

JUDGMENT OF THE COURT
11 June 1991

In Case C-300/89,

Commission of the European [Union], represented by Ricardo Gosalbo Bono and Alain von Solinge, members of its Legal Department, acting as Agents, with an address for service in Luxembourg at the office of Guido Berardis, also a member of the Commission's Legal Department, Wagner Centre, Kirchberg,

applicant,

supported by

European Parliament, represented by its jurisconsult, Jorge Campinos, assisted by Johann Schoo and Kieran Bradley, members of the Parliament's Legal Department, acting as Agents, with an address for service in Luxembourg at the Secretariat General of the Parliament, Kirchberg,

intervener,

v

Council of the European [Union], represented by Arthur Alan Dashwood, a Director in the Council's Legal Department, and Jill Aussant, a Principal Administrator in the same department, acting as Agents, with an address for service in Luxembourg at the office of Jörg Käser, Manager of the Legal Directorate of the European Investment Bank, 100 Boulevard Konrad-Adenauer,

defendant,

APPLICATION for the annulment of Council Directive 89/428/EEC of 21 June 1989 on procedures for harmonizing the programmes for the reduction and eventual elimination of pollution caused by waste from the titanium dioxide industry (Official Journal L 201, p. 56),

THE COURT,

composed of: O. Due, President, G. F. Mancini, T. F. O'Higgins, J. C. Moitinho de Almeida, G. C. Rodríguez Iglesias and M. Díez de Velasco (Presidents of Chambers), Sir Gordon Slynn, C. N. Kakouris, R. Joliét, F. A. Schockweiler and M. Zuleeg, Judges,

Advocate General: G. Tesauro,

Registrar: H. A. Rühl, Principal Administrator,

having regard to the Report for the Hearing,

after hearing oral argument presented by the parties at the hearing on 30 January 1991, at which the Commission was represented by R. Gosalbo Bono and J. Amphoux, acting as Agents,

after hearing the Opinion of the Advocate General at the sitting on 13 March 1991,

gives the following

Judgment

- 1 By application lodged at the Court Registry on 28 September 1989, the Commission of the European [Union] brought an action under [the first and second paragraphs of Article 263 TFEU] for the annulment of Council Directive 89/428/EEC of 21 June 1989 on procedures for harmonizing the programmes for the reduction and eventual elimination of pollution caused by waste from the titanium dioxide industry (Official Journal L 201, p. 56).
- 2 That directive, which was unanimously adopted by the Council on the basis of [Article 192 TFEU], 'lays down ... procedures for harmonizing the programmes for the reduction and eventual elimination of pollution from existing industrial establishments and is intended to improve the conditions of competition in the titanium dioxide industry' (Article 1). For that purpose, it establishes harmonized levels for the treatment of different kinds of waste from the titanium dioxide industry. Thus, for certain waste from existing establishments using particular processes, a total prohibition is imposed (Articles 3 and 4). On the other hand, for other waste from existing establishments, the directive lays down maximum values for harmful substances (Articles 6 and 9).
- 3 It is apparent from the documents before the Court that the contested measure derived from a proposal for a directive presented by the Commission on 18 April 1983 on the basis of [Articles 115 and the first sentence of 352(1) TFEU]. Following the entry into force of the Single European Act, the Commission changed the legal basis to [Article 114 TFEU], which had been inserted by the Single European Act. At its meeting of 24 and 25 November 1988, the Council nevertheless arrived at a common position whereby the directive would be based on [Article 192 TFEU]. Despite the objections voiced by the European Parliament which, having been consulted by the Council pursuant to [Article 192 TFEU], considered the legal basis proposed by the Commission to be appropriate, the Council adopted the directive at issue on the basis of [Article 192 TFEU].
- 4 Taking the view that Directive 89/428/EEC lacked a valid legal basis, in that it was based on [Article 192 TFEU] but should have been based on [Article 114 TFEU], the Commission brought the present action for annulment.
- 5 By order of 21 February 1990, the Parliament was granted leave to intervene in support of the applicant.
- 6 Reference is made to the Report for the Hearing for a fuller account of the facts of the case, the course of the procedure and the pleas and arguments of the parties, which are mentioned or discussed hereinafter only in so far as is necessary for the reasoning of the Court.
- 7 The Commission, supported by the Parliament, claims that the directive, although contributing to environmental protection, has as its 'main purpose' or 'centre of gravity' the improvement of conditions of competition in the titanium dioxide industry. It is therefore a measure concerning the establishment and functioning of the internal market, within the meaning of [Article 114 TFEU], and should therefore have been based on the latter enabling provision.
- 8 The Commission states that the very text of [Articles 114 and 192 TFEU] shows that the requirements of environmental protection form an integral part of the harmonizing action to be taken on the basis of [Article 114 TFEU]. It follows, according to the Commission, that [Article 114 TFEU], which relates to the establishment and functioning of the internal market, constitutes a *lex specialis* in relation to [Article 192 TFEU], the latter article not being intrinsically directed towards the attainment of that objective.
- 9 The Council, for its part, contends that [Article 192 TFEU] is the correct legal basis for Directive 89/428/EEC. Whilst conceding that that directive is intended also to harmonize

conditions of competition in the industrial sector concerned and thus to foster the establishment and functioning of the internal market, it considers that the 'centre of gravity' of the contested measure is the elimination of the pollution caused by waste from the titanium dioxide manufacturing process. That objective is one of those referred to in [Article 191 TFEU], which are pursued by means of measures adopted under [Article 192 TFEU].

- 10 It must first be observed that in the context of the organization of the powers of the [Union] the choice of the legal basis for a measure may not depend simply on an institution's conviction as to the objective pursued but must be based on objective factors which are amenable to judicial review (see the judgment in Case 45/86 *Commission v Council* [1987] ECR 1493, paragraph 11). Those factors include in particular the aim and content of the measure.
- 11 As regards the aim pursued, Article 1 of Directive 89/428/EEC indicates that it is intended, on the one hand, to harmonize the programmes for the reduction and ultimate elimination of pollution caused by waste from existing establishments in the titanium dioxide industry and, on the other, to improve the conditions of competition in that industry. It thus pursues the twofold aim of environmental protection and improvement of the conditions of competition.
- 12 As regards its content, Directive 89/428/EEC prohibits, or, according to strict standards, requires reduction of the discharge of waste from existing establishments in the titanium dioxide industry and lays down time-limits for the implementation of the various provisions. By thus imposing obligations concerning the treatment of waste from the titanium dioxide production process, the directive conduces, at the same time, to the reduction of pollution and to the establishment of greater uniformity of production conditions and therefore of conditions of competition, since the national rules on the treatment of waste which the directive seeks to harmonize have an impact on production costs in the titanium dioxide industry.
- 13 It follows that, according to its aim and content, as they appear from its actual wording, the directive is concerned, indissociably, with both the protection of the environment and the elimination of disparities in conditions of competition.
- 14 [Article 192 TFEU] provides that the Council is to decide what action is to be taken by the [Union] concerning the environment. [Article 114(1) TFEU], for its part, is concerned with the adoption by the Council of measures for the approximation of the provisions laid down by law, regulation or administrative action in Member States which have as their object the establishment and functioning of the internal market. According to the second paragraph of [Article 21 TFEU], that market is to comprise 'an area without internal frontiers in which the free movement of goods, persons, services and capital is ensured'. By virtue of [Article 3 TEU], a precondition for such a market is the existence of conditions of competition which are not distorted.
- 15 In order to give effect to the fundamental freedoms mentioned in [Article 21 TFEU], harmonizing measures are necessary to deal with disparities between the laws of the Member States in areas where such disparities are liable to create or maintain distorted conditions of competition. For that reason, [Article 114 TFEU] empowers the [Union] to adopt measures for the approximation of the provisions laid down by law, regulation or administrative action in Member States and lays down the procedure to be followed for that purpose.
- 16 It follows that, in view of its aim and content, the directive at issue displays the features both of action relating to the environment with which [Article 192 TFEU] is concerned and of a

harmonizing measure which has as its object the establishment and functioning of the internal market, within the meaning of [Article 114 TFEU].

- 17 As the Court held in Case 165/87 *Commission v Council* [1988] ECR 5545, paragraph 11, 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. However, that ruling is not applicable to the present case.
- 18 One of the enabling provisions at issue, [Article 114 TFEU], requires recourse to the cooperation procedure provided for in Article 149(2) of the Treaty [repealed], whereas the other, [Article 192 TFEU], requires the Council to act unanimously after merely consulting the European Parliament. As a result, use of both provisions as a joint legal basis would divest the cooperation procedure of its very substance.
- 19 Under the cooperation procedure, the Council acts by a qualified majority where it intends accepting the amendments to its common position proposed by the Parliament and included by the Commission in its re-examined proposal, whereas it must secure unanimity if it intends taking a decision after its common position has been rejected by the Parliament or if it intends modifying the Commission's re-examined proposal. That essential element of the cooperation procedure would be undermined if, as a result of simultaneous reference to [Articles 114 and 192 TFEU], the Council were required, in any event, to act unanimously.
- 20 The very purpose of the cooperation procedure, which is to increase the involvement of the European Parliament in the legislative process of the [Union], would thus be jeopardized. As the Court stated in its judgments in Case 138/79 *Roquette Frères v Council* [1980] ECR 3333 and Case 139/79 *Maizena v Council* [1980] ECR 3393, paragraph 34, that participation reflects a fundamental democratic principle that the peoples should take part in the exercise of power through the intermediary of a representative assembly.
- 21 It follows that in the present case recourse to the dual legal basis of [Articles 114 and 192 TFEU] is excluded and that it is necessary to determine which of those two provisions is the appropriate legal basis.
- 22 It must be observed in the first place that, pursuant to [Article 191(2) TFEU], 'environmental protection requirements shall be a component of the [Union]'s other policies'. That principle implies that a [Union] measure cannot be covered by [Article 192 TFEU] merely because it also pursues objectives of environmental protection.
- 23 Secondly, as the Court held in its judgments in Cases 91/79 and 92/79 *Commission v Italy* [1980] ECR 1099 (paragraph 8) and 1115 (paragraph 8), provisions which are made necessary by considerations relating to the environment and health may be a burden upon the undertakings to which they apply and, if there is no harmonization of national provisions on the matter, competition may be appreciably distorted. It follows that action intended to approximate national rules concerning production conditions in a given industrial sector with the aim of eliminating distortions of competition in that sector is conducive to the attainment of the internal market and thus falls within the scope of [Article 114 TFEU], a provision which is particularly appropriate to the attainment of the internal market.
- 24 Finally, it must be observed that [Article 114(3) TFEU] requires the Commission, in its proposals for measures for the approximation of the laws of the Member States which have as their object the establishment and functioning of the internal market, to take as a base a high level of protection in matters of environmental protection. That provision thus expressly indicates that the objectives of environmental protection referred to in [Article 191 TFEU] may be effectively pursued by means of harmonizing measures adopted on the basis of [Article 114 TFEU].

25 In view of all the foregoing considerations, the contested measure should have been based on [Article 114 TFEU] and must therefore be annulled.

Costs

26 Pursuant to Article 69(2) of the Rules of Procedure the unsuccessful party is to be ordered to pay the costs. Since the Council has failed in its submissions, it must be ordered to pay the costs, including those of the intervener.

On those grounds,

THE COURT

hereby:

(1) Annuls Council Directive 89/428/EEC of 21 June 1989 on procedures for harmonizing the programmes for the reduction and eventual elimination of pollution caused by waste from the titanium dioxide industry;

(2) Orders the Council to pay the costs, including those of the intervener.

Due Mancini O'Higgins Moitinho de Almeida Rodriguez
Iglesias

Diez de Velasco Slynn Kakouris Joliét Schockweiler Zuleeg

Delivered in open court in Luxembourg on 11 June 1991.

J.-G. Giraud
Registrar

O. Due
President