JUDGMENT OF THE COURT
27 September 1988 *

In Case 165/87

Commission of the European Communities, represented by its Legal Adviser Peter Gilsdorf, acting as Agent, with an address for service in Luxembourg at the office of Georgios Kremlis, a member of its Legal Department, Jean Monnet Building, Kirchberg,

applicant,

v

Council of the European Communities, represented by Bernhard Schloh, an adviser in the Council's Legal Department, acting as Agent, with an address for service in Luxembourg at the office of Jörg Käser, Manager of the Legal Department of the European Investment Bank, 100, boulevard Konrad-Adenauer,

defendant,

APPLICATION for the annulment of Council Decision 87/369 of 7 April 1987 concerning the conclusion of the International Convention on the Harmonized Commodity Description and Coding System and of the Protocol of Amendment thereto (Official Journal 1987, L 198, p. 1),

THE COURT

composed of: Lord Mackenzie Stuart, President, G. Bosco, O. Due, J. C. Moitinho de Almeida and G. C. Rodríguez Iglesias (Presidents of Chambers), T. Koopmans, U. Everling, K. Bahlmann, Y. Galmot, R. Joliet and T. F. O'Higgins, Judges,

Advocate General: C. O. Lenz
Registrar: H. A. Rühl, Principal Administrator

* Language of the Case: French.

having regard to the Report for the Hearing and further to the hearing on 19 May 1988,

after hearing the Opinion of the Advocate General delivered at the sitting on 29 June 1988,

gives the following

Judgment

1 By an application lodged at the Court Registry on 4 June 1987, the Commission of the European Communities brought an action under the first paragraph of Article 173 of the EEC Treaty for the annulment of Council Decision 87/369 of 7 April 1987 concerning the conclusion of the International Convention on the Harmonized Commodity Description and Coding System and of the Protocol of Amendment thereto (Official Journal 1987, L 198, p. 1).

2 That convention, which has been in force since 1 January 1988, was adopted on 14 June 1983 under the auspices of the Cutoms Cooperation Council to replace the Convention of 15 December 1950 on Nomenclature for the Classification of Goods (United Nations Treaty Series, Vol. 347, p. 127) on which the Community's Common Customs Tariff was based.

3 The Commission challenges the legal basis of the contested decision, which it considers is solely a matter of commercial policy and ought therefore to have been based, as the Commission had proposed, only on Article 113 and not on Articles 28, 113 and 235 of the Treaty.

4 Reference is made to the Report for the Hearing for a more detailed account of the facts, the course of the proceedings and the submissions and arguments of the parties, which are mentioned or discussed hereinafter only in so far as is necessary for the reasoning of the Court.

5 It should be observed at the outset that the main object of the convention which is the subject of the contested decision is the establishment of a harmonized commodity description and coding system to be used by the contracting parties for their tariff and statistical nomenclature.

6 In order to rule on the merits of the Commission's action it is necessary to consider the Council's power to adopt the contested decision, taking into account the two aspects covered by the Convention, namely tariff nomenclature on the one hand and statistical nomenclature on the other.

7 With regard to the first of those aspects, it appears from the terms of Article 28 of the Treaty, which is the legal basis for 'any autonomous alteration or suspension of duties in the Common Customs Tariff', and Article 113 of the Treaty, which provides for a common commercial policy based on uniform principles, particularly in regard to changes in tariff rates and the conclusion of tariff and trade agreements, that neither of those two provisions expressly gives the Council power to establish a tariff nomenclature.

8 However, the establishment of a tariff nomenclature is indispensable to the application of customs duties. Without a system of classification of goods it would be impossible to ascribe them to particular tariff headings. It follows that the power given to the Council to make changes in rates necessarily implies, in the absence of express provision in the Treaty, power to establish and amend the nomenclature relating to the application of the Common Customs Tariff.

9 It follows from that observation that the Council has a general power in relation to tariff matters, which is based both on Article 28 and on Article 113 of the Treaty, inasmuch as it has that power irrespective of whether Common Customs Tariff duties are amended autonomously (Article 28) or under tariff agreements or other measures of common commercial policy (Article 113).

10 The Commission's argument that the scope of Article 28 is covered by that of Article 113 of the Treaty must therefore be rejected.

11 It may be added that 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.

12 Such recourse to a dual legal basis is, moreover, consistent with an established practice of the Community institutions in tariff matters which has been endorsed by the fact that the Single European Act has aligned the procedural requirements of Article 28 with those of Article 113 of the Treaty.

13 Articles 28 and 113 of the Treaty thus together constitute the appropriate legal basis for the establishment of a tariff nomenclature and consequently for the conclusion of an international convention on that subject.

14 With regard to statistical nomenclature, the statistical nomenclatures covered by the convention to which the contested decision relates are 'goods nomenclatures established by a contracting party for the collection of data for import and export trade statistics' (Article 1 (c) of the Convention), that is to say, as regards the Community, its external trade statistics and not statistics of intra-Community trade.

15 Power to establish such a statistical nomenclature is given by Article 113 of the Treaty. Statistics of external trade, along with the corresponding nomenclature, constitute an indispensable instrument of commercial policy. The list of commercial policy measures set out in Article 113 is not exhaustive but is included only by way of example.

16 The Council nevertheless contends that recourse to Article 235 was justified by the fact that the convention affected a measure which was itself based on Article 235, namely Regulation No 1445/72 of the Council of 24 April 1972 concerning the

nomenclature of goods for the external trade statistics of the Community and the statistics of trade between Member States (Nimexe) (Official Journal, English Special Edition 1965-72, p. 53).

17 The Council's argument must be rejected. The fact that the contested decision may affect another measure which is based on Article 235 does not necessarily imply recourse to that provision as a legal basis. Such recourse may be contemplated only if the institution in question cannot base its power on any other provision of the Treaty (see the judgment of 26 March 1987 in Case 45/86 *Commission* v *Council* [1987] ECR 1493).

18 It follows from the foregoing that since the Council had power to take the contested decision under Articles 28 and 113 of the Treaty, it was not entitled to base it on Article 235.

19 However, when the contested decision was adopted before the entry into force of the Single European Act, Article 28 of the Treaty, like Article 235, required unanimity in the Council; the illegality found to exist is therefore only a purely formal defect which cannot make the measure void.

20 It is true that in contrast to Article 28, Article 235 requires the European Parliament to be consulted, and such consultation, which took place in the present case, is likely to affect the substance of the measure adopted. Nevertheless, although disregard of the obligation to consult makes the measure concerned void (judgment of 29 October 1980 in Case 138/79 *Roquette Frères* v *Council* [1980] ECR 3333), consultation of Parliament, which the Council is always entitled to do, cannot be regarded as unlawful even if it is not mandatory.

21 It follows from the foregoing that the application must be rejected.

Costs

22 Under Article 69 (2) of the Rules of Procedure, the unsuccessful party is to be ordered to pay the costs. However, Article 69 (3) provides that where the circumstances are exceptional the Court may order the parties to bear their own costs.

23 Although in the circumstances of this case the Commission's application must be dismissed because of the purely formal nature of the illegality found, the Court considers that since the Commission's case has been upheld to a substantial extent the parties should bear their own costs.

On those grounds,

THE COURT

hereby:

(1) Dismisses the application;

(2) Orders the parties to bear their own costs.

Mackenzie Stuart Bosco Due Moitinho de Almeida

Rodríguez Iglesias Koopmans Everling

Bahlmann Galmot Joliet O'Higgins

Delivered in open court in Luxembourg on 27 September 1988.

J.-G. Giraud
Registrar

A. J. Mackenzie Stuart
President