information to be provided to the Commission and the frequency and means of communicating it, obligations which go beyond what is provided for in Article 23.

2. The Commission cannot derive the power from either Article 155 of the Treaty or Article 4 of Regulation No 2052/88 on the tasks of the Structural Funds to adopt an act imposing on Member States obligations that go beyond what is laid down in Article 23 of Regulation No 4253/88 regarding the coordination of the various structural operations.

   Article 155 of the Treaty only gives the Commission the power to make recommendations and deliver opinions, which, according to Article 189 of the Treaty, are not binding on their addressees, whilst Article 4 of Regulation No 2052/88 merely indicates that the Commission may take initiatives and implementing measures in support of structural operations, with Community action nevertheless being conceived as complementing or contributing to national operations within the framework of concerted action involving the Commission, the Member State concerned and the competent authorities designated by the latter at the appropriate level and being confined to the preparation, financing, monitoring and assessment of operations. Moreover, according to Article 3 of Regulation No 2052/88, 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.

   It follows that the Code of conduct on implementing provisions for Article 23 of Regulation No 4253/88 is an act which was adopted by an authority which had no power to adopt it and accordingly must be annulled.

REPORT FOR THE HEARING
in Case C-303/90 *

I — The applicable Community legislation

1. *Articles 130a to 130e of the EEC Treaty*

Articles 130a to 130e of the EEC Treaty concern economic and social cohesion.

Article 130a requires the Community to develop and pursue its actions leading to the strengthening of its economic and social cohesion. In particular, it is to aim at reducing disparities between the various regions and the backwardness of the least-favoured regions.

According to Article 130b, the Community is to support the achievement of these

* Language of the case: French.

objectives by the action it takes through the structural funds (European Agricultural Guidance and Guarantee Fund, Guidance Section, European Social Fund, European Regional Development Fund), the European Investment Bank and the other existing financial instruments.

Article 130d stipulates that, once the Single European Act enters into force, the Council is to act on a proposal from the Commission on the amendments necessary to clarify and rationalize the tasks of the structural funds in order to contribute to the achievement of the objectives set out in Articles 130a and 130c, to increase their efficiency and to coordinate their activities between themselves and with the operations of the existing financial instruments. Article 130e lays down that implementing decisions relating to the European Regional Development Fund are to be taken by the Council, acting by a qualified majority on a proposal from the Commission and in cooperation with the European Parliament. With regard to the other funds, Articles 43, 126 and 127 of the Treaty remain applicable.

2. *The regulations concerning the structural funds*

The objective of economic and social cohesion was implemented by Council Regulations (EEC) Nos 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).

The first part of Regulation No 2052/88 concerns the objectives and tasks of the structural funds. Article 3(4) provides that:

'The specific provisions governing operations under each Structural Fund shall be laid down in the implementing Decisions adopted pursuant to Article 130e of the Treaty. They shall establish in particular the procedures for providing assistance in one of the forms defined in Article 5(2), the conditions of eligibility and the rates of assistance. Without prejudice to paragraph 5 of this Article they shall also establish the arrangements for the monitoring, assessment, financial management and checking of measures and any transitional provisions necessary in relation to existing rules.'

The second part contains provisions on the method which these Funds use to grant financial assistance.

Article 4(1) and (2) is worded as follows:

'1. Community operations shall be such as to complement or contribute to corresponding national operations. They shall 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, with each party acting as a partner in pursuit of a common goal. These consultations are hereinafter referred to as the "partnership". The partnership shall cover the preparation, financing, monitoring and assessment of operations.

2. Acting in accordance with the provisions of this Regulation and with the provisions referred to in Article 3(4) and (5), the Commission shall take the steps and measures necessary to ensure that Community operations are in support of the objectives set out in Article 1 and impart to national initiatives an added value.'

Article 5 gives details of the different forms of assistance, while Article 6 provides for the monitoring and assessment of Community operations.

Article 23(1) of Regulation No 4253/88, entitled 'Financial control', lays down that:

'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.

When submitting requests for payment, Member States shall make available to the Commission any appropriate national control reports on the measures included in the programmes or other operations concerned.'

3. *The Code of conduct*

By letter dated 30 July 1990, the Commission notified to Member States a document 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' (hereinafter referred to as 'the Code'). This document was published in the Official Journal of 9 August 1990 (C 200, p. 3).

The Code is worded as follows:

'1. *Scope*

The measures laid down in this Code of conduct concern all the forms of assistance provided for in Article 5 of Council Regulation (EEC) No 2052/88 relating to the European Regional Development Fund, the European Social Fund and the EAGGF Guidance Section.

Member States must report all cases over ECU 4 000 affecting the Community Budget.

When a measure is financed by both sections of the EAGGF, reports are to be made in accordance with the provisions laid down for EAGGF Guarantee. Reference to such reports should be made in notifications performed under the present Code of conduct.

2. *Concept of irregularity*

Without prejudice to Article 24 of Regulation (EEC) No 4253/88, "irregularity" means any infringement of a Community or national provision by a natural or legal person and affecting the Community budget.

3. *Reports on national systems*

Member State should communicate to the Commission within three months after notification of this Code of conduct:

— the provisions adopted with a view to preventing and taking action against irregularities,

— the services responsible for preventing and taking action against irregularities,

— the main procedural provisions of their administrative authorities.

This obligation also extends to changes occurring after the date of the first report.

4. *Reports on cases of irregularity*

In the course of the two months following January, May and September each year, Member States should transmit to the Commission a return setting out the cases of irregularity that have been discovered by an administrative authority or that have been the subject of prosecutions.

To that end, they should provide the available details regarding:

— the identification of the operation in question, indicating, where appropriate, any previous communication pursuant to this paragraph,

— the period during which, or the moment at which, the irregularity was committed,

— except where contrary to legal provisions, the identity of beneficiaries as well as 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,

— the services or bodies which:

(a) discovered the irregularity;

(b) are responsible for taking follow-up action at administrative or judicial level.

In the event of there being no cases of irregularity requiring notification, Member States should also inform the Commission, by means of a nil return within the time-limit laid down in the first subparagraph.

For cases reported, further information on the state of procedures underway must be transmitted according to the same timetable, where there have been subsequent developments.

Member States should inform the Commission of administrative and judicial decisions terminating the recovery procedures in respect of funds improperly paid.

5. *Irregular practices*

Member States should inform the Commission forthwith of any irregular practices which have been discovered which involve a new practice employed by beneficiaries. They should also give notification without delay of any irregularities where there is reason to believe that implications could arise outside their own territory.

6. *Transmission of information between Member States and the Commission*

The Commission will maintain appropriate contacts with the Member States concerned with a view to supplementing the information provided on irregularities and on the likelihood of recovery.

It will organize at Community level information meetings for representatives of Member States in order to examine with them the information obtained, especially regarding the lessons to be drawn for preventive measures.

The Commission will inform the Community Committee for the Coordination of Fraud Prevention about these activities.

7. *Confidentiality*

Member States and the Commission must take all the security measures necessary to ensure that information exchanged between them remains confidential.

8. *Reports to the Community Committee on Fraud Prevention*

The Commission will advise the Community Committee for the Coordination of Fraud Prevention of the number of cases notified to it and the number of cases that have been completed together with the total amount of sums recovered, in the process of being recovered, not recovered, and irrecoverable. The respective Structural Funds Committees are to be informed in the same manner.'

II — Procedure before the Court

The application of the French Republic was lodged at the Court Registry on 4 October 1990.

The *French Republic, the applicant,* claims that the Court should:

(i) annul the 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';

(ii) order the Commission to pay the costs.

The *Commission, the defendant,* contends that the Court should:

(i) dismiss the application as inadmissible and in the alternative as unfounded;

(ii) order the French Republic to pay the costs.

Upon hearing the report of the Judge-Rapporteur and the views of the Advocate General, the Court decided to open the oral procedure without any preliminary inquiry.

III — Submissions and arguments of the parties

1. *The genesis of the Code*

The Commission explained that the Code of conduct was the result of a declaration it had placed in the minutes of the Council at the time of adoption of Regulation No 4253/88. This declaration is worded as follows:

'The Commission declares that it will take the necessary measures within its competence to ensure the application of uniform arrangements in the various Member States for the monitoring and checking of any irregularities concerning Community assistance.' *

* Unofficial translation.

According to the Commission, by means of this declaration it notified Member States that it would present them with arrangements for implementing Article 23(1) of Regulation No 4253/88. On 12 June 1989 the Commission announced its intention to draw up a Code of conduct in a report in which it stated that it was establishing two working groups, one of which was charged with laying down the means of implementing the provisions of Article 23(1) of the abovementioned Regulation. The Commission considered that following approval of its anti-fraud work programme by the Ecofin Council on 19 July 1989 and the adoption by the European Council of a text in which the latter underlined the need for stern action to tackle the problem of fraud affecting the Community budget, its intention of proposing a uniform means of implementing Article 23(1) had been approved at the highest political level.

On 18 December 1989 it approved document C(89) 2048/4 containing the draft Code of conduct. Point 26 of Appendix 1 to this document states:

'In order to fulfil the obligations imposed by the second indent of Article 23(1) of Regulation No 4253/88 and by declaration No XV in the minutes of the Council meeting of 14 December 1988, the partners shall comply with the Code of conduct to be agreed between the Commission and the Member States in order to ensure the detection of any irregularities in the operation of the form of assistance.' *

The Commission repeated its proposal to set up a working group in order to specify the implementing provisions for Article 23(1) in its programme of work annexed to a report submitted to the Council on 31 January 1990, point 16 of which stated that the text of the Code of conduct was to be agreed between the Commission and the Member States.

This Code of conduct was submitted to the Community Committee for the Coordination of Fraud Prevention (hereinafter referred to as 'the Fraud Prevention Committee'), composed of representatives of the Member States. At a meeting of the Fraud Prevention Committee on 19 and 20 February 1990, the Commission recalled that the Code of conduct was no more than a means of implementing Article 23(1).

At the meeting of the Ecofin Council on 12 March 1990 and at the meetings of the Fraud Prevention Committee, delegations discussed the question of the legal form to be given to this Code of conduct. Certain divergences of opinion on the legality of the Code were resolved at the meeting of the Fraud Prevention Committee on 8 May 1990, where, with the exception of Spain and the United Kingdom, the delegations accepted that the text of the Code laid down the means of applying Article 23(1) without imposing fresh obligations on Member States.

At the meeting on 17 July 1990, at which the reservations of Spain and the United Kingdom were removed, France indicated certain concerns as to the legal form of the Code. By telex of 25 July 1990 from the Permanent Representation, this Member State declared:

'In view of the importance of the objective being pursued with regard to the fight against fraud, the French delegation agrees

* Unofficial translation.

to the draft Code of conduct regarding the implementation of Article 23 of Regulation No 4253/88. It nevertheless reiterates its concerns regarding the legal status of the text. It notes, in any case, that the Code shall not impose on the Member States any new administrative obligations for which Article 23 of the said Regulation does not provide.'

Subsequently, the Code of conduct was officially notified to Member States by letter dated 30 July 1990.

2. *Admissibility*

In its rejoinder, the *Commission* raises an objection of inadmissibility. It considers that by virtue not only of the circumstances in which the Code was adopted but also of the means whereby it was formulated, drafted and published, the Code does not meet the conditions rendering it a measure against which an action for annulment can be brought.

According to the Commission, the Code is no more than a consensus negotiated and accepted by itself and the Member States with regard to a uniform method of implementing the obligations imposed by Article 23(1) of Regulation No 4253/88. The Commission set out its evaluation of these obligations and submitted this approach to the Member States. After discussion, the latter reached agreement on the tenor of Article 23(1) and on the information that each of them could and/or agreed to communicate to the Commission. In this way, the Member States can be certain that the Commission has similar information on all irregularities arising in any of the national territories.

The Commission emphasizes that the Code can be considered as an opinion which Member States have agreed to follow within the framework of the cooperation established between the Commission and Member States both by Article 5 of the Treaty and by Article 23(1). As a consensual document, the Code cannot have any mandatory legal effect for Member States and the fact that the Member States agreed to comply with it in future does not imply that the Code had altered their legal situation as deriving from Article 23(1). Such an opinion cannot therefore be challenged. In this regard, the Commission refers especially to the three judgments of 13 December 1990 (in Cases T-113/89, T-114/89 and T-116/89 *Nefarma, VNZ and Prodifarma* v *Commission* [1990] ECR II-797, II-827 and II-843) in which the Court of First Instance recalled that opinions expressed by the Commission to the authorities of a Member State in fields in which it does not have competence to adopt binding decisions are no more than opinions having no legal effect.

In its present form, the Code is neither intended to have binding legal effects nor intended significantly to alter the legal situation of Member States. The Commission recalls that, in its judgment of 27 September 1988 in Case 114/86 *United Kingdom* v *Commission* [1988] ECR 5289, the Court held that in order for an action for annulment to lie against an act the act in question must be intended to have legal

effects. Furthermore, the Commission recalls that the various terms used to describe the Code (implementing guide, negotiated consensus, gentleman's agreement) confirm that the document is not designed to have new binding legal effects.

The *French Government* contends that the document, whatever its form, constitutes a measure against which an action can be brought under Article 173 of the Treaty. The French Government cites the judgment of 9 October 1990 delivered by the Court in Case C-366/88 *France* v *Commission* [1990] ECR I-3571. This precedent is applicable since the Code alters the nature of the Member States' duty to monitor operations and to notify the Commission. Moreover, the Commission has no competence of its own nor has it been explicitly empowered to implement Article 23(1) of Regulation No 4253/88.

3. *The substance*

According to the *French Government*, the Commission intended, by means of a 'consensus' which had been obtained in the context of partnership within the Fraud Prevention Committee, to be able to exercise with regard to the structural funds powers similar to those it enjoyed with regard to measures to combat fraud affecting the Community budget, which were the subject of Council Regulation (EEC) No 283/72 (Official Journal 1972 L 36, p. 1). Although such an initiative may reinforce the means of combating fraud and irregularities, the Community decision-making rules must be respected.

First plea in law: the Commission's lack of competence

According to the *French Government*, Article 23(1) of Regulation No 4253/88 does not give the Commission any power to specify or increase the obligations placed upon Member States in the exercise of their duty to monitor and their duty to inform. Under this provision, Member States retain the choice of the means of fulfilling these obligations and are bound only to achieve a particular result. Article 3(4) of Regulation No 2052/88 states 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. This latter provision establishes the competence of the Council.

Moreover, the French Government considers that the declaration made by the Commission at the time of adoption of Regulation No 4253/88 has no legal force. In this regard, the French Government cites the judgment of 30 January 1985 in Case 143/83 *Commission* v *Denmark* [1985] ECR 427.

As to the concept of partnership raised by the Commission, the French Government observes that this cannot alter the method of decision-making, given that the Commission has no autonomous powers of initiative with regard to the monitoring of fraud and irregularities nor any explicit delegated powers to implement Article 23(1).

In order to meet its purpose, the Code should do no more than provide a simple commentary on Article 23(1). In reality, the object of the Code is to regulate the conduct of Member States. The French Government stresses that this text has been officially notified and published. Its title 'Code of conduct' shows that it is clearly normative in nature. In particular, paragraphs 3 and 4 contain prescriptions that far exceed the implementation of the principles laid down by Article 23(1). The Code places new obligations on Member States in the context of the establishment of a system for the integrated monitoring of the use of the Community's structural funds.

The Code contains provisions which are proper to a regulation in that they lay down not only the means whereby Member States should perform their duty to inform. The Commission itself set the scope of this duty by defining the concept of irregularity and the threshold above which the notification of irregularities is mandatory (ECU 4 000). Furthermore, there is an analogy between this Code of conduct and a draft regulation aimed at amending Regulation No 283/72 concerning the EAGGF. The French Government underlines that the forms to be completed by Member States are an adaptation of the form used for notifying cases of fraud and irregularities under Regulation No 283/72, but with the difference that the latter has been formally approved by the Council.

Paragraph 4 of the Code of conduct replaces the Member States' duty to inform by requirements to provide additional information on the natural or legal persons involved in the irregularity and on developments in judicial and administrative proceedings. Although, according to this provision, notification must take place 'except where contrary to legal provisions', this formula covers only individual data whose communication is expressly forbidden by national law. The Commission might possibly record individuals' names in a computerized data base without the persons involved having the safeguards in this respect that they enjoy for files subject to French legislation.

Information on the state of administrative and judicial proceedings may conflict with the principle of investigative confidentiality governing criminal proceedings in France and, in the case of accounting and financial control exercised by regional chambers of auditors, the rule that nothing is divulged on proceedings in progress.

The Code of conduct would contravene the principle of legal certainty, as this document, which is as easy to cancel as it is to adopt, uses terms lacking in precision. In particular, the need to communicate 'the identity of beneficiaries as well as natural and legal persons involved in the irregularity' may have important consequences for individuals or enterprises to the extent that the term 'to involve' has not been precisely defined.

Second plea in law: infringement of Community law

The Code of conduct is contrary to Articles 155 and 189 of the Treaty and to Council Regulation No 4253/88, which gives the Commission no competence to comment thereon and to alter its effects.

Third plea in law: misuse of procedure

The adoption of the Code of conduct constitutes a misuse of procedure. On the supposition that the Commission was entitled to take measures simply clarifying Article 23(1), it could not adopt in this form measures entailing such consequences for Member States.

The *Belgian Government* is of the opinion that the Code is more than a simple clarification of Article 23(1). The Code has specific legal effects which normally derive from a regulation, for three reasons.

First, a reading of the Code shows that Member States are no longer free to choose the means of achieving the objective of monitoring the use of the funds and meeting the requirement to notify the Commission. While constituting a measure implementing Article 23(1) of Regulation No 4253/88, the Code imposes precise obligations that do not automatically flow from the general terms of this provision.

Secondly, Article 23(1) confers on the Commission no enabling powers for its implementation. The applicable provisions confirm the need for a Council decision for any measure entailing legal obligations.

Thirdly, the draft regulation amending Regulation No 283/72 concerning irregularities and the recovery of sums wrongly paid in connection with the financing of the common agricultural policy contains measures similar to those in the Code. According to the Belgian Government, it therefore seems inconsistent to establish, for one and the same subject-matter, on the one hand legally binding regulations and on the other simple recommendations that have no legally binding force for Member States.

Accordingly, the Belgian Government endorses the conclusions of the French Government.

The *Commission* considers that it was competent to propose measures for the uniform implementation of the obligations deriving from Article 23(1) by virtue of either Article 155 of the Treaty or Article 4(2) of Regulation No 2052/88. According to the Commission, the latter provision permits it to communicate these arrangements to Member States without prior negotiation, as they do not add to the text of Article 23(1). However, the Commission interprets its powers as falling within the framework of the partnership established by Article 4. The Commission cites examples of 'communications' in other fields whereby it informed Member States

of the way in which it intended either to interpret national action or to apply a judgment of the Court in practice without these communications imposing an obligation on Member States.

According to the Commission, Article 189 does not prevent it from concluding arrangements with Member States on the scope of a Community provision. The emergence of such consensus guarantees legal certainty for all parties, as they know in practice the extent of their obligations without these practices affecting the rights of third parties.

As to paragraph 1 of the Code (Scope), the Commission contends that it is competent to agree with the Member States that, at least initially, it will not require notification of minor cases in order to avoid administrative work disproportionate to the objective pursued. The intention of the threshold is not to increase Member States' obligations, but on the contrary to limit the practical effect of Article 23(1), which requires every irregularity to be reported.

The concept of irregularity (paragraph 2) constitutes a definition that has already been accepted by the Council in connection with the adoption of Regulation No 283/72.

As regards paragraph 3 (Reports on national systems), the Commission is of the opinion that Article 23(1) permits it to ask Member States to notify it of existing measures and those that have been taken to prosecute irregularities and of the services responsible.

The purpose of paragraph 4 (Reports on cases of irregularity) is to permit the Commission to monitor the problem of fraud across the Community as a whole. The qualification 'except where contrary to legal provisions' is perfectly clear. If national law prohibits the communication of such information, the Commission cannot have access to it. As to the complaint that the Code would force France to reform its penal legislation, the Commission notes that the obligations stem only from Article 23(1). Moreover, France has already had to submit to the similar obligations imposed by Regulation No 283/72. A Member State may not plead internal legal procedures in order to justify refusing to fulfil its obligation to inform the Commission of the progress of proceedings under way on its national territory.

According to the Commission, an analysis of the Code shows that its provisions, far from exceeding the obligations imposed by Article 23(1), are confined to explaining the information that Member States have agreed to communicate to the Commission.

P. J. G. Kapteyn
Judge-Rapporteur