JUDGMENT OF THE COURT
13 November 1991 *

In Case C-303/90,

French Republic, represented by Edwige Belliard, Deputy Director of the Legal Affairs Directorate at the Ministry of Foreign Affairs, and by Hélène Duchêne, Legal Affairs Secretary in the same Ministry, acting as Agents, with an address for service in Luxembourg at the French Embassy, 9 Boulevard du Prince Henri,

applicant,

supported by

Kingdom of Belgium, represented by Robert Hoebaer, Director of Administration at the Ministry for Foreign Relations, Foreign Trade and Cooperation with Developing Countries, acting as Agent, with an address for service in Luxembourg at the Belgian Embassy, 4 Rue des Girondins,

v

Commission of the European Communities, represented by David Gilmour, Legal Adviser, and by Marie Wolfcarius, a member of its Legal Service, acting as Agents, with an address for service in Luxembourg at the office of Roberto Hayder, representative of its Legal Service, Centre Wagner, Kirchberg,

defendant,

APPLICATION for a declaration that document 90/C 200/03 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' is null and void,

* Language of the case: French.

THE COURT,

composed of: O. Due, President, F. A. Schockweiler, F. Grévisse, P. J. G. Kapteyn (Presidents of Chambers), G. F. Mancini, C. N. Kakouris, J. C. Moitinho de Almeida, M. Díez de Velasco and M. Zuleeg, Judges,

Advocate General: G. Tesauro,
Registrar: H. A. Rühl, Principal Administrator,

having regard to the Report for the Hearing,

after hearing oral argument presented by the parties at the hearing on 11 July 1991, at which the French Republic was represented by Philippe Pouzoulet, Assistant Director of the Legal Affairs Directorate at the Ministry of Foreign Affairs, and by Hélène Duchêne, and the Kingdom of Belgium, by Jan Devadder, Adviser at the Ministry for Foreign Relations, acting as Agents,

after hearing the Opinion of the Advocate General at the sitting on 19 September 1991,

gives the following

Judgment

1 By an application lodged at the Court Registry on 4 October 1990, the French Republic brought an action under the first paragraph of Article 173 of the EEC Treaty for a declaration that an act adopted by the Commission and 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' (Official Journal 1990 C 200, p. 3, hereinafter referred to as 'the Code') was null and void.

2 Article 130a of the EEC Treaty provides that the Community is to develop and pursue its actions leading to the strengthening of its economic and social cohesion, and that in particular it shall aim at reducing disparities between the various regions and the backwardness of the least-favoured regions.

3 To that effect the Council adopted Council Regulations (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 (Official Journal 1988 L 185, p. 9) and 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 (Official Journal 1988 L 374, p. 1).

4 Article 23 of Regulation No 4253/88, entitled 'Financial control', provides in its first paragraph:

'1. In order to guarantee successful completion of operations carried out by public or private promoters, Member States shall take the necessary measures:

— to verify on a regular basis that operations financed by the Community have been properly carried out,

— to prevent and to take action against irregularities,

— to recover any amounts lost as a result of an irregularity or negligence. Except where the Member State and/or the intermediary and/or the promoter provide proof that they were not responsible for the irregularity or negligence, the Member State shall be liable in the alternative for reimbursement of any sums unduly paid.

Member States shall inform the Commission of the measures taken for those purposes and, in particular, of the progress of administrative and judicial proceedings.'

5 The Commission notified the Code to Member States by letters of 30 July.

6 Reference is made to the Report for the Hearing for a fuller account of the background and facts of the dispute, the genesis of the Code, the course of the procedure and the pleas in law and arguments of the parties, which are mentioned or discussed hereinafter only in so far as is necessary for the reasoning of the Court.

Admissibility of the action

7 In support of its objection of inadmissibility the Commission claims that the Code is not an act against which an action can be brought under Article 173, given the circumstances in which it was adopted and the means by which it was drawn up.

8 As the Court has consistently held, an action for annulment is available as against all provisions taken by the institutions, whatever their nature and form, which aim to produce legal effects (judgment in Case 22/70 *Commission* v *Council* [1971] ECR 263).

9 The case in point involves an act entitled 'implementing provisions', which was published in full in the 'C' series of the Official Journal and which, as appears from the documents before the Court, was notified to each Member State by letter from the competent Member of the Commission. This letter states that the Code is to come into effect on the date of notification and that compliance with Article 23(1) of Regulation No 4253/88 requires full compliance with the provisions of the Code, which, in the opinion of the Commission, expresses the obligations arising from that provision.

10 In order to assess whether the contested measure is intended to have legal effects additional to those entailed by Article 23 of Regulation No 4253/88, it is necessary to examine its content.

11 It follows that the assessment of the validity of the objection of inadmissibility depends on the assessment to be made of the grounds on which the contested measure is challenged and that this issue must therefore be examined in conjunction with the questions of substance raised by the case.

Substance

12 In support of its application, the French Republic, supported by the Kingdom of Belgium, advances pleas alleging the Commission's lack of competence, infringement of Community law and misuse of procedure.

13 As regards the Commission's alleged lack of competence, the French Republic claims that the Code is in substance a regulation containing provisions implementing Article 23(1) of Regulation No 4253/88: that article gives the Commission no competence in this regard and furthermore Article 3(4) of Regulation No 2052/88 provides that the specific provisions governing operations under each structural fund are to be laid down in the implementing decisions adopted pursuant to Article 130e of the Treaty, which grants sole competence to the Council.

14 The Commission, on the other hand, contends that an analysis of the Code shows that it merely specifies in detail the information which the Member States are required to communicate to the Commission under Article 23(1) of Regulation No 4253/88 and that the expressions 'implementing guide', 'negotiated consensus' and 'gentleman's agreement' used to described the Code confirm that it is not intended to have new binding legal effects.

15 It is therefore necessary to consider first of all whether the Code merely clarifies the obligation of Member States to inform the Commission, which derives from Article 23(1) of Regulation No 4253/88, or whether it establishes implementing arrangements entailing specific obligations.

16 In this regard, it should be noted that Article 23(1) of Regulation No 4253/88 only requires Member States to inform the Commission of the measures taken to prevent and prosecute irregularities and of the progress of administrative and judicial proceedings.

17 Reference is made to paragraph 13 of the Opinion of the Advocate General for a more detailed analysis of the main relevant provisions of the contested measure. It is sufficient to observe that the Code regulates in detail this reporting requirement by laying down, in particular, the information to be communicated and the frequency and means of notification.

18 Thus, paragraph 3 of the Code provides that within three months of notification of the Code Member States should communicate, not only the measures adopted in application of Article 23(1) of Regulation No 4253/88 but also the identity of the services responsible for preventing and taking action against irregularities and the procedural provisions of their administrative authorities.

19 In this regard, it should be noted that the obligation established by the second sentence of Article 23(1) of Regulation No 4253/88 to communicate the measures taken to prevent and take action against irregularities does not automatically imply an obligation to furnish a list of the services responsible for implementing these measures nor an obligation to communicate the main procedural provisions of their administrative authorities.

20 Moreover, paragraph 4 of the Code provides that the reporting of irregularities should take place every four months and cover both cases of irregularity discovered by an administrative authority and those which are the subject of prosecutions. To that end, according to the Code, Member States should provide the available details regarding, in particular, the identification of the operation in question, the period during which or the moment at which the irregularity was committed, the identity of beneficiaries as well as natural and legal persons involved in the irregularity, the practices used to commit the irregularity, the financial consequences and likelihood of recovery, and the services or bodies involved.

21 As regards these obligations, it is sufficient to observe that they cannot be considered to be inherent in the obligation to inform, as established by Article 23(1) of Regulation No 4253/88. In particular, it cannot be considered that, without a description of the more exact information provided for by the Code, the obligation to inform the Commission would be devoid of substance.

22 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.

23 If, as the Commission contends, the Code is only an explanatory document, this obligation of confidentiality must derive from Article 23(1) of Regulation No 4253/88. However, that provision, which relates to the communication of information by Member States to the Commission, makes no reference to any obligation on the part of Member States to guarantee the confidentiality of information received as part of the exchange of information for which the Code provides.

24 It follows from the foregoing considerations that by imposing on Member States specific obligations concerning the content of the information to be provided to

the Commission and the frequency and means of communicating it, the Code goes beyond what is provided for by Article 23(1) of Regulation No 4253/88.

25 In those circumstances, it must be declared that the Code constitutes a measure intended to have legal effects of its own, distinct from those created by Article 23 of Regulation No 4253/88, and that it is therefore a measure against which an action for annulment may be brought.

26 Moreover, this conclusion is accepted by the Commission itself, which at the hearing, contrary to what was stated in the notification letter mentioned above in paragraph 9, maintained that a Member State could infringe the Code without thereby violating Article 23(1) of Regulation No 4253/88.

27 The next question to be examined is whether the Commission was competent to adopt a measure imposing on the Member States obligations not provided for by Article 23(1) of Regulation No 4253/88.

28 In this regard, the French Republic, supported by the Kingdom of Belgium, contends that the adoption of the Code is contrary to Articles 155 and 189 of the Treaty and to Regulation No 4253/88, which gives the Commission no competence to adopt measures implementing that regulation.

29 The Commission, on the other hand, claims that it is competent, under Article 155 of the Treaty or Article 4(2) of Regulation No 2052/88, to adopt measures for the uniform implementation of the obligations deriving from Article 23(1) of Regulation No 4253/88. According to the Commission, Article 189 of the Treaty does not prevent it from concluding arrangements with the Member States on the scope of a Community measure.

30 In this regard, it should be noted that Article 155 of the Treaty gives the Commission the right to formulate recommendations or deliver opinions which, according to Article 189 of the Treaty, are not binding. It follows that the Commission cannot draw from Article 155 the power to adopt an act imposing on Member States obligations going beyond what is provided for in Article 23(1) of Regulation No 4253/88.

31 As to the competence which the Commission believes it can draw from Article 4(2) of Regulation No 2052/88, it must be stated first of all that that provision merely indicates that the Commission may take initiatives and implementing measures on the basis of the provisions of the said regulation in support of action which the Community undertakes through the structural funds, the European Investment Bank and the other existing financial instruments. However, it is evident from paragraph 1 of that article that Community operations are designed to complement or contribute to corresponding national operations and that they are to be established through close consultations between the Commission, the Member State concerned and the competent authorities designated by the latter at national, regional, local or other level. It is also clear from this paragraph that such consultations, termed 'partnership', relate only to the preparation, financing, monitoring and assessment of operations.

32 It should be recalled next that Article 3(4) and (5) of Regulation No 2052/88 provides that the arrangements for the verification of operations are to be laid down in the implementing Decisions adopted by the Council pursuant to Article 130e of the Treaty.

33 It follows that 'partnership' does not cover the verification of operations financed by the Community, as envisaged by Article 23(1) of Regulation No 4253/88 and that the Commission cannot draw from the provisions on 'partnership' any competence to lay down verification arrangements that would create obligations for Member States additional to those provided for in paragraph 1 of that article.

34 Finally, as regards the Commission's argument that the contested measure was negotiated between itself and the Member States, it is sufficient to note, without there being any need to examine whether the disputed measure actually constitutes a negotiated act, that the possibility of adopting such an act is not provided for by Article 23(1) of Regulation No 4253/88 and that the measure in question cannot therefore have the effect of altering the legal position of Member States under that provision.

35 It follows from the foregoing considerations that the contested measure is an act which was adopted by an authority which had no power to adopt it. Accordingly, without there being any need to rule on the other submissions made by the French Republic, the application for the annulment of that measure must be declared both admissible and well founded.

Costs

36 Under Article 69(2) of the Rules of Procedure, the unsuccessful party is to be ordered to pay the costs. Since the Commission has failed in its submissions, it must be ordered to pay the costs.

On those grounds,

THE COURT

hereby:

1. **Annuls the 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, adopted by the Commission;**

2. **Orders the Commission to pay the costs.**

Due Schockweiler Grévisse Kapteyn

Mancini Kakouris Moitinho de Almeida Díez de Velasco Zuleeg

Delivered in open court in Luxembourg on 13 November 1991.

J.-G. Giraud
Registrar

O. Due
President