2. Due consultation of the European Parliament in the cases provided for by the Treaty is one of the means enabling the Parliament to participate effectively in the Community's legislative procedure. That duty of consultation includes the requirement that the Parliament be reconsulted whenever the final text, viewed as a whole, departs substantially from the text on which the Parliament has already been consulted, except in cases where the amendments correspond essentially to the wishes expressed by the Parliament itself.

3. A comparison between the Commission's original proposal for Regulation No 4059/89 and the content of that regulation as adopted by the Council shows that temporary authorization within the framework of a Community quota has been substituted for the principle of freedom of cabotage in Member States for carriers established in another Member State. Those substantive amendments, which do not reflect any wish of the Parliament and which affect the whole scheme, are sufficient to require fresh consultation of the Parliament. The fact that the latter was not consulted a second time in the legislative procedure provided for in Article 75 of the Treaty constitutes an infringement of essential procedural requirements, justifying the annulment of Regulation No 4059/89.

REPORT FOR THE HEARING
in Case C-65/90 *

I — Facts

1. This application under Article 173 of the EEC Treaty seeks the annulment of Council Regulation (EEC) No 4059/89 of 21 December 1989 laying down the conditions under which non-resident carriers may operate national road haulage services within a Member State (cabotage) (OJ 1989 L 390, p. 3).

2. The regulation, which is based on Article 75 of the EEC Treaty, established a 'Community cabotage quota' consisting of 15 000 cabotage authorizations, each valid for two months (Article 2(1)). The quota is allocated among the various Member States according to a scale determined and increased annually from 1 July 1991 in line with the average trends in internal road haulage in the Member States (Article 2(3) and (4)). In the event of serious disturbance of the internal transport market in a given geographical area due to cabotage, the Commission may adopt safeguard measures after

* Language of the case: French.

consulting the Member States; such measures may involve the temporary exclusion of the area concerned from the scope of the regulation (Article 2(5)).

The regulation further provides that performance of cabotage transport operations is to be subject, save as otherwise provided in Community regulations, to the provisions in force in the host Member State in respect of the rates and conditions governing the transport contract, weights and dimensions of road vehicles, requirements relating to the carriage of certain categories of goods, driving and rest time and VAT on transport services (Article 5).

The regulation entered into force on 1 July 1990 and applies until 31 December 1992 (first and second paragraphs of Article 9). However, the Council has undertaken to adopt before 1 July 1992 a regulation laying down the definitive cabotage system which is to enter into force on 1 January 1993 (third paragraph of Article 9).

3. As regards the background to the contested regulation, on 5 December 1985 the Commission submitted to the Council a proposal for a Council regulation laying down the conditions under which non-resident carriers may operate national road haulage services within a Member State (OJ 1985 C 349, p. 26).

That proposal, which was based on Article 75 of the EEC Treaty, provided essentially that from 1 January 1987 any road haulier who was established in a Member State and was authorized in that country to carry out international road haulage operations was to be authorized to carry out national road haulage operations in a different Member State; he might temporarily pursue his activities in the Member State concerned without having to set up a registered office or other establishment in that State (Article 1).

In addition the proposal provided that any carrier, as defined therein, might, with effect from 1 January 1987, carry out national transport operations in a different Member State, without quantitative or qualitative restrictions, following on from a haulage operation between two Member States, provided that the number of such transport operations was no more than two and they were carried out during the return journey either to the Member State in which the operator was based or the Member State where the preceding international transport operation had begun (Article 5).

After being consulted by the Council the Parliament gave its opinion in a resolution of 12 September 1986 (OJ 1986 C 255, p. 236) in which it essentially approved the Commission's proposal.

On 21 December 1989 the Council adopted the contested regulation.

4. The European Parliament bases its action on the alleged infringement of its right to take part in the Community legislative process. It maintains essentially that since the

Council departed significantly from the Commission's proposal it ought to have consulted the Parliament again before adopting the contested regulation.

II — Written procedure and forms of order sought

1. The application by the European Parliament was lodged at the Court Registry on 14 March 1990.

2. By a separate document lodged at the Court Registry on 17 May 1990 the defendant Council of the European Communities raised an objection of inadmissibility under Article 91(1) of the Rules of Procedure.

By decision of 21 November 1990 the Court, pursuant to Article 91(4) of the Rules of Procedure, reserved its decision on the objection of inadmissibility for the final judgment.

3. The *European Parliament* claims that the Court should:

— declare void Council Regulation (EEC) No 4059/89 of 21 December 1989 laying down the conditions under which non-resident carriers may operate national road haulage services within a Member State;

— order the defendant to pay the costs.

The *Council* contends that the Court should:

— dismiss the application as inadmissible;

— alternatively, dismiss the application as unfounded;

— order the applicant to pay the costs.

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 in law and arguments of the parties

1. *Admissibility*

(a) In support of its objection of inadmissibility the *Council* first cited the principles stated in Case 302/87 *Parliament* v *Council* ([1988] ECR 5615, the 'Comitology' case).

After referring to the interlocutory judgment in Case C-70/88 *Parliament* v *Council* ([1990] ECR I-2041, on the 'post-Chernobyl' regulation) it put forward the following arguments in supplementary observations lodged with the leave of the Court:

The Council considers that the judgment of 22 May 1990 shows that the Parliament does not have an unconditional right to bring

proceedings under Article 173 of the EEC Treaty and that the Parliament's right to avail itself of that article applies only exceptionally, in cases where the balance of the Treaty system may be at risk, that is to say where there is a substantial infringement of the essential prerogatives of the Parliament.

In that context the Council maintains that in contrast to the 'post Chernobyl' case the legal basis of the contested regulation is not at issue in the present case, so that it is not possible to speak of a patent breach of the essential prerogatives of the Parliament, and that it concerns not the procedure of cooperation but simply consultation of the Parliament.

The Council maintains that in practice if Parliament actions to challenge measures on the ground that there had not been a fresh consultation were admissible the Council would be obliged to consult the Parliament afresh each time it made amendments to a proposal by the Commission which required mandatory consultation of the Parliament. The result would be to burden and delay the Community decision-making process.

Finally, the Council states that where some time has elapsed between the Parliament's opinion and the adoption of the measure, the Parliament is always free to adopt another resolution of its own motion before the Council adopts the measure.

In any event, since the Parliament's right to bring proceedings is an exception to the general rule laid down in Article 173, it must be strictly interpreted. It follows, according to the Council, that the Parliament must show in detail that the Council has adopted a measure which differs substantially by its very nature from the Commission's proposal, that the items which have altered the substance of the text are not in accordance with the Parliament's wishes and that those items have been adopted without ascertaining the Parliament's opinion thereon.

(b) The *Parliament* claims that the action is admissible on the basis of the aforementioned judgment in Case 302/87.

There is nothing in either the terms or the spirit of that judgment to show that its right of action is an exception. On the contrary, the Court has recognized that the Parliament has a general right of action for annulment provided that the action seeks only to safeguard its prerogatives and that it is founded only on submissions alleging breach of them.

The Parliament challenges the Council's view that consultation of the Parliament is merely a formality and that fresh consultation would impede the decision-making process and may, moreover, be replaced by periodical and unofficial information supplied to the Parliament's departments. The Parliament considers that its effective participation would not be guaranteed if the Council were free to amend the Commission's original proposal substantially without being required to consult the Parliament afresh. It is, moreover, clear from the case-law of the Court that full respect for both the right of consultation and the procedure of coopera-

tion is the expression of one and the same prerogative, namely regular participation of the Parliamentary institution in the Community legislative procedure.

The Parliament adds that the case-law of the Court does not support the proposition that the Parliament must show in detail that there has been a manifest breach of its essential prerogatives. Such consideration goes rather to the substance of the case, whereas at the stage when admissibility is being considered the Court may only ascertain whether the action seeks to safeguard the Parliament's prerogatives and is based on pleas alleging their breach.

2. *Substance*

(a) The *Parliament* maintains that the contested measure infringes an essential procedural requirement by disregarding the Parliament's right to participate in the Community legislative process. The Council's obligation to consult the Parliament in accordance with Article 75 of the EEC Treaty includes the obligation to consult it afresh in the event that a substantial amendment of the proposal on which the Parliament has given its opinion is contemplated.

The Parliament considers that the starting point for any discussion of the scope of its participation in the Community legislative process must be the case-law as stated in Cases 138/79 and 139/79 *Roquette* and *Maïzena* v *Council* [1980] ECR 3333 and 3393, the 'Isoglucose' cases.

In those judgments the Court held that 'consultation ... is the means which allows the Parliament to play an actual part in the legislative process of the Community. Such power represents an essential factor in the institutional balance intended by the Treaty ... Due consultation of the Parliament in the cases provided for by the Treaty therefore constitutes an essential formality disregard of which means that the measure concerned is void.'

That obligation requires that the Parliament be given the opportunity to express its opinion, which it can only usefully do if it is aware of all the factors involved in the legislative process. The consultation procedure must therefore include consideration of all the effects of the proposed legislation (scope and terms of the measure, special schemes, derogations, restrictions and so forth).

The Parliament accepts that according to the case-law of the Court, fresh consultation is not necessary if 'considered as a whole the substance of the draft regulation ... has not been altered' by the amendment in question (Case 41/69 *Chemiefarma* v *Commission* [1970] ECR 661) or there were 'changes of method rather than of substance' and in addition the amendment in question 'corresponded broadly to the wish expressed by the Parliament' (Case 453/79 *Battaglia* v *Commission* [1982] ECR 297).

In the Parliament's view it may be inferred from that case-law that fresh consultation is required where the amendment

— concerns an essential aspect of the provision;

— involves a substantial change and is not of a purely technical nature;

— is obviously not in accordance with what the Parliament intended.

Applying those criteria to the present case, the Parliament observes that the Commission's proposal sought to bring about freedom to provide services by establishing general cabotage without any restriction at Community level. Such a system complies with the judgment in Case 13/83 *Parliament* v *Council* ([1985] ECR 1513) in which the Court declared that 'the Council has failed to ensure freedom to provide services in the sphere of international transport and to lay down the conditions under which non-resident carriers may operate transport services in a Member State'.

The Parliament states that the Commission proposed, in addition to general cabotage, 'follow-on' cabotage under authorizations for transport within the Community restricted to two transport operations per journey. In providing for non-resident carriers certain rights which resident carriers did not have the Commission went beyond the necessary minimum laid down by the Court in the aforementioned judgment in Case 13/83.

On the contrary, the Council established a cabotage system with restrictions at the Community level. Based on a Community quota system, such cabotage increases only in accordance with the general trend in traffic and is in addition restricted both in duration (authorizations are valid for two months) and in time (it is applicable until 31 December 1992).

In the Parliament's view those two cabotage schemes are fundamentally different:

The system proposed by the Commission foresees a complete liberalization of access by non-resident carriers to the market of another Member State. The only limitation in that system resides, at the national level, in the quantitative restrictions in force in certain Member States. The system of 'follow-on' cabotage provided for by the Commission allows for development, inasmuch as this type of cabotage is dependent on existing authorizations, or may even be undertaken without an authorization, in the case of liberalized services.

On the other hand the system established by the Council does not, in the Parliament's opinion, allow any serious progress in cabotage since the only increase provided for is on the basis of the average trend in road transport. In addition the scheme is restricted in time and thus represents only a first step towards freedom to provide services in this kind of transport. Finally the Council has departed from the Commission's proposal by providing in Article 2(5) of the regulation for safeguard measures and in Article 6 for penalties in the event of infringements by a carrier.

In conclusion the Parliament considers that all those substantive and formal amendments are of such importance that it ought to have been consulted afresh. In its reply the Parliament states in addition that fresh consultation is required where essential items which give the measure in question its basic characteristic have been amended in such a way

that the Parliament has not been able to take account of them in its original opinion. On the other hand the obligation of fresh consultation cannot be subject to the condition that the Council has changed the purpose of the measure, because in such a case the measure in question must in any event be annulled as having been adopted without a proposal from the Commission.

(b) The *Council* maintains that the Parliament must be consulted afresh where the substance of a proposal submitted to the Council, considered as a whole, has been changed. In that respect the Council states that in acting on a proposal from the Commission it must stay within the confines of that proposal and cannot alter the substance of it. For example in the present case, where it had before it a proposal on road transport operations it could not validly on that basis adopt a measure relating to transport operations by water.

The Council states that the Commission forwarded to the Council in December 1985 a proposal replacing a proposal then pending before the Council. On 12 September 1986, after being consulted by the Council, the Parliament gave its opinion on the 1985 proposal which served as a basis for the discussions in the Council and led to the adoption of the contested regulation. However, since the Commission had subsequently amended its proposal, the latest amendment became the text of the regulation adopted by the Council. The latter adopted the measure in question by a qualified majority, which made it impossible to amend the proposal.

In that connection the Council states that at no time did the Commission suggest that the Parliament should be consulted a second time before the regulation was adopted and the Parliament itself, which was informed of the progress of the procedure in the Council, never requested to be consulted a second time.

The Council then compares the main provisions of the original proposal and the regulation and concludes that the regulation seeks to fulfil an obligation as to a result to be achieved under the Treaty, the terms of which were not laid down by the Treaty but were only sketched out in the original proposal, essentially by means of reference to national law. The Council thereupon established a cabotage system in the road transport of goods; the method it adopted, however, differed in certain respects from that originally proposed by the Commission. The Council considers that in the light of the case-law of the Court that change in method did not require a fresh consultation of the Parliament.

The Council contests the Parliament's claim that in changing the method it established a system leading to much less liberal results than the system originally proposed by the Commission. The Commission's original proposal contained restrictions in the form of the maintenance of national quotas. Those restrictions, like the Community quota, were quantitative even if their number was not necessarily apparent from the proposal. Moreover, in the Council's view, the proposal was likely in practice to have a more restrictive effect than the regulation by subjecting the provider of services to all the laws, regulations and administrative provisions in force in the host Member State. In

addition, the Council states that it discarded certain provisions of a restrictive nature which were included in the proposal and which it regarded as contrary to Community law.

As regards the safeguard measures authorized by Article 2(5) of the regulation in the event of serious disturbance of the transport market the Council states that although the Commission's original proposal contained no safeguard clause the Parliament itself proposed one in the form of an Article 7a to be inserted in the proposal. By incorporating in the regulation a clause allowing temporary safeguard measures to be adopted the Council thus complied with the Parliament's wishes even though the procedure was somewhat different. However, that different procedure, which was basically a change in method, did not require fresh consultation of the Parliament. Similar considerations apply, in the Council's view, with regard to the penalties provided for in Article 6 of the regulation in the event of infringements by a carrier.

Finally, the Council denies that the transitional nature of the regulation represents an appreciable alteration of the Commission's proposal involving the obligation to consult the Parliament afresh. The latter had itself proposed a recital to the effect that in order to avoid serious disturbances freedom to provide services in national transport had to be achieved progressively.

The Council states, in conclusion, that in adopting the contested regulation it adopted without amendment the Commission's amended proposal. The amendments which the Commission had made to its original proposal do not alter the substance, considered as a whole, but have the following features:

— they represent changes in method designed to achieve the proposed aim (such as the provisions relating to the establishment of a Community quota); or

— they reflect the wishes expressed by the Parliament in its opinion on the original proposal (such as the safeguard measures, the penalties and the progressive liberalization); or

— they disregard provisions about which there was doubt as to whether they were in accordance with the Treaty (such as the definition of undertakings entitled and the requirement of a notional registered office or surety).

In its rejoinder the Council states that the difference between its point of view and the Commission's relates essentially to the method to be adopted to establish cabotage and that it has not been established that the effects of the method proposed would have been so different from those of the method adopted that the very substance of the proposal was affected.

M. Zuleeg
Judge-Rapporteur