

JUDGMENT OF THE COURT (Grand Chamber)

2 May 2006

(Action for annulment – Regulation (EC) No 1435/2003 – European Cooperative Society (SCE) – Choice of legal basis – [Article 114 TFEU] – [Article 352 TFEU])

In Case C-436/03,

ACTION for annulment under [Article 263 TFEU], brought on 14 October 2003,

European Parliament, represented initially by J.L. Rufas Quintana and E. Waldherr and subsequently by the latter and R. Passos, acting as Agents, with an address for service in Luxembourg,

applicant,

supported by

Commission of the European [Union], represented initially by C. Schmidt and subsequently by J.-F. Pasquier, acting as Agents, with an address for service in Luxembourg,

intervener,

v

Council of the European Union, represented by J.-P. Jacqué and M.C. Giorgi Fort, acting as Agents,

defendant,

supported by

Kingdom of Spain, represented by E. Braquehais Conesa, acting as Agent, with an address for service in Luxembourg,

United Kingdom of Great Britain and Northern Ireland, represented by R. Caudwell, acting as Agent, as well as Lord Goldsmith and N. Paines QC, with an address for service in Luxembourg,

interveners,

THE COURT (Grand Chamber),

composed of V. Skouris, President, P. Jann, C.W.A. Timmermans, A. Rosas and J. Makarczyk, Presidents of Chambers, J.-P. Puissochet (Rapporteur), R. Schintgen, J. Klucka, U. Löhmus, E. Levits and A. Ó Caoimh, Judges,

Advocate General: C. Stix-Hackl,

Registrar: R. Grass,

having regard to the written procedure,

after hearing the Opinion of the Advocate General at the sitting on 12 July 2005,

gives the following

Judgment

1 The European Parliament seeks annulment of Council Regulation (EC) No 1435/2003 of 22 July 2003 on the Statute for a European Cooperative Society (SCE) (OJ 2003 L 207, p. 1; ‘the contested regulation’).

Legal context

2 The contested regulation was adopted on the basis of [Article 352 TFEU]. It lays down a single statute applicable to the European cooperative society (SCE) in order, inter alia, to remove all barriers to cross-border cooperation of companies while taking account of the specific features of cooperatives.

3 Recital 2 in the preamble to the contested regulation states:

‘The completion of the internal market and the improvement it brings about in the economic and social situation throughout the [Union] mean not only that barriers to trade should be removed, but also that the structures of production should be adapted to the [Union] dimension. For that purpose it is essential that companies of all types the business of which is not limited to satisfying purely local needs should be able to plan and carry out the reorganisation of their business on a [Union] scale.’

4 Recitals 11 to 14 in the preamble to the contested regulation state:

(11) Cross-border cooperation between cooperatives in the [Union] is currently hampered by legal and administrative difficulties which should be eliminated in a market without frontiers.

(12) The introduction of a European legal form for cooperatives, based on common principles but taking account of their specific features, should enable them to operate outside their own national borders in all or part of the territory of the [Union].

(13) The essential aim of this regulation is to enable the establishment of an SCE by physical persons resident in different Member States or legal entities established under the laws of different Member States. It will also make possible the establishment of an SCE by merger of two existing cooperatives, or by conversion of a national cooperative into the new form without first being wound up, where that cooperative has its registered office and head office within one Member State and an establishment or subsidiary in another Member State.

(14) In view of the specific [Union] character of an SCE, the “real seat” arrangement adopted by this regulation in respect of SCEs is without prejudice to Member States’ laws and does not pre-empt the choices to be made for other [Union] texts on company law.’

5 The contested regulation establishes, inter alia, rules concerning the formation of an SCE (Article 2), its minimum capital (Article 3), and its statutes (Article 5). Pursuant to Article 1(5) of the contested regulation, an SCE has legal personality.

6 Under Article 6 of the contested regulation:

‘The registered office of an SCE shall be located within the [Union], in the same Member State as its head office. A Member State may, in addition, impose on SCEs registered in its territory the obligation of locating the head office and the registered office in the same place.’

7 Article 7(1) of the contested regulation regulates the transfer of the registered office of an SCE which takes place without loss of its legal personality:

‘The registered office of an SCE may be transferred to another Member State in accordance with paragraphs 2 to 16. Such transfer shall not result in the winding-up of the SCE or in the creation of a new legal person.’

8 In accordance with Article 8(1) of the contested regulation:

‘An SCE shall be governed:

- (a) by this regulation;
- (b) where expressly authorised by this regulation, by the provisions of its statutes;
- (c) in the case of matters not regulated by this regulation or, where matters are partly regulated by it, of those aspects not covered by it, by:
 - (i) the laws adopted by Member States in the implementation of [Union] measures relating specifically to SCEs;
 - (ii) the laws of Member States which would apply to a cooperative formed in accordance with the law of the Member State in which the SCE has its registered office;
 - (iii) the provisions of its statutes, in the same way as for a cooperative formed in accordance with the law of the Member State in which the SCE has its registered office.’

9 Finally, the contested regulation allows for cross-border mergers of SCEs (fourth indent of Article 2(1) of the contested regulation and Articles 19 to 34).

The legislative procedure leading to the adoption of the contested regulation

10 The Commission of the European [Union] submitted its initial proposal for an SCE to the Council of the European Union on 6 March 1992 (OJ 1992 C 99, p. 14). That proposal was based on [Article 114 TFEU].

11 Following the amendments to the Treaties made by the Maastricht Treaty and the Amsterdam Treaty, the legal basis for that proposal for a regulation was adapted to the requirements of [Article 114 TFEU]. This legal basis was confirmed by the Parliament in its opinion.

12 Discussions which took place in the Council resulted in an amendment of that legal basis, [Article 352 TFEU] being substituted for [Article 114 TFEU]. Because of this amendment the Council resolved to consult the Parliament again.

13 In its opinion of 14 May 2003 the Parliament requested that [Article 114 TFEU] should be retained as the legal basis. The Commission supported this in its observations on the Parliament's amendments.

14 On 22 July 2003 the contested regulation was formally adopted by the Council, which confirmed the choice of [Article 352 TFEU] as the legal basis.

Forms of order sought and procedure before the Court

15 The Parliament claims that the Court should:

- annul the contested regulation;
- maintain the effects of that regulation until the entry into force of new provisions on the matter, adopted within a reasonable time-limit on the appropriate legal basis;
- order the Council to pay the costs.

16 The Council claims that the Court should:

- dismiss the action;
- order the Parliament to pay the costs.

17 By order of the President of the Court of 9 March 2004, the Commission was granted leave to intervene in support of the Parliament. By the same order, the Kingdom of Spain and the United Kingdom of Great Britain and Northern Ireland were granted leave to intervene in support of the Council.

The action

Arguments of the parties

18 In support of its action, the Parliament puts forward a single plea in law, alleging that [Article 352 TFEU] was wrongly chosen as the legal basis for the contested regulation. In its opinion, [Article 114 TFEU] is the appropriate legal basis.

19 In that regard, the Parliament points out that the diversity of the various company laws of the Member States hinders the activities of cooperative societies, in particular as regards the transfer of their registered offices and cross-border mergers.

20 The Parliament also considers that there is nothing standing in the way of a regulation having [Article 114 TFEU] as its legal basis. Thus, the approximation of the laws of the Member States may also be carried out by supplementing national law by creating European legal forms. In the case of the SCE, approximation of the laws of the Member States is necessary in order to create and manage cross-border cooperatives.

21 The Parliament adds that the concept of 'approximation' in [Article 114 TFEU] encompasses not only measures seeking to remove barriers resulting from the disparity of the different national legal orders but also measures aimed at overcoming the territorial boundaries of the national legal orders in so far as necessary for the establishment and functioning of the internal market.

- 22 In that regard, the Parliament rejects the Council's argument that an approximation measure necessarily implies substitution, whether total or partial, for the national provisions. The Court has also held that the convergence of the laws of the Member States, which is the purpose of [Article 114 TFEU], may be implemented even in the absence of legislation in a particular area in certain Member States (Case C-377/98 *Netherlands v Parliament and Council* [2001] ECR I-7079, paragraph 15).
- 23 The same applies to the Council's argument that a prerequisite for approximating laws is that a Member State has power to adopt provisions in the area with the same effects as an approximation. According to the Parliament, that condition cannot be inferred from [Article 114 TFEU], particularly because a Member State cannot, by itself, achieve the same results as an approximation of laws.
- 24 The Parliament also points out that [Article 352 TFEU] does not constitute an appropriate legal basis for the adoption of the contested regulation since recourse to that provision is, *inter alia*, subject to the condition that no other specific power to take action is provided for in the [FEU] Treaty to attain the desired objective. That is not the case here.
- 25 The creation of a European cooperative society cannot be treated as the creation of a new right which exists in addition to national rights, as is the case in the context of intellectual property (see, in particular, Council Regulation (EC) No 40/94 of 20 December 1993 on the [Union] trade mark (OJ 1994 L 11, p. 1), and Council Regulation (EC) No 2100/94 of 27 July 1994 on [Union] plant variety rights (OJ 1994 L 227, p. 1)). The Parliament also submits that those regulations, which are based on [Article 352 TFEU], introduced [Union] administrative bodies with legal personality and financial and administrative autonomy, which is not the case with the contested regulation.
- 26 The European cooperative society is not a new form of company divorced from the laws of the Member States, as the contested regulation does not provide for exhaustive organisation of that form of association but merely regulates its structure, by systematically referring to the law applicable in the Member State in which its registered office is located.
- 27 The Commission, as intervener, submits the same argument as that defended by the Parliament. It also submits that the concept of 'harmonisation' in [Article 114 TFEU] is a broad one.
- 28 According to the Commission, the contested regulation seeks to improve the conditions for the establishment and functioning of the internal market by contributing to the removal of barriers to the free movement of services by introducing a European legal form which allows cooperative societies to operate beyond national borders. In the present case, the specific [Union] character of the statute for the European cooperative society complements the various national statutes for cooperatives and aims to facilitate the development of their cross-border activities.
- 29 The Council considers, for its part, that the contested regulation creates a new legal form, of a European dimension, additional to cooperative societies under national law.
- 30 It adds that the mere fact that a [Union] act is aimed at the establishment and functioning of the internal market is not sufficient to warrant the use of [Article 114 TFEU] as the necessary legal basis. [Article 26 TFEU] specifies that [Article 114 TFEU] is only one of several provisions which aim to complete the internal market.
- 31 In order for an act to be based on [Article 114 TFEU] it has to approximate national laws and aim to remove the barriers which the divergence and/or limited territorial effect of national provisions set in the way of the attainment of the objectives of the Treaty.

- 32 The Council contends that a harmonisation measure must necessarily lead to a result which it would have been possible to achieve by simultaneously adopting identical legislation in each Member State. In the present case, no Member State individually had the authority to establish a statute such as the one laid down in the contested regulation.
- 33 Consequently, and in the absence of another suitable provision, [Article 352 TFEU] is the only provision which could have been used as the legal basis for the contested regulation.
- 34 The Kingdom of Spain and the United Kingdom Government, as interveners, also consider that the European cooperative society is a new legal form. The contested regulation should, therefore, have been adopted on the basis of [Article 352 TFEU].

Findings of the Court

- 35 The appropriate legal basis on which an act must be adopted should be determined according to its content and main object (see, in particular, Case C-155/91 *Commission v Council* [1993] ECR I-939, paragraphs 19 to 21, and *Netherlands v Parliament and Council*, paragraph 27).
- 36 In that regard, [Article 352 TFEU] may be used as the legal basis for a measure only where no other provision of the Treaty gives the [Union] institutions the necessary power to adopt it (Case 45/86 *Commission v Council* [1987] ECR 1493, paragraph 13, and Case C-350/92 *Spain v Council* [1995] ECR I-1985, paragraph 26).
- 37 Thus, the Court has already held that the [Union] may use [Article 352 TFEU] as the basis for creating new intellectual property rights in addition to national rights (see Opinion 1/94 [1994] ECR I-5267, paragraph 59; *Spain v Council*, paragraphs 23 and 27; and *Netherlands v Parliament and Council*, paragraph 24). Recourse to [Article 352 TFEU] as a legal basis is, by contrast, excluded where the [Union] act in question does not provide for the introduction of a new protective right at [Union] level, but merely harmonises the rules laid down in the laws of the Member States for granting and protecting that right (*Netherlands v Parliament and Council*, paragraph 25).
- 38 [Article 114 TFEU] empowers the [Union] legislature to adopt measures to improve the conditions for the establishment and functioning of the internal market and they must genuinely have that object, contributing to the elimination of obstacles to the economic freedoms guaranteed by the Treaty, which include the freedom of establishment (see, in particular, Case C-376/98 *Germany v Parliament and Council* [2000] ECR I-8419, paragraphs 83, 84 and 95, and Case C-491/01 *British American Tobacco (Investments) and Imperial Tobacco* [2002] ECR I-11453, paragraph 60).
- 39 Recourse to [Article 114 TFEU] as a legal basis is also possible if the aim is to prevent the emergence of obstacles to trade resulting from heterogeneous development of national laws; the emergence of such obstacles must, however, be likely and the measure in question must be designed to prevent them (see, to that effect, *Spain v Council*, paragraph 35; *Germany v Parliament and Council*, paragraph 86; *Netherlands v Parliament and Council*, paragraph 15; and *British American Tobacco (Investments) and Imperial Tobacco*, paragraph 61).
- 40 In the present case, it is apparent from the content and the purpose of the contested regulation that it aims to introduce a new legal form in addition to the national forms of cooperative societies, as is also indicated in recitals 12 and 14 in the preamble to the contested regulation, according to which the European cooperative society must be considered to be a European legal form for cooperative societies which has specific [Union] character.
- 41 The legal form of the European cooperative society is, in accordance with Article 8(1)(a) of the contested regulation, governed first and foremost by that regulation. Article 8(1)(b) thereof

provides that the European cooperative society may also be governed by its statutes where expressly authorised by the contested regulation. It is merely in the alternative, in the case of matters not regulated by the regulation or by the statutes of the European cooperative society, that Article 8(1)(c) of the regulation refers, *inter alia*, to the law of the Member State in the territory of which the European cooperative society has its registered office.

- 42 In addition, the conditions of formation of a European cooperative society, which are laid down in Article 2 of the contested regulation, are specific to that form of society. The possibility of transferring its registered office from one Member State to another, without that resulting in the winding-up of the SCE or in the creation of a new legal person, as laid down in Article 7 of the contested regulation, is also specific to the European cooperative society.
- 43 Finally, it is apparent from the provisions in Article 9 of the contested regulation, pursuant to which a European cooperative society is to be treated in every Member State as if it were a cooperative formed in accordance with the law of the Member State in which it has its seat, that the European cooperative society is a form which coexists with cooperative societies under national law.
- 44 In those circumstances, the contested regulation, which leaves unchanged the different national laws already in existence, cannot be regarded as aiming to approximate the laws of the Member States applicable to cooperative societies, but has as its purpose the creation of a new form of cooperative society in addition to the national forms.
- 45 That finding is not affected by the fact that the contested regulation does not lay down exhaustively all of the rules applicable to European cooperative societies and that, for certain matters, it refers to the law of the Member State in the territory of which the European cooperative society has its registered office, since, as pointed out above, that referral is of a subsidiary nature.
- 46 It follows from the above that [Article 114 TFEU] could not constitute an appropriate legal basis for the adoption of the contested regulation, which was correctly adopted on the basis of [Article 352 TFEU].
- 47 As the sole plea is unfounded, the action must be dismissed.

Costs

- 48 Under Article 69(2) of the Rules of Procedure, the unsuccessful party is to be ordered to pay the costs if they have been applied for in the successful party's pleadings. Since the Council applied for the Parliament to pay the costs and the latter has been unsuccessful, it must be ordered to pay the costs. In accordance with Article 69(4) of those rules, the Kingdom of Spain, the United Kingdom and the Commission, as interveners, are to bear their own costs.

On those grounds, the Court (Grand Chamber) hereby:

- 1. Dismisses the action;**
- 2. Orders the European Parliament to pay the costs;**
- 3. Orders the Kingdom of Spain, the United Kingdom of Great Britain and Northern Ireland and the Commission of the European [Union] to bear their own costs.**