OPINION OF ADVOCATE GENERAL DARMON
delivered on 16 March 1994 *

Mr President,
Members of the Court,

1. In these annulment proceedings, the European Parliament (hereinafter referred to as 'the Parliament') complains that the Council failed to reconsult it under the procedure laid down by Article 75(1) of the EEC Treaty. [1]

2. Let me set out the facts.

3. On 4 March 1987, the Commission submitted to the Council a proposal for a regulation laying down the conditions under which non-resident carriers might operate national road passenger transport services within a Member State. [2]

4. Following the Court's judgment of 22 May 1985 in the case of *Parliament* v *Council* ('Common transport policy'), [3] that Commission proposal, comprising six articles, applies the principle of equal treatment in transport policy and provides that non-resident carriers shall 'be permitted to operate national transport services under the conditions imposed by the Member State on its own carriers'. [4]

5. It concerns '*any carrier* who operates road passenger transport services for hire or reward', [5] provided such carrier has the nationality of a Member State and the transport undertaking is under the effective management of Community nationals. [6]

6. The Parliament received the proposal for consultation on 17 March 1987, and, after considering the report of its Committee on Transport, on 21 January 1988 adopted four amendments concerning (i) the definition of 'non-regular services' (Article 1), (ii) the postponement of the date of the regulation's entry into force (Article 2), (iii) the imposition of penalties in the event of violations by the carrier (Article 4), and (iv) the obligation placed on Member States to notify the Commission of the measures taken in implementation of the regulation (Article 5). [7]

* Original language: French.

1 — That article has been amended by Article G(16) of the Treaty on European Union. Transport now falls within the cooperation procedure laid down by Article 189c of the EC Treaty.

2 — COM(87) 31 final (OJ 1987 C 77, p. 13)

3 — Case 13/83 *Parliament* v *Council* [1985] ECR 1513.

4 — Third recital.

5 — Article 2, my italics.

6 — See Article 3.

7 — OJ 1988 C 49, pp. 85, 121, 122.

7. Because the Commission opposed those amendments, the vote on the Parliament's draft legislative resolution was postponed. Finally, at its session on 10 March 1988, the Parliament approved the Commission's proposal subject to three compromise amendments. [8] The resolution, [9] it should be noted in passing, mentions that the Parliament 'requests the Council to notify Parliament should it intend to make substantial modifications to the Commission's proposal'. [10]

8. On 4 November 1988, the Council received an amended proposal, taking account of two of the Parliament's amendments. [11] Article 1 thenceforth provided that the regulation was to apply to national passenger transport by coach and bus, using vehicles suitable for carrying more than nine persons. It was also provided that Member States should communicate to the Commission the texts adopted in implementation of the regulation. The amendment proposing a one-year postponement of the regulation's entry into force was not accepted by the Commission.

9. On 23 July 1992, on the basis of that proposal, the Council adopted Regulation (EEC) No 2454 laying down the conditions under which non-resident carriers may operate national road passenger transport services within a Member State. [12] On 27 July 1992, moreover, the Parliament states that it asked to be reconsulted. [13]

10. In contrast with the Commission's original proposal, the regulation expressly provides for '*gradual* implementation' [14] of freedom of access.

11. The regulation differs from the proposal on seven points:

— Non-regular services come within the scope of the regulation only as from 1 January 1996, except for services in the form of 'closed-door tours', which are opened up to cabotage operations immediately (Article 3(1));

— Regular services are excluded from the scope of the regulation, except for special services for carrying workers, school pupils and students in frontier zones (Article 3(2)) ;

— On the basis of a report to be drawn up by the Commission before the end

8 — OJ 1988 C 94, p. 109.
9 — Ibid., p. 125.
10 — Paragraph 4.
11 — Com(88) 596 final (OJ 1988 C 301, p. 8).
12 — OJ 1992 L 251, p. 1.
13 — See the letter from the President of the Parliament reproduced as annex 6 to the application, which the Council states it never received (paragraph 11 of the defence).
14 — That phrase is added to the second recital; my italics.

of 1995, the Council *may* extend the scope of the regulation to other passenger transport services (Article 12);

— The reference to national rules and regulations is limited to a number of specific points expressly listed (Article 4);

— The carrier must hold an authorization, confirming that he is authorized to operate road passenger transport services under the relevant community legislation, and must also keep a control document (Article 5 and Annex I, Article 6 and Annex II);

— The Commission may adopt safeguard measures after consulting an Advisory Committee (Articles 8 and 9);

— The host Member State may impose penalties on non-resident carriers for infringements (Article 10).

12. In the Parliament's view, those modifications are substantial in nature and should not have been adopted without the Parliament being reconsulted. That omission affected the validity of the regulation, which should therefore be annulled.

13. Before examining the merits, it should be noted that the Council does not dispute the admissibility of the action, [15] as it did in Case C-65/90. [16] The Court's jurisdiction to hear actions for annulment brought by the Parliament to safeguard its prerogatives, which was first accepted in the *Chernobyl* case [17] and then confirmed in the Treaty on European Union, [18] is no longer in dispute.

14. Indeed, the Court has held that '... the Parliament's prerogatives include, in particular, where so provided for in the treaties, participation in the legislative drafting process' [19] and that '... regular consultation of the Parliament is one of the means allowing the Parliament to participate effectively in the Community's legislative process ...'. [20]

15 — Page 4 of the defence.

16 — Case C-65/90 *Parliament* v *Council* [1992] ECR I-4593, in which the Court annulled 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 (OJ 1989 L 390, p. 3).

17 — Case C-70/88 *Parliament* v *Council* [1990] ECR I-2041, at paragraph 27.

18 — See the third paragraph of Article 173 of the EC Treaty, as amended by Article G(53) of the Treaty on European Union.

19 — Case C-65/90, referred to in note 16 above, at paragraph 13.

20 — Ibid., at paragraph 14. See also Case C-316/91 *Parliament* v *Council* [1994] ECR I-625, at paragraph 16.

15. I turn now to the merits.

16. As early as its judgments in the *Isoglucose* cases, the Court stressed the importance of the parliamentary consultation procedure for the institutional balance of the Community:

'... [C]onsultation ... 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. Although limited, it reflects at Community level the fundamental democratic principle that the peoples should take part in the exercise of power through the intermediary of a representative assembly. 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.' [21]

17. The obligation to *reconsult* the Parliament is not provided for by the Treaty. [22] Nevertheless, the Court took the view that:

'... the duty to consult the European Parliament in the course of the legislative procedure, in the cases provided for by the Treaty, includes the requirement that the Parliament be reconsulted on each occasion when the text finally adopted, viewed as a whole, departs substantially from the text on which the Parliament has already been consulted, except in cases where the amendments essentially correspond to the wish of the Parliament itself'. [23]

18. As the Parliament has rightly pointed out, [24] it follows that reconsultation must take place on the basis of 'objective criteria, namely comparison of the two texts'.

19. Let there be no doubt as to what is at stake in this case. To place an extreme restriction on the reconsultation requirement would result in excluding the Parliament from the legislative procedure in cases where the text finally adopted differed in substance from the text on which the Parliament had already been consulted. On the other hand, to apply the reconsultation requirement generally would lead to a systematic second reading and confusion between the consultation and cooperation procedures.

21 — Case 138/79 *Roquette Frères* v *Council* [1980] ECR 3333, at paragraph 33 of the judgment; Case 139/79 *Maizena* v *Council* [1980] ECR 3393, at paragraph 34 of the judgment.

22 — In a resolution on relations between the Parliament and the Council adopted on 9 July 1981, the Parliament 'urges the Council to repeat its consultation of Parliament under the legislative procedure whenever the Commission amends its original proposal on which Parliament has already delivered an opinion and such amendments have not been considered by Parliament' (OJ 1981 C 234, p. 52, at paragraph 11(b)). See also Article 62 of the Rules of Procedure of the Parliament.

23 — Case C-65/90, referred to above, at paragraph 16. See also the judgment in Case 41/69 *ACF Chemiefarma* v *Commission* [1970] ECR 661, at paragraph 178, and the judgment in Case 817/79 *Buyl* v *Commission* [1982] ECR 245, at paragraph 23.

24 — At paragraph 9 of its reply.

20. The Parliament's argument is two-fold:

(i) both the near-exclusion of regular services from the material scope of the regulation and the postponement of full liberalization of non-regular cabotage services until 1 January 1996 constitute substantial amendments;

(ii) a bundle of amendments concerning the admission procedure and formalities for cabotage operations casts doubt on the economic viability of the proposal. [25]

21. I will examine those two arguments in turn.

I — Do the near-exclusion of regular services from the scope of the regulation and the postponement of the liberalization of non-regular services constitute substantial amendments?

22. One cannot fail to be struck by the similarity between this case and Case C-65/92 *Parliament* v *Council*, referred to above, which annulled 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.

23. In that case, the initial proposal was that *any* road haulage carrier for hire or reward, established in a Member State and authorized to operate such services internationally, should be allowed to operate national road haulage services in a Member State other than the one in which he was established.

24. Regulation No 4059/89 (i) laid down a Community cabotage quota of 15 000 authorizations, each valid for two months, [26] and (ii) was applicable, on a temporary basis, only until 31 December 1992, the Council having to adopt a *new* regulation laying down the definitive cabotage system before 1 July 1992. [27]

25. Here, the initial proposal espoused the principle of *complete freedom* to operate regular passenger road transport services, as well as 'shuttle services' and 'occasional services', on a cabotage basis.

25 — See paragraph 25 of the application and paragraphs 20, 21 and 22 of the reply.

26 — Article 2(1).

27 — Article 9.

26. As far as regular services are concerned, the disputed regulation restricts the scope of cabotage operations to nothing more than specialized services for carrying workers, school pupils and students in frontier zones. Cabotage can be extended to other regular passenger transport services only by a *new* Council regulation on a proposal from the Commission, the latter being obliged to report to the Council in that respect before 31 December 1995. [28]

27. Thus, as far as regular services are concerned, cabotage, except on a minimal basis, is excluded from the scope of the regulation until a new text is adopted.

28. Concerning non-regular services, the initial proposal envisaged, as in the case of regular services, that carriers should, within a short period, be allowed unlimited access to operate national shuttle or occasional services. The regulation as adopted delays the liberalization of such services until 1 January 1996 and, until that date, restricts cabotage services in that area to 'closed-door tours'.

29. Thus, in those two areas, instead of opening up cabotage services completely and in the short term as envisaged by the proposal, the regulation substitutes partial implementation in the one case and progressive implementation in the other.

28 — Article 12 of Regulation No 2454/92.

30. As I said in my Opinion in Case C-65/90, the existence of a substantial difference between an initial proposal and the regulation finally adopted may result not only from amendments on procedure or substance, but also from provisions having disappeared from the definitive text. [29]

31. As for regular services, I regard their near-exclusion, and hence the extreme reduction in the material and geographical scope of the regulation, as amendments which 'affect the very essence of the enactment and must therefore be regarded as substantial'. [30] It should be noted, moreover, that the Council has not attempted to prove that such near-exclusion does not constitute a substantial amendment. [31]

32. As for non-regular services, the Council was certainly entitled to postpone the date of entry into force without reconsultation, as the Parliament had itself proposed in its first amendment. In that respect, a period of three years to effect a complete liberalization of non-regular cabotage transport services would not appear to be substantially differ-

29 — [1992] ECR I-4593, 4611 at paragraph 47.

30 — [1992] ECR I-4593, 4622, at paragraph 19 of the judgment.

31 — The Spanish Government maintains that no substantial amendment takes place when the *objective* pursued by the Community regulation has not been changed between the proposal and the definitive text. It argues that there is an *identity of object* between the two, namely the elimination of nationality restrictions on non-resident carriers (p. 7 of the statement in intervention). In my opinion, that criterion does not take account of the Court's case-law on the matter (see paragraph 16 of the judgment in Case C-65/90 and the cases referred to therein).

ent from what was envisaged. However, as I have already said, the Council was not entitled to limit the substantive scope of authorization to carry out cabotage transport operations without reconsulting the Parliament.

33. Let me summarize the comparison I am making.

34. In the case of passenger transport as in the case of road haulage, the initial proposal espoused the principle of unrestricted freedom to carry out cabotage operations.

35. In the case of road haulage, that principle was restricted by a system of quotas and temporary authorizations. The Court has already held such a restriction to be substantial amendment in its judgment in Case C-65/90.

36. Here, the material and geographical scope of cabotage passenger operations is severely restricted. The Court should therefore draw the same conclusions.

37. But did those substantial amendments, as the Council maintains, correspond to the Parliament's *wishes*, making reconsultation unnecessary?

38. Apart from the four amendments referred to above, the Parliament expressly approved the Commission's initial proposal. [32]

39. There is no suggestion in those amendments of any limitation on the substantive and geographical scope of cabotage operations. On the contrary, the Parliament was at pains, in its amendment of Article 1, to state that the regulation should apply to 'regular services' and'non-regular services'.

40. In an attempt to argue that the regulation adopted accorded with the wishes of the Parliament, the Spanish Government, which has intervened in support of the Council, relies, wrongly in my view, on the opinions expressed by a number of parliamentary committees. According to the Spanish Government, those committees had drawn the Parliament's attention to the need to 'moderate the proposed liberalization measure' [33] before the resolution was adopted.

41. But those opinions are in no way binding on the Parliament itself. They do not represent the 'wishes' of that institution, which can only arise from its legislative resolutions, or the amendments it proposes, as the case may be. Thus, in its judgment in Case C-65/90, when examining whether amendments put forward by the Council corresponded to the Parliament's wishes, the

32 — See paragraphs 6 and 7 above.

33 — Statement in intervention, p. 8.

Court referred exclusively to the opinion and the amendments adopted by the Parliament itself. [34]

42. In an attempt to demonstrate that near-exclusion of regular services did not warrant reconsultation of the Parliament, the Council states, first, that that amendment corresponded to the Parliament's wish that cabotage operations by road be introduced progressively, and that that wish is evidenced by the opinions expressed concerning cabotage road haulage services during the procedure for adopting Regulation No 4059/89 [35] and then Regulation (EEC) No 3118/93, [36] which replaced it. [37] Thus, the amendment corresponded to 'policy guidelines advocated by the Parliament itself'. [38]

43. But is the Council entitled, in order to avoid reconsultation in a given legislative procedure, to take account of the opinion expressed by the Parliament in connection with the adoption of a different text, on the pretext that it considers that text to be related? Or, in other words, can the Council decide of its own initiative that such an area is related to another area, and that the Parliament's opinion in the first case is also valid in the second?

44. I see two objections to that, the first being *institutional* in nature and the second relating to the *subject matter*.

45. Without calling in question the *mandatory* nature of fresh consultation in cases of substantial amendment and thus the institutional equilibrium intended by the treaties, the Council cannot dispense itself from reconsulting the Parliament whenever, in its view, the latter has already expressed its opinion in a related legislative procedure.

46. It would thereby be acting as judge of the question of relatedness, appropriating to its advantage an assessment which belongs to the Parliament alone. Contrary to what it maintains, the Council cannot therefore be allowed to 'bring back up-to-date the opinion of the Parliament'. [39]

47. Moreover, such conduct would open the way to inevitable divergences as soon as the Council adopted a *wide* interpretation of the concept of relatedness. Is the opinion expressed by the Parliament in the context of the adoption of a regulation on the transport of goods valid in the context of the adoption of a regulation on the transport of passengers? Is it for the Council to be the judge of that?

34 — Paragraph 19.

35 — Referred to in note 16 above.

36 — Council Regulation (EEC) No 3118/93 of 25 October 1993 laying down the conditions under which non-resident carriers may operate national road haulage services within a Member State (OJ 1993 L 279, p. 1).

37 — Paragraph 22 of the defence. The Spanish Government makes the same argument at page 12 of its statement in intervention.

38 — Paragraph 31 of the defence.

39 — Paragraph 25 of the defence.

48. Finally, and more fundamentally, the procedures for adopting Community regulations cannot be left to the unfettered discretion of the institutions. Referring to the judgment in Case 68/86 *United Kingdom* v *Council*, [40] Advocate General Jacobs pointed out that

'... The rules regarding the manner in which the Community institutions arrive at their decisions are laid down in the Treaty and are not at the disposal of the Member States or of the institutions themselves'. [41]

49. Thus, there is no room here for an 'elementary principle of economy in procedure' which, in the Spanish Government's submission, would allow the Council to refer in certain cases to the opinion of the Parliament expressed in a related legislative procedure. [42]

50. But there is another objection, relating to the subject-matter.

51. Admittedly, the implementation of cabotage in road haulage is not unconnected with its implementation in relation to passenger transport. Adopted under Article 75(1)(b) of the EEC Treaty, the regulations in both cases envisage the admission of non-resident carriers to operate national transport services.

52. But there is no suggestion in any of the texts emanating from the Parliament during the procedure for adopting Regulation No 4059/89 and Regulation No 3118/93 concerning cabotage in road haulage matters that the Parliament had adopted a *global approach* to the problem of cabotage, or that the opinions expressed in the context of road haulage were equally valid for passenger transport.

53. The autonomy and specific character of those two sectors and the need to seek appropriate solutions to the problems posed by each of them are sufficiently shown by the fact that (i) the Commission presented distinct proposals for the different types of road transport, and (ii) the solutions adopted, even though their effect in both areas is to limit the scope of cabotage, are nevertheless divergent. In the one area, cabotage was restricted by the establishment of a Community quota system, and, in the other, by material and geographical limitations on the scope of the regulation.

54. Only if the Parliament had expressly referred, in the procedure for adopting the regulation now in question, to an opinion expressed in another procedure, would the Council be able to rely on the latter. Otherwise, it was under a duty to reconsult the

40 — Case 68/86 *United Kingdom* v *Council* [1988] ECR 855, at paragraph 38.

41 — Opinion in Case C-316/91 *Parliament* v *Council*, referred to in note 20 above, at paragraph 25.

42 — Statement in intervention, p. 11.

Parliament in the case of substantial amendments.

55. The defence submission based on the opinions expressed by the Parliament concerning road haulage is therefore unconvincing.

56. In the second place, the Council argues that complete liberalization of cabotage in passenger road transport has encountered a legal obstacle, namely confusion between freedom of establishment and the freedom to provide services. [43] How, it asks, is it possible to provide transport services a long way from frontier areas without at the same time being *established* in the host State?

57. Assuming that legal question to be relevant, and it does not appear to have been raised in other cases on transport liberalization, I think it constitutes all the more reason for obtaining a fresh opinion from the Parliament.

58. In that respect, the Council states that the Parliament 'was aware of the major difficulties, technical as well as political, that would be raised in drawing up common rules' [44] for cabotage. It was 'fully aware' [45] that delicate questions were involved, such as the progressive implementation of cabotage.

59. The Council deduces from that, paradoxically, that reconsultation was not necessary. I take the view, on the other hand, that it is precisely in such areas, where the economic and political stakes in particular are high, that the Parliament must be allowed to exercise its consultative powers to the full.

II — The bundle of other amendments

60. The Parliament lists the following five amendments concerning procedure and formalities: [46]

— limitation of the application of national provisions to certain specific points, such as rates and conditions governing the contract, weights and dimensions of vehicles, safety requirements, etc. (Article 4);

— the obligation to produce an authorization (Article 5);

43 — End of paragraph 27 and paragraph 29 of the defence.

44 — Paragraph 7 of the defence.

45 — Ibid., paragraph 8.

46 — Paragraph 25 of the application.

— the obligation to produce a control document (Article 6);

— the introduction of safeguard measures with the setting up of an Advisory Committee (Articles 8 and 9);

— the imposition of penalties in the event of infringement (Article 10).

61. Summarizing the case-law of the Court, Advocate General Mancini stated in his Opinion in the *Roviello* case [47] that the Parliament need not be reconsulted if the amendments '(a) (left) unaltered the essential aspects of the provision on which (they had) an effect'... '(b) (were) of a merely technical nature', that is to say (involving) changes of method and not of substance, and '(c) (corresponded) to the wishes of the Parliament'.

62. As there is no need to decide whether a bundle of amendments to the admission procedure and formalities for cabotage constitutes a substantial amendment, I will limit myself to the following observations.

63. As for penalties, it will be noted that the Parliament proposed to introduce them in its amendment to Article 4 of the proposal.

64. The limitation of the application of national legal provisions to certain areas (Article 4) also corresponds to a wish of the Parliament. [48]

65. The amendments concerning authorizations and the monitoring of formalities are purely technical measures which do not affect the substance of the regulation.

66. The introduction of safeguard measures and the setting up of an Advisory Committee do not, it is true, change either the nature or the scope of the liberalization project; on the contrary, they facilitate its implementation. Nevertheless, this question does have an important institutional dimension, and, as I stated in my Opinion in Case C-65/90, the entrusting to the Commission or the Council of a responsibility for safeguard measures 'is an important question for the institutional balance of the Communities'. [49] The Parliament cannot remain indifferent to that, and, on this point also, it should have been reconsulted.

47 — Case 20/85 *Roviello* v *Landesversicherungsanstalt Schwaben* [1988] ECR 2805, 2842 at the end of paragraph 11 of the Opinion.

48 — See Annex I, paragraph 9, on p. 12 of the defence.

49 — Paragraph 56

67. It is time for me to sum up.

68. In my opinion, the substantial amendments I have identified affected 'the scheme of the proposed regulation as a whole' [50] and required the Parliament to be reconsulted. The failure to reconsult it constitutes an infringement of essential formal requirements entailing annulment of the regulation.

69. Such annulment concerns the text 'viewed as a whole' and must affect the entire regulation. [51]

70. Finally, I propose that, until a new regulation is adopted, the provisions of the annulled regulation should remain effective in accordance with the second paragraph of Article 174 of the EC Treaty. To give full effect to the annulment would, paradoxically, make any form of cabotage in passenger transport operations totally impossible, whereas the very purpose of the regulation was to open up that market.

71. I therefore propose that

(1) Council Regulation (EEC) No 2454/92 of 23 July 1992 laying down the conditions under which non-resident carriers may operate national road passenger transport services within a Member State should be annulled;

(2) the provisions of the annulled regulation should remain effective until a new regulation is adopted by the Council;

(3) the Council should be ordered to pay the costs of these proceedings, save for those relating to the intervention, which must be borne by the Kingdom of Spain.

50 — Judgment in Case C-65/90 *Parliament* v *Council*, referred to above, at paragraph 20.

51 — See paragraph 64 of my Opinion and paragraph 20 of the judgment in that latter case.