

OPINION OF ADVOCATE GENERAL
ALBER
delivered on 25 September 2003 ¹

I — Introduction

1. The services of the Commission concluded with their American counterparts guidelines on regulatory cooperation and transparency under the Transatlantic Economic Partnership. The French Republic claims that the Court should annul that arrangement since, in its view, it constitutes a binding international agreement. It points out that, in accordance with Article 300 EC, only the Council has the power to conclude such an agreement. Moreover, it submits that the Commission's right of initiative is restricted on account of the obligatory nature of that arrangement. By contrast, the Commission takes the view that the arrangement is merely a preparatory measure. It contends that since there is no binding act within the meaning of Article 230 EC, the action is inadmissible.

1 — Original language: German.

II — Legal framework

A — *Transatlantic Economic Partnership*

2. At their summit in May 1998 the European Union and the United States of America adopted a statement on the Transatlantic Economic Partnership (TEP). In Point 10 of that statement the partners affirm their intention to concentrate on removing barriers which create significant restrictions to transatlantic trade and investment. In particular, this entails the removal of provisions that hinder market opportunities for goods and services.

3. In Point 17, the partners state their intention to

— establish as soon as possible a Plan identifying areas for common actions both bilaterally and multilaterally, with a timetable for achieving specific results;

— take all necessary steps to allow the early implementation of this Plan, including any necessary authority to start negotiations.

4. The second indent is provided with a footnote to the effect that that passage does not give the EU a negotiating mandate.²

for all interested parties to have meaningful input in these procedures and receive reasonable consideration of their views'. The Action Plan also makes provision to 'examine the results of the review of the respective regulatory procedures and, on that basis, identify ways and means to improve access to each other's regulatory procedures, develop jointly agreed general principles/guidelines on such procedures, and when possible, work to accommodate those improvements, while preserving the independence of domestic regulatory authorities'.

B — *Transatlantic Economic Partnership Action Plan*

5. On 9 November 1998 the Council approved an Action Plan which had been agreed by the EU and the USA with regard to the TEP.³ Section 3.1. of the Action Plan, which relates to points 9 to 14 of the TEP statement, deals with 'Technical barriers to trade in goods'. Paragraph 3.1.1., 'Regulatory Cooperation', provides for the identification and implementation of jointly defined general principles/guidelines for effective regulatory cooperation. Moreover, provision is made 'jointly [to] review mutually agreed issues, notably access to each others' regulatory procedures with respect to transparency and participation of the public — including the opportunity

C — *Guidelines on Regulatory Cooperation and Transparency*

6. In July 1999 negotiations began between the services of the Commission and the American Government on principles/guidelines. During the negotiations the representatives of the Commission pointed out that the principles/guidelines could not create any obligations between the USA and the EC which are binding under international law and that they were fully compatible with the legal provisions in force on both sides. In February 2002 the negotiations on the Guidelines on Regulation and Transparency (hereinafter 'Guidelines') were con-

² — 'Nothing in this text constitutes an EU negotiating mandate'.

³ — Council press release No 12560/98. The text of the Action Plan is attached to the press release as Annex IV.

cluded. The text itself was not signed; instead agreement was reached by means of statements issued by the respective services which had been responsible for the negotiations.

be implemented on a voluntary basis and that they did not constitute an international agreement but rather the results arrived at by the competent services of both partners.

7. The Commission took note of the Guidelines at its meeting of 9 April 2002. On 12 April 2002 commissioners Liikanen and Lamy notified the press of the Guidelines arrangement.⁴

9. The Guidelines are divided into six sections: (I) Introduction, (II) Objectives, (III) Field of Application, (IV) Operational Elements of Regulatory Cooperation, (V) Operational Elements of Transparency and (VI) Procedural Aspects.

8. On the same day, in accordance with the second subparagraph of Article 133(3) EC, the services of the Commission drew up a memorandum addressed to the 133 Committee of the Council which was also responsible for negotiations in the field of the common commercial policy; it sent the Council the text of the Guidelines in the version of 13 February 2002 with that memorandum. The Commission pointed out in the memorandum that the Action Plan, which had been drawn up as part of the TEP, provided *inter alia* for negotiations on guidelines on regulatory cooperation and transparency. The Guidelines had been under negotiation since late 1999 and the Council had been informed of this several times in the past, most recently in January 2001. The Commission expressly emphasised that the negotiated Guidelines were to

10. The Introduction (I) describes the context in which the Guidelines were negotiated, in particular the TEP Statement of 1998 and the Action Plan Section II states that the objectives of the Guidelines are to improve cooperation between regulators and to promote transparency to the public (Point 4). The aim of the cooperation is in particular to improve the planning and development of regulatory proposals, improve the quality and level of technical regulations and minimise divergence in regulations through increased dialogue between regulators (Point 4(a)). The aim is also to obtain increased predictability in the development and establishment of regulations by exchanging information on the objectives pursued by such regulations, instruments used and timetables drawn up for such purpose (Point 4(b)). Another aim is to give the authorities of each side the opportunity to provide the other with

4 — Press release IP/02/555 of 12 April 2002 submitted by the Commission as Annex 2.

'meaningful input' on the drafting of regulations and the possibility also to give due consideration to such input within that framework (Point 4(c)). A further aim is to promote public participation in the regulatory process through access to documents being drafted, analyses and relevant data (Point 4(d)), to provide public explanations and necessary technical information (Point 4(f)) and to create greater public understanding of the objectives pursued and effects sought by the regulations (Point 4(g)). On the whole, such steps aim to help facilitate trade (Point 4, final sentence).

12. Section IV, 'Operational Elements of Regulatory Cooperation', provides for the exchange of information and mutual consultation between the competent services. This also extends where necessary to non-public information (Point 10). Moreover, the aim is to collect and analyse data jointly as well as to reach a common understanding on the methodology for analysing facts and data and causes potentially warranting regulatory action. There should also be an exchange of rulemaking priorities (Point 11). Finally, provision is made for monitoring of forthcoming rulemaking projects (Point 12).

11. Section III describes the field of application of the Guidelines. It begins by expressly pointing out that the Guidelines are to be applied on a voluntary basis (Point 7). Their material scope extends to the development of provisions relating to goods in the field of application of the Agreement on Technical Barriers to Trade (the TBT Agreement),⁵ which is part of the WTO Agreement (Point 8). The Guidelines relate both to the development of future provisions and to amendments to existing provisions (Point 9).

13. Section V of the Guidelines provides for detailed operational elements for informing the public of proposed regulations, which even includes the planning and development phase of the proposed regulations. In particular, the competent authorities are to provide information about current and future regulatory initiatives, make it possible for the public to submit comments on the regulations in good time, take the public comments submitted into account and finally provide information, where appropriate, on how those comments have been taken into account (Point 17).

14. The procedural aspects (Section VI) concern the monitoring and review of the implementation of the Guidelines, as well as their further development.

⁵ — Annex 1 A of the Agreement Establishing the World Trade Organisation (OJ 1994 L 336, p. 86).

15. In Section IV and Section V the verb 'should' is used for the measures to be adopted with regard to cooperation between the authorities and informing the public, whereas in Section VI the verb 'will' is used for the procedural aspects.

18. The French Republic claims that there are two infringements as regards the substance of the case: the Commission's lack of competence to conclude the arrangement and infringement of its monopoly on initiating legislation.

III — Submissions of the parties and forms of order sought

16. The French Republic considers the Guidelines arrangement to be a legally binding international agreement. Relying on the judgment in *France v Commission*,⁶ it takes the view that the act whereby the Commission experts agreed the Guidelines with their American negotiating partners is an act against which an action for annulment may be brought.

17. The act by which the Commission's negotiators agreed on the negotiated text with their American counterparts at operational level expresses the Commission's willingness to enter into a binding obligation with the United States. In view of the level agreed by the two contracting parties for conducting the negotiations, the Commission was required to express its commitment to cooperate only at operational level.

19. In the view of the French Government, the Guidelines constitute a binding international agreement. The Treaty, and in particular Article 300 EC, does not confer any power on the Commission to conclude international agreements but reserves that power for the Council. In Opinion 1/75 the Court of Justice held that neither the form nor the designation is in essence decisive as to whether or not an agreement constitutes an international agreement. Rather, the expression 'agreement' indicates any undertaking entered into by a body subject to international law which has binding force, whatever its form. An understanding which contains a standard, that is to say a rule of conduct, covering a specific field, determined by precise conditions and which is binding upon the participants, is such an undertaking.⁷

20. The Guidelines fulfil those requirements. It is true that they do not take the form of a series of articles and do not contain any provision relating to their entry into force. However, such matters of form are not of decisive importance. What must

6 — Case C-327/91 *France v Commission* [1994] ECR I-3641.

7 — Opinion 1/75 [1975] ECR 1355, 1360.

be noted instead is that the provisions of the Guidelines are presented systematically and the different issues which are addressed are treated in a sufficiently precise manner.

ensure that the Guidelines produce specific results and that they are not merely words on a page.

21. Despite the carefully-chosen wording in the Guidelines, the French Government considers that, in the light of the way in which the content is set out, the arrangement has binding force. For example, the objectives pursued by the arrangement are very precisely defined, as is its field of application and, in particular, the measures to adopt as part of the cooperation between the respective authorities and also in relation to the public.

24. The French Government considers that the fact that the Guidelines do not provide for any mechanism for the settlement of disputes is of no importance. Nor is it necessary, for the Guidelines to be binding, to lay down express rules governing responsibility for their application. This already follows from the general principles of international law.

22. Nor does the fact that the Guidelines are not intended to modify existing Community law militate against their binding nature. The arrangement contains at the very least an undertaking to cooperate with the American authorities.

25. The French Government likewise considers it to be of no consequence that the Commission has never received a negotiating mandate, that it has continually insisted to its negotiating partners that the arrangement is not binding and finally that the American side also regards the Guidelines as not binding. The only relevant factor is the content of the arrangement. The binding nature of the Guidelines follows from the content. Moreover, the procedural provisions in Section VI do not contain the verb 'should' used elsewhere but the verb 'will'. This guarantees the implementation of the measures provided for therein. As far as the French Government is concerned, that means that the review mechanism is not merely optional.

23. The procedural aspects provided for in Section VI, in particular the ongoing review process agreed in point 18, offer clear evidence of the binding nature of the arrangement. The contracting parties have an obligation under the Guidelines to achieve a particular result. In that regard they are under the supervision of an ad hoc review body. Thus the contracting parties

26. The Commission's decision to adopt the Guidelines is void because the Commission lacks competence. In the judgment in *France v Commission*⁸ the Court made reference to the division of powers in Article 300 EC. In principle, the Council has the power to conclude international agreements. The exception provided for in favour of the Commission can result only from powers expressly conferred on it by the Council and not from the interpretation of internal rules on competence. Moreover, in the view of the French Republic, no internal powers are invested in the Commission in the field regulated by the Guidelines.

27. The French Government considers that the Guidelines arrangement is also contrary to Community law in so far as they restrict the Commission's monopoly on initiating legislation because the Commission is bound by those Guidelines. The Commission alone is responsible for deciding which legislative proposals it puts forward and what those proposals contain. This applies in particular to that part of the Guidelines which deals with technical regulations which affect trade in goods and services.

28. However, the Guidelines provide a way of influencing the Commission's proposals and restrict the freedom it enjoys. For

example, the Commission is required to observe certain procedural rules when working with the American authorities. Moreover, the Commission is obliged to take into consideration the comments of the American authorities.

29. In the view of the French Government, restricting the Commission's right to propose legislation affects the whole of the subsequent legislative process. The content of the Commission's proposals determines the scope of the subsequent deliberations of the European legislature. Moreover, the only way in which the Council may dismiss the Commission's proposals is by unanimous decision.

30. The French Republic claims that the Court should:

(1) annul the Commission's decision whereby it concluded with the USA the Guidelines on regulatory cooperation and transparency;

(2) order the Commission to pay the costs.

⁸ — Cited in footnote 6.

31. The Commission claims that the Court should:

- (1) dismiss the action as unfounded;
- (2) order the French Republic to pay the costs.

32. The Commission considers the action to be unfounded. It contends that the Guidelines do not constitute an international agreement. They do not produce any legal effects and therefore there is no act within the meaning of Article 230 EC against which an action for annulment may be brought.

33. The Commission disputes the submission that the College of the Commission ever approved the agreement. It maintains that it is merely an administrative arrangement. In that regard, there has been no act from the Commission as an institution against which an action for annulment may be brought.

34. If the Court were nevertheless to hold that the Guidelines are binding on the Commission as an institution, the action would be inadmissible on the ground that the arrangement does not produce any legal effects.

35. The Commission takes the view that it may agree principles or guidelines with the American authorities without exceeding its powers. It is true that the Commission may enter into international arrangements which produce legal effects and/or give rise to obligations only in the cases expressly provided for by the Treaty. However, *a contrario* this does not preclude the Commission from concluding with the authorities of non-Community states practical talks on cooperation that do not give rise to international obligations. The Commission has the power to conclude informal administrative talks with the competent administrative authorities of the United States. It takes the view that its right of initiative includes the possibility to hold any consultations it considers necessary before it proposes a measure to the Parliament and the Council.

36. Under the law of international treaties the intention of the contracting parties is extremely important. Even the framework within which the Guidelines were drawn up was characterised by talks of a purely political nature which had no legally binding effect. Neither the TEP nor the Action Plan is binding.

37. Not only the context but also the level of the representatives involved, the procedure chosen to conclude the arrangement and the terminology used therein establish the non-binding nature of the Guidelines.

They were neither formally adopted nor signed by either party. Both parties had continually emphasised that they did not want to create binding provisions. The Commission draws attention in particular to the use of the words 'should' and 'will' rather than 'shall'. The vocabulary chosen is standard for non-binding international instruments. The term 'parties' is not used at any point in the text; 'sides' is used exclusively throughout. Moreover, the EU and the USA are not referred to as contracting parties.

38. The structure of the Guidelines also confirms their non-binding nature. They do not contain any final provisions concerning their entry into force or any rules on the settlement of disputes. Provision is made merely for a review mechanism. None of the provisions is capable of making either side liable under international law.

39. Unlike the French Government, the Commission takes the view that the matters of form to which it has referred cannot be considered separately from the content of the Guidelines. Rather, the arrangement must be assessed as a whole and in this

respect the form chosen for the arrangement plays a decisive role. The form demonstrates the intention of the contracting parties to create a non-binding document.

40. The United Kingdom, which has been given leave to intervene in support of the Commission, restricts its observations to the substantive aspects of the dispute. It submits that in order to interpret an international agreement, the whole set of circumstances that led to its adoption must be taken into consideration. This is the only way to determine the legal significance of a document.

41. The monitoring and follow-up provided for in points 18 and 22 of the Guidelines are nothing more than statements of intent. Any infringement of those points cannot under any circumstances render either side liable under international law.

42. Moreover, the Commission's right of initiative is not affected by the arrangement, according to the United Kingdom Government. In its view, the non-binding consultation of the American authorities is still covered by the right of initiative enjoyed by the Commission, which may avail itself of every possible source of information in order to draw up legal acts. It is precisely because the USA is able to contest EU

provisions within the framework of the WTO that it is particularly important, prior to the adoption of a provision, to identify potential barriers to trade that may arise.

45. The term ‘act’ in the first paragraph of Article 230 EC covers all measures, whatever their nature or form, which are intended to have legal effects.⁹ This follows from the exclusion of recommendations and opinions, which, under paragraph 5 of Article 249 EC, have no binding force. The Court has consistently held that only measures producing binding legal effects are open to challenge by an action for annulment.¹⁰

IV — Assessment

A — *Admissibility of the action*

43. The Commission contests the admissibility of the action. It takes the view that, on the one hand, there is no decision by which the Commission as an institution adopted the Guidelines and, on the other, the Guidelines do not produce any legal effects and so there is no act within the meaning of Article 230 EC against which an action for annulment may be brought.

44. Under the first paragraph of Article 230 EC the Court of Justice is to review the legality of acts adopted jointly by the European Parliament and the Council, of acts of the Council, of the Commission and of the ECB, other than recommendations and opinions, and of acts of the European Parliament intended to produce legal effects vis-à-vis third parties. The action brought by the French Republic is admissible if the Guidelines arrangement concluded with the American Government is an act of the Commission within the meaning of that provision.

46. In view of the Commission’s objections, two questions must be examined below. First of all it must be considered whether the act in question is in fact an act of the Commission. Only then does the further question arise whether that act produces legal effects, because only then would it be open to challenge by an action for annulment.

47. The Commission takes the view that since there was no decision by the College of Commissioners, the arrangement does not bind it as an institution. In this regard, it must be pointed out that the College took note of the arrangement at its meeting on 9 April 2002. That fact alone could support the view that that the Commission approved the arrangement and that that approval constitutes a decision by the

9 — Case 22/70 *Commission v Council* [1971] ECR 263, paragraphs 38 to 42; Case C-366/88 *France v Commission* [1990] ECR I-3571, paragraph 8; *France v Commission*, cited in footnote 6, paragraph 14; Case C-58/94 *Netherlands v Council* [1996] ECR I-2169, paragraph 24.

10 — Order in Case 135/84 *F.B. v Commission* [1984] ECR 3577, paragraph 6; order in Case C-50/90 *Sinzest v Commission* [1991] ECR I-2917, paragraph 12.

College of the Commission. If the College of Commissioners had been against the arrangement, it should have intervened as soon as it was informed of it.

48. However, precisely the opposite was the case. According to the Commission's own submissions, on 12 April 2002 Commissioners Liikanen and Lamy, who had responsibility for trade matters, even informed the press of the conclusion of the arrangement. This expresses the Commission's consent to the actions of its services.

49. Moreover, in accordance with the minutes of the Commission meeting on 9 April 2002, the Guidelines arrangement with the USA was concluded at the next EU-US Summit on 2 May 2002 and the necessary implementing measures which were to be adopted were approved and set out in a note distributed by Commissioner Liikanen.¹¹ These facts support the propo-

sition that, contrary to the submissions put forward by the Commission, the College of the Commission even expressly approved the Guidelines.

50. However, even if it is assumed that the College did not approve the Guidelines, the Commission's objection appears to be irrelevant in so far as it relates to a purely internal problem affecting the Commission. Who may act with authority for the Commission vis-à-vis third parties is determined in accordance with the Commission's rules of procedure and other rules governing the division of powers. In accordance with the provisions contained in Article 46 of the Vienna Convention of 23 May 1969 on the Law of Treaties¹² (VCLT) and Article 7(3)(b) of the Vienna Convention of 21 March 1986 on the Law of Treaties between States and International Organisations or between International Organisations¹³ (VCLT-IO), (not yet in force) it must be assumed that any lack of power of representation in an internal relationship is irrelevant if it is not clear that representatives are not competent and if this is also apparent to the American

11 — Cf. the minutes of 17 April 2002 of the meeting on 9 April 2002 (PV(2002)1562 final, which can be found at the following address: www.europa.eu.int/comm/secretariat_general/meeting/archives_en.htm. The English version reads: 'The Commission took note of the agreement reached at technical level between the Community and the United States on guidelines for regulatory cooperation and transparency (SEC(2002)386/2), which would be ratified by means of political declarations by both parties at the next EU/US summit on 2 May. It took note of the conditions for implementation of these guidelines as set out in the note distributed by Mr LIIKANEN (SEC(2002) 386).' The French version reads: 'La Commission prend acte de l'accord intervenu, au niveau technique, entre la Communauté et les Etats Unis sur des lignes directrices sur la coopération et la transparence en matière de régulation (SEC(2002) 386/2) qui seront entérinées, par la voie de déclarations politiques des deux parties, lors du prochain sommet UE/Etats Unis le 2 mai 2002. Elle prend note des conditions de mise en œuvre de ces lignes directrices telles que reprises dans la note diffusée par M. LIIKANEN (SEC (2002) 386).'

12 — Article 46 VCLT reads as follows: '1. A State may not invoke the fact that its consent to be bound by a treaty has been expressed in violation of a provision of its internal law regarding competence to conclude treaties as invalidating its consent unless that violation was manifest and concerned a rule of its internal law of fundamental importance.

2. A violation is manifest if it would be objectively evident to any State conducting itself in the matter in accordance with normal practice and in good faith.'

13 — Article 7(3) VCLT-IO reads as follows: 'A person is considered as representing an international organisation for the purpose of adopting or authenticating the text of a treaty, or expressing the consent of that organisation to be bound by a treaty if: (a) that person produces appropriate full powers; or (b) it appears from the circumstances that it was the intention of the States and international organisations concerned to consider that person as representing the organisation for such purposes, in accordance with the rules of the organisation, without having to produce full powers.'

negotiating partners. However, there can be no question of there being a clear lack of competence in the present case since the competent services of the Commission were negotiating with the American authorities for years. As a result, the Commission as an institution was bound by the actions of its representatives. Consequently, the act at issue in this case is an act of the Commission.

rights or obligations on the part of third parties and do not therefore constitute acts adversely affecting any person against which an action for annulment can be brought.¹⁴ Nor is it possible, in accordance with the case-law of the Court, to bring an action against acts which are the expression of purely voluntary coordination with a view to subsequent decisions of the institutions.¹⁵

51. It must therefore now be considered whether the act of the Commission in the form of the conclusion of the Guidelines arrangement produces legal effects. The Commission contests this, referring to the non-binding nature of the Guidelines.

53. First of all, the objection raised by the Commission that the non-binding nature of the Guidelines results from the very fact that they are not signed by the partners must be dismissed. In accordance with the VCLT and the VCLT-IO, treaties do not have to be concluded solely by signature or ratification. Their acceptance or approval is sufficient, as is apparent in particular from Article 11 et seq. VCLT¹⁶ and Article 11 et seq. VCLT-IO.¹⁷ The willingness to be bound by an agreement can be expressed in any form. The written form is by no means the only form possible.

52. As already mentioned, the first paragraph of Article 230 EC covers only those measures which produce legal effects. Measures which have effects only within the administration itself are beyond legal scrutiny, for example. They give rise to no

14 — Case 366/88 *France v Commission*, cited in footnote 9, paragraph 9, relating to internal instructions.

15 — Judgment in *Netherlands v Council* (cited in footnote 9, paragraphs 25 to 27, relating to the Code of Conduct [93/730/EC] governing public access to Council and Commission documents, OJ 1993 L 340, p. 41).

16 — Article 11 VCLT reads as follows: 'The consent of a State to be bound by a treaty may be expressed by signature, exchange of instruments constituting a treaty, ratification, acceptance, approval or accession, or by any other means if so agreed.'

17 — Article 11(2) VCLT-IO reads as follows: 'The consent of an international organisation to be bound by a treaty may be expressed by signature, exchange of instruments constituting a treaty, act of formal confirmation, acceptance, approval or accession, or by any other means if so agreed.'

54. Consequently, the content of the arrangement should be examined. In this regard, it should first of all be stated that the fact that the Guidelines do not provide for penalties or for liability for non-observance, or for a dispute settlement procedure, does not therefore — contrary to the Commission's view — preclude them from being regarded as a binding document because those elements are not essential for an arrangement to have binding effects. The absence of an express provision governing penalties must be irrelevant for the simple reason that an international agreement is subject to the rule *pacta sunt servanda*.¹⁸ Moreover, in so far as concerns an agreement binding under international law, the general principles of international law governing liability of subjects of international law are applicable in the absence of express rules in the Guidelines.

55. The Guidelines set out rules and forms of conduct which regulators of the US Federal Government on the one hand and the services of the European Commission on the other intend to apply on a voluntary basis as broadly as possible (Point 7 of the Guidelines). The objective is for the authorities to inform and consult one another and to inform the public (Point 4 of the Guidelines) within the framework of the planning and development of provisions which may justify technical barriers to trade within the meaning of the TBT Agreement (Point 8 of

the Guidelines). This is aimed at avoiding trade restrictions as much as possible and facilitating trade in general (last sentence of Point 4 of the Guidelines).

56. Instrumental and procedural obligations are in principle capable of being the subject of an international arrangement.¹⁹ In point 7 of the Guidelines, referred to above, reference is made expressly to the fact that the competent authorities 'intend to apply [the Guidelines] on a voluntary basis'. The non-obligatory nature of the Guidelines is emphasised further by the use of 'should'. In international treaties binding obligations are generally characterised by the use of 'shall', whereas the verbs 'should' and 'may' are used only for non-binding obligations. The obligations laid down in the Guidelines to inform one another and the public are characterised by the word 'should' (cf. in particular Points 5 and 10 to 17). This likewise militates for the non-binding nature of the Guidelines.

57. Only the procedural aspects laid down in Section VI are characterised by the use of 'will'. The word 'will' is less common in the

18 — Cf. in this regard the Opinion of Advocate General Tesouro of 16 December 1993 in Case C-327/91 *France v Commission* [1994] ECR I-3641, I-3643, point 21.

19 — Cf. Opinion of Advocate General Tesouro (cited in footnote 18, point 20).

context of international treaties. It is therefore difficult to attribute a clear meaning to it. However, even if the use of the word 'will' could be seen as enhancing the binding nature — as the French Government asserts —, the express statement in Point 7 of the Guidelines that they apply on a voluntary basis must still be borne in mind. This general statement must not be disregarded when interpreting the word 'will'. It is therefore impossible to draw any conclusions as to the binding nature of the Guidelines from the way in which the procedural aspects are worded.

59. In addition to the wording and objectives of the arrangement, the context in which the Guidelines were agreed must also be taken into consideration. As is apparent from the introduction, the Guidelines were negotiated within the framework of the Transatlantic Economic Partnership which was launched at the London Summit in May 1998. That partnership is not based on a binding international arrangement but constitutes a political agreement within the framework of the New Transatlantic Agenda agreed as early as 1955. It is true that this does not preclude the parties from concluding a binding arrangement under the TEP. However, that context is an indicator that what is at issue is a political dialogue concerning improvements in cooperation on trade matters in general. This suggests that the Guidelines are likewise to be regarded as a political arrangement and not a legally binding document.

58. The objectives pursued by the Guidelines also militate in favour of the arrangement not being binding. One objective, for example, is to grant the 'opportunity' for regulators of each 'side' to provide the other with meaningful input and the possibility to obtain reasonable consideration of such input (Point 4(c) of the Guidelines). The 'opportunity' to provide input and the 'possibility' to have such input taken into consideration are terms which do not create any entitlement to acceptance of any objections that may be raised. Thus, this also militates in favour of the non-binding nature of the Guidelines.

60. This view is confirmed by the statement made in the minutes of the Commission meeting of 9 April 2002 already referred to above. They note the Commission's intention to approve the Guidelines by means of political declarations at the next EU-US summit.²⁰

61. The wording, objectives and context of the Guidelines suggest that they are to be

²⁰ — Cf. the extract from the minutes cited in footnote 11.

regarded as a measure which, like the Code of Conduct agreed between the Council and the Commission governing public access to documents, constitutes the expression of purely voluntary coordination for the purposes of subsequent decisions of the competent institutions of the US Government and the Commission in the context of the development of regulatory proposals. On the basis of the judgment in *Netherlands v Council*,²¹ the Guidelines must therefore, on this analysis, be regarded as a non-binding legal act.

experience of that kind is particularly desirable in the area of trade policy in order to prevent trade conflicts which might lead to dispute settlement procedures under the WTO. When the Commission concludes arrangements to that end, in order to steer the consultations along particular defined paths, it is exercising, rather than restricting, its right of initiative. Ways and means are established which put the Commission in a position to exercise its right of initiative in an appropriate manner.

62. Such an interpretation of the Guidelines is also in line with the tasks assigned to the Commission. In accordance with the third indent of Article 211 EC, the Commission is to participate in the shaping of measures taken by the Parliament and the Council. This is effected primarily by presenting proposals for regulations, directives and decisions. In the context of the development of such proposals, the Commission is required to consult the different interest groups which may be affected by any proposed rules and to examine as thoroughly as possible the circumstances under which rules might be proposed. There is no apparent reason why it should not also be able to consult governments of non-Community States when gathering such material. An exchange of ideas and

63. When the Commission concludes such arrangements, which set out the procedure governing mutual consultations, procedural obligations may be created requiring that the services of the American Government be informed of the Commission's legislative proposals, for example. However, this does not create any substantive obligation on the part of the authorities or services involved in any mutual consultations. Even if, in the course of the consultations held with the Commission, the American Government were to raise serious objections to a proposal for a regulation, for example, there would be nothing to stop the Commission from putting it before the Parliament and the Council in any case. Beyond examining the objections raised, there is no obligation in the Guidelines to have regard to the observations made by the other side in the sense that the competent institutions cannot reject or disregard them. This also militates in favour of regarding the Guidelines as a document regulating cooperation between two administrative bodies which is restricted to procedural aspects and which cannot create any substantive obligations.

21 — Cited in footnotes 9 and 15.

64. However, it seems inappropriate to regard the Guidelines at issue as having the legal status of an administrative agreement. The Commission's submission that the arrangement was concluded between administrative bodies, fell within its competence and in particular within its right of initiative, could be understood to that effect. It should be pointed out that there is no mention in the EC Treaty of the category of 'administrative agreement'.²² It is therefore extremely doubtful whether the Commission is competent at all to conclude such agreements other than in the cases expressly referred to in the Treaty, such as Article 302 EC.

65. In his Opinion in *France v Commission* concerning the agreement between the Commission and the United States regarding the application of their competition laws, Advocate General Tesauro pursued the matter of the extent to which the Commission may conclude administrative agreements. He stated that administrative agreements constitute a legal concept developed through practice.²³ He dismissed the argument advanced by the Commission to the effect that Article 300 EC (formerly Article 228 of the EC Treaty) permits it to be vested with a general power to conclude agreements of an 'administrative' nature.²⁴ In his view, even the fact that the Commis-

sion does in practice conclude agreements with non-Community States cannot substantiate its power since the Court has consistently held that a mere practice on the part of the institutions cannot create a precedent binding on Community institutions with regard to the correct legal basis.²⁵

66. However, even if it is assumed that the executive also has the power in principle to conclude so-called administrative agreements, the question then arises of the extent to which the Commission is to be the 'executive' in this sense. In the context of concluding international treaties, Article 300(2) EC confers on the Council, not the Commission, the executive function of concluding an international agreement. That balance between institutions, which is established by the Treaty and to which consulting, and/or obtaining the assent of, the European Parliament is also added, would be appreciably disturbed if the Commission were generally placed on an equal footing with the Governments of the Member States, which are empowered to conclude administrative agreements.²⁶ In

22 — Attention is drawn here merely for the sake of completeness to a comparison with Article 59(2) of the German Basic Law, which expressly refers to the legal concept of administrative agreements.

23 — Opinion in *France v Commission* (cited in footnote 18, point 22).

24 — Opinion in *France v Commission* (cited in footnote 18, points 25 to 27).

25 — Opinion in *France v Commission* (cited in footnote 18, points 28 to 29). Cf. in addition the comments made in the judgment in that case (cited in footnote 6, paragraph 36).

26 — See also the Opinion in *France v Commission* (cited in footnote 18, points 33 to 34) in that regard. The judgment in that case also relies expressly on the balance to be maintained between institutions.

that regard also it seems inappropriate to attempt to classify the Guidelines arrangement at issue in this case as an administrative agreement.

the one hand, and that the Guidelines restrict its right of initiative, on the other.

67. Finally, however, even if the Guidelines do constitute an administrative agreement it would still have to be determined whether that agreement produced legal effects. For only then would there be an act against which an action for annulment may be brought. As stated above, however, the Guidelines are not binding on account of their content, their objectives or the context in which they were negotiated. It must therefore be concluded that the Guidelines do not lay down binding rules and therefore do not produce legal effects. Since there is no act against which an action for annulment may be brought, the action should therefore be dismissed as inadmissible.

1. The Commission's competence to conclude the Guidelines

69. The French Government claims that in principle the Commission is not competent to conclude international arrangements. It points out that in Article 300 EC this right is reserved to the Council.

B — *Substance*

68. As a purely alternative submission, in the event that the Court does not concur with the view set out here, a brief examination is made below of the two substantive heads of claim made by the French Republic, namely that the Commission has no competence to conclude the Guidelines, on

70. That is in principle correct. As already stated, Article 300 EC is the expression of the institutional balance between Parliament, Council and Commission. The Commission's role in this context is, in principle, merely to open the necessary negotiations (Article 300(1) EC). It is the Council that concludes Community agreements after the Parliament has made the contribution required of it in each case.

71. The Commission has the right to conclude arrangements only in exceptional circumstances. This is the case if the

Council gives the Commission special authorisation to that effect (Article 300(4) EC) or in other circumstances provided for by the Treaty, e.g. Article 302 EC. Because of the need to maintain the balance between institutions, there must be no additional recognition of a general right accorded to the Commission to conclude arrangements.

72. For that reason, the proposition that the Commission may conclude administrative agreements with other governments must be rejected.

73. Thus, assuming that the Guidelines do produce legal effects they would have had to be approved and concluded by the Council. The Commission would not have been competent in that regard and consequently the Community act by which the Guidelines were approved by the Commission would have to be declared null and void.

restricts the Commission's right of initiative. As already mentioned in the context of the admissibility of the action, in exercising its right of initiative the Commission must, however, examine fully the circumstances in which the draft legislation is put forward. It must enter into consultations with all interested parties in order to examine the necessity and possible effects of any rules before submitting a proposal to the Parliament and the Council. There is no apparent reason why governments of non-Community States should not be consulted as part of this process, especially given that the technical regulations forming the subject-matter of the consultations with the American authorities provided for in the Guidelines may, in certain circumstances, be submitted by the USA within the framework of the WTO for examination as to their compatibility with the TBT Agreement. Thus, the consultations with the American authorities may be considered to be a measure to prevent not only legal conflicts, but also trade conflicts within the framework of the WTO. To that extent, there is in fact a duty to discuss the effects of any rules envisaged with American trading partners before such rules are proposed to the European legislature. Consequently, it cannot be concluded that there is an infringement of the Commission's right of initiative.

2. Restriction of the Commission's right of initiative

V — Costs

74. The French Government considers that the conclusion of the Guidelines also

75. Under the first paragraph of Article 69 (2) of the Rules of Procedure, the unsuc-

successful party must be ordered to pay the costs if they have been applied for in the successful party's pleadings. Since the French Republic has been unsuccessful in

its submissions and the Commission has made an application to that effect, the French Republic must be ordered to pay the costs.

VI — Conclusion

76. In the light of the foregoing conclusions, I propose that the Court should:

(1) dismiss the action;

(2) order the French Republic to pay the costs.