OPINION OF MR ADVOCATE GENERAL LENZ
delivered on 29 June 1988 *

Mr President,
Members of the Court,

A — Facts

1. In the proceedings with which we are concerned today the Commission of the European Communities, the applicant, claims once again that the Council of the European Communities, the defendant, has founded one of its decisions on an incorrect legal basis.

2. On 7 April 1987 the Council adopted a decision concerning the conclusion of the International Convention on the Harmonized Commodity Description and Coding System and of the Protocol of Amendment thereto.[1] Although the Commission had proposed that the Council base that decision on Article 113 of the EEC Treaty,[2] the defendant amended the Commission's proposal in accordance with Article 149 of the EEC Treaty and based its decision on the provisions of Articles 28, 113 and 235 of the EEC Treaty.

3. The International Convention on the Harmonized Commodity Description and Coding System was adopted by the Customs Cooperation Council in June 1983. It was intended to replace the Brussels Convention on Nomenclature of December 1950 and also to be used for the purpose of international trade statistics and of freight tariffs and transport statistics. In sum, the Convention was intended to facilitate international trade.

4. Along with its substantive legal provisions the Convention provides for an institutional system whereby with the collaboration of the Harmonized System Committee and the Customs Cooperation Council amendments to the Convention can be adopted by a simplified procedure and explanatory notes, classification opinions and other advice and recommendations can be prepared, so as to ensure uniform interpretation and application of the harmonized system.

5. The Harmonized System Committee includes representatives of the European Economic Community and, as regards products of the European Coal and Steel Community, the Member States of the Community. The Community and Member States have the right to only one vote, however, which they must exercise together.

6. The Convention does not lay down rates of duty.

7. The Commission considers the Council's action to be unlawful, inasmuch as the

* Translated from the German.

1 — Council Decision 87/369/EEC of 7 April 1987 concerning the conclusion of the International Convention on the Harmonized Commodity Description and Coding System and of the Protocol of Amendment thereto (OJ 1987, L 198, p. 1).

2 — OJ 1984, C 120, p. 2.

decision in question should be regarded as a measure of commercial policy under Article 113 of the EEC Treaty.

8. The applicant claims that

(i) Council Decision 87/369/EEC of 7 April 1987 concerning the conclusion of the International Convention on the Harmonized Commodity Description and Coding System and of the Protocol of Amendment thereto should be declared void, and

(ii) the Council should be ordered to pay the costs.

However, the applicant submits that for reasons of legal certainty it should be held pursuant to the second paragraph of Article 174 of the EEC Treaty that even within the Community the Convention continues to have binding force.

9. The Council contends that the action should be dismissed and the Commission ordered to pay the costs. It is of the opinion that no objectives of commercial policy are pursued in the Convention.

10. I shall refer to the parties' submissions where necessary in my analysis. For the rest, reference may be made to the Report for the Hearing.

B — Analysis

11. In my analysis of the case I shall deal first with the question of the legal basis for the decision concerning the agreement as regards the setting-up of the customs nomenclature. A discussion of the problems connected with statistics on goods will follow.

1. *Legal basis for the conclusion of an agreement on customs nomenclature*

12. Under Article 3 (b) of the EEC Treaty the activities of the Community include the introduction of a Common Customs Tariff. A Common Customs Tariff comprises two main elements: description of goods (customs nomenclature) and the corresponding rates of duty.

13. If we examine Articles 18 to 29 of the EEC Treaty, which govern the setting-up of the Common Customs Tariff within the Community, it can be seen that those articles contain provisions on the approximation of the customs duties of the Member States and the requirement that the Common Customs Tariff should be applied in its entirety by the end of the transitional period at the latest. Furthermore, Article 28 of the EEC Treaty provides that any autonomous alteration or suspension of duties in the Common Customs Tariff is to be decided by the Council. However, that chapter of the EEC Treaty does not contain any express provision as to how and by whom the Common Customs Tariff as a whole, and in particular the customs nomenclature, is to be drawn up.

14. During the transitional period of the European Economic Community a rule relating to competence as regards the setting-up of the Common Customs Tariff was not actually necessary, since the Common Customs Tariff, pursuant to Article 19 *et seq.* of the EEC Treaty, was to be derived from the customs tariffs of the four customs territories of the Community, which, despite varying rates of duty, were all based on the Convention of 15 December 1950 on Nomenclature for the Classification of Goods in Customs Tariffs. As the Court held in its judgment of 19 November 1975 in Case 38/75,[3] the Community has replaced the Member States in commitments arising from that convention; it was bound by that convention just as it was by the convention of the same date establishing a Customs Cooperation Council. Consequently, when the Common Customs Tariff was initially set up, the Community retained the so-called Brussels Nomenclature and based the relevant regulation on Articles 28 and 111 of the EEC Treaty.[4]

15. Although express competence to draw up a customs nomenclature is to be found neither in Article 28 nor Article 111 of the EEC Treaty, the Council assumed the existence of such authority. Articles 28 and 113 of the EEC Treaty (on the expiry of the transitional period the latter replaced Article 111 of the EEC Treaty) give the Council the power to change tariff rates. *Tariff rates per se*, however, *cannot be applied without a tariff nomenclature.* Those provisions of the Treaty must therefore give the Community authority to adopt the Brussels Nomenclature of 1950, to which the Member States were parties, as a necessary concomitant (implied competence) to the authority to change tariff rates.

16. After the expiry of the transitional period the annual regulations amending the Common Customs Tariff[5] and the Council decisions amending the nomenclature in which the recommendations of the Customs Cooperation Council were accepted[6] were based on Articles 28 and 113 of the EEC Treaty.

17. If the drawing-up of a customs nomenclature within the Community can be based on Article 28 of the Treaty for autonomous rates of duty and Article 113 for conventional rates of duty, the question arises as to which provision of the Treaty is to be regarded as the proper legal basis for the conclusion of an international convention which provides for a uniform customs nomenclature for autonomous and conventional rates.

18. In the Council's view, the Convention does not constitute a measure of commercial policy, because it is neither aimed at nor effects a change in the volume of the Community's external trade. Because the Convention affects Community legal provisions, such as the Common Customs

3 — Judgment of the Court of 19 November 1975 in Case 38/75 *Douaneagent der NV Nederlandse Spoorwegen* v *Inspecteur der invoerrechten en accijnzen* [1975] ECR 1439, at p. 1451.

4 — Regulation (EEC) No 950/68 of the Council of 28 June 1968 on the Common Customs Tariff (OJ, English Special Edition 1968 (I), p. 275).

5 — For the first time in respect of the entire Common Customs Tariff by Regulation No 1/71 of 17 December 1970 amending Regulation (EEC) No 950/68 on the Common Customs Tariff (OJ 1971, L 1, p. 1).

6 — See, for example, Decisions of 14 June 1977 and 18 December 1978, OJ 1977, L 149, p. 17, and OJ 1979, L 6, p. 23.

Tariff, based on Articles 28 and 113 of the EEC Treaty, the legal bases for its conclusion must be the same as those on which the Community legal provisions were based, that is to say Articles 28 and 113 of the EEC Treaty, in accordance with the judgment of the Court of 31 March 1971 in Case 22/70.[7]

19. The applicant admits that the areas of applicability of Articles 28 and 113 of the EEC Treaty partly overlap. Because, however, the more general rule is to be found in Article 113, Article 28 of the EEC Treaty should be interpreted narrowly. If a measure is intended to pursue an objective of commercial policy, then it falls under Article 113 and not under Article 28 of the EEC Treaty.

20. The introduction of a Common Customs Tariff and a common commercial policy in respect of non-member countries is one of the most important activities of the Community. That follows from the position of that function in the structure of the Treaty, that is, in Article 3 (b). The introduction of a Common Customs Tariff necessarily presupposes the drawing up of a customs nomenclature. The appropriate provisions for the setting up of the Common Customs Tariff are contained in Part 2 of the Treaty (Foundations of the Community, Title I — Free movement of goods, Chapter 1: The Customs Union, Section 2: Setting-up of the Common Customs Tariff).

7 — Judgment of 31 March 1971 in Case 22/70 *Commission* v *Council* [1971] ECR 263.

21. It should first be recalled that when the Common Customs Tariff was set up the customs nomenclature adopted therein already existed: the Brussels Nomenclature of 15 December 1950, which applied in the original four customs territories and by which, the Court has held, the Community was bound.

22. Of course the negotiators of the Treaty did not proceed on the basis that the customs tariff thus set up would remain unamended. Therefore they conferred on the *Community* the power *inter alia* to conclude tariff agreements. Tariff agreements necessarily comprise not only tariff rates but also a customs nomenclature. Otherwise rates of duty simply cannot be set. It is quite natural that tariff agreements should be mentioned in Article 113 of the EEC Treaty, because tariff agreements, which, as I have said, comprise a customs nomenclature and tariff rates, will be concluded between the customs union of the 'European Economic Community' and non-member countries. In the case of a customs nomenclature, the Community is obliged by the circumstances to adopt a multilateral approach. The autonomous establishment of a customs nomenclature, although theoretically conceivable, is no longer practical, in so far as the Member States of the Community and their legal successor, the *European Economic Community*, are bound by international agreements on such matters. Consequently, Article 28 of the EEC Treaty is not applicable whether on the basis of its wording or in the light of the circumstances. Its wording speaks only of *duties*, however, not of a nomenclature. Article 113 is thus the only possible legal basis for the establishment of a new customs nomenclature following international negotiations.

23. That Article 113 of the EEC Treaty must confer a power on the Community to conclude an agreement for customs nomenclature is clear from the following considerations. It is not disputed that Article 28 of the EEC Treaty confers authority to alter autonomous customs duties if that alteration is based on reasons internal to the Community and is not related to the common commercial policy. Following the introduction of that common commercial policy, after the expiry of the transitional period, it must be assumed that the authority conferred in Article 113 of the EEC Treaty to alter customs duties is the general provision, and that it supplants to a large extent the system of Article 28, which is contained in the section on the setting-up of the Common Customs Tariff before the end of the transitional period. Finally, Article 113 of the EEC Treaty speaks not only of changes in conventional tariff rates but of tariff rates in general. That view is supported by the judgment of 6 March 1987 in Case 45/86 [8] in which the Court held that Article 113 of the EEC Treaty was the correct legal basis for the generalized preference system for goods from developing countries. At least as regards the suspension of tariffs for industrial goods an autonomous measure is involved which is not based on obligations resulting from agreements, as the Council has recently confirmed in Case 51/87. [9]

24. That result is not affected by the fact that by the Single European Act the Member States of the Community amended Article 28 of the EEC Treaty; it now permits changes to the autonomous customs tariff to be made pursuant to a simplified procedure which corresponds to that of Article 113 of the EEC Treaty. That change, which aligns the procedural provisions (but is not yet applicable here), means that the question of the demarcation between Articles 28 and 113 of the EEC Treaty has lost its importance for the future. However, the question must still be clarified for the purposes of the present case.

25. If changes of tariff rates fall under Articles 28 or 113 of the EEC Treaty according to the objective pursued, and Article 113 of the EEC Treaty provides in addition for the conclusion of tariff agreements, then it seems clear that such agreements may deal *inter alia* with customs matters other than tariffs, including the structure of the customs nomenclature.

26. If, however, as I have explained, power is expressly conferred on the Community to conclude an *agreement* on customs nomenclature, according to a particular procedure — Council decision by a qualified majority — then it is no longer permissible to fall back on a residual competence which is not expressly mentioned, does not mention a power to conclude agreements at all and at the material time could be exercised only by way of a unanimous Council decision.

27. It might have been possible, if the rules in Article 113 of the EEC Treaty did not exist, by means of a broad interpretation of Article 28 of the EEC Treaty in conjunction with the principles of the judgment of 31 March 1971 in Case 22/70 [10] to assert that the Community had the power to conclude

8 — Judgment of 26 March 1987 in Case 45/86 *Commission* v *Council* [1987] ECR 1493.

9 — Case 51/87 *Commission* v *Council*, Opinion of 29 June 1988.

10 — Ibid., paragraphs 15 to 19.

the agreement; the 'implied powers' found in that judgment by the Court of Justice must, however, take second place behind the express powers granted in the EEC Treaty, in particular when they provide for a more complicated decision procedure.

28. As regards that part of the agreement which relates to the description of goods (customs nomenclature), it is thus not permissible to rely on Article 28 of the EEC Treaty as the legal basis.

2. *Application of Article 235 of the EEC Treaty for the customs nomenclature*

29. Similarly, Article 235 of the EEC Treaty must be excluded as the legal basis for the conclusion of the agreement on the customs nomenclature. Reliance on Article 235 of the EEC Treaty, as is clear from its *wording* and as the Court held in its *judgment* of 6 March 1987 in Case 45/86, is only justified when no other Treaty provision confers on the Community institutions the powers necessary for the adoption of the measure in question. Since, as I have explained, Article 113 of the EEC Treaty constitutes a sufficient legal basis, recourse should not be had to Article 235 of the EEC Treaty in the area of customs nomenclature.

3. *The legal basis for the statistics nomenclature*

30. The defendant is of the opinion that Article 235 of the EEC Treaty must be used for the part of the Convention which relates to statistics because it affects the nomenclature of goods for the external trade statistics of the Community and statistics of trade between Member States (Nimexe). The Council enacted the corresponding regulation on the basis of Article 235 of the EEC Treaty.[11] The applicant, on the other hand, considers that the Convention does not contain rules on statistics for intra-Community trade. The rules on external trade statistics, however, assist in the implementation of the commercial policy, because they permit information to be obtained on the development of patterns of trade and the effectiveness of the instruments of commercial policy employed.

31. It is surely indisputable that a nomenclature which is intended to form the basis for the compilation of external trade statistics falls within the purview of the common commercial policy. It serves as the basis for obtaining information on the development of international trade relations and on the effectiveness of the instruments of commercial policy employed by the Community. Such rules have such a close connection with the list of examples in Article 113 (1) of the EEC Treaty, which is not intended to be exhaustive, that they can be included without difficulty in the common commercial policy.

32. Such rules may well have purely practical effects on statistics for intra-Community trade. Effects of a legal nature — and the Court's judgment of 31 March 1971 in Case 22/70 [10] had only legal effects in view — cannot, however, be detected. If the institutions of the

11 — Regulation No 1445/72 of the Council of 24 April 1972 concerning the nomenclature of goods for the external trade statistics of the Community and statistics of trade between Member States (Nimexe), OJ English Special Edition 1965-72, p. 53.

10 — Ibid., paragraphs 15 to 19.

Community apply such a system 'for reasons of comparability' to statistics of intra-Community trade as well, it is on the basis of an independent legal act [12] which has no legal connection with the Convention.

33. The fact that, although the conduct of the common commercial policy has been transferred to the Community institutions, the system governing internal trade is largely governed by the EEC Treaty itself, in particular the provisions on free movement of goods, means that conclusions cannot be drawn from the system of external trade statistics with regard to statistics on internal trade. However, in that area little scope remains for intervention by the Community in the economy after the end of the transitional period.

34. The application of the harmonized system to intra-Community trade statistics does not therefore justify the use of Article 235 of the EEC Treaty as a legal basis.

4. *The continued validity of the decision*

35. Although the contested Council Decision must therefore be declared void, that does not change the legal situation under international law, according to which the Community, by adopting a convention which has meanwhile entered into force, remains bound by it. That follows from the principles of the general law of treaties, as they are laid down, for example, in Article 46 of the Vienna Convention on the Law of Treaties of 23 May 1969 and Article 14 of the Vienna Convention of 21 March 1986 governing the treaty-making powers of international organizations. The agreement of the Community was indeed given contrary to its internal procedural law on authority to conclude treaties, but that infringement was not apparent to the other contracting parties. Consequently, the Community cannot rely on that irregularity as regards those other contracting parties.

36. Since the international legal obligation thus continues to exist, it does not appear necessary to order pursuant to the second paragraph of Article 174 that the decision should remain definitive once it has been declared void. However, it would do no harm to make the position clear.

C — Conclusion

37. In the result I propose that the Court should uphold the application and order the Council to pay the costs.

12 — Council Regulation No 3367/87 of 9 November 1987 on the application of the Combined Nomenclature to the statistics of trade between Member States and amending Regulation No 1736/75 on the external trade statistics of the Community and statistics of trade between its Member States, OJ 1987, L 321, p. 3.