JUDGMENT OF THE COURT OF FIRST INSTANCE (Fourth Chamber)

27 June 2007 *

In Case T-182/06,

Kingdom of the Netherlands, represented by H. Sevenster and M. de Grave, acting as Agents,

applicant,

v

Commission of the European Communities, represented by M. Patakia, A. Alcover San Pedro and H. van Vliet, acting as Agents,

defendant,

APPLICATION for annulment of Commission Decision 2006/372/EC of 3 May 2006 concerning draft national provisions notified by the Kingdom of the Netherlands under Article 95(5) [EC] laying down limits on the emissions of particulate matter by diesel-powered vehicles (OJ 2006 L 142, p. 16),

* Language of the case: Dutch.

THE COURT OF FIRST INSTANCE
OF THE EUROPEAN COMMUNITIES (Fourth Chamber),

composed of H. Legal, President, I. Wiszniewska-Białecka and E. Moavero Milanesi, Judges,

Registrar: J. Palacio González, Principal Administrator,

having regard to the written procedure and further to the hearing on 29 March 2007,

gives the following

Judgment

Relevant provisions

1 Paragraphs 4 to 6 of Article 95 EC provide:

'4. If, after the adoption by the Council or by the Commission of a harmonisation measure, a Member State deems it necessary to maintain national provisions on grounds of major needs referred to in Article 30, or relating to the protection of the environment or the working environment, it shall notify the Commission of these provisions as well as the grounds for maintaining them.

5. Moreover, without prejudice to paragraph 4, if, after the adoption by the Council or by the Commission of a harmonisation measure, a Member State deems it necessary to introduce national provisions based on new scientific evidence relating to the protection of the environment or the working environment on grounds of a problem specific to that Member State arising after the adoption of the harmonisation measure, it shall notify the Commission of the envisaged provisions as well as the grounds for introducing them.

6. The Commission shall, within six months of the notifications as referred to in paragraphs 4 and 5, approve or reject the national provisions involved after having verified whether or not they are a means of arbitrary discrimination or a disguised restriction on trade between Member States and whether or not they shall constitute an obstacle to the functioning of the internal market.

In the absence of a decision by the Commission within this period the national provisions referred to in paragraphs 4 and 5 shall be deemed to have been approved.

When justified by the complexity of the matter and in the absence of danger for human health, the Commission may notify the Member State concerned that the period referred to in this paragraph may be extended for a further period of up to six months.'

2 Article 7(3) of Council Directive 96/62/EC of 27 September 1996 on ambient air quality assessment and management (OJ 1996 L 296, p. 55) provides that Member States are to draw up action plans indicating the measures to be taken in the short term where there is a risk of the limits and/or alert thresholds for the levels of ambient air pollutants being exceeded, in order to reduce that risk and to limit the duration of such an occurrence. Such plans may, depending on the individual case, provide for measures to control and, where necessary, suspend activities, including motor-vehicle traffic, which contribute to the limits being exceeded.

3 Under Article 11(1)(a) of Directive 96/62, Member States are, within the nine-month period after the end of each annual reporting period, to inform the Commission of the occurrence of levels of pollution exceeding the limits plus the margin of tolerance.

4 Directive 98/69/EC of the European Parliament and of the Council of 13 October 1998 relating to the measures to be taken against air pollution by emissions from motor vehicles and amending Council Directive 70/220/EEC (OJ 1998 L 350, p. 1) entered into force on 28 December 1998, the date of its publication in the *Official Journal of the European Communities*.

5 That text subjects to a limit on concentrations of particulate mass ('PM') of 25 mg/km diesel-powered vehicles, first, in Category M (passenger cars), as defined in Annex II, Section A, to Council Directive 70/156/EEC of 6 February 1970 on the approximation of the laws of the Member States relating to the type-approval of motor vehicles and their trailers (OJ, English Special Edition, 1970 (I), p. 96) — except vehicles the maximum mass of which exceeds 2 500 kg — and, second, in Category N_1, Class I (commercial vehicles with a maximum permissible weight of 1 305 kg).

6 Article 2(1) of Directive 98/69 is in the following terms:

'... no Member State may, on grounds relating to air pollution by emissions from motor vehicles:

— refuse to grant EC type-approval pursuant to Article 4(1) of Directive 70/156/EEC, or

— refuse to grant national type-approval, or

— prohibit the registration, sale or entry into service of vehicles, pursuant to Article 7 of Directive 70/156/EEC,

— if the vehicles comply with the requirements of Directive 70/220/EEC, as amended by this directive.'

7 Council Directive 1999/30/EC of 22 April 1999 relating to limit values for sulphur dioxide, nitrogen dioxide and oxides of nitrogen, particulate matter and lead in ambient air (OJ 1999 L 163, p. 41), lays down, in conjunction with Directive 96/62, limits applicable to, among others, concentrations of PM_{10} particulate matter in ambient air, which have been mandatory since 1 January 2005.

8 For the purposes of applying Directive 1999/30:

'"PM_{10}" shall mean particulate matter which passes through a size-selective inlet with a 50% efficiency cut-off at 10 μm aerodynamic diameter'.

9 Article 5 of Directive 1999/30 provides that the Member States are to take the measures necessary to ensure that concentrations of PM_{10} in ambient air do not exceed the limits laid down in Section I of Annex III to that directive.

10 In addition, and although it is not currently in force, on 21 December 2005, the Commission adopted a Proposal for a regulation, known as 'Euro 5', lowering to 5 mg/km the Community limit on emissions of particulate matter produced by diesel vehicles in both Category M (passenger cars) and Category N_1, Class I (commercial vehicles with a maximum permitted weight of 1 305 kg).

11 Were the Proposal to be adopted in its current form that new Community limit would enter into force at the end of September 2009 in respect of new types of vehicles in those two categories and, at the end of January 2011, for all new vehicles covered.

Background to the dispute

12 By letter of 2 November 2005, the Kingdom of the Netherlands notified the Commission, pursuant to Article 95(5) EC, of its intention to adopt a decree subjecting new diesel vehicles in Category M_1 and Category N_1, Class I, from 1 January 2007, by derogation from the provisions of Directive 98/69, to a limit of 5 mg/km on emissions of particulate matter.

13 In support of its application for derogation, the Kingdom of the Netherlands stated that the limits on concentrations of particulate matter laid down by Directive 1999/30 were exceeded in several areas of its territory. Therefore it did not consider itself in a position to comply with its Community obligations within the specified time-limits, despite the fact that Directive 1999/30 required it to adopt all measures necessary to reduce concentrations of particulate matter.

14 The Kingdom of the Netherlands emphasised that particulate matter is, for it, a cause of major concern, because of the country's high demographic density and a greater concentration of infrastructure than in other European States, which gives rise to a higher rate of emissions of particulate matter per square kilometre. Residents are very exposed to pollution because of the immediate proximity of automobile traffic in residential areas and from other forms of intensive land use. That aspect is of particular importance for the Netherlands, in view of the traffic density in numerous areas of the country. The location of the production of a significant part of the emissions of particulate matter from road traffic in urban areas and overhanging residential spaces also exposes a large part of the population to particularly harmful soot particles contained in the exhaust gases of diesel-powered vehicles.

15 The Kingdom of the Netherlands also stated that it is subject to major pollution of foreign origin, two thirds of 45% of concentrations of anthropogenic particulate matter observed in the country coming from abroad. It follows that only 15% of the national average of concentrations of particulate matter can give rise to national standards of protection of the environment.

16 Finally, the Kingdom of the Netherlands stated that it gives greater priority to the reduction of emissions of particulate matter generated by passenger cars and commercial vehicles. In fact, the Kingdom of the Netherlands favours the reduction of emissions from those vehicles, which are responsible, in its view, for 70% of the emissions from road traffic. It stated that the number of diesel-powered vehicles rose unexpectedly in the Netherlands at the time of the preparation of Directive 98/69.

17 The derogating measure notified would form an integral part of a regulatory framework centred on road traffic and on the promotion of vehicles and fuels which

are less pollutant. It would have been applicable to diesel-powered passenger cars and commercial vehicles used for the first time after 31 December 2006.

18 The practical effect of the draft decree would have been the insertion of a filter reducing the quantity of particulate matter in diesel exhaust but it would not have been applicable to vehicles registered in another Member State of the European Union.

19 The more stringent emissions standard in the draft decree would in no way change the procedures for approving the types of vehicles covered or the conditions for registration of vehicles having obtained EC approval in other Member States.

20 On the other hand, the police and the authorities responsible for the periodical testing of the vehicles covered could verify after the entry into force of the decree whether the passenger car or light commercial vehicle could comply with the new limit of 5 mg/km.

21 By letter of 23 November 2005, the Commission acknowledged receipt of the Netherlands Government's notification and informed it that the period of six months imposed upon it by Article 95(6) EC to make a decision on requests for derogation commenced on 5 November 2005, the day after the notification was received.

22 The report on the air quality assessment in the Netherlands for the year 2004, established pursuant to Directive 96/62, was sent to the Commission on 8 February 2006 and registered by it on the following 10 February.

23 By letter of 10 March 2006, the Netherlands authorities informed the Commission of the existence of a report established in March 2006 by the Milieu- en Natuurplanbureau (Netherlands Environmental Assessment Agency, 'the MNP'), entitled 'Nieuwe inzichten in de omvang van de fijnstofproblematiek' ('New information on the extent of the problem of particulate matter').

24 In order to evaluate the soundness of the arguments advanced by the Netherlands authorities, the Commission asked for the scientific and technical opinion of a team of consultants coordinated by the Nederlandse Organisatie voor toegepast-natuurwetenschappelijk onderzoek (Netherlands Organisation for Applied Scientific Research, 'the TNO').

25 That organisation submitted its report to the Commission on 27 March 2006.

26 By Decision 2006/372/EC of 3 May 2006 concerning draft national provisions notified by the Kingdom of the Netherlands under Article 95(5) [EC] laying down limits on the emissions of particulate matter by diesel-powered vehicles (OJ 2006 L 142, p. 16; 'the Decision'), the Commission rejected the draft decree notified, on the ground that 'the Kingdom of the Netherlands [had] failed to prove the existence of a specific problem with regard to Directive 98/69' and that 'the notified measure [was] not proportionate to the objectives pursued'.

Procedure and forms of order sought by the parties

27 By application lodged on 12 July 2006, the Kingdom of the Netherlands brought an action for annulment of the Decision. On the same day it lodged, under Article 76a of the Rules of Procedure of the Court of First Instance, an application for its action to be decided under the expedited procedure.

28 On 8 August 2006, the Commission lodged its observations on the application for the expedited procedure and, on the following 6 October, its defence.

29 By decision of 26 October 2006, the Court of First Instance (Fourth Chamber) granted the application for the expedited procedure.

30 The oral arguments of the parties and their answers to the oral questions were heard at the hearing on 29 March 2007.

31 The Netherlands Government claims that the Court of First Instance should:

— annul the Decision;

— order the Commission to pay the costs.

32 The Commission contends that the Court should:

— dismiss the action;

— order the applicant to pay the costs.

Law

33 The Netherlands Government pleads that the Decision contravenes the basic rules of Article 95 EC and the duty to state reasons under Article 253 EC, first, because it dismisses the existence of a problem specific to the Netherlands which arose after the adoption of Directive 98/69, without having examined the relevant information submitted by the Member State concerned; secondly, because it finds that the draft decree notified is not proportionate to the objectives pursued by the Kingdom of the Netherlands and, thirdly, because it takes into account the international legal situation in its examination of the notified draft.

34 As regards the existence of a problem specific to the Netherlands, the Netherlands Government challenges the Decision in two respects. First, the Commission wrongly denied the existence of a specific problem of air quality in the Netherlands. Second, the Commission failed, without explanation, to take into consideration the documents properly submitted to it by the Netherlands authorities in its evaluation of the specificity of the problem, thereby failing in both its duty of care and its duty to state the reasons for its decisions.

35 It is appropriate to examine, first, the second part of the proposition in the application, relating to the specificity of the problem with which the Kingdom of the Netherlands considers itself to be confronted.

The failure to exercise reasonable care and breach of the duty to state reasons alleged to have vitiated the determination of the specificity of the problem of air quality in the Netherlands

Arguments of the parties

36 The Netherlands Government submits that the Commission failed in its duty of care by failing to examine, without stating the reason, the relevant information which it had been sent within the time-limit prior to the adoption of the Decision.

37 Contrary to its contention in recital 41 in the Decision, the Commission was in possession of the relevant information concerning the Netherlands relating to the 2004 reporting period.

38 If the Commission had fulfilled its duty of care and taken account of that recent information, it could have concluded that a problem specific to the Netherlands had arisen after the adoption of Directive 98/69.

39 The Commission admits that, contrary to is statement in recital 41 in the Decision, the Kingdom of the Netherlands did, in fact, officially lodge its report of the assessment for 2004 before the adoption of the Decision. However, it does not in the least follow that there was any lack of care in the examination of the file.

40 The Kingdom of the Netherlands produced that report more than four months after the expiry of the period prescribed for its lodgement by Article 11(1)(a) of Directive 96/62. The notification, dated 2 November 2005, of the national measure does not therefore refer to that information.

41 The Commission requested the Kingdom of the Netherlands to send it that information as soon as possible and transmitted it, after its receipt, to the TNO, requesting it to take it into account in its report on the request for derogation submitted by the Kingdom of the Netherlands.

42 The Kingdom of the Netherlands' assessment report for the 2004 reporting period was taken into account in the TNO's report and in the recitals in the preamble to the Decision.

Findings of the Court

43 The TNO observes on page 29 of its report, on which the Commission, as is common ground, relied in adopting the Decision, and the findings and conclusions of which have not been put in issue by the Netherlands Government, '[a] comparison for 2004 ... could not be done yet, because the evaluation for 2004 has been delayed due to delayed submission [by] several Member States, including the [Kingdom of the] Netherlands'.

44 It is clear, however, from the explanations in the Decision on the question of the specificity of the ambient air quality in the Netherlands that the most recent data provided by the Netherlands authorities was included in the TNO's report. In particular, the TNO states on page 29, cited above, in that document:

'[a] preliminary submission by [the Kingdom of] the Netherlands on [excesses] in 2004 gives a picture that is different from 2003: in all zones, at least one of the [limits plus the margin of tolerance] for PM_{10} is exceeded'.

45 In addition, the TNO, on page 29 of its report, and the Commission, in recital 41 in the Decision, reproduce certain conclusions from the MNP's report of March 2006, cited above.

46 Finally, as is clear from recital 42 in the Decision, it was also in view of the new information transmitted by the Netherlands Government and contained in the MNP's report that the Commission refused to take as established the existence of a specific problem of compliance by the Kingdom of the Netherlands with the limits on concentrations of particulate matter laid down by Directive 1999/30.

47 In those circumstances, the Commission cannot be accused of having failed to examine the recent information which the Netherlands Government sent it prior to the adoption of the Decision.

48 It necessarily follows that the Commission cannot be charged either with having failed to state the reasons for that alleged failure.

49 The allegations of breach by the Commission of its duty of care and of its duty to state reasons cannot therefore be upheld.

The Commission's refusal to accept the specificity of the problem of ambient air quality in the Netherlands

Preliminary considerations

50 It is for the Member State which invokes Article 95(5) EC to prove that the conditions for application of that provision have been met (Case T-366/03 *Land Oberösterreich and Austria* v *Commission* [2005] ECR II-4005, paragraph 63; and see also, by analogy with Article 95(4) EC, Case C-3/00 *Denmark* v *Commission* [2003] ECR I-2643, paragraph 84).

51 In its request for derogation, the Kingdom of the Netherlands justified the notified national measure by emphasising that, in numerous areas of the Netherlands, the ambient air quality did not comply with the standards laid down by Directive 1999/30 and that, in particular, the limits on concentrations of particulate matter laid down by that directive were exceeded in several areas, despite the fact that the Member States are required to adopt all measures which would reduce concentrations of such matter.

52 Accordingly, the Kingdom of the Netherlands claims that it could not reasonably wait for the entry into force of the 'Euro 5' Proposal for a regulation lowering to 5 mg/km the current limit of 25 mg/km set by Directive 98/69 for emissions of particulate matter by the diesel vehicles in question and that it therefore wished to advance, at the national level, the introduction of the limit of 5 mg/km for those same vehicles.

53 It is therefore for the Kingdom of the Netherlands, in order to establish the soundness of its action, to demonstrate that the Commission, in the Decision, was wrong in holding that it was not established that the excesses observed in the Netherlands over the limits on concentrations of particulate matter laid down by Directive 1999/30 were so acute as to distinguish them significantly from those observed in other Member States.

54 To that end, the Netherlands Government complains that the Commission, first, misapplied the criterion of specificity of the problem of the protection of the environment under Article 95(5) EC, second, disregarded the obstacles to the adoption of national measures reducing emissions of particulate matter generated by inland navigation and marine transport, third, ignored the impossibility of taking action against cross-frontier pollution and finally, fourth, did not recognise the particularly serious nature of the excesses over the limits on concentrations of particulate matter observed in the ambient air in the Netherlands.

The application of the criterion of specificity

— Arguments of the parties

55 The Netherlands Government complains that the Commission, first of all, made the grant of the derogation requested subject to the requirement that the air quality problem relied upon in support of its request affects the Netherlands exclusively.

56 The Commission's view that a problem cannot be specific to a Member State for the purposes of Article 95(5) EC if the same problem arises in another Member State, in this case, Belgium, has no basis either in the wording of that provision or in the Commission's previous practice. It is, moreover, difficult to conceive how that criterion of exclusivity of an environmental problem linked to cross-frontier air pollution could be applied.

57 The Commission submits, by contrast, that it in no way required the Kingdom of the Netherlands to show that the air quality problem affects its territory exclusively. It compared the Netherlands' situation with that of the other Member States on the basis of the national assessment reports submitted and concluded that the Netherlands had not been confronted with a specific problem of excesses over the limits on concentrations of particulate matter laid down by Directive 1999/30 or on emissions of particulate matter from motor vehicles covered by Directive 98/69.

— Findings of the Court

58 Paragraphs 4 to 7 of Article 95 EC confer on the Member States and on the Commission the power to derogate from the application of harmonisation measures adopted for the establishment or functioning of the common market, provided that the protection of the environment or of the working environment necessitates such derogation.

59 In order to introduce national provisions with that object in cases where a harmonisation measure has already been adopted, a Member State must, under Article 95(5) EC, be able to show that the national measures are based on new scientific evidence and respond to a problem which is specific to that State and which has appeared after the harmonisation measure's adoption.

60 That provision, which is a safeguard clause, constitutes an adjustment to the organisation of the common market introduced for the purposes of preserving personal living and working conditions in the Community, an objective of the Treaty just as fundamental as that of the harmonisation of laws.

61 It applies, in particular, to cases where a new phenomenon arises in all or part of a Member State's territory, which has negative effects on the environment or the working environment and which could not be taken into account in the preparation of the harmonised rules and to which it is appropriate to apply a remedy at the outset at the national level, without waiting for an amendment to the Community legislation. Such an amendment could in fact be unsuitable to resolve the problem established, either because of the purely local nature of the phenomenon, or because of the particular characteristics which it exhibits locally and which are incompatible with the delays inherent in the negotiation and entry into force of new harmonised rules.

62 By referring to the case of a problem specific to a Member State which has arisen after the adoption of a Community harmonisation measure, Article 95(5) EC therefore excludes the possibility of national provisions being introduced based upon it which derogate from harmonised rules in order to deal with a general environmental danger in the Community.

63 Any problem which arises in terms which are on the whole comparable throughout the Member States and which lends itself, therefore, to harmonised solutions at Community level is general in nature and is, consequently, not specific within the meaning of Article 95(5) EC.

64 It is therefore necessary, in order correctly to interpret Article 95(5) EC, to envisage the requirement of national specificity of a problem essentially from the angle of the aptness or inaptness of the harmonisation of the applicable Community rules to confront adequately the difficulties encountered locally, since the established inaptness of those rules justifies the introduction of national measures.

65 The Netherlands Government is therefore right in claiming that, in principle, for a problem to be specific to a Member State within the meaning of the relevant provision, it is not necessary that it is the result of an environmental danger within that State alone. In the context of the occurrence of a general danger, local particularities may, in the cases referred to in the preceding paragraphs, constitute a specific problem.

66 However, it is not apparent from the contents of the Court file that the Commission in this case limited the concept of the national specificity of problems of protection of the environment under Article 95(5) EC to the condition that they occur within a single notifying Member State.

67 In particular, as the Netherlands Government itself points out in paragraph 34 of the application, the Commission expressly found in recital 41 in the Decision that, according to the national assessment reports, the Kingdom of the Netherlands did not, in 2003, encounter problems of particularly significant excesses compared to other Member States such as Belgium, Austria, Greece, the Czech Republic, Lithuania, Slovenia and Slovakia.

68 The TNO moreover observes, on page 31 of its report, that road transport is clearly one of the main sources of particulate matter in the Netherlands, but that it is not significantly different in that regard from other Member States such as Belgium, Denmark, France, Germany and the United Kingdom.

69 The TNO also points out that the percentage of diesel-powered passenger cars is not high in the Netherlands compared to that in other Member States.

70 Finally, the Commission finds in recital 42 in the Decision that it is by no means certain that the Kingdom of the Netherlands is confronted, as against other Member States, with a specific problem of compliance with the limits laid down by Directive 1999/30.

71 It cannot therefore be maintained that the Commission required the Kingdom of the Netherlands to show that the problem of ambient air quality relied upon to justify its request for derogation affects the Netherlands alone.

72 The Netherlands Government's argument relating to the interpretation of the criterion of specificity must therefore be rejected as lacking any factual basis.

The failure to have regard to the obstacles to the adoption of national measures to reduce the emissions of particulate matter generated by inland navigation and marine transport

— Arguments of the parties

73 The Netherlands Government complains, next, that the Commission decided that it could approve the draft decree only on condition that the excesses over the limits on concentrations of particulate matter in the ambient air observed in the Netherlands arise, for the most part, from emissions of particulate matter produced by diesel-powered road vehicles.

74 The Commission thus forgets that the Kingdom of the Netherlands concluded, after a detailed study, that the means available to it to deal with the problem of emissions of particulate matter generated by inland navigation and marine transport were limited, even non-existent.

75 The constraints arising from the European and international legislation governing the emissions of particulate matter from those two methods of transport are precisely the factors limiting the Netherlands Government's freedom of action at national level. The existence of a large port like Rotterdam adds to the acuteness of that problem specific to the Netherlands.

76 The Commission submits, on the contrary, that it merely found that the Kingdom of the Netherlands had not shown that it was confronted with a specific problem of emissions of particulate matter from motor vehicles covered by Directive 98/69. It found only that, if inland navigation and marine transport produced a far greater proportion of particulate matter in one Member State than in others and if only 25% of the new vehicles ran there on diesel, the existence of a specific problem of concentrations of particulate matter caused by the lack, authorised by Directive 98/69, of a particle filter on some of those vehicles has not been shown.

77 The Netherlands Government did not set forth in its request for derogation the argument based on its obligations under Community law and international law. Furthermore, that proposition amounts to running the insupportable argument that, if obligations under international law prevent a Member State from adopting certain measures, the Commission would have to accept derogation from the requirements of Article 95 EC, whether or not the requirements of paragraphs 5 and 6 thereof have been satisfied.

— Findings of the Court

78 The Court points out, first, that the question of the aptness of the notified draft decree to reduce concentrations of particulate matter in the ambient air in the Kingdom of the Netherlands by decreasing the amount only of particulate matter emitted by certain diesel-powered road vehicles forms part of the review of the proportionality of the notified national measure as against other detailed courses of action which can be envisaged with regard to two other sources of emissions of particulate matter, inland navigation and marine transport, rather than that of the specificity of the problem.

79 On any hypothesis, and secondly, the Netherlands Government cannot claim that obligations of international and Community law can constitute an obstacle to dealing with the problem posed by emissions of particulate matter produced by inland navigation and marine transport, since it did not refer to them in its request for derogation.

80 Like approvals of notified State aid, the grant to a Member State of the benefit of a derogation from Community harmonisation measures under paragraphs 5 and 6 of Article 95 EC can cover only the national measure as it was submitted to the Commission (see, to that effect, Case T-37/97 *Forges de Clabecq* v *Commission* [1999] ECR II-859, paragraph 100).

81 Finally, thirdly, the Netherlands Government's argument lacks any factual basis. Contrary to its submission, the Commission did not make the possibility of approving the notified measure subject to the condition that the excesses over the limits on concentrations of particulate matter in ambient air recorded in the Netherlands arise, for the most part, from the emissions of particulate matter generated by diesel-powered road vehicles.

82 As is clear from recitals 40 and 43 in the Decision, the Commission, on the contrary, merely found that, in comparison to other Member States, the Kingdom of the Netherlands was characterised by a significantly higher volume of emissions of particulate matter from inland navigation and marine transport and that the percentage of diesel-powered road vehicles was significantly lower in the Kingdom of the Netherlands than the average in the European Union, with the result that the very existence of the specific problem in the Netherlands in the form of emissions of particulate matter from diesel vehicles covered by Directive 98/69 could be put in doubt.

83 Therefore the Commission did not, in any event, make the possibility of approving the notified measure subject to the condition that the excesses over the limits on concentrations of particulate matter in ambient air observed in the Netherlands arise, for the most part, from emissions of particulate matter generated by diesel-powered vehicles.

84 The Netherlands Government's argument cannot therefore be accepted.

The impossibility of the Kingdom of the Netherlands taking action against cross-frontier pollution

— Arguments of the parties

85 The Netherlands Government also argues that its freedom of action is obstructed by the impossibility of taking any action over the large amount of particulate matter crossing its borders.

86 The Commission retorts that numerous countries of the European Union are also confronted by significant rates of emissions of cross-frontier particulate matter.

— Findings of the Court

87 The impossibility of taking any action over particulate matter of foreign origin, asserted by the Kingdom of the Netherlands, cannot, by itself, show that the Kingdom of the Netherlands is confronted with a specific problem of ambient air quality.

88 As the TNO observes in its report, a greater proportion of particulate matter is, almost by definition, from an exogenous source in countries which, like the Netherlands, are geographically small and the sources of pollution situated at some distance tend to be classified as foreign, whereas they are taken as endogenous in a geographically large country.

89 Moreover, the Netherlands Government itself implicitly admits that cross-frontier pollution cannot, by definition, be specific to a Member State, since it submits that the criterion of exclusivity, which it accuses the Commission of having wrongly adopted, is difficult to reconcile with the intrinsically cross-frontier nature of pollution.

90 At the hearing, the Netherlands Government submitted that the Netherlands was actually confronted with a specific problem of air quality because of its geographical situation.

91 It has, none the less, not been established that the emissions of cross-frontier particulate matter affect the air quality in the Netherlands to such an extent that the problem of limiting emissions of particulate matter arises there in a different way to that in which it arises in the rest of the Community, justifying specific national measures.

92 It is appropriate, furthermore, to observe that it is in the light of the standards established by Directive 1999/30 that the specificity of the problem of respect for the environment relied upon in support of its request for derogation from Directive 98/69 is to be determined. Annex III to Directive 1999/30 establishes only limits on the emissions of particulate matter in ambient air with which the Member States must comply, without taking into consideration the origin of the particulate matter present.

93 The Court cannot therefore take it as established that the contribution of particulate matter emitted outside the Netherlands to the concentrations of particulate matter in the ambient air in that country is, in itself, for the Netherlands, a problem of air quality specific to that country within the meaning of Article 95(5) EC.

94 The Netherlands Government's argument cannot therefore be accepted.

The failure to recognise the particularly serious nature of the excesses over the limits on concentrations of particulate matter observed in the ambient air in the Netherlands

— Arguments of the parties

95 The Netherlands Government criticises the Commission for refusing to acknowledge the particularly serious nature of the excesses observed in 2004 in all the areas

and population centres of the Netherlands as against the daily limits on concentrations of particulate matter laid down by Directive 1999/30 as from 1 January 2005 and those limits plus the margin of tolerance.

96 According to the TNO's report, the Kingdom of the Netherlands' preliminary submission shows that at least one of the limits on concentrations of particulate matter plus the margin of tolerance is exceeded.

97 Admittedly, the MNP's report of 2006 notes, on page 11, that the levels of particulate matter in the Netherlands are lower than on earlier assumptions. However, that statement cannot be imputed to the Netherlands Government, even if the MNP is an agency thereof.

98 In any event, the MNP's findings in no way put in doubt the specificity of the excesses over the limits on concentrations of particulate matter as against the maximum levels laid down by Directive 1999/30, as is clear from page 3 of the MNP's report.

99 At the hearing, the Netherlands Government also accused the Commission of not having taken into consideration the factors specific to the Netherlands constituted by its demographic density, the intensity of its traffic and the location of its population along its road traffic routes.

100 The Commission replies that, as the TNO's report concludes, the Kingdom of the Netherlands was not confronted in 2003 with particularly significant excesses in comparison to other Member States, some of which recorded, in contrast to the Netherlands, excesses in all areas.

101 The Commission adds that all the national assessment reports for the year 2004 confirm the absence of a specific problem of ambient air quality in the Netherlands. The Kingdom of the Netherlands' assessment report noted more excesses than in 2003 because the report relating to that reporting period was based exclusively on measurements, whereas the report for 2004 was in part based on calculations from models. In addition, the limits laid down in the directives were lowered, with the result that an increase in the number of excesses in the Netherlands in 2004 does not in itself signify with certainty that that country was confronted with a specific problem of air quality.

102 According to the MNP's report of March 2006, which is binding on the Kingdom of the Netherlands because it produced it officially in support of its request for derogation, the earlier estimates of emissions of particulate matter in the Netherlands were over estimated by 10 to 15%. It was not certain that, by comparison to other Member States, the Kingdom of the Netherlands is confronted with a specific problem preventing it from complying with Directive 1999/30.

103 The enduring nature of the potential effects of particulate matter on health is not a problem specific to the Netherlands. Moreover, the MNP draws attention to the fact that the effects on health of long-term exposure to particulate matter are lower than earlier estimates by some 10 to 15%.

104 It follows that not only the Kingdom of the Netherlands, and not only the Kingdom of the Netherlands and the Kingdom of Belgium, but also many other Member States had difficulties in complying with the limits on concentrations of particulate matter laid down by Directive 1999/30, that the problem of air quality in the Netherlands was not particularly significant as against that affecting those other Member States and that, at times, it was probably even less than the difficulties encountered, in particular, by the Kingdom of Belgium.

— Findings of the Court

105 It is established and not disputed that the problem of emissions of particulate matter produced by diesel vehicles is acute and justifies, at Community level, appropriate regulatory measures. It is also common ground that the national measure notified by the Kingdom of the Netherlands is designed to advance, in that country, the introduction into the harmonised rules of a limit on emissions of particulate matter contained in a proposal for a regulation which is under negotiation (see paragraph 52 above).

106 Such a manner of proceeding is not, in principle, incompatible with Article 95(5) EC, provided that it is established by the Member State concerned that the time required for the possible entry into force of the new harmonised rules will result in all or part of its territory in particular problems, which differentiate it from the other Member States, and which make early implementation necessary.

107 In that regard, it is not apparent from the documents in the Court file that the excesses recorded in the Netherlands over the limits on concentrations of particulate matter laid down by Directive 1999/30 are so acute, as against those observed in other Member States, as to constitute a problem of ambient air quality specific to the notifying Member State.

108 In the MNP's report entitled 'Beoorderling van het prinsjedagpakket — Aanpak Luchtkwaliteit 2005' (Assessment of the budget package — Tackling Air Quality 2005), the binding nature of which on the Netherlands Government cannot be put in doubt, since it emanates from an agency under the authority of one of its ministries

(Case 249/81 *Commission* v *Ireland* [1982] ECR 4005, paragraph 15) and since it was even annexed to the application, it is stated that, as the Commission observed in a progress report, the limits on concentrations of particulate matter had been exceeded since 2001 in a large number of European towns.

109 It follows, also, from the list established on the basis of the national assessment reports on air quality for the 2004 reporting period that the Netherlands forms part of a group of five Member States all the areas of which recorded, in 2004, rates of concentration of particulate matter higher than the daily limits plus the margin of tolerance laid down by Directive 1999/30, while, moreover, in five other Member States those limits were exceeded in more than 50% of their areas.

110 The Kingdom of the Netherlands' assessment report for the 2004 reporting period notes that an analysis of the results of the assessments of ambient air quality carried out on its territory reveals an amelioration in the air quality as against 2003 and that it is primarily the case, particularly, for particulate matter, although the report attributes that amelioration mainly to a change in the meteorological conditions observed in 2004 as against the previous year.

111 In addition, the MNP points out, in its report 'Assessment of the budget package — Tackling Air Quality 2005', that European countries other than the Kingdom of the Netherlands also have difficulties in complying with the European limits on concentrations of particulate matter.

112 As is noted, first, by the MNP, in its report of March 2006 produced by the Netherlands Government in the course of the procedure of examination of the notified draft measure, and, second, by the Commission, without contradiction on that point, in recital 41 in the Decision, the levels of concentrations of particulate matter in the Netherlands are lower than earlier estimates by 10 to 15% .

113 According to the MNP, the number of areas where excesses over the limits on daily average concentrations are expected in 2010 has decreased by more than half in comparison to the earlier estimates and the estimates of long-term exposure to particulate matter and its effects have been revised downwards by 10 to 15%.

114 As the Commission points out in recital 41 in the Decision, the MNP also finds that the number of areas where the Community limit on the daily average of concentrations of particulate matter will be exceeded will be reduced by half in 2010 as against 2005 and in 2015 as against 2010.

115 Finally, apart from the fact that they are not criteria under Directive 1999/30, it has not been established that the demographic density, the intensity of the road traffic in many areas of the Netherlands and the location of the population along the road traffic routes combine to constitute for that Member State, for the purposes of Article 95(5) EC, a problem of the protection of the environment distinguishing it significantly from other regions of the European Union.

116 In that regard, the TNO attributes the high level of emissions of particulate matter found in the part of the European Union formed by the Benelux, the central part of the United Kingdom and western Germany to its high demographic density and to its polluting activities, among which road traffic features prominently.

117 The Netherlands Government has not therefore established the existence of problems particular to its territory which necessitate the early implementation of the new harmonised rules which are under negotiation.

118 Accordingly, it cannot be concluded that the Commission was wrong in regarding the problem which the notifying Member State has in complying with the Community limits on concentrations of particulate matter in ambient air laid down by Directive 1999/30 as not being specific to it.

119 Since the conditions required by Article 95(5) EC are cumulative, it is sufficient that only one of those conditions is not satisfied for the request for derogation to be rejected (Case C-512/99 *Germany* v *Commission* [2003] ECR I-845, paragraph 81, and *Land Oberösterreich and Austria* v *Commission*, paragraph 69).

120 Since the Netherlands Government has not succeeded in demonstrating that any of those conditions was satisfied, it must be held that the Commission was obliged to reject the notified national provisions.

121 In those circumstances, the action must be dismissed as unfounded, without the necessity of adjudicating upon the other complaints raised by the applicant against the Decision.

Costs

122 Under Article 87(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 other party's pleadings.

123 In the present case, since the Kingdom of the Netherlands has been unsuccessful, it must be ordered to bear its own costs and pay those incurred by the Commission, in accordance with the form of order sought by the latter.

On those grounds,

THE COURT OF FIRST INSTANCE (Fourth Chamber)

hereby:

1. Dismisses the action;

2. Orders the Kingdom of the Netherlands to pay the costs.

Legal Wiszniewska-Białecka Moavero Milanesi

Delivered in open court in Luxembourg on 27 June 2007.

E. Coulon H. Legal

Registrar President