OPINION OF ADVOCATE GENERAL TESAURO
delivered on 1 December 1992 *

Mr President,
Members of the Court,

1. This action raises once again the question of the relationship between two of the 'legal bases' introduced by the Single European Act, Articles 100a and 130s: the former relating to measures concerning the establishment and functioning of the internal market, the objective of Article 8a of the Treaty; the latter specifically relating to measures designed to achieve objectives of environment policy (briefly, environmental protection, protection of health and prudent utilization of resources) set out in the preceding Article 130r of the Treaty.

2. The directive at issue in this case is Directive 91/156/EEC, which amends substantially the earlier Directive 75/442/EEC. The contested directive, which lays down the essential elements of the system of waste management within the Community, was adopted by the Council on the basis of Article 130s. In contrast, the Commission considers that the measure should have been adopted — in accordance with its proposal — on the basis of Article 100a; it therefore asks the Court to find that the directive is unlawful on that ground and annul it. It is perhaps worth adding that the Commission has also challenged the later Directive 91/689/EEC on hazardous waste on the same ground.

3. Before proceeding to appraise the contested directive, it seems appropriate to call to mind the general criteria which, according to the Court's case-law, govern the application of the rules in question.

The Court has already ruled on the relationship between Article 100a and Article 130s in the judgment in the *titanium dioxide* case (Case C-300/89 *Commission* v *Council* [1991] ECR I-2867).

In that judgment, the Court first confirmed that the choice of the legal basis for a measure may not depend simply on an institution's conviction as to the objective pursued but must be based on objective factors which are amenable to judicial review. To that end, it is necessary to identify the object of the measure on the basis of an in-depth examination of both its aim and its content.

On that footing, the Court went on to hold that where a measure, in view of its object, 'displays the features both of action relating to the environment with which Article 130s of the Treaty is concerned and of a harmonizing measure which has as its object the establishment and functioning of the internal

* Original language: Italian.

market, within the meaning of Article 100a of the Treaty', it must be adopted *solely* on the basis of Article 100a, although in principle it can be attributed to two separate enabling provisions.

That approach — which moreover is in accordance with my Opinion in the *titanium dioxide* case — is based on a two-fold consideration. In the first place, the Court held that Articles 100a and 130s cannot apply concurrently. The procedure set out in Article 130s would divest the cooperation procedure provided for in Article 100a of its very substance, making reference to that article completely nugatory.

Secondly, the Court observed that the Treaty itself provides for the possibility of the implementation, where necessary, of environment protection requirements in the context of Community policies other than environmental policy, in particular in connection with the harmonization of national legislation envisaged by Article 100a. On the basis of those considerations, the Court concluded that, where Articles 100a and 130s are in competition, Article 100a should prevail, in the sense that the measure must be adopted *solely* on the basis of that provision.

4. Manifestly, the approach adopted in the *titanium dioxide* case inevitably results in a degree of broadening of the field of application of Article 100a by comparison with Article 130s. But for that very reason the criteria adumbrated by the Court should be applied strictly. This means that Article 100a should be regarded as relevant for the purposes of adopting a given measure only if that measure has as its *object* the establishment and functioning of the internal market, that is to say, only if it lays down rules specifically on the conditions of competition or trade within the Community.

In contrast, Article 100a should be regarded as being inapplicable where the measure in question, in pursuing particular aims falling within the scope of a specific Community action or policy, has ancillary repercussions on market conditions.

That interpretation of Article 100a is consistent with its wording, which refers to measures having 'as their object' the establishment and functioning of the internal market. It is also consistent with the systematic requirement — to which I shall be returning shortly — not to enlarge to an excessive degree the field of application of Article 100a to the detriment of other specific legal bases with which the provision on the internal market may, regarded in the abstract, find itself in competition.

It should be observed above all that this interpretation is confirmed by the Court's recent case-law. Indeed, in its judgment of 4 October 1991 in Case C-70/88 *Parliament* v *Council* [1991] ECR I-4529, the Court held that recourse to Article 100a is not justified where the measure to be adopted has only the *ancillary effect* of harmonizing conditions on the Community's internal market.

That case was concerned with a regulation laying down maximum levels of radioactive contamination of foodstuffs and animal feedingstuffs. The Court held that the regulation had as its object the protection of the general public against the risks arising from contaminated foodstuffs and that the resultant prohibition of sales laid down in the regulation had to be regarded simply as a condition intended to guarantee the effective application of the prescribed maximum levels. Accordingly, the Court held that 'le règlement n'a donc qu'accessoirement pour effet d'harmoniser les conditions de la libre circulation des marchandises' and that the regulation should therefore be based on the legal basis specifically laid down for the protection of the general public against ionizing radiation, namely Article 31 of the EAEC Treaty, and not on that relating to the establishment of the single market, Article 100a of the EEC Treaty.

5. That having been stated, and to return to the contested directive, the applicant's argument may be summarized as follows. In the Commission's view, the directive has as its object both the protection of the environment and the establishment and functioning of the internal market. Therefore, by reason of its subject-matter, it falls within the field of application of both Article 130s and Article 100a. It follows that, in accordance with the judgment in the *titanium dioxide* case, the directive should have been adopted on the basis of Article 100a only.

In support of its argument, the Commission points out that the directive contributes to the harmonization of conditions of competition as regards both industrial production and waste disposal. In addition, the applicant stresses that, in so far as it harmonizes national legislation in the sector of waste management, it helps to abolish barriers to trade between Member States in that sector.

6. I shall state forthwith that I do not agree with the applicant's argument. I take the view that, in view of its aim and content, the contested directive has to be regarded as a measure which has as its object the protection of the environment and that it has only an ancillary effect on market conditions.

7. As regards the *aims* of the directive at issue, it must be observed, as is clear, *inter alia*, from the third, fourth, sixth, seventh and ninth recitals in its preamble, that all the objectives which it specifically pursues are environmental policy aims, in the sense that they fall within the ambit of the general objectives enshrined in Article 130r of the Treaty. In fact, the directive aims to improve the efficiency of waste management in the Community; to achieve a high level of environmental protection, which in turn necessitates restricting the production of waste; to encourage the recycling of waste; to achieve self-sufficiency in waste disposal at the level of both the Community and the Member States; and to reduce movements of waste in the Community.

Admittedly, the fifth recital in the preamble to the directive states that 'any disparity between Member States' laws on waste disposal and recovery can affect the quality of the environment and interfere [with] the functioning of the internal market'. However, it should be observed that this is an extremely general indication which is, in itself, insufficient for it to be held that harmonization of the conditions of competition and trade constitutes one of the *essential aims* of the measure. In fact, whilst the environmental policy aims pursued by the directive are defined analytically and precisely, the preamble contains no information from which it can be inferred what the conditions of competition and trade are which the directive is intended to harmonize. The fifth recital therefore simply makes it clear that the provision of a Community system of waste management may have positive effects on the functioning of the market, but this is not tantamount to indicating that specific reasons pertaining to competition and trade constituted one of the grounds which prompted the institutions to adopt the rules in question. In other words, the statement of reasons of the directive rightly draws attention to the fact that it will have an effect on the market; that effect, however, is not such as to justify — as I have already stated — the application of Article 100a.

8. If we now turn to its *content*, the directive (apart from defining the terms which determine its scope) establishes first the basic objectives which should guide Member States' action in the field of waste management. To that end, it puts them under a duty to encourage the reduction of waste production and its harmfulness (through the development of clean technologies, products which are less of a source of pollution and techniques for the final disposal of dangerous substances); to encourage the recycling of waste; to ensure that waste is disposed of without endangering human health or harming the environment; and, lastly, to prohibit the abandonment of waste.

Secondly, the directive provides that Member States, in cooperation with other Member States, are to establish an integrated network of technologically advanced disposal installations which will enable the Community as whole, and the Member States individually, to become self-sufficient in waste disposal. In addition, that network is to enable waste to be disposed of in one of the nearest installations to the place where it was produced so as to minimize the movement of waste (*proximity* principle).

Thirdly, the directive provides that the Member States must draw up waste management plans. The plans are to be national plans and Member States may prevent movements of waste which do not satisfy the criteria laid down therein.

Fourthly, the directive requires the Member States to subject disposal undertakings and establishments to a system of permits, registration and inspections.

Lastly, the directive reiterates, with regard to waste disposal, the 'polluter pays' principle laid down at the general level by Article 130r of the Treaty.

In sum, it appears from this outline of the content of the directive that it sets out the broad lines of the action which the Member States are to take in order to ensure that waste management within the Community is conducted so as to guarantee protection for the environment and health. However, the Member States remain substantially free to define the content of that action and the means which they employ.

9. Having said that, it must be emphasized that the directive contains no provision which has as its *object* the harmonization of the conditions of competition in particular industries or of the terms of trade in relation to particular products. As regards in particular the conditions of competition, the directive does not — as I have already mentioned — lay down common rules relating to the activity of waste management, but merely defines the principles by which action by the Member States is to be guided. It follows that each Member State may adopt *in subiecta materia* the provisions which, in its view, are most appropriate for the purpose of attaining the prescribed objectives. Consequently, the rules on waste disposal and recycling may differ — even to a significant degree — from one Member State to another and hence the cost burden on the undertakings affected may also turn out to differ considerably. It therefore seems to me that it can be considered that not only does the directive in question not equalize, but it does not even set out to equalize, the conditions of competition of undertakings specifically dealing with waste management or of the industries which produce waste and, in the final analysis, have to bear the costs of disposal.

Similarly, as regards the terms of trade, it certainly cannot be held that the directive introduces common rules intended to implement the free movement of waste within the Community. On the contrary, in accordance with the principle of proximity, which the Court recognized in Case C-2/90 *Commission* v *Belgium* [1992] ECR I-4431, paragraphs 34 and 35, the directive proceeds from the assumption that waste should essentially be collected, treated and disposed of locally, so as to minimize the movement of waste generally.

From that point of view, not only does the directive provide that, in drawing up their management plans, the Member States should aim for self-sufficiency in waste disposal, it also recognizes that they may themselves take the measures necessary to prevent movements of waste which are not in accordance with their management plans.

In short, the directive confirms, in accordance with the case-law cited above, that Community environmental law — at least in its present configuration — lays down with regard to waste management a *jus singulare* which is based on the principles of self-sufficiency and proximity and, in accordance with those principles, aims to achieve, not a liberalization of trade in waste, but, on the contrary, reduced movements of waste within the Community (see the ninth recital in the preamble to the contested directive).

It follows that, in terms of their *object*, the rules laid down by the contested directive

fall squarely within the environmental policy measures designed to implement the specific objectives of Article 130r of the Treaty, and not within the actions intended to harmonize conditions of competition and trade on the internal market. Consequently, the Council acted properly in adopting the measure on the basis of Article 130s of the Treaty.

10. Moreover, that conclusion seems consistent with Community practice. It can be seen that in the environmental field Article 100a is used above all for measures harmonizing the rules relating to *specific products* (see, for example, the directive on the sound power level of lawnmowers [1] or, again, the directive on the disposal of batteries and accumulators containing certain dangerous substances, [2] the latter directive being of particular interest because it shows that the Council normally adopts the specific rules governing particular categories of waste on the basis of Article 100a).

Furthermore, in accordance with the judgment in the *titanium dioxide* case, Article 100a is also used for measures harmonizing environmental rules — including rules on waste management — relating to *specific industries* (which was precisely the case with the directive harmonizing the programmes for the reduction and eventual elimination of pollution caused by waste from the titanium dioxide industry which the Court considered in that judgment [3]).

In contrast, anti-pollution legislation of a general nature, that is to say, not dealing with a product or a specific industry, are normally adopted on the basis of Article 130s, even though such legislation has, in any event, to a varying degree a measure of effect on the system of production. I would mention, for instance, the directive on the treatment of urban waste water, which contains very precise provisions on the discharge of industrial effluent (see Article 11 and Annex I(c)) and on biodegradable industrial effluent from installations in certain sectors (see Article 13 and Annex III); the directive on limiting pollution from large combustion plants, which also concerns various other categories of industrial plant; and the directive on the prevention of pollution from new plant for the incineration of urban waste. Those measures — I repeat — were adopted, without dispute, on the basis of Article 130s, despite their effects and repercussions on economic activity.

It seems to me that the contested directive can also be classed in this category of measures. It introduces completely general anti-pollution rules, covering domestic and industrial waste alike. Furthermore, it certainly affects the functioning of the market

1 — Council Directive 88/181/EEC of 22 March 1988 (OJ 1988 L 81, p. 71).

2 — Council Directive 91/157/EEC of 18 March 1991 (OJ 1991 L 78, p. 38).

3 — Council Directive 89/428/EEC of 21 June 1989 (OJ 1989 L 201, p. 56).

to a definitely less marked degree than some of the directives I have mentioned, both because it does not contain specific provisions on waste from industrial activities and because — as I have already observed — it does not harmonize the rules on waste management but leaves the Member States substantially free to define them themselves.

Certainly, in laying down those rules, the directive obviously also affects the functioning of the market. But here again what is involved is a *purely ancillary effect*, which, in accordance with the judgment in Case C-70/88 *Parliament* v *Council*, cited above, is not such as to justify the use of Article 100a as the legal basis for the measure.

It follows that in this case the Council acted correctly in following its previous practice and adopting the contested measure on the basis of Article 130s.

11. Moreover, I would observe that to decide otherwise would be liable to extend excessively the scope of Article 100a as compared with Article 130s.

One of the chief arguments deployed by the Commission in order to justify recourse to Article 100a is that harmonization of the rules on waste management would enable the cost burden on undertakings of waste disposal to be equalized and hence obviate the risk of distortions of competition.

I must be said, however, that this is true of virtually all anti-pollution legislation. Were it to be held that that effect on competition sufficed to justify recourse to Article 100a, the result would be that Article 130s would be deprived of a large part of its scope; for instance, if the reasoning put forward by the Commission were followed, directives such as those on waste water and on the limitation of emissions of pollutants from large combustion plants — which, as I mentioned, have to date been based on Article 130s, even though they have a much more marked and detailed effect on economic operators than the directive at issue in this case — could be based on Article 100a.

In other words, it seems to me that were the reasoning put forward by the Commission to be taken to its conclusion, there would be a danger that Community measures laying down general rules for the protection of the environment, in particular measures relating to waste water, emissions into the atmosphere and waste management, would gradually cease to be based on Article 130s.

12. In the light of those considerations, I take the view that the Council properly based the contested directive on Article 130s

and that consequently the Commission's application should be dismissed.

The alternative claim put forward by the intervener

13. A final point still has to be considered. In the form of order sought by the European Parliament in its statement in intervention, Parliament seeks, not only the annulment of the directive on the ground that it is not based on the proper legal basis, but also the annulment of *Article 18 of the directive* on the ground that the procedure provided for therein (regulatory committee) is contrary to the Treaty.

I take the view that the Court does not have to rule on that second claim. Intervention under Article 37 of the Statute of the Court is purely ancillary in the sense that, as that article states, 'submissions made in an application to intervene are to be limited to supporting the submissions of one of the parties'.

In this case, it must be held that, in arguing that Article 18 of the directive is unlawful — moreover on grounds which have nothing to do with the alleged defective legal basis —, Parliament has introduced an alternative claim, independent of the forms of order sought by the parties. Consequently, that claim is inadmissible.

Conclusion

On the grounds set out above, I propose that the Court should dismiss the application and order the Commission also to pay the Council's costs; the European Parliament and the Kingdom of Spain should bear their own costs.