

JUDGMENT OF THE COURT (Sixth Chamber)

18 November 1999 *

In Case C-209/97,

Commission of the European Communities, represented by M. Nolin and P. van Nuffel, of its Legal Service, acting as Agents, with an address for service in Luxembourg at the office of C. Gómez de la Cruz, of its Legal Service, Wagner Centre, Kirchberg,

applicant,

supported by

European Parliament, represented by J. Schoo, Head of Division in its Legal Service, and J.-L. Rufas Quintana, Principal Administrator in the same service, acting as Agents, with an address for service in Luxembourg at the General Secretariat of the European Parliament, Kirchberg,

intervener,

v

Council of the European Union, represented by B. Hoff-Nielsen, Head of Division in its Legal Service, M.C. Giorgi, Legal Adviser, and F. Anton, of its

* Language of the case: French.

COMMISSION V COUNCIL

Legal Service, acting as Agents, with an address for service in Luxembourg at the office of A. Morbilli, Director-General of the Legal Affairs Directorate of the European Investment Bank, 100 Boulevard Konrad Adenauer, Kirchberg,

defendant,

supported by

French Republic, represented by M. Perrin de Brichambaut, Director of the Legal Affairs Directorate of the Ministry of Foreign Affairs, and F. Pascal, Central Administrative Attaché in the same ministry, acting as Agents, with an address for service in Luxembourg at the French Embassy, 8B Boulevard Joseph II,

intervener,

APPLICATION for 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 (OJ 1997 L 82, p. 1),

THE COURT (Sixth Chamber),

composed of: P.J.G. Kapteyn, acting for the President of the Sixth Chamber, G. Hirsch (Rapporteur) and H. Ragnemalm, Judges,

Advocate General: A. Saggio,

Registrar: R. Grass,

having regard to the Report of the Judge-Rapporteur,

after hearing the Opinion of the Advocate General at the sitting on 11 March 1999,

gives the following

Judgment

- 1 By application lodged at the Court Registry on 2 June 1997, the Commission of the European Communities brought an action under Article 173 of the EC Treaty (now, after amendment, Article 230 EC) for 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 (OJ 1997 L 82, p. 1, hereinafter 'the contested regulation').
- 2 Article 52 of the contested regulation repeals Council Regulation (EEC) No 1468/81 of 19 May 1981 (OJ 1981 L 144, p. 1), which was based on

Article 43 of the EEC Treaty (now, after amendment, Article 37 EC) and Article 235 of the EEC Treaty (now Article 308 EC).

3 Regulation No 1468/81 was itself amended by Council Regulation (EEC) No 945/87 of 30 March 1987 (OJ 1987 L 90, p. 3), whose legal basis was likewise Articles 43 and 235 of the Treaty.

4 According to the third and fourth recitals in the preamble to the contested regulation, the Community legislature considered that the system established by Regulation No 1468/81 had proved effective but that it was necessary, in the light of experience gained, to replace it in its entirety.

5 The Commission thus submitted to the Council on 23 December 1992 a draft regulation whose legal basis was Article 43 of the EC Treaty, Article 100a of the EC Treaty (now, after amendment, Article 95 EC) and Article 113 of the EC Treaty (now, after amendment, Article 133 EC). During the negotiations within the Council, the Commission abandoned Article 113 since the provision in the draft justifying recourse to that article was deleted. After consulting the European Parliament, the Council unanimously decided, in accordance with the procedure laid down in Article 189a(1) of the EC Treaty (now Article 250(1) EC), to delete Article 100a of the Treaty and replace it with Article 235 of the Treaty. The Council thus adopted Articles 43 and 235 of the Treaty as the legal basis for the contested regulation.

6 The contested regulation, as stated in Article 1 thereof, lays down the ways in which the administrative authorities responsible for implementation of legislation on customs and agricultural matters in the Member States are to cooperate with

each other and with the Commission in order to ensure compliance with that legislation within the framework of a Community system.

- 7 To that end, the contested regulation lays down, in Titles I and II, rules relating to assistance on request (Articles 4 to 12) and spontaneous assistance (Articles 13 to 16). Titles III and IV are respectively devoted to relations between the competent authorities of the Member States and the Commission (Articles 17 and 18) and to relations with third countries (Articles 19 to 22).
- 8 Title V (Articles 23 to 41) is divided into eight chapters. Chapter 1 establishes an automated information system called the 'Customs Information System' (hereinafter 'the CIS') to meet the requirements of the administrative authorities responsible for applying legislation on customs or agricultural matters, as well as those of the Commission (Article 23(1)). 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'. Under Article 23(3), the 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 (Articles K to K.9 of the Treaty on European Union have been replaced by Articles 29 EU to 42 EU). Finally, Article 23(6) provides that the Member States and the Commission are to take part in the CIS as 'CIS partners'.
- 9 Chapters 2 to 8 of Title V of the contested regulation contain rules relating to the organisation and operation of the CIS. Thus, under Article 24, the CIS is to consist of a central database facility accessible via terminals in each Member State and at the Commission, and is to comprise exclusively data necessary to fulfil its aim as stated in Article 23(2), including personal data. In accordance with Article 29(1), direct access to data included in the CIS is to be reserved

exclusively for the national authorities designated by each Member State and the departments designated by the Commission.

- 10 Chapter 5 of Title V is specifically devoted to the protection of personal data. Article 34(1) provides that, no later than the date on which the contested regulation first applies, each CIS partner intending to receive personal data from, or include such data in, the CIS is to adopt national legislation, or internal rules applicable to the Commission, guaranteeing the protection of the rights and freedoms of individuals with regard to the processing of personal data.
- 11 By order of the President of the Court of 29 September 1997, the French Government was granted leave to intervene in support of the form of order sought by the Council. By order of the President of the Court of 1 December 1997, the Parliament was granted leave to intervene in support of the form of order sought by the Commission.
- 12 In its application, the Commission relies on a single plea, to the effect that the legal basis adopted was inappropriate. In its submission, the Council should have based the contested regulation on Articles 43 and 100a of the Treaty, not on Articles 43 and 235.
- 13 A preliminary point to note is 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 must be based on objective factors which are amenable to judicial review. Those factors include, in particular, the aim and content of the measure (see, in particular, Case C-300/89 *Commission v Council* [1991] ECR

I-2867 (the '*Titanium dioxide*' case), paragraph 10, and Joined Cases C-164/97 and C-165/97 *Parliament v Council* [1999] ECR I-1139, paragraph 12).

- 14 The Commission submits that the contested regulation is intended to ensure the proper functioning of the customs union and thus of the internal market, a circumstance which justifies recourse to Article 100a of the Treaty. Moreover, the protection of the financial interests of the Community within the meaning of Article 209a of the EC Treaty (now, after amendment, Article 280 EC), hence the fight against fraud, is not an independent objective but follows from the establishment of the customs union.
- 15 The Parliament argues that the contested regulation goes beyond merely protecting the financial interests of the Community. In many respects, its grounds related to the approximation of the provisions laid down by law, regulation or administrative action of the Member States concerned with the establishment and functioning of the common market, within the meaning of Article 100a of the Treaty.
- 16 So far as concerns the content of the contested regulation, the Commission submits that it comprises, first, the improvement of mutual assistance between the Member States and the Commission to ensure the correct application of the law on customs and agricultural matters, and second, the creation, within the framework of the CIS, of a central database facility accessible to the Member States and the relevant Commission departments. In its submission, the legal basis for the enhanced cooperation is contained within Article 100a of the Treaty since that cooperation requires a real harmonisation of national laws. As regards the establishment of the CIS, the Commission maintains that while the CIS is not itself capable of harmonising national laws, it is nevertheless common ground that it could not operate without their harmonisation.
- 17 The Commission submits in the alternative that, if recourse to Article 235 of the Treaty had to be considered necessary given the creation of the CIS, the

provisions relating to mutual assistance given on request or spontaneously should nevertheless have been based on Article 100a. The question of a possible dual legal basis therefore arises. In accordance with the *Titanium dioxide* judgment, only Article 100a is applicable in such a case.

- 18 According to the Parliament, the fact that a regulation setting up an instrument (database) which is placed in the service of mutual assistance within the framework of the internal market also serves to counter fraud affecting the financial interests of the Community cannot alter the legal basis, which is Article 100a of the Treaty.
- 19 The Council, by contrast, maintains that the aim of Regulation No 1468/81, unlike that of the contested regulation, was the proper functioning of the customs union and the common agricultural policy, which required close cooperation between the national administrative authorities. The objective of the contested regulation, on the other hand, is to combat fraud in the context of the customs union and the common agricultural policy, which calls for cooperation between the same authorities. The protection of the financial interests of the Community, introduced by Article 209a of the Treaty, does not follow from the establishment of the customs union but constitutes an independent objective.
- 20 As regards content, the Council contends that the contested regulation reflects the objective of protecting the financial interests of the Community since it sets up a system to combat fraud which also respects civil liberties, the two aspects being inextricably linked. So far as concerns the fight against fraud, the new system is administrative in nature, constitutes a Community entity and is designed to strengthen the operational character of customs cooperation between Member States. Since that system goes beyond simple customs cooperation, Article 235 of the Treaty had to be relied on: the competence conferred on the Community by

Article 209a, in the version in force when the contested regulation was adopted, was not an adequate basis for a measure of that kind.

- 21 The French Government maintains that the contested regulation is not designed to harmonise national provisions but to combat fraud in the context of the customs union and the common agricultural policy. While the establishment of the CIS results in the introduction of certain specific rules concerning data protection, that does not in its submission mean that the aim of the contested regulation consists in harmonising data protection in the Community.
- 22 In the present case it is necessary, in order to ascertain the aim of the contested regulation, to take account of the legislative changes from the adoption of Regulation No 1468/81 up until the contested regulation.
- 23 First, the objective of Regulation No 1468/81 was to ensure the proper functioning of the customs union and the common agricultural policy. In order to attain that objective, the regulation set out rules concerning mutual administrative assistance, in particular in order to prevent and punish infringements of customs and agricultural legislation and to detect any activity which was or seemed to be contrary to that legislation.
- 24 Next, the amendment of Regulation No 1468/81 by Regulation No 945/87 was founded on the consideration that the importance of combating fraud with ramifications in several Member States justified the reinforcement of the scope of action of the Commission and the Member States in that field (second recital in the preamble to Regulation No 945/87).
- 25 Finally, the contested regulation states, in the first recital in its preamble, 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’.

- 26 According to the second recital in its preamble, ‘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’.
- 27 A comparison of Regulations Nos 1468/81 and 945/87 and the contested regulation reveals that, while the title has remained practically unchanged, the aim of the legislation has progressively evolved. While the cooperation was initially directed, in particular, at the functioning of legislation on customs and agricultural matters, the enhanced cooperation laid down, most recently, in the contested regulation is designed, first and foremost, to combat fraud and thus seeks to protect the financial interests of the Community.
- 28 It should be noted that the relevant Treaty provisions have also changed. Article 209a of the Treaty, inserted by the Treaty on European Union, states that the Member States are to take the same measures to counter fraud affecting the

financial interests of the Community as they take to counter fraud affecting their own financial interests.

- 29 Contrary to the Commission's assertion, the protection of the financial interests of the Community does not follow from the establishment of the customs union, but constitutes an independent objective which, under the scheme of the Treaty, is placed in Title II (financial provisions) of Part V relating to the Community institutions and not in Part III on Community policies, which includes the customs union and agriculture.
- 30 Since the entry into force of Article 209a of the Treaty, the objective of protecting the financial interest of the Community has been implemented by regulations such as 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) or regulations which seek to lay down specific rules applicable only to given sectors.
- 31 The contested regulation is such legislation. The Council considered that, in the context of the customs union and the common agricultural policy, specific rules additional to the generally applicable legislation had to be adopted in order to protect financial interests.
- 32 As regards the content of the contested regulation, that measure lays down a system of cooperation both between the administrative authorities of the Member States and between those authorities and the Commission, under which the former assist each other by transmitting, in accordance with the detailed rules laid down in the regulation, information concerning operations which are or appear contrary to customs or agricultural legislation, or by conducting appropriate

administrative enquiries (Titles I, II and III of the contested regulation). Furthermore, a specific infrastructure, namely the CIS, whose essential elements are described in paragraphs 8, 9 and 10 of this judgment, allows the rapid and systematic exchange of information forwarded to the Commission.

33 It is apparent from the contested regulation that, taken as a whole, its aim and specific content is the fight against fraud in the context of the customs union and the common agricultural policy, so that it seeks to protect the financial interests of the Community. Since Article 209a of the Treaty, in the version applicable when the contested regulation was adopted, indicated the objective to be attained but did not confer on the Community competence to set up a system of the kind at issue, recourse to Article 235 of the Treaty was justified.

34 It should be noted in this regard that, contrary to the assertions of the Commission and the Parliament, Article 100a is not applicable in the present case.

35 It is settled 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 (see, in particular, Case C-70/88 *Parliament v Council* [1991] ECR I-4529, paragraph 17, and Case C-155/91 *Commission v Council* [1993] ECR I-939, paragraph 19).

36 While, in accordance with the 15th recital in the preamble to the contested regulation, the Member States must, in order to take part in the CIS, adopt legislation on the rights and freedoms of individuals with regard to the processing of personal data and are required, pending the national measures transposing Directive 95/46/EC of the European Parliament and of the Council of 24 October 1995 on the protection of individuals with regard to the processing

of personal data and on the free movement of such data (OJ 1995 L 281, p. 31), to guarantee a level of protection based on the principles of that directive, it is also clear, as the French Government has pointed out and the Commission has acknowledged, that the CIS does not itself harmonise national laws.

- 37 The mere fact that the CIS cannot be established unless principles harmonised at Community level concerning the protection of personal data are in force at national level and that the Member States and the Commission must guarantee a level of protection based on the principles contained in Directive 95/46 is not a sufficient basis for Article 100a of the Treaty to apply, since such harmonisation of national laws was only an incidental effect of the legislation.
- 38 It is therefore to be concluded that, since Article 235 of the Treaty constitutes the correct basis for adoption of the contested regulation, the application must be dismissed.

Costs

- 39 Under Article 69(2) of the Rules of Procedure, the unsuccessful party is to be ordered to pay the costs. Since the Commission has been unsuccessful, it must be ordered to pay the costs. In accordance with Article 69(4) of those rules, the Parliament and the French Republic are to bear their own costs.

On those grounds,

THE COURT (Sixth Chamber)

hereby:

1. **Dismisses the application;**
2. **Orders the Commission of the European Communities to pay the costs and the European Parliament and the French Republic to bear their own costs.**

Kapteyn

Hirsch

Ragnemalm

Delivered in open court in Luxembourg on 18 November 1999.

R. Grass

Registrar

J.C. Moitinho de Almeida

President of the Sixth Chamber