

JUDGMENT OF THE COURT
5 July 1995 *

In Case C-21/94,

European Parliament, represented by Johann Schoo, Head of Division in its Legal Service, and Jannis Pantalis, of the same service, acting as Agents, with an address for service in Luxembourg at the General Secretariat of the Parliament, Tower Building, Kirchberg,

applicant,

v

Council of the European Union, represented by Antonio Sacchetti, Director in its Legal Service, and Amadeu Lopes Sabino, Legal Adviser, acting as Agents, with an address for service in Luxembourg at the office of B. Eynard, Manager of the Legal Directorate of the European Investment Bank, 100 Boulevard Konrad Adenauer,

defendant,

supported by

Federal Republic of Germany, represented by Ernst Röder, Ministerialrat in the Federal Ministry of Finance, and Bernd Klope, Regierungsrat in the same Ministry, acting as Agents,

* Language of the case: French.

and by

United Kingdom of Great Britain and Northern Ireland, represented initially by Lucinda Hudson, then by Lindsey Nicholl, of the Treasury Solicitor's Department, acting as Agent, with an address for service at the British Embassy, 14 Boulevard Roosevelt,

interveners,

APPLICATION for the annulment of Council Directive 93/89/EEC of 25 October 1993 on the application by Member States of taxes on certain vehicles used for the carriage of goods by road and tolls and charges for the use of certain infrastructures (OJ 1993 L 279, p. 32),

THE COURT,

composed of: G. C. Rodríguez Iglesias, President, F. A. Schockweiler, P. J. G. Kapteyn, C. Gulmann and P. Jann (Presidents of Chambers), G. F. Mancini, C. N. Kakouris, J. C. Moitinho de Almeida (Rapporteur), J. L. Murray, D. A. O. Edward, G. Hirsch, H. Ragnemalm and L. Sevón, Judges,

Advocate General: P. Léger,
Registrar: R. Grass,

having regard to the report of the Judge-Rapporteur,

after hearing the Opinion of the Advocate General at the sitting on 28 March 1995,

gives the following

Judgment

- 1 By application lodged at the Court Registry on 20 January 1994, the European Parliament brought an action under Article 173 of the EC Treaty for the annulment of Council Directive 93/89/EEC of 25 October 1993 on the application by Member States of taxes on certain vehicles used for the carriage of goods by road and tolls and charges for the use of certain infrastructures (OJ 1993 L 279, p. 32).
- 2 It is apparent from the documents before the Court that the contested act derives from a proposal for a directive COM(87) 716 final on the charging of transport infrastructure costs to heavy goods vehicles (OJ 1988 C 79, p. 8), which was twice amended. The second amended proposal, COM(92) 405 final (OJ 1992 C 311, p. 63, 'the proposal'), was submitted by the Commission to the Council on 26 October 1992 and was approved by the European Parliament on 18 December 1992, subject to two minor amendments (OJ 1993 C 21, p. 522).
- 3 The proposal, based on Articles 75 and 99 of the EC Treaty, provided for the Council to adopt as soon as possible appropriate measures aimed at introducing a harmonized system of road charging based on the principle of territoriality (Article 9(1)). To that end the Commission was to submit to the Council before 1 January 1998 a report and proposals aimed at achieving the objective set out in paragraph 1. Acting on the proposals, the Council was by 31 December 1998 to adopt

a harmonized system to enter into force as from 39 June 1999 at the latest (Article 9(3)).

- 4 The proposal provided in addition for the establishment of a provisional system to harmonize existing taxes; among its salient features were the application of minimum rates, reviewable every two years, for heavy goods vehicles, except for two States — Portugal and Greece — which were authorized temporarily to apply lower rates (Article 8), the possibility of levying tolls and user charges on the motorway network (Article 5) and, lastly, the right to make partial refunds of vehicle taxes on the basis of tolls and user charges paid (Article 10).
- 5 The contested directive, which provides for minimum rates for the taxes on heavy goods vehicles identical to those in the Commission's proposal, establishes various possibilities for exemptions from or reductions in those rates, which are not reviewable until 1998 (Article 6). It permits the States to levy tolls and user charges for the use of motorways and other road categories (Article 7(d)) and to subject all vehicles registered in their territory to user charges for the use of their whole road network (Article 7(e)). In addition, it sets a ceiling of ECU 1 250 per year on user charges (Article 7(f)). Finally, it makes no provision for the reimbursement of vehicle taxes on the basis of tolls and user charges paid.
- 6 Moreover, pursuant to Article 12(1), the Commission is to present a report to the Council on implementation of the directive no later than 31 December 1997. If necessary, the report is to be accompanied by proposals for establishing cost-charging arrangements based on the principle of territoriality in which national borders do not play a predominant role.

- 7 The act in dispute was adopted on 25 October 1993, without prior reconsultation of the European Parliament by the Council.

Annulment of the directive

- 8 In support of its action, the European Parliament alleges that the Council's failure to consult it a second time before adopting the directive in question constitutes an infringement of its right to take part in the Community legislative process. It claims that reconsultation is required under the procedure laid down in Articles 75 and 99 of the Treaty where, as in the present case, the text adopted by the Council has been substantially amended in comparison with the Commission's proposal.
- 9 The Parliament maintains that the directive radically alters the exceptional nature of the derogations provided for by the proposal by extending the authorization to apply minimum rates reduced to 50% to three other Member States — France, Italy and Spain — in addition to those mentioned in the proposal. The result of that extension is that hauliers in the five Member States concerned enjoy a competitive advantage over their competitors in the other Member States who may not apply a rate lower than the tax floor, and that it is not therefore conducive to elimination of distortions of competition, which is the paramount objective of the directive. The same negative effect is also produced by the complete removal by the Council of any possibility of reimbursing vehicle taxes on the basis of the payment of user charges or tolls on motorways.
- 10 Furthermore, the extension of the possibility for the Member States to levy user charges to categories of roads other than motorways and the right to subject all vehicles registered in their territory to user charges for the use of the whole road

network (Article 7(e)) also constitute substantial amendments in comparison with the Commission's proposal. Moreover, the possibility for the States to apply reduced rates or exemptions for certain categories of vehicle (Article 6(3)) and for the Council to authorize further exemptions or reductions on socio-economic grounds or grounds linked to infrastructure policy (Article 6(5)), which were not provided for in the Commission's proposal, also deviate from the objective of a fair system for charging road costs, as envisaged by the Commission.

- 11 Notwithstanding the numerous derogations, a ceiling of ECU 1 250 is set for user charges (Article 7(f)), a limitation which was neither provided for in the Commission's proposal nor requested by the European Parliament.

- 12 Lastly, the Parliament claims that, apart from those specific alterations, the contested directive departs substantially from the binding objective of the Commission's proposal, namely the adoption by the Council by 31 December 1998 at the latest of a harmonized system of road charging, based on the principle of territoriality, to enter into force by 30 June 1999. The directive merely requires the Commission to report to the Council on implementation of the directive and provides that the Commission is, 'if necessary', to put forward cost-charging arrangements based on the principle of territoriality (Article 12). The Council has thus transformed what the Commission intended to be a temporary solution into a more or less definitive system. There is therefore no longer any requirement for the Council to adopt a common system within a given period.

- 13 The Council, on the contrary, supported by the German Government, maintains that consideration of the texts before the Court, taken together, reveals, first, that the directive does not depart from the objectives of the proposal and, secondly, that it supplies answers to the questions asked the internal logic of which is the same as that of the Commission's proposal.

- 14 The aim of that proposal was neither the complete and total harmonization of national taxes nor the immediate establishment of a system based on the principle of territoriality. According to the Council, the essential elements of the proposal were to be found in the progressive adjustment of national systems (second recital in the preamble), the idea that it was necessary to have an initial transitional phase in preparation for the definitive phase (fifth recital) and that distortions of competition could simply be 'attenuated' (eleventh recital), the realization that an ideal cost-charging system was not possible at the time, which made a transitional system inevitable, and the definition of a future taxation system as a subsequent objective.
- 15 The Council also disputes the European Parliament's assertion that the directive departs substantially from the binding objective of the Commission's proposal. A comparison of Article 9 of the proposal with Article 12 of the directive shows that the objective to be attained by 1998 is the same, that is to say the establishment as of that year of cost-charging arrangements based on the principle of territoriality in which national borders are not to play a predominant role.
- 16 The Council notes that the phrase 'if necessary', on which the Parliament bases its line of argument, does not take away from the Commission its right to propose relevant legislation, nor does it add anything to or take anything away from the objective pursued by the Council which consists, in the wording both of Article 9 of the proposal and of Article 12 of the contested directive, of a programme to be followed.
- 17 It must first of all be borne in mind that due consultation of the Parliament in the cases provided for by the Treaty constitutes an essential formal requirement breach of which renders the measure concerned void (see, for example, the judgment in Case 417/93 *Parliament v Council* [1995] ECR I-1185, paragraph 9). The effective participation of the Parliament in the legislative process of the Community, in

accordance with the procedures laid down by the Treaty, represents an essential factor in the institutional balance intended by the Treaty. Such power reflects the fundamental democratic principle that the people should take part in the exercise of power through the intermediary of a representative assembly (see, for example, the judgment in Case C-65/93 *Parliament v Council* [1995] ECR I-643, paragraph 21).

- 18 The duty to consult the European Parliament in the course of the legislative procedure, in the cases provided for by the Treaty, implies the requirement that the Parliament should be reconsulted whenever the text finally adopted, viewed as a whole, departs substantially from the text on which the Parliament has already been consulted, except where the amendments essentially correspond to the wish of the Parliament itself (see, for example, the judgment in Case C-388/92 *Parliament v Council* [1994] ECR I-2067, paragraph 10, and in Case C-280/93 *Germany v Council* [1994] ECR I-4973, paragraph 38).
- 19 The Court must therefore consider whether or not the amendments referred to by the Parliament affect the actual substance of the text, viewed as a whole.
- 20 It should be borne in mind that the Commission proposal on which the Parliament gave its opinion provided that the Council should 'adopt as soon as possible appropriate measures aimed at introducing a harmonized system of road charging which shall include vehicle taxes, excise duty on fuel and charges (user charges and tolls) for the use of certain types of road infrastructure and shall take infrastructure and external costs, including environmental costs, into account' (Article 9(1)). The Commission was to submit 'to the Council, before 1 January 1998, a report and proposals aimed at achieving the objective set out in paragraph 1. Acting on the proposals, the Council shall, by 31 December 1998, adopt a harmonized system which shall enter into force as of 30 June 1999 at the latest' (Article 9(3)).

- 21 In contrast, the directive provides that no later than 31 December 1997 the Commission is to present a report to the Council on implementation of the directive, accompanied 'if necessary ... by proposals for establishing cost-charging arrangements based on the principle of territoriality, in which national borders will not play a predominant role' (Article 12).
- 22 As the Advocate General pointed out in paragraph 49 of his Opinion, it is apparent from a comparison between the Commission's initial proposal and the directive not only that the Council is no longer obliged to adopt a harmonized system by 31 December 1998 at the latest, but also that the Commission is no longer required to submit, in the report to be presented to the Council, proposals for establishing cost-charging arrangements based on the principle of territoriality. Those amendments go to the very essence of the system introduced and must be classified as substantial.
- 23 It is, moreover, not disputed that those amendments do not correspond to any wish expressed by Parliament.
- 24 Nevertheless, the Council believes that even if the text finally adopted, viewed as a whole, did depart substantially from the text on which the Parliament had been consulted, it was not required to reconsult that institution provided that, as in this case, the Council was sufficiently well informed as to the opinion of the Parliament on the essential points at issue.
- 25 That argument must be rejected.

- 26 Proper consultation of the Parliament in the cases provided for by the Treaty constitutes one of the means enabling it to play an effective role in the legislative process of the Community (see, in particular, the judgment in Case C-316/91 *Parliament v Council* [1994] ECR I-625, paragraph 17); to accept the Council's argument would result in seriously undermining that essential participation in the maintenance of the institutional balance intended by the Treaty and would amount to disregarding the influence that due consultation of the Parliament can have on adoption of the measure in question.
- 27 Since the abovementioned amendments, which affect the scheme of the proposal as a whole, are in themselves enough to require reconsideration of the Parliament, it is not necessary to consider the other arguments put forward by the Parliament.
- 28 Consequently, the fact that the Parliament was not consulted for a second time during the legislative procedure laid down in Articles 75 and 99 of the EEC Treaty constitutes an infringement of essential formal requirements as a result of which the measure at issue must be annulled.

Preservation of the effects of the directive

- 29 In its defence, the Council, supported by the German Government, has asked the Court, if it should annul the directive, to order that the effects of the directive should be preserved until the Council has adopted new legislation.
- 30 In its reply, the Parliament indicated that it had no objection to such a request, which in fact seemed to it to be justified on important grounds of legal certainty.

In its observations on the statements in intervention of the German Government and of the United Kingdom, the Parliament did however suggest that the Court should order the Council to adopt new legislation within a period to be fixed by the Court in order to prompt that institution to resume as quickly as possible the procedure for the proper replacement of the directive.

31 As the Advocate General observed in paragraphs 64 and 65 of his Opinion, the need to avoid discontinuity in the programme for the harmonization of transport taxation and important considerations of legal certainty, comparable with those arising where certain regulations are annulled, justify the Court in exercising the power expressly conferred on it by the second paragraph of Article 174 of the EC Treaty when it annuls a regulation and in stating which of the effects of the contested directive must be preserved (see the judgment in Case C-295/92 *Parliament v Council* [1992] ECR I-4193, paragraph 26).

32 In the particular circumstances of this case, all the effects of the annulled directive should be preserved provisionally until the Council has adopted a new directive.

33 The request of the Parliament that the Court should impose on the Council a time-limit within which the latter must adopt a new directive cannot be upheld. The Court does not have jurisdiction to issue such an order in the context of its review of the legality of an act under Article 173 of the Treaty. The fact none the less remains that the Council is under a duty to put an end within a reasonable period to the infringement it has committed.

Costs

- ³⁴ 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. Since the Council has been unsuccessful, it must be ordered to pay the costs. In accordance with the second paragraph of Article 69(4) of the Rules of Procedure, the Federal Republic of Germany and the United Kingdom of Great Britain and Northern Ireland, which have intervened, are to bear their own costs.

On those grounds,

THE COURT

hereby:

1. Annuls Council Directive 93/89/EEC of 25 October 1993 on the application by Member States of taxes on certain vehicles used for the carriage of goods by road and tolls and charges for the use of certain infrastructures;
2. Declares that the effects of the annulled directive shall be preserved until the Council has adopted new legislation in the matter;
3. Orders the Council to pay the costs;

4. Orders the Federal Republic of Germany and the United Kingdom of Great Britain and Northern Ireland to bear their own costs.

Rodríguez Iglesias

Schockweiler

Kapteyn

Gulmann

Jann

Mancini

Kakouris

Moitinho de Almeida

Murray

Edward

Hirsch

Ragnemalm

Sevón

Delivered in open court in Luxembourg on 5 July 1995.

R. Grass

Registrar

G. C. Rodríguez Iglesias

President