JUDGMENT OF THE COURT (Fifth Chamber)
25 February 1999 *

In Joined Cases C-164/97 and C-165/97,

European Parliament, represented by Johann Schoo, Head of Division in the Legal Service, and João Sant'Anna, of its Legal Service, acting as Agents, with an address for service in Luxembourg at the General Secretariat of the European Parliament, Kirchberg,

applicant,

v

Council of the European Union, represented by John Carbery, Legal Adviser, and Thérèse Blanchet, of its Legal Service, acting as Agents, with an address for service in Luxembourg at the office of Alessandro Morbilli, Manager of the Legal Affairs Directorate of the European Investment Bank, 100 Boulevard Konrad Adenauer,

defendant,

supported by

Commission of the European Communities, represented by Xavier Lewis and Pieter van Nuffel, of its Legal Service, acting as Agents, with an address for service in Luxembourg at the office of Carlos Gómez de la Cruz, of its Legal Service, Wagner Centre, Kirchberg,

intervener,

* Language of the case: French.

APPLICATION for the annulment of Council Regulation (EC) No 307/97 of 17 February 1997 amending Regulation (EEC) No 3528/86 on the protection of the Community's forests against atmospheric pollution (OJ 1997 L 51, p. 9) and of Council Regulation (EC) No 308/97 of 17 February 1997 amending Regulation (EEC) No 2158/92 on protection of the Community's forests against fire (OJ 1997 L 51, p. 11),

THE COURT (Fifth Chamber),

composed of: J.-P. Puissochet (Rapporteur), President of the Chamber, J. C. Moitinho de Almeida, C. Gulmann, L. Sevón and M. Wathelet, Judges,

Advocate General: F. G. Jacobs,
Registrar: H. A. Rühl, Principal Administrator,

having regard to the Report for the Hearing,

after hearing oral argument from the parties at the hearing on 29 October 1998,

after hearing the Opinion of the Advocate General at the sitting on 17 December 1998,

gives the following

Judgment

1 By applications lodged at the Court Registry on 30 April 1997 the European Parliament brought actions under Article 173 of the EC Treaty for the annulment, first, of Council Regulation (EC) No 307/97 of 17 February 1997 amending Regulation

(EEC) No 3528/86 on the protection of the Community's forests against atmospheric pollution (OJ 1997 L 51, p. 9) and, second, of Council Regulation (EC) No 308/97 of 17 February 1997 amending Regulation (EEC) No 2158/92 on protection of the Community's forests against fire (OJ 1997 L 51, p. 11).

2 By order of the President of the Court of 18 June 1997 the two cases were joined for the purposes of the written and oral procedure and judgment.

3 Regulations Nos 307/97 and 308/97, whose purpose is to extend for a further five years the duration of Community schemes to increase the protection of forests against, respectively, atmospheric pollution and fire, were adopted on the basis of Article 43 of the EC Treaty.

4 In the case of protection against atmospheric pollution, the scheme was originally established with a duration of five years by Council Regulation (EEC) No 3528/86 of 17 November 1986 (OJ 1986 L 326, p. 2) 'in order to provide increased protection for forests in the Community and thereby contribute in particular to safeguarding the productive potential of agriculture', the aim being to 'to help Member States to:

— establish on the basis of common methods a periodic inventory of damage caused to forests, in particular by atmospheric pollution,

— establish or extend, in a coordinated and harmonious way, the network of observation points required to draw up this inventory'.

That regulation was adopted on the basis of Articles 43 and 235 of the EC Treaty.

5 Council Regulation No 3528/86 was then amended by Council Regulation (EEC) No 2157/92 of 23 July 1992 (OJ 1992 L 217, p. 1), which extended the envisaged duration of the Community scheme by five years and gave the following new definition of the scheme:

'The aim of the scheme shall be to help the Member States to:

— establish, on the basis of common methods, a periodic inventory of damage caused to forests, in particular by atmospheric pollution;

— establish or extend, in a coordinated and harmonious way, the network of observation plots required to draw up that inventory;

— conduct intensive, continuous surveillance of forestry ecosystems;

— establish or extend, in a coordinated and harmonious way, a network of permanent observation plots required for such intensive, continuous surveillance.'

That regulation was adopted on the basis of Articles 43 and 130s of the EC Treaty.

6 In the case of protection against fire, the scheme was originally established to run for five years by Council Regulation (EEC) No 3529/86 of 17 November 1986 on protection of the Community's forests against fire (OJ 1986 L 326, p. 5) 'in order to provide increased protection for forests in the Community and thereby contribute to safeguarding in particular the productive potential of agriculture'. 'The scheme shall cover the following preventive measures:

(a) encouragement for forestry operations designed to reduce the risk of fire;

(b) encouragement for the purchase of brush-clearance equipment where indispensable;

(c) the provision of forest roads, fire belts and water supplies;

(d) the installation of fixed or mobile look-out structures;

(e) the organisation of information campaigns;

(f) assistance in establishing interdisciplinary data-gathering centres and assistance for subsequent analytical surveys of the data gathered.

These measures shall be supplemented by the following:

— encouragement for the training of highly specialised personnel,

— encouragement for the harmonisation of techniques and equipment,

— coordination of the research necessary for implementing the measures referred to in the first and second indents.'

That regulation was adopted on the basis of Articles 43 and 235 of the Treaty.

7 A new Community scheme for the protection of forests against fires was established to run for a period of five years from 1 January 1992 by Council Regulation

(EEC) No 2158/92 of 23 July 1992 (OJ 1992 L 217, p. 3). 'The purpose of the scheme is:

— to reduce the number of forest fire outbreaks,

— to reduce the extent of areas burnt.'

It comprises:

'(a) measures to identify the causes of forest fires and the means of combating them, and in particular:

— studies to identify the causes of fires and the background thereto;

— studies to devise proposals for schemes to eliminate such causes and background;

— campaigns to inform and educate the public;

(b) measures to set up or improve systems of prevention, with particular emphasis on the launching of protective infrastructures such as forest paths, tracks, water supply points, firebreaks, cleared and felled areas, the launching of operations to maintain firebreaks, cleared and felled areas and preventive forestry measures, within the framework of a global strategy for the protection of forested land against fire;

(c) measures to set up or improve forest monitoring systems, including deterrent monitoring, with particular emphasis on the installation of fixed or mobile monitoring facilities and the purchase of communications equipment;

(d) accompanying measures, including:

— training of highly specialised personnel;

— analytical studies and pilot or demonstration projects to try out new methods, techniques and technologies and intended to boost the effectiveness of the scheme'.

That regulation was adopted on the basis of Articles 43 and 130s of the Treaty.

8 The Parliament maintains, in support of its applications, that the amending Regulations Nos 307/97 and 308/97 were adopted on an inappropriate legal basis, so that its prerogatives in respect of the procedure involving its participation in the drafting of legislation were undermined. In its view both regulations should have been based on Article 130s of the Treaty and therefore adopted by the Council under the procedure for cooperation with the Parliament provided for in Article 189c of that Treaty; however, since those measures were adopted solely on the basis of Article 43, the Parliament was merely consulted.

9 The Parliament states that the Community measures for the protection of forests provided for by the regulations are, by virtue both of the aim which they pursue and of their content, schemes specifically concerned with the environment and have only indirect and marginal consequences for the common agricultural policy. Neither trees nor forests appear on the list in Annex II to the EC Treaty and they are not therefore covered by Articles 39 to 46 of that Treaty. The only accompanying measures relating to objectives of the common agricultural policy which pertain to forests are those concerning the afforestation of unproductive land and planting of trees to protect agricultural land. They are not affected by the regulations at issue, which are concerned essentially with maintaining important ecological balances and as such fall within the common environmental policy.

10 The Council concedes that woods and forests are not agricultural products within the meaning of the Treaty but argues from the premiss that the agricultural policy is concerned not merely with products but also with structures. It thus contends that the aid scheme for the afforestation of agricultural areas set in place with effect from 1992 on the basis of Articles 42 and 43 of the Treaty initiated a forestry strategy which was designed to ensure the increasingly close involvement of farmers in the process of turning forests to account with the result that Community schemes for the benefit of forests, although mainly environmental at the outset, were so no longer. The Council therefore considers that Article 43 could serve as the sole legal basis of the regulations at issue. It is undisputed that they take account of requirements of an ecological nature but, since the latter are merely incidental, the connection with the common policy to which the schemes mainly relate must, in accordance with the relevant case-law, prevail; that applies particularly where the agricultural policy is involved in that its provisions enjoy priority, guaranteed by Article 38(2) of the EC Treaty, over the general provisions on the establishment of the common market.

11 The Commission, intervening in support of the forms of order sought by the Council, contends that trees, and therefore forests, must be regarded as products

listed in Annex II to the Treaty for which Community competence is based on Article 43. It relies for that contention on the inclusion in the 'Brussels Nomenclature' of a heading entitled 'Other live plants (including their roots)', which includes trees.

12 It must be borne in mind that in the context of the organisation of the powers of the Community, the choice of a legal basis for a measure must be based on objective factors which are amenable to judicial review. Those factors include, in particular, the aim and content of the measure (see, for example, Case C-155/91 *Commission* v *Council* [1993] ECR I-939, paragraph 7, and Case C-42/97 *Parliament* v *Council* [1999] ECR I-869, paragraph 36).

13 It is clear from the provisions of the amended regulations that the aims of the Community schemes for the protection of forests are partly agricultural since they are intended in particular to contribute to safeguarding the productive potential of agriculture, and partly of a specifically environmental nature since their primary objective is to maintain and monitor forest ecosystems.

14 In such circumstances it is necessary, in order to determine the appropriate legal basis, to consider whether the measures in question relate principally to a particular field of action, having only incidental effects on other policies, or whether both aspects are equally essential. If the first hypothesis is correct, recourse to a single legal basis is sufficient (Case C-70/88 *Parliament* v *Council* [1991] ECR I-4529, paragraph 17, and Case C-271/94 *Parliament* v *Council* [1996] ECR I-1689, paragraphs 32 and 33); if the second is correct, it is insufficient (Case 242/87 *Commission* v *Council* [1989] ECR 1425, paragraphs 33 to 37, and Case C-360/93 *Parliament* v *Council* [1996] ECR I-1195, paragraph 30) and the institution is required to adopt the measure on the basis of both of the provisions from which its competence derives (Case 165/87 *Commission* v *Council* [1988] ECR 5545, paragraphs 6 to 13).

However, no such dual basis is possible where the procedures laid down for each legal basis are incompatible with each other (Case C-300/89 *Commission* v *Council* [1991] ECR I-2867, paragraphs 17 to 21).

15 With more particular reference to the common agricultural policy and the Community environmental policy, there is nothing in the case-law to indicate that, in principle, one should take precedence over the other. It makes clear that a Community measure cannot be part of Community action on environmental matters merely because it takes account of requirements of protection referred to in Article 130r(2) of the EC Treaty (Case C-62/88 *Greece* v *Council* [1990] ECR I-1527, paragraph 20). Articles 130r and 130s leave intact the powers held by the Community under other provisions of the Treaty and provide a legal basis only for specific action on environmental matters (see, with regard to the use of drift nets in the context of the common agricultural policy, Case C-405/92 *Mondiet* v *Armement Islais* [1993] ECR I-6133, paragraphs 25 to 27). In contrast, Article 130s of the Treaty must be the basis for provisions which fall specifically within the environmental policy (see, with regard to waste disposal directives, Case C-155/91 *Commission* v *Council*, cited above), even if they have an impact on the functioning of the internal market (see, with regard to a regulation on shipments of waste, Case C-187/93 *Parliament* v *Council* [1994] ECR I-2857, paragraphs 24 to 26) or if their objective is the improvement of agricultural production (see, regarding a directive concerning plant protection products, Case C-303/94 *Parliament* v *Council* [1996] ECR I-2943).

16 In this case, although the measures referred to in the regulations may have certain positive repercussions on the functioning of agriculture, those indirect consequences are incidental to the primary aim of the Community schemes for the protection of forests, which are intended to ensure that the natural heritage represented by forest ecosystems is conserved and turned to account, and does not merely consider their

utility to agriculture. Measures to defend the forest environment against the risks of destruction and degradation associated with fires and atmospheric pollution inherently form part of the environmental action for which Community competence is founded on Article 130s of the Treaty.

17 Moreover, the Commission's argument that trees and forests as a whole constitute agricultural products governed by Title II of the Treaty does not appear well founded.

18 'Live trees and other plants; bulbs, roots and the like; cut flowers and ornamental foliage' appear in the list in Annex II to the Treaty, in Chapter 6, following the numbering in the Brussels Nomenclature. Since there are no Community provisions explaining the concepts contained in that annex, it is appropriate to refer to the established interpretations and the methods of interpretation relating to the Common Customs Tariff in order to interpret the annex (see Case 77/83 *CILFIT* v *Ministero della Sanità* [1984] ECR 1257, paragraph 7). The combined nomenclature annexed to Council Regulation (EEC) No 2658/87 of 23 July 1987 on the tariff and statistical nomenclature and on the Common Customs Tariff (OJ 1987 L 256, p. 1) contains, in Chapter 6, a heading 0602 'Other live plants (including their roots), cuttings and slips; mushroom spawn', together with a subheading 0602 20 'Trees, shrubs and bushes, grafted or not, of kinds which bear edible fruit or nuts'). The first explanatory note to that chapter states that, subject to a reservation which is not relevant to this case, 'this chapter covers only live trees and goods (including seedling vegetables) of a kind commonly supplied by nursery gardeners or florists for planting or for ornamental use'. Thus, contrary to the Commission's contention, Annex II cannot be regarded as covering in general terms trees and forestry products even though some of those products, taken in isolation, may fall within the scope of Articles 39 to 46 of the Treaty.

19 It follows that the contested regulations do not constitute rules on the production and marketing of agricultural products for which, to the extent to which those rules contribute to the attainment or one or more objectives of the common agricultural policy set out in Article 39 of the Treaty, Article 43 of the Treaty would have been

the appropriate legal basis (Case 68/86 *United Kingdom* v *Council* [1988] ECR 855 and Case 131/86 *United Kingdom* v *Council* [1988] ECR 905).

20 The Parliament is therefore correct in its assertion that, by basing the contested regulations on Article 43 of the Treaty although Article 130s was the appropriate legal basis, the Council has infringed essential procedural requirements and undermined its prerogatives. The contested regulations must therefore be annulled.

Limitation of the effects of the annulment

21 The Council has asked the Court to suspend the effects of any annulment until such time as new rules have been adopted on the appropriate legal basis and under the appropriate procedure. The Parliament does not object to that request provided that the new proposals for regulations are forwarded to it and are adopted within a reasonable period.

22 In view of the subject-matter of Regulations Nos 307/97 and 308/97, the full effect of their annulment might be seriously detrimental to the progress of action undertaken in the Member States, with the support of the Community, for protection of the environment.

23 It is therefore appropriate for the Court to avail itself of the power conferred on it by the second paragraph of Article 174 of the EC Treaty to state which of the effects of regulations which it has declared void are to be considered definitive.

24 In the circumstances of this case, it is proper to use that power to direct that the effects of the annulled regulations are to be fully maintained until the Council adopts, within a reasonable period, new regulations having the same subject-matter.

Costs

25 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. The Parliament has asked that the Council be ordered to pay the costs and since the latter has been unsuccessful, it must be ordered to do so. Pursuant to the first paragraph of Article 69(4), the Commission, which intervened in these proceedings, must bear its own costs.

On those grounds,

THE COURT (Fifth Chamber)

hereby:

1. **Annuls Council Regulation (EC) No 307/97 of 17 February 1997 amending Regulation (EEC) No 3528/86 on the protection of the Community's forests against atmospheric pollution and Council Regulation (EC) No 308/97 of 17 February 1997 amending Council Regulation (EEC) No 2158/92 on protection of the Community's forests against fire;**

2. **Declares that the annulled regulations are to remain in force until the Council adopts, within a reasonable period, new regulations having the same subject-matter;**

3. **Orders the Council of the European Union to pay the costs;**

4. **Orders the Commission of the European Communities to bear its own costs.**

Puissochet Moitinho de Almeida Gulmann

Sevón Wathelet

Delivered in open court in Luxembourg on 25 February 1999.

R. Grass J.-P. Puissochet

Registrar President of the Fifth Chamber