

## EUROPEAN PARLIAMENT

# Working Documents

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### REPORT

drawn up on behalf of the Committee on Budgetary Control

on the powers of control of the Commission of the European Communities over the collection of own resources following the judgment of the Court of Justice in Case No. 267/78 'Como butter'

Rapporteur: Mr V. GABERT



On 13 October 1980 the President of the European Parliament authorized the Committee on Budgetary Control to draw up a report on the powers of control of the Commission of the European Communities over the collection of own resources following the judgment of the Court of Justice in Case No. 267/78.

At its meeting of 23/24 January 1980, the Committee on Budgetary Control appointed Mr Gabert rapporteur.

The Committee on Budgetary Control examined the draft report at its meetings of 29/30 September and 1/2 December 1980. At the latter meeting it adopted the draft report unanimously save for one abstention.

Present: Mr Aigner, chairman; Mrs Boserup, vice-chairman; Mr Gabert, rapporteur; Mr Battersby, Mr Colla, Mr Kellett-Bowman and Mr Notenboom.

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The Committee on Budgetary Control hereby submits to the European Parliament the following motion for a resolution together with explanatory statement:

MOTION FOR A RESOLUTION

on the powers of control of the Commission of the European Communities over the collection of own resources following the judgment of the Court of Justice in Case No. 267/78, 'Como butter'

The European Parliament,

- having regard to the judgment of the Court of Justice of 10 January 1980 in Case No. 267/78 'Como butter',
  - having regard to the report of the Committee on Budgetary Control (Doc. 1-695/80),
1. Considers that while the Court of Justice dismissed the Commission's application in its judgment of 10 January 1980 in Case No. 267/78, at the same time the grounds of this judgment defined more closely the scope and limits of its control function;
  2. Takes the view that the Como butter fraud has again underlined the need to refine the Community transit arrangements by taking a certain number of elementary precautions to avoid irregularities without interfering too much with the free movement of goods in the Community; supports the efforts undertaken by the Commission in this direction;
  3. Urges the Council quickly to adopt the regulation on mutual assistance in customs and agricultural matters and the regulation on measures to be taken in the event of irregularities affecting own resources; notes that the Commission presented the proposal for the first regulation as long ago as 25 April 1973 and forwarded the proposal for the second regulation on 19 March 1979. It is high time that the Council took a decision on both matters in the interest of the Community;
  4. Asks the European Court of Auditors to use the powers conferred on it by the Treaties and the Financial Regulation, bearing in mind that these powers are not limited by the judgment of the Court of Justice, to do all it can in liaison with national control bodies, in order to enable the competent Community institutions to be informed in good time of deficiencies in the system and to react as soon as possible;

5. Asks the Commission of the European Communities to use its powers of control over own resources to the full extent recognized by the Court of Justice, that is to say from the event giving rise to the resource up to its being made available;
6. Asks the Commission, in the light of the Court of Justice's finding that in the present state of Community law there are certain restrictions on the Commission's power of control, to consider under what circumstances it might propose a regulation which would enable it in exceptional cases to conduct independent investigations in the Member States;
7. Considers that certain national practices particularly in relation to the 'establishment of own resources' should be harmonized;
8. Asks the Commission to be especially vigilant in supervising the establishment and collection of the revenue outstanding in the Como butter case;
9. Asks the Commission to refer to the measures taken following this resolution in its next report on the working of the system for the control of own resources;
10. Instructs its President to forward this resolution to the Council and Commission of the European Communities and to the Court of Auditors.

EXPLANATORY STATEMENT

1. As soon as the extent of the Como butter fraud and how it was perpetrated became more or less known and the difficulties encountered by the Commission in carrying out its task of control were brought to its attention, the sub-committee on budgetary control, which has since become Parliament's Committee on Budgetary Control, took the view that this affair should serve as an example to Parliament and encourage it to support the efforts of the Commission to obtain the fullest possible information. This case has therefore been followed very closely and featured on the agenda of many meetings of the Committee on Budgetary Control.
2. The committee was interested firstly in examining the effectiveness of the procedures for granting exemption from the collection of own resources. In this particular case the question was to see to what extent Community transit documents T 1 and T 2 were capable of preventing fraudulent dealing with intent to avoid payment of Community levies. The Committee on Budgetary Control made known its point of view in its opinion, adopted by Parliament, on the second amendment to the regulation on Community transit.
3. Secondly, turning to the subject of this report, the Committee on Budgetary Control was anxious to see that the Commission was not hindered in the exercise of its task of control pursuant to Article 14 of Regulation No. 2/71 (now replaced by Article 18 of Regulation No. 2891/77) by any opposition from national authorities.

1. THE SUBSTANCE OF THE JUDGMENT OF THE COURT OF JUSTICE

4. Having received information in April 1976 about a fraud relating to 6,000 tonnes of butter from Eastern Europe imported into Italy via Rotterdam and Roubaix after the falsification of the accompanying documents in order to avoid the payment of import levies, the Commission on 26 July 1976 asked Italy to effect a further control in which it wished to be associated. After initial contact was made, the Italian administration undertook to conduct an investigation and inform the Commission accordingly.
5. Following the Italian administration's reluctance throughout 1977 to associate the services of its financial controller with the investigation, the Commission on 19 January 1978 took the steps laid down in Article 169 of the EEC Treaty for the commencement of proceedings against Italy for failure to act. The proceedings were commenced on 21 December 1978. On 19 January 1979 the Commission received a copy of the heads of charges.

6. The arguments submitted by Italy in support of its refusal to supply the further information requested by the Commission were as follows:

- the Commission's right to be associated with measures of control could only arise after the establishment of the Community's claim against the person owing an own resource; the task of establishing the amount due was for the national administration to carry out when it was in possession of all the necessary information for establishing the claim, and in the present case when the facts at issue had been established by the court;
- the Commission's right to be associated with measures of control, which was administrative in character, could not involve acts of a judicial character from which the controlling administrative services of the Member States were excluded; the latter therefore had no power to associate the Commission with control measures that they themselves were not entitled to carry out.

7. The relevant Community provisions state that the establishment of own resources shall be carried out by the Member States in accordance with their laws, regulations and administrative provisions.

8. Italian law and in particular the Italian law on the confidentiality of preliminary inquiries does not prevent the transmission of information to the Commission but merely postpones the time when such information can be transmitted.

9. The Court's judgment has decided the following points:

- the Court found that the Italian government cooperated with the Commission as far as it was legally able and that it passed on the information requested once the confidentiality of the preliminary inquiries had been lifted;
- the Community provisions giving the Commission a right to be associated with measures of control do not entitle the Commission itself to carry out controls. National control procedures are therefore not affected by such provisions in the present state of Community law;
- the Commission's powers of control over the establishment and making available of own resources come into being on the occurrence of an event giving rise to own resources (in the present case crossing the border) and not from the time when the competent national body has 'established' the own resource.

## II. SIGNIFICANCE OF THE JUDGMENT AND POSITION OF THE COMMISSION'S POWERS OF CONTROL

10. The Court's judgment derives from an initial finding that Italy communicated the information requested albeit after the commencement of proceedings and after the completion of preliminary inquiries in the criminal proceedings.

Nevertheless this judgment represents if not necessarily a limitation at least a closer definition of the Commission's powers of control, the exercise of which is subject to the same legal conditions as controls by national administrations.

11. Since the Commission's requests were in large part met, the dismissal of the application in fact has only limited significance, especially as the judgment decides in favour of the Commission on a controversial question of principle. It is now settled that the Commission's powers of control arise as soon as the event giving rise to an own resource occurs. The Commission does not therefore have to wait for the competent national body to establish the claim.

12. Interestingly, the judgment also clarifies the scope of Article 14(2) of Regulation 2/71 (now replaced by Article 18(2) of Regulation 2891/77). The additional control measures which the Commission may ask the national administrations to carry out include all those which the national legislation allows. A national administration refusing to carry out a control which it is within its powers to carry out would therefore be in default.

13. As regards the substance of the Commission's power of control, as in a previous judgment, 'Pretore di Cento'<sup>1</sup>, relating to the Commission's powers over the collection of own resources, the Court of Justice refused to ignore the principle on which the present Community regulations are based, namely the fundamental jurisdiction of the national administrations.

14. In a system of this kind the task of the Commission is to guarantee that the operations for the establishment, collection, making available and control of own resources are carried out in a proper, fair and uniform manner in all the Member States. For the Community legislator, the notion of a right to be associated with measures of control was sufficient and gave the Commission the means with which to carry out that task. To call into question that principle and that notion is obviously a highly political matter closely concerning Parliament insofar as it considers itself to have

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<sup>1</sup>  
Case 110/76, ECR 1977-3, p. 855

a special responsibility towards the citizens and taxpayers of the Community for budgetary matters.

15. Your rapporteur considers that it is in the nature of genuine own resources that they are collected on an objective basis, applicable uniformly over the whole of the Community and that the Community should, if the own-resource character of its revenue is not to be called into question, be able to guarantee the objectivity and uniformity of its collection. To do so the Community must, in the event of a dispute with a Member State touching that objectivity and uniformity, be able to carry out controls in an independent and not merely an associated capacity.

16. There are two possible ways of creating such an independent power of investigation for the Community, which being complementary should be used successively.

- (a) The Court of Auditors, which is not affected by the judgment of the Court of Justice, could use the powers conferred on it by the Treaty and the Financial Regulation to exercise such a power of investigation in liaison with the Commission;
- (b) The present rules could be changed so as to give the Commission an independent power of investigation where it considers that there is a serious and immediate threat to the objectivity and uniformity of the collection of own resources.

17. One negative consequence of the Court's judgment is that since the Commission's powers are limited by the national provisions (necessarily divergent) governing relations between the administration and the judiciary, the extent of the Commission's control will vary from one Member State to another. The harmonization of laws in this field may present some difficulties.

### III. INITIATIVES TO BE TAKEN IN THE WAKE OF THE JUDGMENT OF THE COURT OF JUSTICE

18. The judgment of the Court of Justice is important in that it has underlined how in the present state of the law the Commission feels unable to play its role as guarantor of the interests of the Community and in particular to 'expose in good time lacunae in the system, continually to verify whether the Community provisions suffice to attain the objectives pursued by the legislature and finally to take in good time the initiative in improving the said provisions and adapting them to the actual practices adopted by traders'<sup>1</sup>. If Community control is not to continue with lacunae, certain measures need to be taken:

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<sup>1</sup> Application of the Commission, p. 14

A. Extension of existing controls

19. Some measures have already been taken by the Commission to strengthen the effectiveness of Community transit procedures. Thus more systematic controls are carried out by means of sampling or in cases where there are reasons to doubt the accuracy of statements in Community transit documents. In such a case a copy of the documents is sent to the customs office of destination. A system of prior notification for shipments thought to be suspect or sensitive has also been set up. The customs office of departure concerned alerts the investigative services of the country of destination and the transit countries. The Committee on Budgetary Control has already stated that these measures are self-evident and that Community transit forms should be revised in order to avoid situations whereby extremely serious financial consequences may be attached to the signature of a single official.

20. The powers conferred on the Court of Auditors by the Treaties and the Financial Regulation should enable it to conduct investigations, possibly in liaison with national control bodies, in order to enable the competent Community institutions to be informed in good time of deficiencies in the system and to react as soon as possible.

B. Strengthening of Community legislation

21. Assistance from the Court of Auditors can only be a temporary solution for the Commission which is the guarantor of the proper working of the system.

A proposal for a regulation presented by the Commission on 15 March 1979<sup>1</sup> in response to the request from Parliament contained in the decision of discharge for the financial year 1975<sup>2</sup> proposes the creation of a system for the automatic notification of the Commission of all irregularities uncovered which form the subject of an administrative or judicial investigation. Such a regulation would enable the Commission to be notified of irregularities much more quickly and regularly than at present and even where they form the subject of judicial proceedings.

This proposal was forwarded to the Council on 19 March 1979 but has not yet received consideration.

22. As regards the collection of claims, the prevention and prosecution of breaches of Community rules on own resources, a further proposal from the Commission intended to create a system of mutual assistance between the Member States inter se and between the Member States and the Commission with

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<sup>1</sup> Doc. 38/79 adopted by Parliament on 11 May 1979 following a report by Mr Notenboom

<sup>2</sup> Doc. 165/77 - report by Mr Aigner - comments, point 22

a view to guaranteeing the proper application of Community rules in customs and agricultural matters was submitted to the Council on 25 April 1973 and is still pending. These rules would also enable the Commission to be better informed.

23. Finally, the Commission might consider the possibility of proposing a regulation which would enable it in exceptional cases to conduct independent investigations.

C. Harmonization of laws in the Member States

24. The Como butter affair has revealed profound divergences between national practices relating to the establishment of own resources. Since this is an essential concept in the relevant Community rules, its substance should be harmonized. Work is currently in progress in the Commission with that end in view.

D. Recovery of own resources owing

25. The Commission is invited to ensure that the interests of the Community in this matter are safeguarded.

Extracts from the judgment of the Court of Justice in Case No. 267/78 concerning goods taxable in transit: (Como butter case)

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The Commission's power of supervision

" The Italian Government contends that the power of supervision given to the Commission by Regulation No. 2/71 can be exercised only after the national administrative body has finished its task of establishing the Communities' own resources, that is to say has determined the claim and made it available to the Communities. The procedure laid down by the Community rules in fact comprises three stages: 'establishing the Communities' own resources, 'making available' the resources which have been established and carrying out 'measures of control'. Before the stage of measures of control, in which the Commission has power to intervene, can begin, the national administrative departments must have completed the previous stages. Only then can the Commission co-operate with those departments to check whether the Communities' own resources have been properly established and paid over.

Against this argument the Commission maintains that to be effective it must be able to effect its supervision as soon as a fact giving rise to the Communities' own resources has been established. This is apparent from the provisions governing measures of control and in particular Articles 6 and 14 of Regulation No. 2/71

The Court cannot accept the arguments of the Italian Government which would mean robbing the applicable provisions of their substance. On that basis the Commission's powers would be confined to a simple subsequent verification of the accounts of the Communities' own resources which the Member States are required to keep. Article 6 of Regulation No. 2/71 provides for a monthly statement of accounts and Article 9 (2) provides that any delay in making an entry shall give rise to the payment of interest by the Member State concerned. The fact that in accordance with the said Article 6 the established entitlements are to be entered in the accounts of the Communities as revenue to be collected requires that from then onwards the Commission shall have a right to ask for additional measures of control and to be associated with the measures applied by the Member States themselves as from the time when the resources ought to have been established.

The Italian Government is thus not justified in contesting the Commission's power to exercise its supervision as soon as the Communities' own resources have been 'established' by the competent authority in the Member State in question.

The question of privilege as regards criminal investigations

From a consideration of the arguments put forward in support of the application it is apparent that the Commission's main complaint is the refusal by the Italian administration to pass on information relating to the criminal proceedings and as such privileged. The question accordingly arises whether Community rules in the matter may be interpreted as requiring Member States to transmit such information in derogation, if necessary, from the rules of national judicial procedure.

Article 14 of Regulation No. 2/71 as re-enacted by Article 18 of Regulation No. 2891/77 provides as follows:

(1) Member States shall carry out the verifications and inquiries concerning the establishment and the making available of own resources. The Commission shall make use of its powers as specified in this article.

(2) Accordingly, Member States shall:

Carry out any additional inspection measures the Commission may ask for in a reasoned request,

Associate the Commission, at its request, with the inspection measures which they carry out.

Member States shall take all steps required to facilitate these inspection measures...'

It is necessary to observe first of all that the applicable Community regulations do not empower the Commission itself to carry out inspections but provide that the Commission shall be "associated" with the inspection measures carried out by the Member States. It follows that the regulations do not modify the actual procedures for inspection applicable in the various Member States.

It is proper further to recall that the Community regulations do not mention the relationship between the powers of inspection in relation to establishing the Community's own resources on the one hand and the guarantees provided by municipal law for the proper conduct of criminal proceedings on the other.

It follows from these considerations that in the present state of Community law the inspection measures which the Commission may request and with which it must be associated cover all those which the national authorities may carry out but it is not possible to infer from the regulations in question an intention to alter the relations between the administration and the judicial authorities.

Rules which in the national systems of criminal law prevent the communication to certain persons of documents in the criminal proceedings may therefore be relied upon against the Commission in so far as the same restrictions may be relied upon against the national authorities.

It appears from consideration of the file that the Italian Government co-operated with the Commission as far as was legally possible during the proceedings and transmitted to the Commission the information which was privileged as relating to criminal investigation as soon as the privilege was lifted by the Examining Magistrate.

It is therefore necessary to find that Italy did not fail to fulfil its obligations under the Treaty...."

Como butter case

In April 1976 the Commission received information to the effect that 6000 t of butter from third countries had been imported into the Community in contravention of Community regulations.

At the end of 1976 the Italian 'Guardia di Finanza' confirmed the probability of a link between this case and the investigations being conducted at the time into a case of a large-scale fraud, which had been discovered as a result of a road accident involving a lorry with forged papers.

It appeared that after being imported lawfully into the Community via Rotterdam, the butter was transported to Italy in 248 consignments, accompanied initially by T<sub>1</sub> documents (external Community transit) which conformed to the regulations. During transit false T<sub>2</sub> documents (internal Community transit) - probably issued by the customs in Roubaix - were substituted, which allowed payment of the levies on agricultural products - estimated at 8,000,000 EUA - and the checks at the border to be avoided.

327 vehicles were involved in these transactions.

The clearance documents, i.e. the forged T<sub>1</sub> forms, wrongly certified that there had been customs clearance in Como, and therefore the Netherlands customs office of departure did not demand payment of the deposit.

The Italian customs claim to have notified the Netherlands customs from the start of their inquiries that the clearance documents were false, but the Netherlands customs did not reply.

In November 1977 Mr Gundelach told Parliament that a similar transaction had taken place some months before and said that the Commission had already established that a certain quantity of butter, exported from the Community with the benefit of export refunds, had been reimported into the Community without payment of the levy.

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Criminal proceedings are currently being taken against ten persons and 29 lorries have been seized.

ANNEX III

Breakdown of the main titles for the financial year 1980

	<u>EUA</u>	<u>%</u>
Taxes on sugar and isoglucose	504,500,000	3.4
Agricultural levies	1,719,200,000	11.4
Common Customs Tariff (duties)	5,667,800,000	37.7
Own resources from VAT	7,151,030,850	47.5
	<u>15,042,530,850</u>	<u>100 %</u>

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Source: OJ No. L 242, 15.9.1980, p. 45

