

OPINION OF ADVOCATE GENERAL
JACOBS

delivered on 17 December 1998 *

1. In these two joined cases the European Parliament is seeking annulment of Council Regulations (EC) Nos 307/97¹ and 308/97² ('the Regulations'), submitting that they were adopted on the basis of the incorrect Treaty provision. The Parliament does not contest the substance of the Regulations. The Commission has intervened in support of the Council.

2. Both Regulations concern the protection of forests. Both were adopted on the basis of Article 43 of the Treaty, which is to be found in Part Three, Title II of the Treaty, Agriculture. Article 43(2) requires the Commission to 'submit proposals for working out and implementing the common agricultural policy ... and for implementing the measures specified in this Title'. The final subparagraph of Article 43(2) provides:

pean Parliament, acting unanimously during the first two stages and by a qualified majority thereafter, make regulations, issue directives, or take decisions, without prejudice to any recommendations it may also make.'

3. The Parliament submits that the Regulations should have been adopted on the basis of Article 130s of the Treaty. Article 130s(1) provides:

'The Council, acting in accordance with the procedure referred to in Article 189c and after consulting the Economic and Social Committee, shall decide what action is to be taken by the Community in order to achieve the objectives referred to in Article 130r.'

'The Council shall, on a proposal from the Commission and after consulting the Euro-

4. Article 189c provides for the cooperation procedure, entailing greater involvement of the Parliament in the legislative process than under the consultation procedure followed under Article 43.

* Original language: English.

1 — Council Regulation 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.

2 — Council Regulation 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.

5. Article 130r(1) provides:

'Community policy on the environment shall contribute to pursuit of the following objectives:

— preserving, protecting and improving the quality of the environment;

— protecting human health;

— prudent and rational utilisation of natural resources;

— promoting measures at international level to deal with regional or worldwide environmental problems.'

6. Regulation No 307/97 amends Regulation No 3528/86 on the protection of the Community's forests against atmospheric pollu-

tion³ ('the atmospheric pollution Regulation') and Regulation No 308/97 amends Regulation No 2158/92 on protection of the Community's forests against fire⁴ ('the forest fire Regulation').

The atmospheric pollution Regulation

7. The original atmospheric pollution Regulation was adopted in 1986. At that time, there was no provision in the Treaty conferring specific powers for the adoption of legislation on the environment. The 1986 Regulation was adopted on the dual basis of Article 43 and Article 235, which provides:

'If action by the Community should prove necessary to attain, in the course of the operation of the common market, one of the objectives of the Community and this Treaty has not provided the necessary powers, the Council shall, acting unanimously on a proposal from the Commission and after consulting the European Parliament, take the appropriate measures.'

3 — Council Regulation of 17 November 1986, OJ 1986 L 326, p. 2.

4 — Council Regulation of 23 July 1992, OJ 1992 L 217, p. 3.

8. Under Article 1 of the regulation a Community scheme is established 'to protect forests against atmospheric pollution, hereinafter referred to as "scheme", in order to provide increased protection for forests in the Community and thereby contribute in particular to safeguarding the productive potential of agriculture'.

- 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.'

9. Article 2(1) as amended by Regulation No 2157/92⁵ provides:

10. By virtue of Article 4(1):

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

'The scheme shall aim at encouraging the carrying out of:

- 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 this inventory;

- experiments in the field to improve understanding of atmospheric pollution in forests and its effects on forests and to devise methods of maintaining and restoring damaged forests,
- pilot and demonstration projects to improve methods of observing and measuring damage to forests.'

⁵ — Council Regulation of 23 July 1992 amending Regulation (EEC) No 3528/86 on the protection of the Community's forests against atmospheric pollution, OJ 1992 L 217, p. 1.

11. Article 11(1) provided that the duration of the scheme should be five years as from January 1987.

12. The atmospheric pollution Regulation has been amended twice before the amending regulation in dispute.

13. Regulation (EEC) No 1613/89⁶ amended certain provisions. In the Commission's proposal for Regulation No 1613/89 the legal basis was Article 43 alone, but the Council adopted the regulation on the basis of both Article 43 and Article 130s.

14. The version of Article 130s of the Treaty in force at the relevant time, before amendment by the Treaty on European Union, provided for the Council to act unanimously after consulting the European Parliament; the cooperation procedure, introduced by the Single European Act, was extended to Article 130s only by the Treaty on European Union.

15. Article 11(1) of the atmospheric pollution Regulation was then amended by Regulation No 2157/92 so as to provide that the duration of the scheme should be 10 years as from January 1987. Regulation No 2157/92 was likewise adopted on the basis of Articles 43 and 130s of the Treaty. The version of Article 130s of the Treaty in force at the relevant time also pre-dated amendment by the Treaty on European Union.

16. Regulation No 307/97, whose annulment is sought by the Parliament, amends Article 11(1) so as to provide that the scheme is scheduled to run for 15 years from 1 January 1987 and to make financial provision for the period 1997 to 2001.

The forest fire Regulation

17. The forest fire Regulation was adopted in 1992 on the basis of Articles 43 and 130s (although its predecessor, Regulation (EEC) No 3529/86,⁷ was, like the atmospheric pollution Regulation, based on Articles 43 and 235).

⁶ — Council Regulation of 29 May 1989 amending Regulation (EEC) No 3528/86 on the protection of the Community's forests against atmospheric pollution, OJ 1989 L 165, p. 8.

⁷ — Council Regulation of 17 November 1986 on protection of the Community's forests against fire, OJ 1986 L 326, p. 5.

18. Article 1 of the regulation provides:

'(1) In order to provide increased protection for forests and in particular to step up efforts undertaken to maintain and monitor forest ecosystems and to safeguard the various functions which forests fulfil for the benefit of rural areas, a Community scheme for the protection of forests against fire ... is hereby instituted.

(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;

...'

(2) The purpose of the scheme is:

— to reduce the number of forest fire outbreaks,

— to reduce the extent of areas burnt.

19. Article 2 provides:

'(1) Member States shall classify their territory according to the degree of forest-fire risk. ...

(3) The scheme shall comprise:

(a) measures to identify the causes of forest fires and the means of combating them ...;

(2) Only areas where the permanent or cyclical risk of forest fire presents a serious threat to the ecological balance and the safety of persons and goods or constitutes a factor which is hastening the process of desertifica-

tion of rural areas may be classified as areas of high risk.

Appraisal of the contested regulations

...

(3) Areas where the forest fire risk is not permanent or cyclical but presents a significant threat to forest ecosystems may be classified as areas of medium risk.

...'

20. Article 10(1) provided that the scheme was scheduled to run for five years from 1 January 1992.

21. Regulation No 308/97, whose annulment is sought in these proceedings, amends Article 10(1) so as to provide that the scheme is to run for 10 years from 1 January 1992 and to make financial provision for the period 1997 to 2001.

22. The thrust of the Parliament's case is that, by virtue of their aims and content, the Regulations fall within the realms of environmental policy, even if they have beneficial effects for agriculture and farmers. The Council acknowledges that forests are not among the agricultural products listed in Annex II to the Treaty to which, by virtue of Article 38(3) of the Treaty, Articles 39 to 46 of the Treaty apply. Its defence is essentially that protection of forests is an essential component of the Community's agricultural policy since it helps to conserve and improve soil, fauna, flora and water systems and to develop ecosystems favourable to agriculture.

23. The Court has held that 'in the context of the organisation of the powers of the Community 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'.⁸ Those factors include in particular the aim and content of the measure.⁹

⁸ — Case 45/86 *Commission v Council* [1987] ECR 1493, paragraph 11 of the judgment.

⁹ — Case C-300/89 *Commission v Council* [1991] ECR I-2867, paragraph 10 of the judgment.

24. In my view it is abundantly clear from the aims and content of the regulations that they should both have been adopted on the basis of Article 130s of the Treaty.

Whereas results from the systematic survey network show obvious trends in spatial and temporary distribution of forest damage over the entire area of the Community;

25. As regards the aims of Regulation No 307/97, the second to the eighth recitals in the preamble to the regulation state:

Whereas plots for the intensive and continuous monitoring of forest ecosystems have been set up by the Member States; whereas a continuation of this monitoring activity over a longer period will improve the understanding of the causal relationship between changes in forest ecosystems and the factors influencing it;

'Whereas forests play an essential role in maintaining fundamental ecological balances, particularly as regards the soil, water resources, climate, fauna and flora; whereas those ecological balances are indispensable for a sustainable agriculture and the management of rural areas;

Whereas forest damage due to various factors, notably atmospheric pollution and certain unfavourable meteorological events, are problematic for the development of a sustainable agriculture and the management of rural areas;

Whereas the conservation of the forest ecosystems is important for its economic, ecological and social functions and contributes, in particular, towards safeguarding the social function for those people working in agriculture and rural areas;

Whereas consequently the protection of forests against atmospheric pollution and certain unfavourable meteorological factors contributes directly to the achievement of the objectives laid down in Article 39(1)(b) of the Treaty;

Whereas the Community and the Member States have committed themselves at international level ...;

....

26. The preamble to Regulation No 308/97 is in similar vein. The second and third recitals are identical to those in Regulation No 307/97. The fourth to the ninth recitals continue:

‘Whereas the Community and the Member States attach particular importance to the protection of their forest resources and whereas they have given international undertakings on the sustainable development of forests and the protection of forest regions ...;

Whereas, pursuant to Regulation (EEC) No 2158/92, 60 million hectares of forest, equivalent to about a half of European forests, have been classified as fire-risk zones;

Whereas fires continue to restrict the sustainable development of forests in fire-risk zones, thus reducing the contribution of forests to the development of sustainable agriculture and the management of rural areas;

Whereas protecting forests against fire therefore directly contributes to the achievement of the objectives laid down in Article 39(1)(b) of the Treaty;

Whereas the Community system of information on forest fires established under Article 5 of Regulation (EEC) No 2158/92 has permitted the development of Community cooperation on forest fires; whereas the development of that system will provide an effective instrument for better evaluating forest-fire protection measures and for better analysing the causes of fires;

Whereas, therefore, the scheme as provided for by Regulation (EEC) No 2158/92 should be continued, in particular to strengthen the consistency of forest measures financed in fire-risk zones, to reinforce the fight against the causes of fires and to improve prevention and monitoring systems and whereas the duration of the scheme should be extended for five years, thus bringing the period of application of the scheme to 10 years from 1 January 1992’.

27. The content of both regulations consists essentially in extending the schemes for the protection of forests introduced by the regulations which they amend, the main provisions of which are set out at paragraphs 8 to 11 and 18 to 20 above.

28. It is clear from the aims and content of the two regulations, read together with the regulations which they amend, that they are directed at ensuring the continuance of schemes designed to protect forests and the ecological balance which forests play an essential part in maintaining, in particular as regards soil, water resources, climate, flora and fauna. To my mind such measures fall squarely within the aims set out in 130r, in particular 'preserving, protecting and improving the quality of the environment'. Protection of forests and the ecological balance which they preserve is a matter of general environmental concern, not merely to those whose livelihood depends on agriculture.

29. It is possible, as the Council and Commission suggest, that a particular motive for the adoption of the regulations was the contribution made by forests to the development of agriculture and rural areas; and certainly the preambles seek to show that such goals are among those pursued by the measures. The aims and content of the regulations are nevertheless primarily and directly concerned with the protection of forests, a policy which is quintessentially environmental in nature. It may be true, as the Council observes, that agriculture and silviculture go together. It is equally true however that without forests life on earth would not be as we now know it.

30. Contrary to the Council's view, I do not think that the present regulations are comparable to Council Regulation (EEC) No

2080/92 instituting a Community aid scheme for forestry measures in agriculture,¹⁰ which is based on Articles 42 and 43. That regulation establishes an aid scheme part-financed by the EAGGF directed specifically at afforestation as an alternative use of agricultural land and the development of forestry activities on farms. Although pursuing environmental aims, its aims and content are very different from those of the present regulations, which seek to maintain the schemes established by the atmospheric pollution Regulation and the forest fire Regulation.

31. The Council argues further that Article 43 must be given priority over other articles of the Treaty. As regards Article 100 it refers in particular to the Court's judgments in *United Kingdom v Council*¹¹ and *Commission v Council*.¹² In those cases the Court held that 'Article 43 of the Treaty is the appropriate legal basis for any legislation concerning the production and marketing of agricultural products listed in Annex II to the Treaty which contributes to the achievement of one or more of the objectives of the common agricultural policy set out in Article 39 of the Treaty. There is no need to have recourse to Article 100 of the Treaty where such legislation involves the harmonisation of provisions of national law in that field.'¹³ In addition, the Court pointed out that:

'Article 38(2) of the Treaty gives precedence to specific provisions in the agricultural field

10 — OJ 1992 L 215, p. 96.

11 — Case 68/86 [1988] ECR 855 and Case 131/86 [1988] ECR 905.

12 — Case 131/87 [1989] ECR 3743.

13 — *Commission v Council*, cited in note 12, paragraph 10 of the judgment.

over general provisions relating to the establishment of the common market and that consequently, even where the legislation in question is directed both to objectives of agricultural policy and to other objectives which, in the absence of specific provisions, are pursued on the basis of Article 100 of the Treaty, that article, a general one under which directives may be adopted for the approximation of laws of the Member States, cannot be relied on as a ground for restricting the field of application of Article 43 of the Treaty.¹⁴

32. Those judgments do not however provide any support for the Council's view. The Court was there merely making the point that the appropriate legal basis for legislation concerning the production and marketing of agricultural products listed in Annex II to the Treaty was the specific provision on agriculture rather than the more general harmonising provision in Article 100 of the Treaty.

33. The same principle applies in the relationship between Article 130s and Article 100a. In *Parliament v Council*¹⁵ the Court, asked to consider the appropriate legal basis for a regulation on the supervision and control of shipments of waste,¹⁶ favoured the more specific provision in Article 130s of the

Treaty over the general provision in Article 100a. In that case the Court held similarly that its conclusion was 'not invalidated by the fact that, by harmonising the condition in which movements of waste take place, the regulation affects such movements and thus has a bearing on the functioning of the internal market.'¹⁷

34. In the present case the Council and the Parliament agree that the regulations do not concern the conditions for production and marketing of agricultural products covered by Annex II to the Treaty. Nor is it a question of choosing between a general and a more specific provision; rather it is a question of choosing which of two specific provisions is the more appropriate legal basis.

35. The Council also suggests that Article 43 takes priority over Article 130s. In support of that view it refers to the judgment in *Greece v Council*,¹⁸ where the Court held:

'Articles 130r and 130s are intended to confer powers on the Community to undertake specific action on environmental matters. However, those articles leave intact the powers held by the Community under other provi-

¹⁴ — *Commission v Council*, paragraph 11 of the judgment.

¹⁵ — Case C-187/93 [1994] ECR I-2857.

¹⁶ — Council Regulation (EEC) No 259/93 on the supervision and control of shipments of waste within, into and out of the European Community, OJ 1993 L 30, p. 1.

¹⁷ — Paragraph 24 of the judgment.

¹⁸ — Case C-62/88 [1990] ECR I-1527.

sions of the Treaty, even if the measures to be taken under the latter provisions pursue at the same time any of the objectives of environmental protection.

Moreover, that interpretation is confirmed by the second sentence of Article 130r(2), pursuant to which "environmental protection requirements shall be a component of the Community's other policies". That provision, which reflects the principle whereby all Community measures must satisfy the requirements of environmental protection, implies that a Community measure cannot be part of Community action on environmental matters merely because it takes account of those requirements.'

by virtue of the judgment in *Commission v Council*.¹⁹ There the Court held that a directive which, according to its aim and content, was concerned indissociably with both the protection of the environment and the elimination of disparities in conditions of competition could not be based on both Article 100a, which at the time required recourse to the cooperation procedure, and Article 130s, which at the time required the Council to act unanimously after merely consulting the Parliament; owing to the requirement of unanimity the use of both provisions as a joint legal basis would divest the cooperation procedure of its very substance. Compelled therefore to make a choice between two equally appropriate provisions, the Court opted for Article 100a involving the cooperation procedure, noting that by virtue of Article 100a(3) Commission proposals for measures for approximation of laws were in any event to take as a base a high level of environmental protection.

36. However, that passage does no more than recognise that the mere fact that a measure pursues environmental aims is not in itself sufficient for it to be based on Article 130s. It in no way suggests that Article 130s is not the appropriate basis for a measure whose centre of gravity is environmental policy. The contrary view would render Article 130s otiose.

37. It is not in my view necessary to consider the Parliament's alternative plea that, if the regulations could equally be based on either provision, Article 130s should prevail

38. In the present case there is no such difficulty. It is clear that Article 130s is the appropriate Treaty article for the contested regulations and provides a sufficient basis for their adoption. There is therefore no need to consider recourse to another Treaty basis either as an alternative or joint legal basis.²⁰

19 — Case C-300/89, cited in note 9.

20 — See, for example, the judgments in *United Kingdom v Council* and *Commission v Council*, cited above in notes 11 and 12.

Conclusion

39. I conclude therefore that the regulations must be annulled. As the Parliament suggests, however, the effects of the contested regulations should be maintained pending the adoption, within a reasonable period, of new measures in accordance with the appropriate procedure.

40. Accordingly the Court should in my opinion

- (1) annul 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;
- (2) annul 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;
- (3) declare that the regulations shall continue to have effect pending the adoption, within a reasonable time, of regulations enacted on the proper legal basis;
- (4) order the Council to pay the costs;
- (5) order the Commission to bear its own costs.