movement of which, in accordance with Article 30 of the Treaty, must in principle not be prevented, the directive in question cannot, for all that, be regarded as implementing the free movement of such products, since, on the contrary, it implements the principle that environmental damage should as a priority be rectified at source, a principle laid down by Article 130r(2) of the Treaty as a basis for action by the Community relating to the environment. Accordingly, the directive could be validly adopted on the sole basis of Article 130s of the Treaty.

The fact that some provisions of the directive affect the functioning of the internal market is not sufficient for Article 100a of the Treaty to apply. Recourse to that provision is not justified where, as in this case, the measure to be adopted has only the incidental effect of harmonizing market conditions within the Community.

3. According to the third paragraph of Article 37 of the Statute of the Court of Justice of the EEC, submissions made in an application for leave to intervene are to be limited to supporting the submissions of one of the parties. That condition is not satisfied where that sought by the intervener diverges from that sought by the party in support of whom the intervener purports to be intervening — to the effect that the whole of the measure should be annulled — in that the intervener seeks the annulment of only one of the provisions of the contested measure on grounds entirely unconnected with those relied on by the party in question.

REPORT FOR THE HEARING
in Case C-155/91 *

I — Facts

1. The origins of Community action on waste are to be found in the Programme of Action of the European Communities concerning the environment, which was adopted by a Declaration of the Council and of the Representatives of the Governments of the Member States meeting in the Council of 22 November 1973 (OJ 1973 C 112, p. 1). The programme provided for, *inter alia*, an action concerning consumer and industrial wastes. On 15 July 1975, the Council adopted, pursuant to Articles 100 and 235 of the EEC Treaty, Directive 75/442/EEC on waste (OJ 1975 L 194, p. 39).

In view of the experience acquired as a result of the application of that directive by the

* Language of the case: French.

Member States, the Commission submitted to the Council on 16 August 1988 a proposal for a directive based on Article 100a of the Treaty amending the 1975 directive (OJ 1988 C 295, p. 3). On 25 May 1989, the European Parliament approved the Commission's proposal subject to a number of amendments (OJ 1989 C 158, p. 232). On 23 November 1989, the Commission amended its proposal in the light of Parliament's Opinion (OJ 1989 C 326, p. 6). After arriving at a 'common position', the Council consulted Parliament by letter of 9 July 1990 on the relevance of opting for Article 130s of the Treaty as the legal basis of the proposed directive. In a resolution adopted on 22 February 1991, Parliament challenged the relevance of the legal basis proposed by the Council and considered that the directive should be based on Article 100a of the Treaty (OJ 1991 C 72, p. 232). On 18 March 1991, the Council adopted Directive 91/156/EEC amending Directive 75/442/EEC on waste (OJ 1991 L 78, p. 32), in which it took as the legal basis Article 130s of the Treaty rather than Article 100a as proposed by the Commission.

2. Article 1 of the directive sets out a list of common definitions of certain basic terms, including waste, disposal and recovery. Article 2 goes on to define the directive's scope, while providing that rules on the management of particular categories of waste may be laid down by means of individual directives.

According to Article 3, Member States are to take appropriate measures to encourage, first, the prevention or reduction of waste production and its harmfulness and, secondly, the recovery of waste or the use of waste as a source of energy.

Article 4 requires Member States to take the necessary measures to ensure that waste is recovered or disposed of without endangering human health and without using processes or methods which could harm the environment. In addition, Member States are to take the necessary measures to prohibit the abandonment, dumping or uncontrolled disposal of waste.

Under Article 5(1), the Member States are to take appropriate measures, in cooperation with other Member States where this is necessary or advisable, to establish an integrated and adequate network of disposal installations, taking account of the best available technology not involving excessive costs. That network must enable the Community as a whole to become self-sufficient in waste disposal and the Member States to move towards that objective individually, taking into account geographical circumstances or the need for specialized installations for certain types of waste. Under Article 5(2), the network referred to in Article 5(1) must also enable waste to be disposed of in one of the nearest appropriate installations by means of the most appropriate methods and technologies in order to ensure a high level of protection for the environment and public health.

Under Article 7, in order to attain the objectives referred to in Articles 3, 4 and 5, the competent authorities are required to draw up one or more waste management plans.

To that end, Member States are to collaborate, as appropriate, with the other Member States and the Commission. They are to notify the plans to the Commission. Member States may take the measures necessary to prevent movements of waste which are not in accordance with their waste management plans. They are to inform the Commission and the Member States of any such measures.

In addition, the directive specifies that the Member States must require any establishment or undertaking carrying out disposal, including recovery, operations, to obtain a permit, although it enables establishments carrying out their own waste disposal or carrying out waste recovery to be exempted from the permit requirement on certain conditions (Articles 9, 10 and 11). Establishments or undertakings which collect or transport waste on a professional basis must at least be registered with the competent authorities; all establishments and undertakings are to be subject to periodic inspections (Article 13); only disposal or recovery operators have to keep a record of the quantity, nature and origin of waste and of other particulars of their activities (Article 14).

Article 18 provides that the Commission is to be assisted, as regards certain implementing measures, by a committee corresponding to Procedure III(a) of Council Decision 87/373/EEC of 13 July 1987 laying down the procedures for the exercise of the implementing powers conferred on the Commission (OJ 1987 L 197, p. 33).

Lastly, annexes to the directive deal with categories of waste and disposal and recovery operations.

II — Written procedure and forms of order sought by the parties

1. The Commission's application was received at the Court on 11 June 1991.

2. By orders of 30 September and 5 November 1991, the Court gave the Kingdom of Spain leave to intervene in support of the form of order sought by the Council and the European Parliament leave to intervene in support of the form of order sought by the Commission.

3. The *Commission* claims that the Court should:

— annul Council Directive 91/156 of 18 March 1991 amending Directive 75/442 on waste;

— declare that the provisions of that directive are to continue to be effective until such time as the Council adopts a directive complying with the Court's judgment in this case;

— order the Council to pay the costs.

The *European Parliament*, intervening, claims that the Court should:

— annul Directive 91/156 amending Directive 75/442 on waste, in that its legal basis is wrong;

— annul Article 18 set out in Article 1 of Directive 91/156 in so far as procedure of the regulatory committee provided for therein does not comply with the Treaty;

— order the defendant to pay the costs.

The *Council* claims that the Court should:

— dismiss the application as unfounded;

— order the applicant to pay the costs.

The *Kingdom of Spain*, intervening, claims that the Court should:

— dismiss the application for the annulment of Directive 91/156 brought by the Commission;

— order the applicant to pay the costs, including those of the intervener.

4. Upon hearing the report of the Judge-Rapporteur and the views of the Advocate General, the Court decided to open the oral procedure without any preparatory inquiry.

III — Pleas and arguments of the parties

1. The *Commission* bases its action on infringement of essential procedural requirements prescribed by the EEC Treaty in so far as Directive 91/156 is based on Article 130s, rather than Article 100a, of the Treaty.

It points out in that connection that, under Article 100a, the Council is to act by a qualified majority on a proposal from the Commission in cooperation with the European Parliament and after consulting the Economic and Social Committee, whereas, under Article 130s, the Council is to act unanimously on a proposal from the Commission and after consulting the European Parliament and the Economic and Social Committee. Accordingly, in the Commission's view, the dispute as to the legal basis is not purely formal, since Articles 100a and 130s embody different rules in regard to decision-taking by the Council and Parliament's participation in the decision-taking process.

(a) Criteria for determining the legal basis of a Community measure

In this connection, the Commission argues that, as the Court has consistently held (judgments in Case C-62/88 *Greece* v *Council* [1990] ECR I-1527, paragraph 13, and in Case C-300/89 *Commission* v *Council* (the '*titanium dioxide case*') [1991] ECR I-2867, paragraph 10), the choice of the legal basis for a measure must be based on objective factors which are amenable to judicial review. Thus it considers that the choice of

legal basis is not determined by the main aim of a measure — a criterion whose assessment is invariably dependent on subjective considerations — but primarily by the object or, in other words, the content and the effects, of the measure having regard to the particular features of the Treaty provisions in question. Consequently, there is no need to determine the chief aim of the directive in question.

(b) The relationship between Articles 100a and 130s

The Commission goes on to state that the object of Article 100a is to equip the Community with an appropriate, effective tool for achieving the objective set by Article 8a. Accordingly, apart from its specific procedural provisions, it lays down specific substantive requirements for the harmonization of legislation which is to be carried out to that end:

— the harmonization is to take as its basis a high level of protection as regards national provisions relating to certain non-economic requirements which may possibly justify the retention of barriers to trade between Member States or the creation of distortions of competition; among the requirements mentioned is environmental protection (paragraph 3);

— the possibilities for Member States to apply higher standards are restricted in order to ensure that the functioning of the internal market is not jeopardized; national provisions must satisfy 'major' needs and are subject to the supervision of the Commission and, if necessary, the Court of Justice (paragraph 4).

The Commission considers that, in view of its balanced system reconciling the twin aims of environmental protection and the establishment of the internal market, Article 100a takes the place of Article 100 and, possibly, of Articles 100 and 235, on which the Council had based the legislation at issue before the Single Act came into force. Moreover, the express reference to the environment contained in paragraph 3 simply constitutes a more concrete, stronger expression of the general principle, set out in Article 130r(2), that all Community measures should satisfy environmental protection requirements, and is designed to secure the effective application of that principle.

In contrast, the Commission takes the view that the aim of Article 130s is to endow the Community with an express, ancillary power to take any other action falling within the environmental policy to be pursued at Community level. In its view, this is obvious from its very wording. Instead of requiring the Council to take specific measures or achieve a specific aim, it gives it complete discretion to decide whether action is needed and what action it may consider to be necessary. In addition, Articles 130r and 130t define the conditions in which such action is to be undertaken and the limits on its effects. Two

provisions are particularly significant in this regard:

— the first sentence of Article 130r(4), which subjects Community action to the principle of subsidiarity.

The Community is to take action relating to the environment to the extent to which the objectives can be attained better at Community level than at the level of the individual Member States. It is clear that this question does not even arise where it is a question of creating the conditions for an internal market without frontiers and distortions of competition;

— Article 130t, under which Member States may maintain or introduce more stringent protective measures compatible with the Treaty in an area governed by Community legislation adopted pursuant to Article 130s; that provision could not refer to measures for the harmonization of legislation designed to secure the establishment or functioning of the internal market.

The Commission therefore maintains that Article 100a constitutes a specific legal basis, compared with Article 130s, for any environmental protection measure which, at the same time, is situated within the context of the establishment or functioning of the internal market, irrespective as to the 'principal' aim that one might be tempted to assign to it. The mere fact that the establishment or functioning of the internal market is affected should be sufficient for it to be held that the provisions relating to Article 100a apply. In the Commission's view, it is the effect of the directive in question which seems, in the final analysis, to determine the choice of Article 100a as the legal basis of a measure which, whatever its other aims may be, concerns the internal market.

(a) Analysis of Directive 91/156

Next, the Commission argues that Directive 91/156 satisfies the requirements of Article 100a of the Treaty. In its view, three criteria have to be satisfied in order for a Community environmental protection measure to come under Article 100a of the Treaty. It is necessary to show that:

— it is an action for the harmonization of national provisions;

— as a result of its object, the measure contributes towards the establishment or functioning of the internal market; and

— there is no more specific measure in the sphere of the internal market.

As far as the first criterion is concerned, the Commission points out that the directive

introduces single, common definitions of 'waste' and related activities (producer, holder, management, disposal, recovery, collection) which are to apply in all Member States. Apart from that harmonization which may have a direct impact on movements of products (goods/waste), it also lays down common rules relating to the conditions of industrial production, the processing of waste and, in particular, the movement of waste. Consequently, as a result of its content, it seeks to approximate conditions of competition, on the one hand, and to abolish barriers to trade between Member States, on the other, these being the two components of the internal market.

As regards approximation of the conditions of competition, the Commission refers in particular to the obligations on Member States to encourage the prevention or reduction of waste production (Article 3(1)(a)) and to take the necessary measures to prohibit the abandonment, dumping or uncontrolled disposal of waste (second paragraph of Article 4), which prevents industry in one Member State from enjoying advantages in terms of production costs simply because its legislation on the processing of waste is less strict. In the Commission's view, the harmonizing effects of the directive in respect of the competitive situation of industry in the Member States are underscored by the fact that, under Article 15, it is the holder or the producer of the product from which the waste came who has to bear the cost of disposal.

The Commission further observes that in order to render the harmonization resulting from the obligation set out in the first paragraph of Article 4 of the directive to ensure that waste is recovered or disposed of without endangering human health and harm to the environment more tangible, the directive requires a permit to be obtained for any treatment of waste (Article 9).

As regards the elimination of barriers to trade between Member States, the Commission stresses that the aim of the directive is, of course, not to encourage movements of waste across the Community. On the contrary, in its view, the intention is to limit such movements to the extent required by environmental protection and in conformity with the obligation to establish the internal market. That is why the directive draws a distinction between re-usable waste, on the one hand, and the conditions for waste disposal, on the other.

In the Commission's opinion, all waste and waste treatment are covered by the obligation for Member States to draw up waste management plans in collaboration, as appropriate, with the other Member States and the Commission (Article 7(1) and (2)). Only waste intended for disposal is covered by the special measures restricting the movement of waste (Article 7(3)).

As far as waste intended for disposal is concerned, the Commission refers to the obligation for Member States to establish an integrated and adequate network of disposal installations, which will enable waste to be disposed of in one of the nearest installations

(Article 5). Through harmonization at the level of those installations, the system laid down by the directive will, in the Commission's view, be able to guarantee that movements of waste are minimized under the conditions of a genuine internal market.

In contrast, as far as re-usable or recoverable waste is concerned — for which the directive embodies no specific provisions, with the exception of Article 3(1)(b), — it would be contrary to the aims of the directive to place restraints on shipments of waste to the recovery installation offering the best conditions, regard being had to the cost of shipment.

The Commission therefore submits that, despite its aims connected with environmental protection, the directive concerns the establishment and the functioning of the internal market, having regard to the specific economic characteristics of waste.

Lastly, the Commission reiterates that Article 130s merely supplements the means of action available to the Community so as to cover measures for which no other provision of the Treaty affords a legal basis. The words used in Article 130r(1) — 'action by the Community relating to the environment' — are therefore not comparable to a common policy whose legal basis constitutes a *lex specialis* in relation to Article 100a.

In conclusion, the Commission takes the view that the system established by the directive achieves — generally and subject to the specific provisions of other directives on dangerous waste — the principle of the free movement of waste intended for recovery and subjects the movement of waste intended for disposal to conditions which are in conformity with the internal market. The whole of this is based on harmonization of national provisions relating to the conditions under which waste may be treated, thus eliminating distortions of competition in the internal market. Consequently, the Commission considers that Article 100a is the only appropriate legal basis for such a directive.

(d) The effects of annulment

Since the annulment of the directive could create considerable risks in terms of legal certainty both for the Member States which are ready to incorporate the directive into national law and for economic operators who, with an eye to the implementation of the directive, are having to take steps as of now, with regard in particular to investment, the Commission asks the Court to have recourse, by analogy, to the second paragraph of Article 174 and order the effects of the annulled directive to continue.

2. The *European Parliament* points out, in the first place, that, according to the Court's case-law, the legal basis for a measure is determined by its aim and content and the Council is not entitled to choose the legal basis in the light of its subjective conviction that one of the aims pursued by the measure is the most important one or 'essential' in comparison with its other aim or aims.

In Parliament's view, the directive's substantive provisions relate both to waste management in the Community and to environmental protection. It is obvious, for instance, that the development of clean technologies and of products designed so as to make the smallest possible contribution to increasing the amount or harmfulness of waste will have major effects on the conditions of competition in the field of industrial production and, as a result, on the establishment and functioning of the internal market. It is also obvious that such measures are bound to help reduce or eliminate the pollution caused by waste from industrial processes. Parliament therefore considers that, in view of its content, the directive is concerned, not only with environmental protection, but also with the creation and functioning of the internal market.

As far as the aims of the directive at issue are concerned, Parliament points out that, in the eighth recital in the preamble, the Council recognizes that the directive has manifold aims, yet does not for all that specify which is the most important one. In Parliament's view, the directive pursues, indissociably, 'internal market' aims — namely improvement of the conditions of competition, the establishment and functioning of an internal market in waste and the aim of better protection for the environment. Accordingly, Parliament takes the view that the directive at issue falls within the field of application of Article 100a.

Secondly, Parliament questions the consistency with the Treaty of the procedure provided for in Article 18 of the directive. It points out in that connection that, in its initial proposal for the directive (OJ 1988 C 295, p. 3), the Commission proposed that the changes necessary in order to adapt the directive in the light of scientific and technical progress would be adopted in accordance with the advisory committee procedure (Procedure I of Decision 87/373, cited above). When, on 25 May 1989, Parliament adopted its opinion on that proposal, it approved the proposed advisory committee procedure (OJ 1989 C 158, p. 232). However, when considering the change of the legal basis in February 1991, it refrained from taking a view on the regulatory committee procedure (Procedure III(a) of Decision 87/373, cited above) which the Council was proposing to adopt.

Parliament considers that, by adopting Directive 91/156 on the basis of Article 130s rather than Article 100a, the Council deprived it of the opportunity of reacting on a second reading to the amendment of the committee procedure provided for in Article 18 of the contested directive. Such conduct was in breach of the essential procedural requirements for adopting the directive in so far as the cooperation procedure provided for in Article 100a was not applied. It considers that that plea is included on the plea relating to the legal basis of the directive.

Parliament makes it clear that it is not questioning the compliance of Article 18 with Decision 87/373, cited above. It considers, however, that the regulatory committee procedure provided for in Article 18 does not comply with the third indent of Article 145 of the Treaty, under which the Council 'may ... reserve the right, in specific cases, to exercise directly implementing powers itself'. In that regard, Parliament argues, first, that

the regulatory committee is a body which is not provided for by the Treaty and not compatible with its institutional structure. Although it is true that such the committee may not adopt implementing measures, it does have the power to prevent the Commission from doing so. In Parliament's view, however, it is for the Council to reserve the right to exercise implementing powers and to confer such a power on another entity constitutes an infringement of Article 4 of the Treaty. Secondly, Parliament considers that nothing in Article 18 limits the power of reservation exercised by the committee in specific cases. Thirdly, the regulatory committee procedure provides for no possibility for judicial review of the decision reserving implementing powers to the Council and accordingly fails to comply with the obligation on the Council to state reasons for its decisions.

The *Council* takes the view that Directive 91/156 was adopted on a proper legal basis and in compliance with the procedures laid down to that end.

(a) Criteria for determining the legal basis for a Community measure

In this connection, the Council refers first to the Court's case-law, according to which the appropriate legal basis for a measure of the Council must be based on objective factors which are amenable to judicial review, including in particular the aim and content of the measure (judgments in Case 45/86 *Commission* v *Council* [1987] ECR 1493, paragraph 11, and in the '*titanium dioxide case*', cited above).

As regards the first of those two criteria, the Council observes that, generally, in order to determine the legal basis for a measure, the Court has identified its most important (or 'essential') aim. In the judgment in the '*titanium dioxide case*', cited above, the Court compared the respective importance of the two aims which it found and decided that they were of equal importance, that the content of the directive was hybrid and that the internal market/environmental protection aims could not be dissociated from each other. In the Council's view, it is therefore necessary to draw a distinction between

— a normal case, in which analysis of the aim and content of a measure enables its essential aim and the legal basis corresponding thereto to be identified (even if the measure concurrently pursues other secondary or ancillary aims) and

— an exceptional case, in which analysis of the measure leads to the conclusion that it pursues two (or more) equal-ranking aims and that its content is hybrid and in which it may prove necessary, on account of the incompatibility of the possible legal bases, to choose between them on purely procedural grounds.

The Council considers that the Commission's argument, which stresses the 'effect' of the measure concerned, is tantamount to giving the internal market absolute priority over all the other objectives of the EEC Treaty. Virtually all Council measures are capable of having effects in the context of the internal market or concern it in one way or another.

The Commission's interpretation could have the effect of significantly diminishing recourse to a good number of Treaty articles in addition to Article 130s.

(b) Analysis of Directive 91/156

Next, the Council observes that analysis of the aim and content of Directive 91/156 brings to light five major considerations proving that it constitutes an action by the Community relating to the environment within the meaning of Article 130r of the Treaty.

In that connection, the Council points out in the first place that there is no provision in the contested directive of the kind of Article 1 of Directive 89/428/EEC of 21 June 1989 ('titanium dioxide', OJ 1989 L 201, p. 56), which juxtaposes, without indicating their relative importance, the aims of environmental protection and of improving the conditions of competition.

Secondly, the Council notes that, saving the express exceptions laid down in Article 2, the directive covers *all* waste and not only waste resulting from industrial processes or other economic activities. The production of household waste, however, has nothing to do with the establishment or functioning of the internal market, whether it is treated together with industrial waste or separately.

In the Council's view, a third argument flows from the general nature of the new Articles 3, 4 and 5 of the contested directive. Those articles lay down either principles with which the Member States must comply or objectives which they must attain using means or methods which in some cases are indicated, but not exhaustively. The Member States have considerable leeway as regards the content of the national plans which they are required to draw up under the new Article 7 of the directive and hence as regards the content of any legislation. As a result, the Council considers that the directive is above all a measure laying down a Community waste management strategy. It is for that reason, and not because it constitutes the first stage on the way to harmonization, that the directive is general in nature.

The Council bases a fourth argument on the fact that some provisions of the contested directive provide that Member States may restrict the free movement of waste (Article 5(1) and Article 7(3) of the directive). As for waste intended for disposal, the Council maintains that to claim, as the Commission does, that a significant reduction in the movement of waste intended for disposal is a measure whose aim and content is to improve the conditions of competition and contribute towards the establishment of the internal argument lacks conviction. As for waste intended for re-use or recovery, the Council considers, on the one hand, that Article 7(3), which authorizes Member States to prevent movements of waste which are not in accordance with their waste management plans, is applicable to movements of those sorts of waste and, on the other hand, that such interferences with the free movement of waste, albeit definitely justifiable as components of a specific action relating to

the environment, do not in any way contribute towards the establishment or functioning of the internal market.

As for the fifth consideration, relating to the 'polluter pays' principle enshrined in Article 15 of the directive, the Council observes that that article merely specifies who is to bear the costs and, in this case, too, the choice is left to the Member States. If one Member State requires the holder, another the producer, to pay, the Council cannot see how this will harmonize the conditions of competition.

In conclusion, the Council maintains that, in the light of the considerations set out above, the content of the directive manifestly testifies to the measure's having one essential aim, namely protection of health and the environment. It is only to the extent allowed by that aim that the directive involves a degree of harmonization of national legislation in the field of waste management (harmonization which was already set in train by Directive 75/442). According to the Council, the directive does not lay down rules for undertakings with the aim of preventing distortions of competition and barriers to trade, but constitutes positive, global action by the Community in relation to the protection of health and the environment.

(c) The choice between Article 130s and Article 100a

In answering the question as to the appropriate legal basis for a directive which, while having effects in the sphere of the internal market, essentially has the aim of protecting health and the environment, the Council points out, in the first place, that, according to the Court's judgment in the '*titanium dioxide case*', cited above, a combination of Articles 100a and 130s is, in any event, precluded.

As regards Article 130s, the Council goes on to observe that Title VII of the Treaty, which is made up of Articles 130r, 130s and 130t, reflects a policy in its own right, like regional or social policy, and constitutes a Community objective which exists independently of the other policies, and of the establishment of the internal market. According to the Council, Article 130r lays down the guiding principles for Community action in relation to the environment, one of the results of which is that such action is not pursued in isolation. However, in the Council's view, that provision definitely does not lay down the prime rule for action.

As regards Article 100a, the Council observes that provision was not made for the internal market in order to protect the environment. On the contrary, the increased economic and industrial activity to which the internal market will presumably give rise might result in a deterioration of the environment, since the conditions of competition could be approximated and barriers to free trade eliminated at any level of protection. The *rationale* of Article 100a(3) is to obviate such a deterioration. In cases involving harmonization of environmental protection legislation in the Member States for the purposes of the establishment of the internal market, Article 100a would be the appropriate legal basis. In contrast, in so far as

harmonization of legislation is necessary in order to attain the objectives of effective protection of the environment while complying with the conditions of the internal market, Article 130s is applicable.

The Council further observes that, if Article 100a(3) enables environment protection aims to be pursued, this must be within the field of application of that article and not outside it. A measure benefiting the environment to the detriment of the free movement of waste could scarcely be based on Article 100a alone, since such a measure would be incompatible with its very objective.

Lastly, the Council contends that the Commission's argument would justify using Article 100a in virtually every case, since any disparity, actual or potential, between national provisions affecting any economic activity whatever could have a — direct or indirect — effect on the conditions of competition. Such a development would be neither legally correct nor political desirable.

(b) Reply to the European Parliament's statement in intervention

As regards the plea alleging the wrong choice of legal basis, the Council refers to the arguments set out above.

In so far as, in its second plea, Parliament claims that Article 18 of the contested directive is incompatible with the Treaty, while admitting that that article complies with Decision 87/373, cited above, the Council considers that Parliament is impliedly contesting the compliance with the Treaty of Decision 87/373. Since the Commission is not contesting that decision in the case — which would not in any event have called in question Article 18 of the contested directive —, the Council considers that Parliament is manifestly going beyond a form of order sought 'in support of or opposing, in whole or in part, the form of order sought by one of the parties' to which, according to Article 93(5) of the Court's Rules of Procedure, an intervener is confined. Consequently, that plea is inadmissible.

The Council claims that that plea is inadmissible on a second ground, namely lack of evidence adduced by Parliament to show that one of its prerogatives has been infringed. The Council observes that, in its judgment in Case C-70/88 *Parliament* v *Council* [1991] ECR I-4529, paragraph 20, the Court rejected that plea, observing that Parliament had adduced no evidence suggesting that its prerogatives had been infringed.

In case the Court should nevertheless consider that that plea is admissible, the Council points out that the third indent of Article 145 of the Treaty contains no requirement, or limitation, as to the rules to which the Council may make subject the implementing powers which it confers on the Commission. In the Council's view, it is clear that Procedure III(a) of Decision 87/373, which is adopted in Article 18 of the contested directive, confers implementing powers on the Commission, in accordance with certain of the detailed rules laid down in that decision.

In the Council's contention, the whole of Parliament's argument seems to be based on the assumption that that procedure essentially constitutes a direct reservation of powers by the Council for itself, which, as it possible only in specific cases, should be duly reasoned. The Council considers that that approach is based on a fundamental misunderstanding of the nature of Procedure III(a). It points out that if the committee provided for under that procedure delivers an unfavourable opinion on the draft measures, with the result that the Commission has to communicate a proposal to the Council, the Council has, according to the basic measure, a maximum of three months within which it must act. If within that three-month period, the Council fails to obtain a qualified majority in favour of the proposal, or a unanimous vote in favour of amending it, the Commission is to adopt the draft measures. Accordingly, the Council could only prevent the implementing measure contemplated by the Commission from being actually adopted by means of a unanimous decision. That procedure, which therefore in no wise guarantees that the decision-taking power will be exercised by the Council in the event of the committee's delivering an unfavourable opinion constitutes a genuine implementing power as far as the Commission is concerned.

According to the Council, that situation was brought into focus by the Court in the judgment in Case 16/88 *Commission* v *Council* [1989] ECR I-3457, in which it held with regard to Procedure II (the management committee procedure) that 'the effect of that procedure ... is to allow the Council to act itself in the Commission's stead'. The Council considers that the word 'allow' is correct, since the procedure gives the Council the possibility of acting, but does not rule out the outcome of an act of the Commission. Consequently, in the event that the Court should consider this plea to be admissible, the Council asks it to dismiss it as unfounded.

4. The *Spanish Government* is unable to accept the Commission's argument based on the broad nature of Article 100a of the Treaty, which would mean that it would be necessary to use that provision in order to legislate on any environmental issue affecting, even incidentally, the establishment of the single internal market. In that regard, the Spanish Government points out, in particular, that it emerges from Article 130r itself that, albeit guided by the principle of subsidiarity, action by the Community in relation to the environment itself aims at a high degree of protection of the environment. In its view, that action operates, moreover, independently of any economic, social or other consideration, which is in contrast with Community action with a view to the establishment of the single internal market, it being influenced by other values, of which the environment is just one component. It follows, in the Spanish Government's opinion, that the Council invariably guarantees a high level of environmental protection when it bases its action on Article 130s, whereas, under Article 100a(3), the guarantee is not a total one, since, according to the Treaty, the requirement of a high level of protection has only to be complied with by the Commission in its proposal, not by the Council.

The Spanish Government considers, however, that the different level of environmental protection does not enable a measure of hierarchy to be introduced into the choice of the legal basis which is appropriate in the light of the content and aims of the Community

measure. It should instead be considered that Community action in relation to the environment differs. On the one hand, there is environmental action proper, which pursues a single objective — achievement of greater protection for the environment — leaving aside any other consideration, which is now based on the principle of subsidiarity and is crystallized by Article 130s of the Treaty. On the other, there is action designed to approximate the legislation of the Member States on environmental matters in so far as it may affect the formulation of Community policies for the establishment of the single internal market, the aim of which is to restrict the leeway or freedom of manoeuvre of the Community institutions in drawing up measures adopted to that end which might affect the environment; such action must be based on Article 100a of the Treaty.

The Spanish Government considers that, in view of its content and aims, Directive 91/156 constitutes a perfect example of action by the Community in relation to the environment, that is to say, action — pitched at a high level of protection of the environment — based on the principles that preventive action should be taken, that environmental damage should as a priority be rectified at source, and that the polluter should pay (Article 15 of the directive), and on the principle of solidarity, whose objectives are to preserve, protect and improve the quality of the environment, to contribute towards protecting human health and to ensure a prudent and rational utilization of natural resources.

The Spanish Government maintains that those considerations rule out Article 100a as an adequate legal basis for the contested directive. In its view, it does not appear reasonable that a Member State wishing to continue to apply its environmental legislation in relation to a matter which has nothing to do with competition or the free movement of goods should, in order to do so, have to follow the procedure set out in Article 100a(4) until it obtains authorization from the Commission.

In addition, the Spanish Government cites a number of Community measures (Council Directive 88/609/EEC of 24 November 1988 on the emission of certain pollutants into the air from large combustion plants, OJ 1988 L 336, p. 1; Council Directive 90/656/EEC of 4 December 1990 on the transitional measures applicable in Germany with regard to certain Community provisions relating to the protection of the environment, OJ 1990 L 353, p. 59; Council Regulation (EEC) No 594/91 of 4 March 1991 on substances that deplete the ozone layer, OJ 1991 L 67, p. 1), all of which have an effect in the field of competition or in the field of the elimination of barriers to the free movement of goods in the Community and were adopted on the legal basis specific to environmental matters, namely Article 130s of the Treaty.

M. Zuleeg

Judge-Rapporteur