JUDGMENT OF THE COURT
17 May 1994 *

In Case C-41/93,

French Republic, represented by Edwige Belliard, Assistant Director in the Legal Service of the Ministry of Foreign Affairs, and Catherine de Salins, Foreign Affairs Adviser in the same Ministry, acting as Agents, with an address for service in Luxembourg at the French Embassy, 9 Boulevard du Prince Henri,

applicant,

v

Commission of the European Communities, represented by Denise Sorasio, Legal Adviser, and Virginia Melgar, a French official on secondment to the Legal Service, acting as Agents, with an address for service in Luxembourg at the office of Georgios Kremlis, of its Legal Service, Wagner Centre, Kirchberg,

defendant,

supported by

Federal Republic of Germany, represented by Ernst Röder, Ministerialrat in the Federal Ministry of the Economy, and Roberto Hayder, Regierungsdirektor in the

* Language of the case: French.

same Ministry, acting as Agents, at the Bundesministerium für Wirtschaft, Villemombler Str. 76, D-W-5300 Bonn,

and

Kingdom of Denmark, represented by Jørgen Molde, Legal Adviser in the Ministry of Foreign Affairs, acting as Agent, with an address for service in Luxembourg at the Danish Embassy, 4 Boulevard Royal,

interveners,

APPLICATION for the annulment of the Commission Decision of 2 December 1992, based on Article 100a(4) of the EEC Treaty, confirming the German rules concerning the prohibition of pentachlorophenol (OJ 1992 C 334, p. 8),

THE COURT,

composed of: O. Due, President, G. F. Mancini, J. C. Moitinho de Almeida and D. Díez de Velasco (Presidents of Chambers), R. Joliet, F. A. Schockweiler, G. C. Rodríguez Iglesias, F. Grévisse, M. Zuleeg, P. J. G. Kapteyn (Rapporteur) and J. L. Murray, Judges,

Advocate General: G. Tesauro,
Registrar: D. Louterman-Hubeau, Principal Administrator,

having regard to the Report for the Hearing,

after hearing oral argument from the parties at the hearing on 7 December 1993, at which the Commission was represented by Jean-Louis Dewost, Director-General of the Legal Service, and Virginia Melgar, acting as Agents,

after hearing the Opinion of the Advocate General at the sitting on 26 January 1994,

gives the following

Judgment

1 By application lodged at the Court Registry on 9 February 1993, the French Republic brought an action under the first paragraph of Article 173 of the EEC Treaty for the annulment of the Commission Decision of 2 December 1992, based on Article 100a(4) of the Treaty, confirming the German rules concerning the prohibition of pentachlorophenol (OJ 1992 C 334, p. 8).

2 Pentachlorophenol ('PCP') is a chemical substance used for the treatment of wood, for the impregnation of industrial textiles and for soil sterilization, as a bactericide in the dressing of skins and the paper pulp industry and, lastly, as a molluscicide in the treatment of industrial liquids. PCP is toxic for humans through oral, respiratory or skin contamination; it also has a highly toxic effect on the aquatic environment. Its use is subject to various restrictions in more than 30 countries.

3 In 1987, pursuant to Council Directive 83/189/EEC of 28 March 1983 laying down a procedure for the provision of information in the field of technical standards and regulations (OJ 1983 L 109, p. 8), the Federal Republic of Germany notified the Commission of a draft regulation restricting the PCP concentration in wood-treatment preparations to 0.5%.

4 In response to that notification, the Commission stated that it was preparing a directive on the subject and asked the German Government to defer adopting the regulation for 12 months.

5 On 20 April 1988 the Commission submitted a proposal for a Council directive amending for the ninth time Directive 76/769/EEC on the approximation of the laws, regulations and administrative provisions of the Member States relating to restrictions on the marketing and use of certain dangerous substances and preparations (OJ 1991 C 117, p. 14). The proposal limited to 0.1% by mass the concentration of PCP in substances and preparations placed on the market and provided for derogations in three cases exhaustively listed.

6 On 12 December 1989, the Federal Republic of Germany adopted the Pentachlorphenolverbotsverordnung (regulation prohibiting PCP) (*Bundesgesetzblatt* I 1989, p. 2235), which entered into force on 23 December 1989.

7 Paragraph 1(1) of the regulation provides that the regulation is to apply to pentachlorophenol, sodium pentachlorophenolate and other pentachlorophenol salts and compounds, preparations containing in total more than 0.01% of those substances and to products which, following treatment with such preparations, contain those substances in a concentration of more than 5 mg/kg (parts per million).

8 Under Paragraph 2(1) of the regulation the manufacture, marketing or use for commercial or industrial purposes of the substances referred to in Paragraph 1(1) are prohibited in any commercial undertaking or one employing workers. The only exemptions from that prohibition relate to the manufacture and use of PCP and its compounds which arise in the synthesis of other substances or as

by-products or which are intended exclusively for scientific research or experiment, where risk-free disposal of waste materials can be guaranteed and adequate safety measures have been taken to protect workers and the environment. Those exemptions are subject to authorization by the administrative authorities.

9 On 21 March 1991 the Council adopted, on the basis of Article 100a of the Treaty, Directive 91/173/EEC amending for the ninth time Directive 76/769/EEC on the approximation of the laws, regulations and administrative provisions of the Member States relating to restrictions on the marketing and use of certain dangerous substances (OJ 1991 L 85, p. 34, 'Directive 91/173'). PCP is among the dangerous substances covered by that directive. Four Governments, including the German Government, voted against adoption of the directive.

10 Article 1 of the directive amends Annex I to Directive 76/769/EEC (OJ 1976 L 262, p. 210), by adding a Point 23, according to which PCP, its salts and esters are not to be used in a concentration equal to or greater than 0.1% by mass in substances or preparations placed on the market. It provides exceptions, essentially, for products and preparations intended for use in the treatment of wood, impregnation of fibres and heavy-duty textiles, as a synthesizing and/or processing agent in industrial processes and in specific treatment for buildings forming part of the cultural heritage of Member States. Pursuant to the same provision, those exceptions are to be re-examined in the light of developments in knowledge and techniques not more than three years after the implementation of the directive.

11 Article 2 of Directive 91/173 provides that the Member States are to communicate to the Commission before 31 December 1991 the text of the main provisions of national law which they adopt in the field covered by that directive and are to

bring into force the laws, regulations and administrative provisions necessary to comply with the directive before 1 July 1992.

12 On 2 August 1991 the Federal Republic of Germany notified the Commission of its decision, based on Article 100a(4) of the Treaty, to continue to apply national provisions concerning PCP instead of Directive 91/173. The notification was forwarded to the other Member States for their opinions. On 10 February 1992, the French Republic forwarded its observations on the notification to the Commission.

13 On 2 December 1992 the Commission adopted the contested decision confirming the German provisions. All the Member States were notified of that decision.

14 In support of its application, the French Republic submits, first, that the Commission was at fault in confirming the German regulation notified to it and that, consequently, it infringed Article 100a(4) of the Treaty.

15 The French Government points out that the information provided by the German authorities did not demonstrate that the measures restricting the use of PCP were justified on grounds of the major needs referred to in Article 36 of the EEC Treaty or relating to the protection of the workplace or environment, or that those measures were proportionate, having regard to the barriers to trade which might result from them.

16 Furthermore, where a Member State maintains in force rules which are more restrictive than those laid down in directives adopted by the Council, this can be

justified under Article 100a(4) only by circumstances peculiar to that State, which is not the situation in this case.

17 Secondly, the French Government claims that the Commission, in its decision, infringed Article 190 of the EEC Treaty, in that it did not prove to the requisite legal standard that the conditions prescribed by Article 100a(4) for confirmation were fulfilled.

18 Before those pleas are considered, the procedure leading up to the decision at issue should be analysed and placed in its context within the scheme of the Treaty, and its objective and mode of operation defined.

19 One of the objectives of the Community set out in Articles 2 and 3 of the EEC Treaty is the creation of a common market. The Court has consistently held that the establishment of the common market is intended to remove barriers to intra-Community trade with a view to merging national markets into a single market achieving conditions as close as possible to those of a genuine domestic market.

20 Article 8a of the EEC Treaty (Article 7a of the EC Treaty) provides that the internal market is to be progressively established by measures adopted by the Community in accordance with the provisions of the article and of the other provisions mentioned therein, including Article 100a.

21 By way of derogation from Article 100 and save where otherwise provided in the Treaty, the provisions of Article 100a apply for the achievement of the objectives set out in Article 8a.

22 According to Article 100a(1), those objectives are to be implemented by measures, including directives to be adopted by the Council in accordance with the procedure laid down therein and which have as their object the abolition of barriers to trade arising from differences between the provisions laid down by law, regulation or administrative action in Member States.

23 Under that system, however, if the conditions which Article 100a(4) lays down are fulfilled, that provision allows a Member State to apply rules derogating from a harmonization measure adopted in accordance with the procedure laid down in Paragraph 1.

24 As this possibility constitutes a derogation from a common measure aimed at attaining one of the fundamental objectives of the Treaty, namely the abolition of obstacles to the free movement of goods between Member States, Article 100a(4) makes it subject to review by the Commission and the Court of Justice.

25 It is in the light of those considerations that it is necessary to examine the procedure according to which the Commission must review and, where appropriate, confirm the national provisions of which it is notified by a Member State.

26 In the first place, where, after the expiry of the time allowed for transposing, or after the entry into force of, a harmonization measure mentioned in Article 100a(1), a Member State intends, as in this case, to continue to apply national provisions derogating from the measure, it is required to notify the Commission of those provisions.

27 The Commission must then satisfy itself that all the conditions for a Member State to be able to rely on the exception provided for by Article 100a(4) are fulfilled. In particular, it must establish whether the provisions in question are justified on grounds of the major needs mentioned in the first subparagraph of Article 100a(4)

and are not a means of arbitrary discrimination or a disguised restriction on trade between Member States.

28 The procedure laid down by that provision is intended to ensure that no Member State may apply national rules derogating from the harmonized rules without obtaining confirmation from the Commission.

29 Measures for the approximation of the provisions laid down by law, regulation or administrative action in Member States which are such as to hinder intra-Community trade would be rendered ineffective if the Member States retained the right to apply unilaterally national rules derogating from those measures.

30 A Member State is not, therefore, authorized to apply the national provisions notified by it until after it has obtained a decision from the Commission confirming them.

31 It should now be considered, firstly, whether the Commission's decision of 2 December 1992 satisfies the requirements of Article 190 of the Treaty.

32 The Commission says that it fulfilled those requirements by stating, in its decision, that the objective of the German measure was the protection of health and the environment, two grounds of justification mentioned in Article 36 and Article 100a(4) of the Treaty respectively. In particular, it pointed out that the German rules were intended to protect citizens from the risks of cancer which were linked to dioxins.

33 That argument cannot be accepted.

34 The Court has consistently held that the obligation under Article 190 to give reasons requires that the measures concerned should contain a statement of the reasons which led the institution to adopt them, so that the Court can exercise its power of review and so that the Member States and the nationals concerned may learn of the conditions under which the Community institutions have applied the Treaty.

35 In this case, that condition is not fulfilled. The second part of the decision of 2 December 1992, headed 'Assessment', after briefly describing the content and objective of Article 100a(4) in its first three paragraphs, confines itself in the fourth paragraph to indicating the content of the German regulation and the dangers of PCP and then noting in the following paragraph that the limit laid down by the regulation is higher and that that safety margin is justified by the needs specified in Article 100a(4). Then, after a reference in the sixth and seventh paragraphs to the obligation to re-examine Directive 91/173 after three years, it is stated in the eighth paragraph of the decision that the German regulation is a barrier to trade. Finally, in the ninth paragraph, the Commission concludes that the German regulation satisfies the requirements of the second subparagraph of Article 100a(4).

36 It appears, therefore, that the Commission confined itself to describing in general terms the content and aim of the German rules and to stating that those rules were compatible with Article 100a(4), without explaining the reasons of fact and law on account of which the Commission considered that all the conditions contained in Article 100a(4) were to be regarded as fulfilled in the case in point.

37 Consequently, the contested decision does not satisfy the obligation to state reasons laid down in Article 190 of the Treaty and must be annulled for infringement of essential procedural requirements. There is therefore no need to consider the other pleas put forward by the applicant.

Costs

38 Under Article 69(2) of the Rules of Procedure, the unsuccessful party is to be ordered to pay the costs. Since the defendant has been unsuccessful, it must be ordered to pay the costs.

On those grounds,

THE COURT

hereby:

1. Annuls the Commission's decision of 2 December 1992 confirming the German rules concerning the prohibition of pentachlorophenol;

2. Orders the Commission to pay the costs.

Due Mancini Moitinho de Almeida

Díez de Velasco Joliet Schockweiler

Rodríguez Iglesias Grévisse Zuleeg

Kapteyn Murray

Delivered in open court in Luxembourg on 17 May 1994.

R. Grass
Registrar

O. Due
President