OPINION OF ADVOCATE GENERAL SAGGIO

delivered on 11 March 1999 *

1. In this action, the Commission is seeking the annulment of Council Regulation (EC) No 515/97 of 13 March 1997 on mutual assistance between the administrative authorities of the Member States and cooperation between the latter and the Commission to ensure the correct application of the law on customs and agricultural matters. [1] At issue is the legal basis of the regulation, adopted on the basis of Articles 43 and 235 of the EC Treaty. The applicant takes the view that the contested regulation should have been adopted instead on the basis of Articles 43 and 100a of the EC Treaty. By orders of the President of the Court of 29 September 1997 and 1 December 1997, the European Parliament and the French Government were granted leave to intervene in support of the forms of order sought by the Commission and the Council respectively.

2. The establishment of the correct legal basis of the contested measure is not merely a matter of form. The legal basis serves to define the procedure to be followed in that particular context as regards both the role of the institutions taking part in the legislative process and the majority required to adopt the measure. It is a well-known fact that Article 235 simply provides for the Parliament to be consulted and for the Council to act unanimously; Article 100a establishes that the Council is to act in accordance with the co-decision procedure referred to in Article 189b, which entails qualified majority voting and greater participation by the Parliament in the adoption of the measure. In these circumstances, it is clear therefore that the choice of legal basis affects the drafting process and may thus also affect the content of the measure. Consequently, in accordance with settled case-law, if it were to be found that an incorrect legal basis had been chosen, this would represent a breach of essential procedural requirements such as to render the measure unlawful under Article 173 of the EC Treaty.

Legal framework

3. On 13 March 1997 the Council adopted Council Regulation (EC) No 515/97 on

* Original language: Italian.

1 — OJ 1997 L 82, p. 1.

mutual assistance between the administrative authorities of the Member States and cooperation between the latter and the Commission to ensure the correct application of the law on customs and agricultural matters (hereinafter referred to as 'the regulation'). Article 52 of the regulation expressly repeals Council Regulation (EEC) No 1468/81 of 19 May 1981 [2] bearing the same title and adopted on the legal basis of Articles 43 and 235 of the EEC Treaty.

4. During the procedure leading to adoption of the measure, the Council, in making several amendments to the text of the draft proposal from the Commission, also decided unanimously to modify the legal basis suggested in the proposal, in particular replacing Article 100a with Article 235. The measure was therefore adopted in accordance with the consultation procedure referred to in Article 189a of the Treaty instead of the co-decision procedure referred to in Article 189b.

5. Certain points in the preamble to the regulation are important in this connection. The first recital states that 'combating fraud in the context of the customs union and the common agricultural policy calls for close cooperation between the administrative authorities responsible in each Member State for the application of provisions adopted in those fields; ... it also calls for appropriate cooperation between these national authorities and the Commission, which is responsible for ensuring the application of the Treaty and the provisions adopted by virtue thereof; ... effective cooperation in this field strengthens the protection of the financial interests of the Community'.

The next recital adds that 'rules should therefore be drawn up whereby the Member States' administrative authorities assist each other and cooperate with the Commission in order to guarantee the proper application of customs and agricultural regulations and legal protection for the Community's financial interests, in particular by preventing and investigating breaches of those regulations and by investigating operations which are or appear contrary to those regulations'.

The 12th recital states that 'with a view to securing the rapid and systematic exchange of information forwarded to the Commission, there is a need to set up a computerised customs information system at Community level; ... in that context sensitive data concerning frauds and irregularities in the customs and agricultural domains should be stored in a central database accessible to the Member States, while ensuring that the confidential nature of the information exchanged, in particular data of a personal nature, is respected; ... given the justifiable sensitivity of the issue,

2 — OJ 1981 L 144, p. 1, amended by Council Regulation (EEC) No 945/87 of 30 March 1987.

there should be clear and transparent rules to protect the freedom of the individual'. The next recital adds that 'customs authorities have daily to apply both Community and non-Community provisions; ... it is therefore desirable to have available a single infrastructure for applying these provisions'.

Finally, the last recital states that 'the provisions of this regulation refer both to the application of the rules of the common agricultural policy and to the application of customs legislation; ... the system set up under this regulation constitutes an integral Community entity; ... since the provisions of the Treaty specifically covering customs matters do not empower the Community to set up such a system, it is necessary to invoke Article 235'.

6. Article 1(1) of the regulation states that '[t]his regulation lays down the ways in which the administrative authorities responsible for implementation of the legislation on customs and agricultural matters in the Member States shall cooperate with each other and with the Commission in order to ensure compliance with that legislation within the framework of a Community system'.

To that end, the regulation lays down a series of rules relating to assistance on request (Title 1) and spontaneous assistance (Title II). Titles III and IV are devoted to relations between the national administrative authorities and the Commission and to relations with third countries respectively. Title V, which is divided into eight chapters, establishes an automated information system called the 'Customs Information System' ('the CIS'). Under Article 23(1), the system is to 'meet the requirements of the administrative authorities responsible for applying the legislation on customs or agricultural matters, as well as those of the Commission'. Article 23(2) states that the aim of the CIS is to 'assist in preventing, investigating and prosecuting operations which are in breach of customs or agricultural legislation, by increasing, through more rapid dissemination of information, the effectiveness of the cooperation and control procedures of the competent authorities referred to in this Regulation'. Article 23(3) adds that, '[t]he customs authorities of the Member States may use the technical infrastructure of the CIS in the performance of their duties in the framework of the customs cooperation referred to in Article K.1 (8) of the Treaty on European Union'. Finally, Article 23(6) provides that Member States and the Commission are to be 'CIS partners'.

7. The operation and organisation of the CIS are governed by Articles 24 to 42. The CIS is to consist of a central database accessible via terminals in each Member State and at the Commission. The system is to comprise exclusively data, including personal data, necessary to fulfil its aim as stated in Article 23. Direct access to such data is to be reserved exclusively for the national authorities designated by each Member State and the departments designated by the Commission (Article 29(1)). Personal data included in the database is to be protected under national legislation or internal rules applicable to the Commission, 'guaranteeing the protection of the rights and freedoms of individuals' (Article 34(1)).

Analysis of the regulation

8. Coming now to the substance of the case. I should first point out that, in accordance with settled case-law, in the context of the organisation of the powers of the Community the choice of the legal basis for a measure cannot depend simply on an institution's conviction as to the object pursued, but must be based on objective factors which are amenable to judicial review. Those factors include in particular the aim and content of the measure. [3] It is necessary, therefore, to consider whether the intended aims and the content of the regulation, are such as to justify invoking Article 235 which, it is clear from the terms in which it is couched, is a residual provision. It may therefore be used as the legal basis for a measure only where no other provision of the Treaty gives the Community institutions the necessary power to adopt it. [4]

9. The Commission and the Council disagree on both the aspects mentioned above. The Council holds that the aim of the regulation is to combat fraud in the context of the protection of the financial interests of the Community and that the content is the establishment of an independent Community body. The Commission, for its part, maintains that the regulation constitutes a

3 — See judgments in Case C-300/89 *Commission* v *Council* [1991] ECR I-2867, paragraph 10; Case C-295/90 *Parliament* v *Council* [1992] ECR I-4193, paragraph 13; Case C-155/91 *Commission* v *Council* [1993] ECR I-939, paragraph 7; Case C-271/94 *Parliament* v *Council* [1996] ECR I-1689, paragraph 14.

4 — For settled case-law on the matter, see judgments in Cases C-350/92 *Spain* v *Council* [1995] ECR I-1985; C-271/94 *Parliament* v *Council* [1996] I-1689 cited above, paragraph 13.

form of harmonisation of legislation, at least in the domain of personal-data protection, and that it is intended to ensure the proper functioning of the internal market.

10. To be more precise the Commission submits that the regulation is intended to ensure the correct application of customs and agricultural legislation and therefore, by definition, the proper functioning of the internal market, hence the need to have recourse to Article 100a of the Treaty. The Commission adds that the fight against fraud, and therefore the protection of the financial interests of the Community, is not an independent objective but follows from the establishment of the customs union. As regards the content of the regulation, the Commission submits that it comprises two parts: first the improvement of mutual assistance between Member States, and second, the establishment of the CIS. In its view recourse to Article 235 is not justified in either case: as regards the first part, it argues that this is a matter of harmonising the Member States' legislation on mutual assistance between the administrative authorities to ensure the correct application of the law on customs and agricultural matters; as regards the CIS, the Commission submits that the operation and use of the system require harmonised action by the Member States, while the role of the Commission, although it is a partner in the system on the same footing as the Member States, is limited simply to coordinating the activities of the national administrative authorities. In any case, even if recourse to Article 235 were to be considered necessary for the establishment of the CIS, the correct legal base would, nevertheless be Article 100a as recourse to several legal bases is precluded if one of them provides for the use of the cooperation rather than the consultation procedure. The Commission concludes by requesting the Court to annul the contested regulation on the ground that it is in breach of essential procedural requirements. This opinion is shared by the Parliament which observes that the contested regulation is intended to approximate national legislation, adding that the CIS is not an independent body but simply an instrument at the service of the Community, so that its establishment should not have affected the choice of legal basis.

11. For its part, the Council observes that the contested regulation has as its objective the establishment of a legally independent body at Community level. It maintains that a comparison between that regulation and the previous one, Regulation No 1468/81,

which it replaced shows that it was intended to re-draft the text, with a single objective for the entire system, namely to protect the financial interests of the Community. Moreover, it claims, that objective is referred to specifically in Article 209a of the Treaty, introduced by the Single European Act, although in its present form it does not confer the necessary powers on the Community institutions to achieve such an objective. Hence the need to invoke Article 235 of the Treaty. The Council states that the protection of the financial interests of the Community does not follow from the establishment of the customs union but constitutes an independent objective. This is confirmed by the position in the Treaty of Article 209a, not among the provisions on customs union but among the financial provisions. On the content of the regulation, the Council maintains that it creates an entire new system for the protection of the financial interests of the Community, based on the coordinated activities of the national administrative authorities and the Commission and also on the functioning of the CIS infrastructure. It is therefore an independent Community body, the establishment of which, the Council claims, goes beyond simply harmonising national legislation; hence the need to invoke Article 235 of the Treaty. As regards the provisions for the protection of personal data, the Council contends that they do not constitute a separate part of the regulation, and do not pursue separate objectives but are linked to the general system of which they form a part. The French Republic, intervening in support of the Council, observes that the purpose of the regulation is not the approximation of legislation but the fight against fraud in the context of customs and agriculture, and that the establishment of the CIS is the most important part of the contested regulation.

12. I believe that the submissions of the Council and France are correct. Indeed, as regards the objectives of the regulation, it is clear from the preamble (first and twentieth recitals) that the entire system established by the regulation is intended to promote the protection of the financial interests of the Community. In the system of the Treaty, that objective is completely independent of the functioning of the customs union and therefore of the internal market. It is sufficient here to consider the position in the Treaty of Article 109a: it is in Title II (Financial Provisions) in Part Five of the Treaty (Institutions of the Community) and not in Chapter 1 of Title I in Part Three, on the customs union. The protection of the financial interests of the Community is therefore a horizontal objective which, through the regulation in issue, is pursued specifically in the area of the fight against fraud in customs and agricultural matters. Moreover, the fact that the protection of the financial interests of the Community is an independent objective, quite distinct from the operation of the customs union, is borne out by the legislative practice prior to the regulation and in particular by the

adoption of other 'horizontal' regulations which have Article 235 as their legal basis. [5]

While it is true that cooperation between the administrative authorities of the Member States, and between them and the Commission, may be conducive to the proper functioning of the internal market, the link is nevertheless entirely indirect and as such cannot justify recourse to a provision, Article 100a, which concerns instead measures which have *as their object* the establishment and functioning of the internal market. It appears from the Court's case-law that recourse to Article 100a is not justified where the measure to be adopted has only the incidental effect of harmonising market conditions within the Community. The mere fact that the establishment or functioning of the internal market is affected is not sufficient for Article 100a of the Treaty to apply. [6] In the case at issue, we are dealing with a regulation which has as its objective the protection of the financial interests of the Community and which affects market conditions only indirectly. Therefore, even if it were to be held that the regulation also serves internal market objectives, inasmuch as it coordinates action by national administrations to ensure correct application of customs and agricultural regulations, those objectives are merely ancillary in relation to the main objective of the regulation, with the result that Article 100a cannot constitute the proper legal basis for its adoption. [7] The objective of protecting the financial interests of the Community is dealt with specifically in Article 209a which, however, in the form at present in force, [8] while it does set out the aims to be achieved, does not confer the necessary powers of action on the Community institutions, hence the need to invoke Article 235.

13. As regards the content of the regulation, it is quite consistent with the objec-

5 — See Council Regulation (EC, Euratom) No 2988/95 of 18 December 1995 on the protection of the European Communities' financial interests (OJ 1995 L 312, p. 1), and Council Regulation (Euratom, EC) No 2185/96 of 11 November 1996 concerning on-the-spot checks and inspections carried out by the Commission in order to protect the European Communities' financial interests against fraud and other irregularities (OJ 1996 L 292, p. 2).

6 — Judgment in Case C-70/88 *Parliament* v *Council* [1991] ECR I-4529, paragraph 17; judgment in Case C-155/91 *Commission* v *Council*, cited above, paragraph 19, and Opinion of Advocate General Tesauro, point 4, where he states that 'Article 100a should be regarded as relevant for the purposes of adopting a given measure only if that measure has as its *object* the establishment and functioning of the internal market, that is to say, only if it lays down rules specifically on the conditions of competition or trade within the Community'.

7 — Judgment in Case C-271/94 *Parliament* v *Council*, cited above, paragraph 32.

8 — The text of Article 209a (now Article 280 EC) is, in fact, amended by the Treaty of Amsterdam, which adds two new paragraphs (4 and 5). The first states that the Council, acting in accordance with the co-decision procedure and after consulting the Court of Auditors, 'shall adopt the necessary measures in the fields of the prevention of and fight against fraud affecting the financial interests of the Community with a view to affording effective and equivalent protection in the Member States. These measures shall not concern the application of national criminal law or the national administration of justice'. So, after the Amsterdam Treaty comes into force, it will no longer be necessary to have recourse to Article 235 to adopt measures to protect the financial interests of the Community.

tives set out above. The text lays down a complex system for the prevention and prosecution of breaches of Community customs and agricultural regulations. This system is based, on the one hand, on cooperation between the administrative authorities of the Member States and between those authorities and the Commission in accordance with the detailed rules laid down in the regulation; and on the other, on an infrastructure essential for this purpose, the CIS, which is set up specifically to assist the activities both of the national administrations and the Commission. The Commission's role in the general system is far from marginal, as may be seen from a number of provisions in the regulation (Articles 23(3) and (4), 29, 30 etc.). Furthermore, in Title IV, the regulation sets out rules governing relations with third countries, indicating the conditions and detailed rules for joint action by the national administrative authorities, the Commission and the administrative authorities of the third countries in question (Article 19 et seq.).

14. That being so, there appears to be ample justification for the statement in the last recital of the preamble to the regulation that the system set up under the regulation constitutes an 'integral Community entity', an independent body, the establishment of which does not require any 'harmonisation of national legislation' within the meaning of Article 100a of the Treaty (now Article 95 EC).

15. Finally, as regards the provisions of the regulation on the protection of personal data within the framework of the rules on the functioning of the CIS, suffice it to say that the text of the regulation does not include any harmonisation of national legislation in this area. In a context where the operation of the administrative system for ensuring compliance with agricultural and customs legislation might pose risks to the freedoms of individuals, the regulation requests the CIS partners (the Member States and the Commission) to adopt measures 'guaranteeing the protection of the rights and freedoms of individuals with regard to the processing of personal data' (Article 34). As regards the use of such data, the regulation requires CIS partners to observe certain rules concerning in particular the individuals' right of access to the data contained in the CIS. Clearly these rules, although directly applicable, are ancillary measures essential to the proper functioning of a system from which they cannot be separated for the purpose of determining independently whether their legal basis is correct. [9]

9 — This conclusion, namely that measures which are to govern the processing of personal data within a complex system of controls to ensure compliance with customs legislation cannot be evaluated separately them from the system of which they are an integral part, is confirmed by the practice adopted by the Commission itself. See Article 6 of the Proposal for a Council Regulation (EC, Euratom) establishing a European Fraud Investigation Office, submitted by the Commission on 4 December 1998 (OJ 1999 C 21, p. 10), with Article 235 of the Treaty as the legal basis.

Conclusion

16. In the light of the foregoing considerations, I propose that the Court should:

— dismiss the application;

— order the Commission to pay the Council's costs;

— order each of the interveners to bear its own costs.