, a form was sent to all the Member States, which they must complete and send to the Commission in accordance with a set timetable. The applicant considers this form to be further proof of the fact that the contested measure is not simply a recommendation. The Commission, on the other hand, maintains that it is a standard form, identical to those already existing in other sectors.

In this respect, it is sufficient to note that as regards the form for irregularities involving the EAGGF, Guarantee Section, the information required therein is that expressly specified in Regulation No 595/91 and previously in Regulation No 283/72.

As regards the form for irregularities affecting own resources, it is to be noted that this is based on Article 6(3) of Regulation No 1552/89, [12] which expressly provides for the Member States to send the Commission a half-yearly statement giving a brief description of cases of frauds and irregularities of over ECU 10 000, indicating the measures taken or under consideration in order to prevent the recurrence of cases already detected. The form imposes an obligation to communicate only this information; indeed, the request for additional information is accompanied by the explanation that this is not compulsory information in the meaning of Article 6(3) of Regulation No 1552/89: the Member States are *invited* to provide such details to the extent that they are useful for an effective campaign against fraud.

19. The foregoing observations confirm that the Code of conduct is not confined to clarifying the obligations set out in Article 23(1) of Regulation No 4253/88, but interprets them and widens their scope without nevertheless providing appropriate safeguards, especially as regards the protection of individuals.

It is therefore necessary to examine the question of the competence of the Commission to issue the measure in question.

20. The position of the Commission is very ambiguous in this regard. On the one hand, it claims that the Code has no binding effect, while on the other it nevertheless affirms, both on the basis of Article 155 of the Treaty and on the basis of Article 4(2) of Regulation No 2052/88, that it has the power and hence the competence to adopt measures of this kind.

I do not consider it possible to share such a position. Article 189 of the Treaty permits the adoption of non-binding acts and Article 155 of the Treaty gives the Commission power to formulate recommendations or deliver opinions not only on matters expressly dealt with in the Treaty but also whenever it considers it necessary; the Commission therefore has absolutely no need to demonstrate its competence to recommend one course of action rather than another: this competence is incontestable. Moreover, if it is true, as the Commission

12 — Council Regulation (EEC, Euratom) of 29 May 1989 implementing Decision 88/376/EEC, Euratom on the system of the Communities' own resources (OJ 1989 L 155, p. 1).

contends several times in its defence submissions, that the measure in question is no more than a recommendation, an opinion addressed to Member States on the manner in which to apply Article 23(1) of Regulation No 4253/88, it is difficult to understand why the Commission did not describe the measure as such in the title or present it in such a way as to demonstrate clearly, over and beyond the *nomen iuris*, that it was purely and simply a recommendation to Member States,[13] thus avoiding possible confusion and uncertainty, and an artificial dispute.

In general, one cannot but be surprised that the Commission, albeit in the context of a defence before the Court, persists in maintaining that in a matter as sensitive as that involved in this case, in which the severity and compulsory nature of the measures were to be reinforced, it created a measure with no binding force for Member States, in other words a measure which, if this were so, would not only be useless but also, for that very reason, harmful in that it was likely to sow confusion and lead to disparities in the conduct of Member States.

21. Nor do I consider that the Commission's reference to Article 5 of the Treaty is such as to alter the terms of the issue. In this regard, it must be observed that the obligation placed on Member States by this Article to 'facilitate the achievement of the Community's tasks' is a general obligation which, as the Court itself has stated, cannot be invoked 'in the absence of a particular provision in the Treaty or in binding acts adopted by the institutions';[14] this applies in the sense that such an obligation on Member States cannot in any case be invoked to adopt acts of a regulatory nature. Finally, the Commission may undoubtedly ask Member States, on the basis of Article 5 of the Treaty, to provide specific information on a particular case and it may institute proceedings for breach of the Treaty if a Member State refuses to supply such information, but it certainly cannot use such a legal basis to harmonize, clarify and widen the obligations imposed by a rule, in this instance Article 23(1) of Regulation No 4253/88.

22. As to the competence which the Commission infers from Article 4(2) of Regulation No 2052/88, it is hardly necessary to emphasize that such a provision relates to the so-called partnership, a concept defined in the regulation as 'close consultations between the Commission, the Member State concerned and the competent authorities designated by the latter at national, regional, local or other level, with each party acting as a partner in pursuit of a common goal'. According to the same regulation, 'the partnership shall cover the preparation, financing, monitoring and assessment of operations'.

13 — Permit me to add, however banal this remark may appear, that as a rule, as is right and obvious, the Commission adopts formal acts in accordance with Article 189 of the Treaty when it has competence to do so. On the other hand, acts with an atypical *nomen* are, in my opinion, a sign of a certain ambiguity, especially where the subject to be regulated is so typical that it does not require an atypical act. In this regard, let me recall the judgment in Case 322/88 *Grimaldi* v *Fonds des Maladies Professionnelles* [1989] ECR 4407, in which the Court stated at paragraph 13 that recommendations 'are generally adopted by the institutions of the Community when they do not have the power under the Treaty to adopt binding measures or when they consider that it is not appropriate to adopt more mandatory rules'. Such an affirmation seems equally valid in principle for the innumerable atypical acts existing in practice.

14 — Order of 30 September 1987 in Case 229/86 *Brother Industries* v *Commission* [1987] ECR 3757, especially p. 3763.

Finally, on the supposition that structural action by the Commission complements or contributes to corresponding national operations, a kind of permanent dialogue has been instituted between the Commission and the Member State concerned in order to distribute the tasks with a view to greater efficiency and to pool the human resources involved in Community structural action. The concept of partnership therefore by no means implies that the partners can by common accord adopt binding acts or even binding interpretations of existing acts and regulations. Moreover, the partnership relates not to the verification of operations but, as has already been stated, only to the preparation, financing, monitoring and assessment of operations. It follows that the legal basis in question does not permit the issuing of binding acts, but confines itself to providing for close consultations among all the interested parties in order to ensure the successful completion of each operation undertaken.

23. One final aspect remains to be considered: the Commission has repeatedly contended, both in its defence submissions and at the hearing, that the contested measure was adopted by consensus; this would therefore be a new type of act, which the Commission has defined as a kind of 'gentleman's agreement'. Such a construction does not appear acceptable, nor such as to alter the legal situation, without its being necessary to ascertain whether in fact the measure in question was a negotiated measure. In failing to observe any provisions that such a measure may contain, Member States could at most assume political responsibility for such failure without for that reason being considered in breach of their obligations arising under Community rules in the field in question; moreover, and above all, such a measure would be alien to the system guaranteed by the Treaty, given that the adoption of *normative acts agreed* between the Commission and the Member States or agreements of any kind among the same parties, even in particularly simplified form, is entirely alien to the system. I do not believe that this singular and contradictory position adopted by the Commission deserves further comment.

24. Given the considerations set out above, the Commission's statement that it will never institute proceedings for breach of the Treaty on the basis of non-compliance with the Code of conduct is completely irrelevant and in patent contradiction with the terms of the letter of notification, which, it will be recalled, expressly states that compliance with Article 23(1) of Regulation No 4253/88 requires full compliance with the Code of conduct. It is unnecessary, however, to dwell further on this aspect since, as we have seen, an analysis of the content of the measure has revealed that it consists in implementing provisions which create for Member States obligations which are not laid down as such in the basic rules.

25. The important point for the purposes of this case is that the contested measure, containing provisions for the implementation of Article 23(1) of Regulation No 4253/88, makes the obligations imposed by the regulation in question more onerous for Member States in that it extends and specifies them in detail.

Article 23 confines itself to indicating the obligations of Member States, but does not attribute any power to the Commission to specify, interpret or increase the obligations in question. No other relevant provision confers similar competence on the Commission. Indeed, Article 3(4) and (5) of Regulation No 2052/88 provides that the arrangements for checking operations are to be laid down in the implementing decisions adopted pursuant to Article 130e of the Treaty. Furthermore, Article 7(2) of the same regulation confirms that the harmonized rules for strengthening checks on structural operations are to be established on the basis of the provisions in the aforesaid Article 3(4) and (5). It follows that in so far as the Code of conduct in question is intended to have legal effects it must be annulled on the grounds of the Commission's lack of competence.

Conclusion

On the basis of the foregoing considerations, I propose that the Court grant the application and order the Commission to pay the costs.