



Legal Service

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**BRUXELLES**

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## LEGAL OPINION

**Re:** Legal basis – Proposed Regulation amending Council Regulation (EC) No 515/97 on mutual assistance and cooperation on customs and agricultural matters – Extension of the scope of administrative cooperation to the rules governing VAT as regards imports and exports – Recourse to Article 93 EC in addition to Articles 135 EC and 280 EC

### I. Introduction

1. By letter of 18 September 2007 (annexed hereto), received by the Legal Service on the following day, Ms Arlene McCARTHY, Chair of the Committee on Internal Market and Consumer Protection, sought the opinion of the Legal Service on the choice of legal basis of the Proposal for a Regulation of the European Parliament and of the Council amending Council Regulation (EC) No 515/97 on mutual assistance and cooperation in customs and agricultural matters (hereinafter: the "Proposal")<sup>1</sup>.
2. The question raised covers the two following points:
  - (a) first, whether the proposed modification of Article 2(1) of Regulation (EC) No 515/97 which is designed to extend the scope of administrative

<sup>1</sup> COM(2006)866 – 2006/0290(COD); Report Newton Dunn.

cooperation to the rules governing the application of value added tax ("VAT") as regards national imports and exports, requires the recourse to Article 93 EC, which refers to harmonisation in tax matters, as an additional legal basis for the Proposal;

- (b) second, should the recourse to Article 93 EC be necessary, whether, this would entail the use of a decision-making procedure (consultation of the EP/unanimity in the Council) incompatible with that required by the legal basis proposed by the Commission (Articles 135 EC and 280 EC; codecision/qualified majority in the Council).

3. Those points will be examined below.

## II. Background

- 4. 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 (hereinafter also referred to as "the Regulation")<sup>2</sup> has established a system of administrative cooperation designed to ensure compliance with Community legislation in the fields of agriculture and customs and thereby to prevent irregularities and fraud having a financial impact on the Community budget.<sup>3</sup>
- 5. **Regulation (EC) No 515/97 was adopted on the basis of Articles 43 and 235 of the EC Treaty (now Articles 37 EC and 308 EC).** Recourse to Article 235 of the EC Treaty was due to the absence, at that time, of a specific legal basis empowering the Community to legislate with the aim of fighting fraud and irregularities affecting the Community's financial interests.<sup>4</sup>

<sup>2</sup> OJ L 82, 22.3.1997, p. 1. Regulation (EC) No 515/97 has since then be amended by Regulation (EC) No 807/2003 of 14 April 2003 (OJ L 122, p. 36). For the sake of clarity, reference is made here to the text of Regulation (EC) No 515/97 as currently in force.

<sup>3</sup> See, in particular, recitals 1-3 and 6 of the Regulation.

<sup>4</sup> See the last recital of the Regulation. In that regard, it may be noted that the framework Regulation on the protection of the Communities' financial interests (Council Regulation (EC, Euratom) No

6. However, The Treaty of Amsterdam has since then introduced such specific competence in the EC Treaty. Article 280 EC now empowers the European Parliament and the Council to adopt, following the codecision procedure, *“the necessary measures in the fields of the prevention of and fight against fraud affecting the financial interests of the Community”*. Also, a new Article 135 EC has been inserted, which provides for the European Parliament and the Council to take, again under codecision, *“measures in order to strengthen customs cooperation between Member States and between the latter and the Commission”*.
7. **It is on the basis of Articles 135 EC and 280 EC that, on 22 December 2006, the Commission presented the Proposal.** According to recitals 2 and 3 in its preamble, the Proposal seeks to amend Regulation (EC) No 515/97 with a view, on the one hand, to improving the functioning of the existing cooperation mechanisms established therein in order to fully achieve the objective of fighting fraud and irregularities and, on the other hand, to adapting those mechanisms to the needs arisen further to the enlargement of the European Union. In the same vein, recital 20 explicitly refers to the objective of the Proposal as *“the coordination of the fight against fraud and any other illegal activity to the detriment of the Community’s financial interests”*.
8. Article 1, point 1), of the Proposal is of importance for the present purposes. That provision aims at amending the definition of *“customs legislation”* set out in the first indent of Article 2(1) of the Regulation, by including in that definition:  
  
*“the body of Community provisions governing income from application of a uniform rate valid for all the Member States to the harmonised basis of assessment for value added tax as regards national imports and exports, and associated implementing provisions”*.
9. The effect of that modification would be to extend the scope of the mutual assistance and cooperation provided for in the Regulation to the application of VAT rules when it comes to national import or export operations.

10. In this connection, recital 9 of the Proposal makes it clear that the inclusion within the scope of the administrative cooperation of compliance with VAT rules as regards imports and exports would be without prejudice to the existing Community rules on administrative cooperation in the field of VAT as laid down in Council Regulation (EC) No 1798/2003 of 7 October 2003.<sup>5</sup>

### III. Legal analysis

#### A. Preliminary remarks – General principles on the choice of legal basis

11. As a preliminary point, it should be recalled that, according to consistent case-law of the European Court of Justice (“ECJ”), the choice of the legal basis for a Community measure must rest on objective factors which are amenable to judicial review, in particular the aim and content of that measure.<sup>6</sup> Subjective factors, such as the conviction of an institution as to the objective pursued are, by contrast, irrelevant in this connection.<sup>7</sup>
12. The ECJ has also made it clear that, in case of measures having a twofold purpose or twofold component, the legal basis should be determined according to the main or predominant purpose or component.<sup>8</sup> Recourse to a dual legal basis is only possible “by way of exception, if a measure simultaneously pursues several objectives which are inseparably linked without one being secondary and indirect in relation to the other”.<sup>9</sup> However, no such dual basis is possible where the

<sup>5</sup> OJ L 264, 15.10.2003, p. 1.

<sup>6</sup> See Case 45/86, *Commission v Council* [1987] ECR 1493, paragraph 11; Case C-300/89, *Commission v Council* [1991] ECR I-2867, known as *Titanium dioxide*, paragraph 10; Case C-269/97, *Commission v Council* [2000] ECR I-2257, paragraphs 43 and 44; Joined Cases C-453/03, C-11/04, C-12/04 and C-194/04, *ABNA and Others* [2005] ECR I-10423, paragraph 54; Case C-479/04, *Laserdisken* [2006] ECR I-8089, paragraph 30.

<sup>7</sup> See, e.g., the *Titanium dioxide* judgment, cited above, paragraph 10; Case C-269/97, *Commission v Council* [2000] ECR I-2257, paragraphs 43 and 44.

<sup>8</sup> See Case C-155/91, *Commission v Council* [1993] ECR I-939, paragraphs 19 and 21; Case C-42/97, *Parliament v Council* [1999] ECR I-869, paragraphs 39 and 40; Case C-36/98, *Spain v Council* [2001] ECR I-779, paragraph 59; Case C-336/00, *Huber*, [2002] ECR I-7699, paragraph 31; Case C-178/03, *Commission v Parliament and Council*, 2006 [ECR] I-107, paragraph 42.

<sup>9</sup> See, e.g. Opinion 2/00 [2001] ECR I-9713, paragraph 23; Case C-211/01, *Commission v Council*, [2003] ECR I-8913, paragraph 40; Case C-178/03, cited above, paragraph 43.

procedures laid down for each legal basis are incompatible with each other.<sup>10</sup> The same goes for recourse to multiple legal bases.

13. It is in the light of those principles that it should be determined whether the proposed amendment of the definition of “*customs legislation*” contained in the first indent of Article 2(1) of the Regulation requires recourse to Article 93 EC to supplement the legal basis of the Proposal and, if so, whether the procedures laid down, on the one hand, in Articles 135 EC and 280 EC and, on the other hand, in Article 93 EC are compatible with each other.

*B. Does the proposed modification of Article 2(1) of Regulation (EC) No 515/97 require the recourse to Article 93 EC as an additional legal basis?*

14. In the Legal Service’s views, that question must be answered in the negative. In that regard, it should be recalled at the outset that, as indicated above, the overall objective of the Proposal is to strengthen the framework of mutual assistance and cooperation put in place by Regulation (EC) No 515/97 with a view to fighting against fraud and irregularities.<sup>11</sup> In so doing, the Proposal appears to share the same objective as Regulation (EC) No 515/97 which, as the ECJ found in Case C-209/97, “*is designed, first and foremost, to combat fraud and thus seeks to protect the financial interests of the Community*”.<sup>12</sup>

15. The measures provided for in the Proposal reflect that objective. It may be noted that, in addition to various adjustments aiming at improving the operations of mechanisms already established in Regulation (EC) No 515/97, the Proposal introduces two new significant cooperation instruments: a platform of services to be managed by the Commission (new Articles 18a and 18b of the Regulation) and the Customs Files Data Identification Database (new Title Va, Articles 41a to 41d of the Regulation). Both those instruments are primarily intended to preventing and detecting irregularities and fraud.

<sup>10</sup> See, e.g. the *Titanium Dioxide* judgment, cited above, paragraphs 17 to 21; Joined Cases C-164/97 and C-165/97, *Parliament v Council* [1999] ECR I-1139, paragraph 14.

<sup>11</sup> See paragraph 7 above.

<sup>12</sup> See Case C-209/97, *Commission v Council* [1999] ECR I-8067, paragraphs 27 and 33.

16. Moreover, as indicated in the explanatory memorandum, the rationale for extending the scope of mutual assistance and cooperation between customs authorities to the implementation of VAT rules when it comes to imports and exports is the need to ensure effective prevention and detection of illicit import or exports detrimental to the Community budget or affecting the Community commercial policy through the use of elements provided for in the relevant VAT rules.<sup>13</sup> According to the explanatory memorandum, such prevention and detection could not be achieved in an efficient manner on the basis of the existing VAT-related administrative cooperation.<sup>14</sup>
17. In the Legal Service's views, all the above elements concur in indicating that use of elements provided in the relevant VAT rules is intended to be instrumental to the prevention and detection of illicit import or exports potentially affecting the Community budget or the common commercial policy. In addition, VAT is an important part of the system of Community's own resources and therefore the fight against VAT irregularities and fraud contributes to the protection of the Community's financial interests. For these reasons, the purpose of the reference to VAT rules in the proposed amendment of Article 2(1) of the Regulation appears to be directly related to protection of Community's financial interests and customs cooperation. As explained above, those fields of action fall under Articles 280 EC and 135 EC.
18. The fact that the proposed amendment concerns the definition of "*customs legislation*" must not mislead about its actual purpose. The aim of that amendment is not to establish harmonised rules in the field of customs, nor is it to introduce rules of such a kind concerning indirect taxation, in particular the VAT. To the contrary, it seeks to ensure that an efficient administrative cooperation is enforced with regard to customs-related operations (imports and exports), and this also covers VAT rules when they come into play in connection with those operations.

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<sup>13</sup> See the explanatory memorandum of the Proposal, point 3.1., second paragraph.

<sup>14</sup> *Ibidem*, third paragraph.

19. This is confirmed by the explanatory memorandum to the Proposal<sup>15</sup>, according to which the purpose of the amendment of Article 2(1) of the Regulation is to bring the definition of “*customs legislation*” set out therein in line with that provided in the Convention on mutual assistance and cooperation between customs administrations (the “Naples II Convention”), drawn up by Council Act of 18 December 1997 on the basis of Article K.3 of the EU Treaty (now Article 34 EU).<sup>16</sup>
20. In that regard, it must be noted that the language of the amendment in question is indeed based on Article 4(2) of the Naples II Convention, which defines the “*Community customs provisions*” as including “*the body of provisions adopted at Community level ... for value-added tax on importation together with the national provisions implementing them*”. Accordingly, the mutual assistance and cooperation between customs authorities set up under the Naples II Convention also covers VAT rules when it comes to imports.
21. It must further be noted that, according to the Explanatory Report to the Naples II Convention, approved by the Council on 28 May 1998,<sup>17</sup> the mutual assistance and cooperation provided for therein aims *inter alia* at “*prosecuting and punishing infringements of Community ... customs provisions*”. In this connection the Explanatory Report specifies that “*the prevention and detection of the infringements of Community customs provisions is covered by Regulation (EC) No 515/97; however, enforcement (i.e. prosecution and punishment) in relation to such infringements falls within Title VI of the Treaty on European Union and is the subject of this Convention*”.<sup>18</sup> It follows that the Regulation and the Convention should be seen as parts of an overall framework designed to improve cooperation between the customs administrations of the Member States in combating fraud and irregularities. In that sense, the alignment of the definition of “*customs legislation*” in Regulation (EC) No 515/97 on that contained in the

<sup>15</sup> See point 3.1., first paragraph.

<sup>16</sup> OJ C 24, 23.1.1998, p. 1.

<sup>17</sup> OJ C 189 of 17.6.1998, p. 1.

<sup>18</sup> See the Explanatory Report, Part II “*Commentary on the Articles*”, points 1.1. and 1.2. (*ad* Article 1 of the Convention).



Naples II Convention can be seen as intended to ensure consistency within that framework.

22. Accordingly, the Legal Service sees no reason to have recourse in the present case to Article 93 EC, which relates to “*the harmonisation of legislation concerning turnover taxes, excise duties and other forms of indirect taxation*”.
23. In this connection, it must also be observed that specific rules designed to establish an administrative cooperation with the aim of combating tax evasion and tax avoidance in the field of VAT to the benefit of national budgets have been laid down in Council Regulation (EC) No 1798/2003 of 7 October 2003.<sup>19</sup> Such rules are liable to contribute to the approximation of national procedural provisions in tax matters within the meaning of Article 93 EC and have validly been adopted on the basis of that provision.<sup>20</sup> However, as recalled in recital 9 of the Proposal, the application of the administrative cooperation set up by Regulation (EC) No 515/97 is without prejudice to that provided for in Regulation (EC) No 1798/2003. Indeed, plainly, those instruments have a different object. The former is devoted, first and foremost, to protecting Community’s financial interest (and so is the Proposal).<sup>21</sup> The latter is, in contrast, designed to ensure compliance with the laws on VAT.<sup>22</sup>
24. In any event, even if it were to be admitted that, due to the extension of the scope of cooperation rules and procedures established by Regulation (EC) No 515/97 to VAT rules as regards imports and exports, that Regulation would also cover aspects of a fiscal nature, this would be only secondary and indirect if compared with the objective pursued by the Regulation. In the light of the case-law mentioned above, which indicates that the legal basis must be determined according to the main or predominant purpose or component of the measure under examination, recourse to Article 93 EC as an additional legal basis would therefore not be justified in the present case.

<sup>19</sup> OJ L 264, 15.10.2003, p. 1. See, in particular, recitals 1-3 of the Regulation.

<sup>20</sup> See Case C-533/03, [2006] ECR I-1025, paragraphs 61-64.

<sup>21</sup> See paragraphs 14-15 above.

<sup>22</sup> See, in particular, Article 1 of the Regulation.



25. Having established that the proposed amendment of Article 2(1) of Regulation (EC) No 515/97 does not require the use of Article 93 EC as an additional legal basis for the Proposal, there is no need to examine the second point raised, namely whether the procedures referred to in the legal basis selected by the Commission (Articles 135 EC and 280 EC) and in Article 93 EC are compatible with each other.

### III. Conclusion

26. In the light of the foregoing, the Legal Service reaches the following conclusion:

*"The proposed modification of the definition of 'customs legislation' set out in Article 2(1) of Regulation (EC) No 515/97 does not require the recourse to Article 93 EC".*

*By delegation of the Jurisconsult,*

Seen:

Annex