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8 October 1996 A4-0303/96

REPORT

on the change of the legal basis of the proposal for a Council Regulation (EC) 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
(COM(93)0350 and COM(94)0034 - 4324/95 - C4-0212/95 - 00/0450(COD))

Committee on Budgetary Control

Rapporteur: Mrs Diemut Theato

C O N T E N T S

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By letter of 12 June 1995 the Council consulted Parliament on the change of the legal basis of the proposal for a Council Regulation (EC) 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 (4324/95 - C4-0212/95).

At the sitting of 16 June 1995 the President of the European Parliament announced that he had referred this proposal to the Committee on Budgetary Control as the committee responsible and to the Committee on Legal Affairs and Citizens' Rights, the Committee on Agriculture and Rural Development and the Committee on Economic and Monetary Affairs and Industrial Policy for their opinions.

At its meeting of 5 February 1996 the Committee on Budgetary Control appointed Mrs Diemut Theato rapporteur.

It considered this change of legal basis and the draft report at its meeting of 7 October 1996.

At that meeting it adopted the motion for a resolution unanimously.

The following took part in the vote: Theato, chairman and rapporteur; Bardong, De Luca, Haug (for Tomlinson), Samland (for Rönnholm), Tappin, Wemheuer and Wynn.

The opinion of the Committee on Legal Affairs and Citizens' Rights is attached to this report.

The report was tabled on 8 October 1996.

The deadline for tabling amendments will be indicated in the draft agenda for the relevant part-session.

A
MOTION FOR A RESOLUTION

Resolution on the change of the legal basis of the proposal for a Council Regulation (EC) 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 (COM(93)0350 and COM(94)0034 - 4324/95 - C4-0212/95 - 00/0450(COD))

The European Parliament,

- having regard to the Commission proposals to the Council (COM(93)0350[1] and COM(94)0034[2] - 00/0450(COD)),

- having regard to its opinion at first reading delivered on 15 December 1993[3],

- having been consulted by the Council on the appropriateness of Article 235 of the EC Treaty as the legal basis (C4-0212/95),

- having regard to the Council's policy stance on the proposal for a regulation (4324/95),

- having regard to the report of the Committee on Budgetary Control and the opinion of the Committee on Legal Affairs and Citizens' Rights (A4-0303/96),

1. Disputes the appropriateness of the legal basis proposed by the Council;

2. Considers that the proposal for a regulation should be based on Articles 43 and 100A of the EC Treaty;

3. Instructs its President to forward this resolution to the Council and Commission.

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1 OJ C 262, 28.9.1993, p. 8

2 OJ C 80, 17.3.1994, p. 12

3 OJ C 20, 24.1.1994, p.35

B
EXPLANATORY STATEMENT

I. BACKGROUND

In December 1993 the European Parliament adopted a legislative resolution on the proposal for a Council Regulation in question[4], under the 'co-decision' procedure (Article 189b of the EC Treaty). Following Parliament's opinion, the Commission submitted a modified proposal which took up most of the amendments (COM(94)0034 final).

On 5 December 1994 the Council produced a 'policy stance', which does not constitute a 'common position' under the terms of Article 189b. It considered that it was not appropriate to apply the legal basis proposed by the Commission (Article 100a of the EC Treaty) making provision for the co-decision procedure, but that Article 235 should be used as well as Article 43 which remains unchanged; the two articles provide for the consultation procedure).

Thus, by unilateral decision of the Council, the co-decision procedure becomes a simple consultation procedure.

The Council consulted Parliament on the change of legal basis[5].

The Council refers to the content of the measure, which it says does not justify the legal basis of Article 100a; the Council maintains that the part of the rules which makes up the Customs Information System (CIS) is not covered by the harmonization of national provisions which Article 100a provides for the establishment and operation of the internal market.

This part of the resolution would, rather, create a completely new Community entity for which it would be necessary to use the exceptional powers of Article 235.

Two questions arise:

(a) Is there justification for the use of Article 235? Parliament is required formally to adopt a position on this question.

(b) Does the question of the legal basis have importance only as regards institutional and procedural matters or also as regards the substance?

We will consider point (a) in section II. In the next section we will review the content of the proposal for a regulation as envisaged in the Council's policy stance in order to check whether it is satisfactory or

4 Resolution of 15 December 1993 - COM(93)0350 - C3-0446/93

5 Letter of 12 June 1995 (C4-0212/95 - 4324/95)

whether it would be appropriate to discuss it in the framework of the guarantees offered by the co-decision procedure.

II. UNJUSTIFIED CHANGE IN LEGAL BASIS[6]

Does the CIS constitute an integral community entity which does not relate to the harmonization of legislation required for the completion of the internal market provided for by Article 100A? This argument could be supported. If the Commission had proposed a separate regulation on the CIS and had based it on Article 235 it would have been difficult to dispute the legal basis. But neither the Commission nor the Council opted for this separation. The rules on the CIS (title V) thus co-exist with those on mutual assistance activities as such (Articles 1 to 22).

The legislative provision relating to the mutual assistance activities deals with the harmonization of provisions with a view to the completion of the internal market. As shown by the opinion delivered by the Legal Affairs Committee, the proposal for a regulation seeks to create a regulatory environment allowing mutual assistance to be activated and to operate in relations between the Member States and with the Commission. This environment which involves the application of both national and Community provisions, with the latter having precedence (Article 31(1) and (2) and 34(3)), can be based only on the harmonization of provisions.
This is the case even though all reference to the internal market has been removed by comparison with the text proposed by the Commission, probably for reasons of expediency.

Even if it was accepted that Article 235 was the basis for the CIS rules, it would have to co-exist with Articles 43 and 100A, which are the basis for provisions on harmonization.

As the articles in question deal with different procedures (235: consultation and unanimity in the Council; 43: consultation and qualified majority in the Council; 100A: co-decision and qualified majority in the Council), how can they be combined?

The Treaty does not deal with this aspect and it was submitted to the jurisprudence of the Court of Justice which gave a ruling in 1991[7]

- provisions cannot be combined when different procedures apply;

- the procedure applicable is thus that which allows the European Parliament's participation in the legislative process to be strengthened; such a procedure in fact corresponds to the 'fundamental

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6 The assessment which follows takes account of the observations contained in the opinion of the Committee on Legal Affairs (PE 217.345/fin.) which is thanked for its very lucid and pertinent contribution.

7 Titanium dioxide, 11 June 1991, Case C-300/89 (Commission, supported by Parliament, v. Council).

democratic principle that the peoples should take part in the exercise of power through the intermediary of a representative assembly'. There is absolutely no doubt that such a legal basis in this particular case is Article 100A. This Article should be used together with Article 43.

III. ANALYSIS OF THE COUNCIL'S POLICY STANCE

The following analysis seeks to check whether the change in legal basis and Parliament's removal from the guarantees provided by the co-decision procedure can have adverse effects on the text of the proposal. It will cover:

- the main differences with regard to the amendments adopted by Parliament;

- the Council's modifications to the text proposed by the Commission, where they are to be considered detrimental.

A. Parliament's amendments in its opinion of 15 December 1993

Some of the amendments proposed in Parliament's opinion were taken up in form or in content in the Council's stance:

- Second recital: reference to the legal protection of the Community's financial interests (Amendment 1 of the 1993 opinion);
- Article 8: possibility for the authority requesting cooperation to ask for the findings of the special watch carried out pursuant to Article 7 (Amendment 5 of the 1993 opinion);
- Article 19: Removal of the need for the agreement of the person concerned for communication of data to third countries providing assistance (Amendment 7 of the 1993 opinion);
- Article 20(2) and (3): Community missions in third countries may be carried out 'on the basis of information supplied by the European Parliament'; the Commission shall inform not only the Member States but also the European Parliament of the results of missions in third countries (Amendment 8 of the 1993 opinion, partly incorporated by the Council with regard to paragraph 2).

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However, several of the amendments proposed in the 1993 opinion, which were taken up by the Commission in its modified proposal (COM(94)0034 final - COD450 of 17.2.1994) were not incorporated in the Council's policy stance:

- Article 3: in the policy stance, where a judicial authority is involved, communication of data from one administrative authority to another must have the prior authorization of the judicial authority consulted for this purpose on a case-by-case basis, a requirement which could cause serious delays and obstacles in anti-fraud operations (see Amendment 3 of the 1993 opinion and the Commission's modified text).

- Article 25: the policy stance fails to include in the CIS a number of types of data essential for the effectiveness of the enquiry (legal or administrative history, address, nature of the case, cross references, route used, customs offices notified, etc.), which were added by Amendment 9 of the 1993 opinion and taken up in the Commission's modified text;

- Article 48: the Regulation on mutual assistance shall not apply, according to the policy stance, where it would be likely to be injurious not only to public order (which is in line with general legal principles) but also Member States' 'other fundamental interests', which could leave application of the Regulation open to a very wide margin of discretion (see Amendment 13 of the 1993 opinion and the Commission's modified text);
- Article 51: the policy stance states that the Regulation shall not affect the rules on criminal procedure, mutual assistance in criminal matters and the secrecy of judicial inquiries, which could considerably reduce the Regulation's field of application (see Amendment 14).

B. Modifications to the Commission text

The Council has made a number of amendments to the Commission text, in cases where Parliament, which was satisfied with the proposed text, did not propose amendments. Some of the modifications could seriously weaken the effectiveness or the applicability of the Regulation:

- Articles 12, 16, 21: findings obtained by the authorities of a different Member State, in the course of mutual assistance (on request: Article 12; spontaneously: Article 16; in the context of relations with third countries: Article 21) may be used as evidence before the competent authorities of the Member State which has received assistance; in this case, they should not be accorded lesser weight simply because the evidence was not referred by a state authority. The Council has deleted this clause in all the relevant articles, as it does not wish to affect national criminal proceedings. However, this deletion could on the contrary cause adverse effects on proceedings, as it could leave open the possibility of discrimination against evidence referred by authorities other than the national authorities;

- Article 43: the policy stance replaces the advisory committee, responsible for matters concerning the determination of items and operations to be included in the CIS, with a type 3B regulatory committee. The Council's inconsistency is obvious: on the one hand it refers to Article 235 for the creation of what it calls an 'integral Community entity', while on the other hand, in order to take account of national interests, this 'Community entity' is subjected, for its operation, to the constraints of a very cumbersome national procedure which cannot fail to hinder the effectiveness and rapidity of anti-fraud measures.

- Article 53: Denmark, Ireland, the United Kingdom and Sweden secured the right to opt out of application of Article 42 (non-automatic processing of data), pending the adoption of Community rules applicable to all the data covered by the Regulation in question. The new Regulation's effectiveness could therefore be seriously limited, given the still very wide extent of non-automatic data processing. Furthermore, to differentiate the application of a regulation by sector and by Member State would seem to go against the fundamental principles of Community law.

The importance of the modifications made to the text by the Council indicates to us that abandoning the codecision procedure is not only unjustified but also detrimental to the effectiveness of the rules, which Parliament could back on the basis of more effective powers.

IV. CONCLUSIONS

The Council has changed the legal basis of the proposal for a regulation on mutual assistance: Article 235 which provides for a simple consultation procedure has taken the place of Article 100A (see section I).

The change of legal basis is unjustified. Even if it is accepted that the creation of the Customs Information System (CIS) does not concern harmonization of provisions with a view to completion of the internal market and requires Article 235, the rules on mutual assistance as such would require application of Article 100A. In the conflict between the two articles the second would take precedence (see Section II).

The choice of procedure (consultation or co-decision) is not neutral. In its draft the Council made several detrimental modifications to the text by comparison with the Commission proposal and Parliament's amendments. Application of the co-decision procedure would allow Parliament to implement a more effective action for the protection of the Community's financial interests (see section III).

The legal basis is therefore contested. The Commission is called on, for its part, to follow up coherently the declaration which it entered in the Council's minutes in which it regretted the modification of the legal basis and reserved the right to have recourse to the appropriate legal channels.

O P I N I O N

(Rule 147 of the Rules of Procedure)

of the Committee on Legal Affairs and Citizens' Rights

for the Committee on Budgetary Control

Draftsman: Mrs Ana Palacio Vallelersundi

At its meeting of 1 and 2 December 1994, the Committee on Legal Affairs and Citizens' Rights appointed Mrs Ana Palacio Vallelersundi draftsman.

At its meeting of 18 and 19 March 1996 it considered the amended proposal for a regulation and at its meeting of 6 and 7 May 1996 it considered a working document; at its meeting of 22, 23 and 24 July 1996 it considered the draft opinion and adopted its conclusions unanimously.

Present at the vote: Rothley, first vice-chairman and acting chairman; Palacio Vallelersundi, second vice-chairman and draftsman; Barzanti, third vice-chairman; Gebhardt, Nassauer, Oddy and Pelttari.

PART A: RENEWED CONSULTATION OF PARLIAMENT

1. Parliament was reconsulted by the Council on a policy guideline text approved by the latter. The letter of referral is dated 12 June 1995. The policy guideline released by the Council contains a number of amendments to the original Commission proposal, in particular a change to the legal basis proposed by the Commission, replacing Articles 43 and 100a by Articles 43 and 235 of the EC Treaty.

2. The Committee on Legal Affairs and Citizens' Rights was again asked for its opinion, pursuant to Rule 147 of the Rules of Procedure. That committee had already been consulted when the Theato report was drawn up at first reading, and had delivered its opinion in the form of a letter adopted on 1 June 1993 (Doc A3-0393/93, 2 December 1993, pp 30-33).

3. The principal amendments made to the text of the proposal for a regulation by the Council's policy guideline text are as follows:

   (a) A change of legal basis, the Council having adopted Article 235 instead of Article 100a as originally chosen. The reasons are explained briefly in the last recital, according to which:
   '... 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; whereas the system set up under this Regulation constitutes an integral Community entity; whereas, 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.'

   The system in question is implemented by Article 23 of the proposal for a regulation and is intended to operate as an automated information system, to be known as the 'Customs Information System' (CIS). It constitutes the principal innovation in the proposal from its first stage; it incidentally, also contains provisions on assistance on request (Articles 4 to 12) and spontaneous assistance (Articles 13 to 16). That set of provisions on assistance had already been incorporated - in near-identical form, with some exceptions, such as Article 16 - in Regulation (EEC) No 1468/81 of the Council of 19 May 1981[8], which is repealed by Article 52 of the current proposal for a regulation.

   It is appropriate to point out that the proposal for a regulation - both in the Commission and the Council versions - implements a mechanism whereby:
   - the entering of data in the CIS, and

[8] OJ L 144, 2.6.1981, p. 1

   - the processing of data retrieved from the CIS, including the use of such data, are to be 'governed by the laws, regulations and procedures of the supplying Member State and, where appropriate, the corresponding provisions applicable to the Commission in this connection, unless this Regulation lays down more stringent provisions' (Article 31(1) and (2). That also applies to the protection of personal data, of course subject to the specific internal rules applicable to the Commission (Article 34(1) and (3). Our opinion should therefore be focused on the aspect of 'more

stringent provisions' as laid down by this Regulation, to try to determine whether the latter do not introduce a certain degree of harmonization of legislation in the context of the internal market, which would justify invoking Article 100a of the EC Treaty.

(b) A rewording of Article 23(3), to take into account the entry into force of the Treaty on European Union and, more particularly, Article K.1(8) thereof, deriving from the third pillar.

(c) Simplification of the procedure for applying for access to personal data where that data has been supplied by another CIS partner. In such cases it will be sufficient for that partner to have 'been given the opportunity to state its position' for access to be granted (Article 36(3)). The Commission proposal adopted a more stringent solution in cases where there was no agreement between the partners concerned to authorize access to such data.

(d) The Commission's activities as regards the data-protection rules applicable to personal data are now to be supervised by the European Union Ombudsman, in the context of the task allotted to him by Article 138e of the EC Treaty (Article 37(3) and (4)).

(e) In Article 43, the consultative committee is replaced by a regulatory committee operating according to rules of procedure III b of Decision 87/373/EEC of the Council on 'Comitology'.

(f) Still on the subject of comitology, Article 43(4) contains an indicative list of the principal matters that can be considered by this committee, while paragraph 5 of that article gives the Ombudsman the right to participate in meetings of the committee when it meets in its ad hoc formation to consider matters the purpose of which is compatible with the Ombudsman's mandate (essentially problems relating to the protection of personal data).

(g) Article 53(2) provides for a derogation in favour of Denmark, Ireland, the United Kingdom and Sweden, which are thus exempted from implementing the provisions of this Regulation as regards 'the non-automatic exchange and processing of data' - as laid down in Article 42 - 'until Community rules exist applicable to all the data covered by this Regulation'.

(h) The Annex stipulated in Article 30(1) is now confined only to the transmission of data and no longer contains principles to be applied to data storage, the use of data by the police, publicity, and the right of access to police files.

4. The foregoing sets out the amendments contained in the policy guideline text issued by the Council. The Committee on Budgetary Control had opened a dialogue in that connection with Council departments with a view to securing a compromise on safeguarding Parliament's powers in the decision-making procedure. No result has as yet been secured.

PART B: THE PROBLEM OF THE LEGAL BASIS

5. The amended Commission proposal was based on Articles 43 and 100a of the EC Treaty. These two provisions provide for different procedures - consultation of Parliament and co-decision respectively - but there is nevertheless one factor common to both: the fact that in both cases the

Council acts by qualified majority. We know in this connection that the Court of Justice has acknowledged that 'where an institution's power is based on two provisions of the Treaty, it is bound to adopt the relevant measures on the basis of the two relevant provisions'[9]. That principle can therefore apply, but only provided that the adoption procedures set out in the two provisions chosen are not contradictory[10]. In such cases the two provisions cannot be combined.

6. Even were it conceded that the adoption procedures pursuant to Articles 43 and 100a are not identical, the same consideration applies all the more forcefully to the articles chosen as legal basis by the Council: in fact, Articles 43 and 235 differ fundamentally to the extent that recourse to unanimity pursuant to Article 235 cancels out the effect of Article 43. Consequently, if the Council's policy guideline approach were to be accepted that would at the same time mean being prepared to accept Article 235 of the EC Treaty as the sole effective legal basis.

7. A further question is whether Article 100a can be justified as a legal basis for this proposal for a regulation. It is known that this provision of the EC Treaty cannot be considered as a legal basis for a Community act unless the following three conditions are complied with:

   (a) It must concern measures relating to the approximation of the laws, regulations and administrative provisions of the Member States;

   (b) The purpose of such measures must be the establishment and functioning of the internal market (i.e. securing the objectives set out in Article 7a of the EC Treaty);

   (c) Other specific provisions of the EC Treaty should not be applicable in the same connection.

8. These considerations enable us to establish the main points of a general assessment that can serve as a guide to considering the problem of the applicability of Article 100a. They would thus place us in a position to move towards a definitive choice of legal basis.

9. The points to be established are the following:

   (a) As regards the approximation of legislations, we have already referred - paragraph 3(a) above, p. 2 - to the provisions of Article 31(1) and (2) and Article 34(3) respectively, concerning the application of the laws, regulations and administrative procedures of the Member State unless this Regulation lays down more stringent provisions'. It is undeniable that this wording contains the suggestion of at least a first step towards legislative harmonization.

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[9] Judgment of 27 September 1988, Case 165/87, Commission v Council, Reports of Cases p. 5561, paragraph 11

[10] Titanium dioxide Judgment of 11 June 1991, Case C-300/89, Commission (supported by Parliament) v Council, paragraphs 17 and 18.

   - More specifically, the provisions of Articles 13 to 15 (Title II of the amended proposal) lay down the conditions in which the competent authorities in each Member State are to

provide assistance to the competent authorities of the other Member States without prior request by the latter. The absence of prior request presupposes a regulatory framework, necessarily harmonized, enabling such assistance to be spontaneously initiated and to operate thereafter.

- It is ultimately difficult to conceive of the text other than from a standpoint of harmonization, when the Commission considers that 'customs authorities have daily to apply both Community and non-Community provisions', and that 'it is therefore clearly necessary to ensure that the provisions relating to mutual assistance, administrative cooperation and the common automated information system for customs purposes (for non-Community and for Community provisions) develop as far as possible in step in both sectors' - recital 19 of the amended Commission proposal (COM(93)0350 final). It is quite clear that the concern expressed in this recital tends to pervade the substance of the text as a whole, even after the modifications it has undergone in line with Council policy guidelines.

(b) As regards the impact on the internal market, we are faced with two opposing approaches:

- The Commission approach, which views the effectiveness of the customs union and the common agricultural policy in the light of the completion of the internal market (first recital); and considers, on the other hand, that it is necessary to amend the provisions of Regulation (EEC) No 1468/81 of 19 May 1981 (OJ L 144, 2 June 1981, pp. 1-5) in the light of the 'changes brought about in the context of the internal market and in particular the abolition of customs controls at internal Community frontiers' (Recital 4);

- The Council approach, which - whether as a precaution or tactically - deletes from its text all references to the internal market and stresses that the CIS constitutes an integral Community entity which is not covered by the harmonization of national provisions and therefore cannot be set up by an act based on Article 100a of the EC Treaty (see letter of consultation dated 12 June 1995).

(c) As regards the application of one other specific provision, it is appropriate to refer to what the Council asserts in the matter of establishing an 'integral Community entity'. It considers 'that since the provisions of the Treaty specifically covering customs matters do not empower the Community to set up such a system, it necessary to invoke Article 235' (20th and last recital).

It should be noted in this connection that the Council bases its argument in favour of Article 235 on the following two precedents:

- Opinion 1/94 of the Court of Justice of 15 November 1994 on the World Trade Organization, paragraph 59 of which stipulates the following (while pointing out that this concerns the area of intellectual property):
  'It should be noted here that, at the level of internal legislation, the Community is competent, in the field of intellectual property, to harmonize national laws pursuant to Articles 100 and 100a

and may use Article 235 as the basis for creating new rights superimposed on national rights, as it did in Council Regulation ... on the Community trademark.'

- The approach that the same Council would have taken on the proposal for a regulation on the legal protection of designs or models (COM(93)0342 final, 3 December 1993) which, drawing on precisely the precedent of Regulation (EEC) No 40/94 of the Council on the Community trademark[11] and the above opinion of the Court of Justice would have concluded by privileging Article 235 as the appropriate legal basis - a factor that the Committee on Legal Affairs noted in the course of its proceedings.

10. The considerations set out above can help to give concrete form to our views on the problems associated with the legal basis. These problems are complex in that one and the same text contains provisions requiring both the harmonization of existing legislation and the creation of new instruments. An answer is nevertheless provided by Court of Justice case law. In its 'Titanium Dioxide' judgment, the Court ruled[12] that 'where an institutions's power is based on two provisions of the Treaty, it is bound to adopt the relevant measures on the basis of the two relevant provisions'[13]. But no such ruling is possible when the two provisions concerned lay down different decision-making procedures. That being the case, the Court of Justice rules in favour of the procedure that is such as to 'increase the involvement of the European Parliament in the legislative process of the Community'[14]; this 'reflects a fundamental democratic principle that the peoples should take part in the exercise of power through the intermediary of a representative assembly'[15].

CONCLUSION

11. Subsequent to the foregoing considerations, and given that the establishment of the CIS - the new title according to the Council - is only partially relevant to the context of the proposal for a regulation, your rapporteur proposes that Article 100a should be confirmed as the appropriate legal basis at the same time as Article 43 of the EC Treaty.

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11 OJ L 11, 14.1.1994

12 Judgment of 11 June 1991, Case C-300/91, Reports of Cases 1991, p. I-2867

13 Ibid. paragraph 17

14 Ibid. paragraphs 18 to 20

15 Ibid. paragraph 20

Commission position

The Commission states that it agrees with the analysis made in the report.