OPINION OF ADVOCATE GENERAL LA PERGOLA

delivered on 23 September 1997 *

1. Through the present action, the European Parliament seeks annulment of Council Decision 95/468/EC of 6 November 1995 on a Community contribution for telematic interchange of data between administrations in the Community (IDA). [1] The ground of challenge concerns the legal basis of that decision, which was adopted under Article 235 of the EC Treaty. The Parliament argues that the contested measure should instead have been based on Article 129d. The Commission, intervening in the proceedings in support of the applicant, also submits that the decision should be annulled on the ground that the second of the abovementioned articles constitutes the appropriate legal basis for the decision at issue.

2. Before going into the arguments put forward by the parties, it is worth recalling the procedural steps leading to the adoption of the decision.

On 12 March 1993, the Commission submitted a communication to the Parliament and the Council on trans-European telematic networks between administrations. That document contained two proposals for a decision: the first sought to define a series of 'guidelines' for trans-European data communications networks between administrations; [2] the second concerned a multiannual Community programme to support the implementation of trans-European networks for the interchange of data between administrations (hereafter 'the IDA project'). [3] Both proposals initially indicated Article 235 as the legal basis for a decision. With the coming into force of the Treaty of Maastricht, the legal basis was however changed to Article 129d; in particular, reference was made to the first paragraph of that article — which provides for use of the so-called 'co-decision' procedure — as regards the definition of guidelines, and to the third paragraph — which requires use of the cooperation procedure — with regard to the IDA multiannual programme. The Council, however, notwithstanding the Parliament's negative opinion, adopted the contested decision on the basis of Article 235.

It must be noted that the Commission originally made two proposals: one concerning the guidelines and the other the IDA project. In the end, the Council adopted the contents of both proposals in one single document,

* Original language: Italian.

1 — OJ 1995 L 269, p. 23.

2 — OJ 1993 C 105, p. 10.

3 — OJ 1993 C 105, p. 12.

being the decision at issue here. [4] It is true that the final document differs significantly from the mere combination of the two original proposals. However, in substance the contested decision incorporates both proposals. [5]

3. Now to the merits of the action. The contested decision, as indicated above, was adopted on the basis of Article 235. The Court has consistently held that 'the use of Article 235 as the legal basis for a measure is justified only where no other provision of the Treaty gives the Community institutions the necessary power to adopt the measure in question'. [6] Article 235 is therefore a residuary provision, to which recourse can be made only in the absence of other more specific enabling provisions. In defending its choice of that article, the Council starts out from the very premiss that, in the case in question, there was no support for Community powers other than the general and secondary basis provided by Article 235.

The defendant institution argues, in other words, that the provisions of Title XII on trans-European networks, which both the Parliament and the Commission argue is the legal basis for adoption of the contested measure, are not capable of application in the present case. According to the Council, the contested decision provided for a financial contribution to certain projects in the field of telematic transmission of data between administrations; the Community contribution to trans-European networks, as provided under Article 129c(1), third indent, is however made dependent upon the definition of the framework programme provided for in the first indent of the same article. In the present case, it is argued, those guidelines had not been established. The Council therefore maintains that it did not adopt the IDA decision on the basis of Article 129d, since there had been no prior adoption of 'guidelines' nor identification of 'projects of common interest', which constitute the mandatory reference framework for all Community financial contributions. Nor can the contested measure be said — again, according to the Council — to lay down 'guidelines' within the meaning of Article 129c(1), first indent, or to provide for measures ensuring 'the interoperability of the networks' in accordance with the second indent of that same article. Hence the need, it says, to base the decision at issue on Article 235.

The Parliament and the Commission are of a contrary opinion. They argue that the contested decision incorporates both proposals of the Commission, that relative to 'guidelines' and that relative to the IDA project, and consequently represents the use of two kinds of powers conferred on the Community bodies in the matter: the Commission's first proposal defined the 'guidelines', while

4 — The fact that the contested decision incorporates both proposals is also clear from the fact, of a formal nature, that the recital in the preamble recalling the Commission's proposal makes reference not only to the proposal concerning the IDA project but also to that relative to the guidelines: it cites, in fact, OJ 1993 C 105, p. 10, which concerns the latter proposal.

5 — The parties, moreover, agree that the changes made to the decision are in line with the power of amendment vested in the Council by Article 189a of the Treaty.

6 — See Case C-271/94 *Parliament* v *Council* [1996] ECR I-1689, paragraph 13.

the second adopted the implementation measures. The decision therefore satisfies the conditions laid down by Article 129c(1) regarding three distinct cases of intervention: establishment of guidelines and identification of projects of common interest (first indent); measures in the field of network interoperability (second indent); Community contribution for projects so identified (third indent). Thus presented, the decision has its proper legal basis in Title XII of the Treaty and not in Article 235.

4. The criterion to be followed in resolving the case at issue is that set out in the Court's settled case-law: [7] it is the aim and content of the contested measure which must be considered in appraising whether or not the Council was entitled to adopt the measure on the basis of Article 235. I explain below the reasons why I agree with the applicant that the contested measure falls under the scope of Title XII of the Treaty, on trans-European networks.

The aim pursued by the decision at issue is described in its preamble. It seeks, through 'the use of telematic techniques', [8] to ensure 'close cooperation between the competent administrations in the Member States and between them and the Community institutions'. [9] In particular, the Member States' telematic systems must 'ensure the interoperability of those telematic systems'. [10] Whereas a Community contribution is necessary, [11] the sixth recital underscores the need to lay down 'the conditions ... under which the implementation of certain specific projects is eligible for Community support'.

Regarding the content of the contested measure, Article 1 is worded as follows: 'The purpose of this Decision is to determine the Community contribution to certain projects in the field of telematic interchange of data between administrations with a view to facilitating cooperation between them. For this purpose, a list of projects is laid down for 1995, 1996 and 1997 for which a specific need is hereby recognised along with the need for a Community contribution to render them operational throughout the Community'.

The projects which are recognised as requiring 'Community support' are listed in

7 — See Case C-300/89 *Commission* v *Council* [1991] ECR I-2867, at paragraph 10; Case C-426/93 *Germany* v *Council* [1995] ECR I-3723, at paragraph 29; and Case C-271/94, cited above, at paragraph 14.

8 — See the second recital.
9 — See the first recital.
10 — See the third recital.
11 — See the fifth recital.

Article 2. [12] Some of those projects relate to the practical implementation of specifically identified sectoral projects. [13]

Article 3(1) defines 'the financial reference amount for the implementation' of the IDA action programme for 1995 and 1996 and the procedure for the adoption of such amount for 1997.

The Commission is responsible for the implementation of the decision, [14] which may include, *inter alia*, the following types of action: 'presentation of technical network solutions to enable communication between the administrations' autonomous information systems; preparation and validation of common rules for a communications architecture; ...; contribution to laying down a legal framework, in particular by drawing up specimen agreements; ...'. [15]

Lastly, the 'framework conditions' to be satisfied 'in the case of Community contributions' are defined. [16]

5. If the aim and the content of the decision are taken into account, it is clear that the action of the Community legislature is within the sphere of trans-European telematic networks. The fact that the ninth recital indicates that the 'main purpose' of the decision 'is to facilitate cooperation between administrations' is not, in my opinion, decisive. This, in fact, is merely the consequence of the creation of telematic networks. The direct purpose of the measure is, basically, to promote telematic techniques for the interchange of data on the functioning of the internal market, and the Treaty provides for a specific Community policy and action, under a separate title, in relation to it. Moreover, it seems to me natural that the creation of interoperable networks should 'serve' other aims and should promote, in this case, cooperation between administrations. The fact remains, however,

12 — Article 2(1): 'The following are hereby recognised as projects for telematic exchange of data between administrations requiring Community support:
— practical introduction of electronic mail on the basis of X.400,
— improvement in the telematic interchange of data among Member States and between Member States and the Community institutions,
— facilitating the Community decision-making process, i. e. mainly the communication and management of official documents,
— progress in the field of the following horizontal activities:
— provision of generic services such as message transfer, file transfer and data base access,
— data structure and reference model involving definition of common architecture rules, standardisation activities and practical implementation, in particular NSPP (National Service Pilot Projects),
— legal and contractual framework and quality control,
— support for preparatory measures for telematic interchange of data of the European Environmental Agency, the Office for Harmonisation in the Internal Market (Trade Marks and Designs), the European Agency for the Evaluation of Medicinal Products, the European Monitoring Centre on Drug and Drug Addiction and the Translation Centre for the Bodies of the Union, upon the request of these bodies ...'

13 — Article 2(1), sixth indent: 'customs and taxes: VIES/Sites, Excises Control, Quota, Scent-CIS/Fiscal, Taric, EBTI, Transit; fisheries: Fides; agriculture: Animo, Physan, Shift; social security: Sosenet, Eures; Public procurement: Simap; health: CARE (early warning system and pharmacovigilance), Reitox; statistics: SISR/DSIS (including Extracom and SERT); commercial policy: SIGL; competition policy: Fourcom; culture: ITCG (illegal traffic of cultural goods)'.

14 — The Commission is assisted by a committee and must follow the procedure laid down in Article 4.

15 — See Article 5(1).

16 — See Article 5(2).

that the decision still lies in the sphere of Community action in the matter of trans-European networks.

At all events, the question to be determined is which specific aspect of Title XII is concerned by the contested decision: In other words, does it establish guidelines (Article 129c(1), first indent)? Is it a measure to ensure the interoperability of the networks (Article 129c(1), second indent)? Or is it simply a Community contribution (Article 129c(1), third indent)? It should be noted that this question is not without practical importance, given that the legislative procedures to be followed for the adoption of the measure concerned differ according to the purpose of the action.

6. In this respect, one fact seems certain: one aspect of the decision bears upon the Community financing of trans-European telematic networks. This point is undisputed and is, after all, admitted by the Council itself; the defendant institution does not, in fact, dispute that financing exists for projects in the field of trans-European telematic networks, but it argues that such projects were not included in the previous series of 'guidelines' within the meaning of the first indent of Article 129c(1). For this reason, basing the contested decision on the third indent of that provision is precluded.

The Council's arguments cannot, however, be upheld. Certainly, I acknowledge the fact that the Community contribution to the financing of telematic networks is made dependent upon the prior establishment of 'guidelines'. I have already had occasion to consider this point in the Opinion I delivered in another case involving the Parliament and the Council: [17] in that Opinion, I expressed the view that, as regards financing, 'implementing action is made, of necessity, to depend on the planning measures which have to precede such action, since only projects of common interest, identified in the guidelines, may qualify, according to the express provision set out in the third indent, for financial support from the Community. This clearly shows the subordinate relationship which exists, within the system set out in Article 129c(1), between actual exercise of the competence provided for in the third indent and the prior establishment of guidelines'.

However, there is nothing to prevent the programmes from being laid down in the same regulatory act as that which provides for the financing. The sole purpose of Article 129c(1) is to allow objectives identified at programme level, and which, so to speak, follow a planning rationale, to benefit from the financial support of the Community. There is no need for the programme framework to be defined in advance by a separate decision instead of being defined at the same time as the decision that provides for Community financial support. The legislature

17 — Cited in footnote 6 above, in particular at pages I-1697 and I-1698.

may, in one and the same decision, establish the guidelines, identify the projects of common interest and decide which of those projects are eligible for financial support. This is the case here.

7. As I have already stated, the decision has its origin in the Commission's proposal on the establishment of 'guidelines'. [18] All the elements which qualify the 'guidelines' within the meaning of the first indent of Article 129c(1) are to be found in the decision at issue. Pursuant to this article, the guidelines cover 'the *objectives*, *priorities* and *broad lines* of measures envisaged in the sphere of trans-European networks; these guidelines shall identify *projects of common interest*'. [19]

The 'objectives' of the Community action are, in this case, set out in the recitals of the decision and the aim sought by the legislature emerges implicitly but clearly therefrom: to facilitate the exchange, between national administrations, of all information on the functioning of the internal market. Pursuit of this objective is now an absolute necessity, given the advancement of the integration process, which, as stated in the first recital, requires 'close cooperation between the competent administrations in the Member States and between them and the Community institutions'. Technological progress and the complexity and quantity of data to be transmitted also require that information be interchanged by means of telematic techniques.

It further emerges from the preamble to the decision that the Community contribution to the telematic interchange of data between administrations is a priority objective which must consequently be realised immediately. The fifth recital states that 'a Community contribution is necessary insofar as the objectives of the proposed action cannot be sufficiently achieved by the Member States ...'. The seventh recital then stresses that 'if there were no such Community contribution, exchanges of information between the different administrative systems concerned at national and Community level would be likely not to be satisfactorily carried out'. It is here in particular that one can evaluate the legislature's appraisal of the 'priority' to be given to the Community action, insofar as the scheme of the decision at issue seeks to ensure an essential prerequisite — now

18 — There are numerous elements in the decision which are taken from the Commission's proposals on 'guidelines':
— Article 2(1), first indent (introduction of electronic mail): see Article 3, seventh indent and Article 4, horizontal activities, second indent;
— Article 2(1), second indent (improvement in the telematic interchange of data): this is a general formula which summarises the series of 'horizontal' activities indicated under Article 4 of the proposal;
— Article 2(1), fourth indent (common architecture rules, standardisation activities): see Article 3, fifth and sixth indents and Article 4, horizontal activities, first indent;
— Article 2(1), fourth indent (legal framework): the Commission had proposed that this aspect be regulated in the framework of the second proposal for a decision (IDA); the Council instead considered it to be a question of a general order to be included therefore among the projects of common interest.
Moreover, the measures listed under Article 2(1), third, fifth and sixth indents also correspond substantially with the 'guidelines' proposal: the only difference, as the Commission notes, lies in their presentation: while the proposal indicated a list of sectors, the decision mentions the networks which already exist in those sectors.

19 — The italics are mine.

imposed by the ongoing development of telematic technologies — for the proper functioning of the internal market.

The 'broad lines of the measures envisaged' appear in Article 5 of the decision. Paragraph (1) of this provision specifies the 'types of action' which may be undertaken in implementing 'the projects recognised under Article 2'. Paragraph (2) goes on to define 'the framework conditions' which should be satisfied 'in the case of Community contributions'.

Finally, the 'projects of common interest' are identified in Article 2, which lists all the initiatives 'recognised as projects ... requiring Community support'.

Furthermore, in my view, the decision at issue has certain aspects which may be described as action 'necessary to ensure the interoperability of the networks,' as is provided for in the second indent of Article 129c(1). This conclusion appears to result not only from the recitals of the decision, which underscore the need to ensure the interoperability of the national telematic systems, [20] but also from the clear wording of the decision itself. First of all, pursuant to the fourth indent of Article 4(3)(a), the special procedure instituted by that same article is to be followed for the 'adoption of common rules and procedures for bringing about technical and administrative interoperability'. This confirms that the action instituted by the decision at issue also relates to the interoperability of the networks. The provisions of Article 5(1) go along the same lines: among the actions the Community may undertake to implement 'projects of common interest', identified under Article 2, mention is made of those relating to the 'presentation of technical network solutions to enable communication between the administrations' autonomous information systems' and to the 'preparation and validation of common rules for a communications architecture'. Lastly, interoperability is one of the conditions to be satisfied in the case of Community contributions. [21]

8. In essence, as evidenced by the foregoing review, the contested decision establishes 'guidelines' within the meaning of the first indent of Article 129c(1) and also recognises Community support to projects of common interest, in accordance with the third indent of that provision. From this point of view, the provisions to which I have just referred are the ones which should provide the basis for Community action and not Article 235.

The adoption of the contested measure can therefore be deemed to be covered also by the Community powers, governed by Article 129c(1), second indent, in the sphere of network interoperability.

20 — See the third recital.

21 — See Article 5(2), second indent.

9. In conclusion, in view of the foregoing, it is my opinion that the content of the contested decision is covered by the Community powers provided for in the first, second and third indents of Article 129c(1). In effect, the decision establishes 'guidelines', ensures the 'interoperability of the networks' and provides for a financial contribution from the Community. The decision at issue should, therefore, have been adopted pursuant to Article 129c(1) and the Council was not entitled to adopt it on the basis of Article 235. Consequently, the contested measure did not have the proper legal basis and should therefore be annulled.

It remains to be established which procedure should have been followed to adopt the contested decision. The thrust of the Court's case-law is 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'. [22]

In this case, however, reliance upon several legal bases is not practicable, since the relevant provisions provide for observance of different legislative procedures: the so-called 'co-decision' procedure for the establishing of guidelines, [23] but the cooperation procedure for activities relating to network interoperability and the Community financial support. [24] Under the circumstances, I believe that precedence of choice should go to the co-decision procedure, which enables the Parliament to be more incisively involved in the elaboration of the measure.

10. The Commission further requested that the Court partially annul the decision at issue, and specifically Article 2(2) thereof. However, as the decision should be annulled in its entirety for want of due legal basis, the request for partial annulment is redundant.

11. Finally, a few words on the request for the effects of the decision to be maintained in accordance with the second paragraph of Article 174 of the EC Treaty. The Council in fact asks the Court that, in the event that the decision is annulled, its effects should none the less be maintained. The Commission has, for its part, associated itself with this request. The Parliament, on the other hand, takes the opposite view. [25]

22 — See Case 165/87 *Commission* v *Council* [1988] ECR 5545, at paragraph 11.

23 — See Article 129c(1), first indent, in conjunction with the first paragraph of Article 129d.

24 — See Article 129c(1), second and third indents, in conjunction with the second paragraph of Article 129d.

25 — Indeed, the Parliament seems to doubt whether the Commission's request is in due order under Article 37, third paragraph, of the EC Statute of the Court of Justice. In its opinion, the intervening institution exceeded the limits laid down by this provision, insofar as the party in support of which it has intervened, that is to say the Parliament, did not request application of Article 174, second paragraph. Therefore, the Commission, intervening in support, could not make such a request either. This argument cannot be upheld. In my view, the Commission's request should not be considered as a 'claim' in the technical sense but rather as an invitation to the Court that it make use of a power conferred upon it by the Treaty. In any case, the issue is irrelevant because the Council expressly requested application of the second paragraph of Article 174, and the Court is consequently bound to rule on this point.

In support of this request, it is submitted that an annulment with retroactive effect of the contested decision would seriously hinder the proper course of cooperation between national administrations with regard to the functioning of the internal market. It is stressed in particular that programmes of essential importance such as VIES and ANIMO could no longer be pursued if the decision at issue were annulled *ex tunc*.

I consider that the Court should use the power conferred upon it by the second paragraph of Article 174 so as to prevent retroactive annulment of the contested decision from causing serious harm to economic operators, Member States, and to the Community itself. It remains to be determined, however, which effects of the decision should be considered as definitive. The parties, and the Commission in particular, have explained the reasons for which the effects arising from action already undertaken on the basis of the decision at issue should be maintained. Nothing has been said, however, with regard to the other effects. Consequently, by analogy with the Court's ruling in *Parliament* v *Council*, [26] I propose that the Court declare that only the effects of measures already adopted on the basis of the contested decision are to be maintained.

Conclusion

In the light of the foregoing, I propose that the Court:

— annul Council Decision 95/468/EC of 6 November 1995 on a Community contribution for telematic interchange of data between administrations in the Community (IDA);

— maintain the effects of measures already undertaken by the Commission pursuant to the annulled decision until such time as a decision adopted on the appropriate legal basis enters into force;

— order the Council to pay the costs, with the exception of those to be borne by the Commission.

26 — Cited in footnote 6 above, at paragraphs 39 and 40.