JUDGMENT OF THE COURT

21 January 2003 *

In Case C-512/99,

Federal Republic of Germany, represented by W.-D. Plessing and B. Muttelsee-Schön, acting as Agents,

applicant,

v

Commission of the European Communities, represented by G. zur Hausen, acting as Agent, with an address for service in Luxembourg,

defendant,

* Language of the case: German.

supported by

Republic of Finland, represented by T. Pynnä and E. Bygglin, acting as Agents, with an address for service in Luxembourg,

intervener,

APPLICATION for annulment of Commission Decision 1999/836/EC of 26 October 1999 on the national provisions concerning mineral wool notified by Germany derogating from Directive 97/69/EC adapting to technical progress for the 23rd time Council Directive 67/548/EEC on the approximation of the laws, regulations and administrative provisions relating to the classification, packaging and labelling of dangerous substances (OJ 1999 L 329, p. 100),

THE COURT,

composed of: G.C. Rodríguez Iglesias, President, J.-P. Puissochet, M. Wathelet, R. Schintgen and C.W.A. Timmermans (Presidents of Chambers), C. Gulmann, D.A.O. Edward, A. La Pergola, P. Jann, V. Skouris, F. Macken, N. Colneric, S. von Bahr, J.N. Cunha Rodrigues (Rapporteur) and A. Rosas, Judges,

Advocate General: A. Tizzano,
Registrar: R. Grass,

having regard to the report of the Judge-Rapporteur,

after hearing the Opinion of the Advocate General at the sitting on 30 May 2002,

gives the following

Judgment

1 By application lodged at the Court Registry on 28 December 1999, the Federal Republic of Germany brought an action under the first paragraph of Article 230 EC for annulment of Commission Decision 1999/836/EC of 26 October 1999 on the national provisions concerning mineral wool notified by Germany derogating from Directive 97/69/EC adapting to technical progress for the 23rd time Council Directive 67/548/EEC on the approximation of the laws, regulations and administrative provisions relating to the classification, packaging and labelling of dangerous substances (OJ 1999 L 329, p. 100, hereinafter 'the contested decision').

2 By order of the President of the Court of 28 September 2000, the Republic of Finland was granted leave to intervene in support of the form of order sought by the Commission.

Legal framework

EC Treaty

3 Article 100a of the EC Treaty (now, after amendment, Article 95 EC) provides, in paragraph 4:

'If, after the adoption of a harmonisation measure by the Council acting by a qualified majority, a Member State deems it necessary to apply national provisions on grounds of major needs referred to in Article 36, or relating to protection of the environment or the working environment, it shall notify the Commission of these provisions.

The Commission shall confirm the provisions involved after having verified that they are not a means of arbitrary discrimination or a disguised restriction on trade between Member States.

By way of derogation from the procedure laid down in Articles 169 and 170, the Commission or any Member State may bring the matter directly before the Court of Justice if it considers that another Member State is making improper use of the powers provided for in this article.'

4 The Treaty of Amsterdam, which came into force on 1 May 1999, substantially amended Article 100a of the Treaty and renumbered it Article 95 EC. Article 95 EC provides, in paragraphs 4, 5 and 6:

'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.'

Directive 67/548/EEC

5 Council Directive 67/548/EEC of 27 June 1967 on the approximation of laws, regulations and administrative provisions relating to the classification, packaging and labelling of dangerous substances (OJ English Special Edition 1967, p. 234) was adopted on the basis of Article 100 of the EEC Treaty (after amendment, Article 100 of the EC Treaty, now in turn Article 94 EC), which also relates to the approximation of the laws of the Member States.

6 Under Article 23 of Directive 67/548, as amended by Directive 96/56/EC of the European Parliament and the Council of 3 September 1996 (OJ 1996 L 236, p. 35, hereinafter 'Directive 67/548'), Member States are to take all the necessary measures to ensure that dangerous substances cannot be placed on the market unless the labelling on their packaging satisfies the requirements defined in the same article.

7 As stated in Article 4 of Directive 67/548, Annex I to that directive contains the list of dangerous substances classified in accordance with their intrinsic properties. That annex is regularly updated to reflect advances in scientific

knowledge. For that purpose, the entries in the list are revised and new entries are added.

Directive 97/69/EC

8 Commission Directive 97/69/EC of 5 December 1997 adapting to technical progress for the 23rd time Directive 67/548 (OJ 1997 L 343, p. 19) introduced, *inter alia*:

— a general entry on mineral wool into the list of dangerous substances contained in Annex I to Directive 67/548,

— a Note Q specifically relating to mineral wool into the foreword to Annex I.

9 The general entry defines mineral wool as '[m]an-made vitreous (silicate) fibres with random orientation with alkaline oxide and alkali earth oxide ($Na_2O+K_2O+CaO+MgO+BaO$) content greater than 18% by weight'.

10 Those man-made mineral fibres (hereinafter 'MMF') are classified as:

— Category 3 carcinogens. In accordance with the definition set out in point 3.2 in Annex VI to Directive 67/548, they are '[s]ubstances which cause concern

for man owing to possible carcinogenic effects but in respect of which the available information is not adequate for making a satisfactory assessment. There is some evidence from appropriate animal studies, but this is insufficient to place the substance in category 2.'

— Irritants. These are MMF which, according to Note Q in the foreword to Annex I, need not be classified as carcinogens if the result of an animal test is negative. Note Q offers four types of test. A mineral wool which fulfils that criterion need not be classified as a carcinogen, but classification and labelling as an irritant are maintained.

Background to the dispute

Application by the German Government

11 The Federal Republic of Germany transposed Directive 97/69 within the prescribed period, amending its national legislation accordingly.

12 However, since it considered that the assessment criteria in Directive 97/69 did not provide a sufficient level of protection, the German Government notified the Commission on 11 December 1998 of its intention to introduce national provisions which were more stringent than those provided for in Directive 97/69 as regards the classification and labelling of MMF (hereinafter 'the contested provisions'). That application was introduced on the basis of Article 100a(4) of the Treaty, which was applicable at the time.

13 According to the contested provisions, MMF are divided into two categories:

— those classified as Category 3 carcinogens,

— those classified as Category 2 carcinogens. According to point 3.2 of Annex VI to Directive 67/548, those are '[s]ubstances which should be regarded as if they are carcinogenic to man. There is sufficient evidence to provide a strong presumption that human exposure to a substance may result in the development of cancer, generally on the basis of appropriate long-term animal studies and other relevant information.'

14 MMF for which an animal test produces negative results are excluded from that classification. Those MMF therefore need not be either classified or labelled, even as irritants. The contested provisions are based on the notion that, in principle, MMF should be classified as Category 2 carcinogens. If a MMF does not satisfy the conditions for Category 2 classification, it must be classified in Category 3. If it does not fulfil the conditions for classification in Category 3, it must neither be classified nor labelled.

15 The German authorities base that assessment on the fact that, according to scientific studies, it must be assumed that MMF give rise to effects similar to those of asbestos. Therefore, certain MMF could potentially be carcinogens. Yet the use of MMF as thermal and acoustic insulation is steadily increasing.

The contested decision

16 On 26 October 1999, the Commission adopted the contested decision on the basis of Article 95(6) EC.

17 In that decision, the Commission found that 'the request made by Germany is not justified in the light of the substantive conditions set out in Article 95(5) [EC]' and rejected the contested provisions.

18 The contested decision was notified to the German Government on 28 October 1999.

Application for annulment

19 The Federal Republic of Germany asks the Court to annul the contested decision and order the Commission to pay the costs.

20 In support of its action, it relies on two main pleas, the incorrect choice of Article 95(5) EC as the legal basis for the contested decision and infringement of the right to a hearing and of the duty of cooperation under Article 10 EC and, in the alternative, on a third plea alleging misinterpretation of the conditions of application in Article 95(5) EC.

21 The Commission asks the Court to reject the application as unfounded and order the Federal Republic of Germany to pay the costs.

22 In its statement in intervention, the Republic of Finland, which considers only the third plea for annulment, concerning compliance with the conditions set out in Article 95(5) CE, submits that the Court should reject the application.

The first plea

Arguments of the parties

23 In its first plea, the applicant's primary contention is that the Commission should have adopted the contested decision on the basis of Article 100a(4) of the Treaty.

24 It maintains that Article 95(5) EC was used wrongly as the legal basis, since it was not in force when Directive 97/69 was adopted, when the period prescribed for transposing it expired, or when the contested provisions were notified to the Commission.

25 The fact that the Commission replied only 10 months later and that, at the time the contested decision was adopted, Article 95 EC was already in force cannot alter the legal basis applicable, which cannot depend on the date when the Commission considers an application.

26 Moreover, since the new set of rules under Article 95(5) EC is more stringent than that established under Article 100a(4) of the Treaty, the Commission should have assessed the German Government's application in the light of the article of the EC Treaty which was in force at the time when it was notified.

27 The applicant claims that Article 100a(4) of the Treaty cannot be precluded as a legal basis notwithstanding the fact that, in the present case, the directive from which the contested provisions seek to derogate was issued by the Commission rather than by the Council.

28 That article is applicable by analogy to Commission directives, since otherwise there would be a lacuna in the system of legal protection. The fact that legislative competence was conferred on the Commission to adapt an approximation directive adopted by the Council to technical progress cannot result in the weakening of the legal position of the Member States, at least in cases where the adoption of a directive by the Commission depends on a vote in an adaptation committee and a Member State is put into a minority position as the result of a vote by qualified majority.

29 In the alternative, the applicant states that, if it was not Article 100a(4) of the Treaty which was applicable but rather Article 95 EC, the contested decision would still be unlawful, because it is based on Article 95(5) EC rather than on 95(4), which would be the appropriate legal basis.

30 Article 95(4) EC corresponds almost word for word to Article 100(a)4 of the Treaty. The term 'maintain' in Article 95(4) EC should be understood as including national provisions adopted in order to implement harmonising measures. The fact that the German Government's application was not

considered in the light of Article 95(4) EC, although the conditions of that provision were satisfied, constitutes a further infringement of Community law.

31 The Commission replies that, under Article 7(1) EC, a Community institution may act only within the limits of the powers conferred upon it by the EC Treaty at the time the act in question was adopted.

32 Therefore, on 26 October 1999 the Commission could no longer take a decision on the basis of Article 100a(4) of the Treaty, since that provision had been replaced, with effect from 1 May 1999, by new provisions introduced by the Treaty of Amsterdam. As of 1 May 1999, the power conferred upon the Commission to approve or reject national provisions which derogate from harmonisation measures flows from Article 95(6) EC.

33 The Treaty of Amsterdam does not include transitional provisions as regards the amendments made to Article 100a of the Treaty. In the case of substantive rules, therefore, the governing principle is that a new rule applies directly to the future effects of situations arising during the currency of the earlier law, as follows *inter alia* from Case C-60/98 *Butterfly Music* [1999] ECR I-3939, paragraphs 25 and 26.

34 The Commission also denies that it allowed too much time to elapse between notification of the contested provisions and adoption of the contested decision. The procedures which it was required to follow could not have been carried out more quickly, in particular in the light of the difficulty of assessing the technical and scientific grounds put forward by the German Government. In any case, the Commission complied with the six month period prescribed by Article 95(6) EC — a period which began on 1 May 1999, when the Treaty of Amsterdam came into force.

35 In addition, the Commission states that the factual circumstances in the case precluded application of Article 95(4) EC.

36 The contested provisions did not exist at the time Directive 97/69, from which they derogate, was adopted. According to the Commission, they were national provisions which the German Government was considering adopting in the future, and not national provisions which it sought to maintain. However, it is clear from the wording of Article 95 EC that paragraph 4 thereof applies exclusively to national provisions which already exist at the time the harmonisation measure is adopted, while paragraph 5 refers to those which are introduced subsequently.

37 The Commission therefore considers that it adopted the contested decision on the appropriate legal basis, that is to say, Article 95(6) EC, and complied with the procedure laid down in that provision, at the same time applying the appropriate assessment criterion, set out in paragraph 5 of that article.

Findings of the Court

38 The Treaty of Amsterdam, which came into force on 1 May 1999, made amendments to Chapter 3, on the approximation of the laws of the Member States, of Title V of Part Three of the EC Treaty, without laying down transitional provisions in that field.

39 Under Article 100a(4) of the Treaty, which was applicable prior to the entry into force of the Treaty of Amsterdam, when, after the adoption of a harmonisation

measure, a Member State deemed it necessary to apply national provisions on grounds of the major needs referred to in Article 36 of the EC Treaty (now, after amendment, Article 30 EC) or relating to protection of the environment or the working environment, it was to notify them to the Commission. The Commission was to confirm the provisions in question after having verified that they were not a means of arbitrary discrimination or a disguised restriction on trade between Member States.

40 Article 95 EC, which under the Treaty of Amsterdam replaces and amends Article 100a of the Treaty, makes a distinction according to whether the provisions notified are national provisions already in place prior to harmonisation or national provisions which the Member State in question seeks to introduce. In the former case, under Article 95(4) EC, the maintenance of existing national provisions must be justified on grounds of the major needs referred to in Article 30 EC or relating to the protection of the environment or the working environment. In the latter case, under Article 95(5) EC, the introduction of new national provisions must be 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.

41 The difference between the two cases provided for in Article 95 EC is that, in the first, the national provisions predated the harmonisation measure. They were therefore known to the Community legislature but it could not or did not seek to be guided by them for the purpose of harmonisation. It was therefore considered acceptable for the Member State to request that its own rules remain in force. To that end, the EC Treaty requires that such national provisions must be justified on grounds of the major needs referred to in Article 30 EC or relating to the protection of the environment or the working environment. By contrast, in the second case, the adoption of new national legislation is more likely to jeopardize harmonisation. The Community institutions could not, by definition, have taken account of the national text when drawing up the harmonisation measure. In that case, the requirements referred to in Article 30 EC are not taken into account and

only grounds relating to protection of the environment or the working environment are accepted, on condition that the Member State provides new scientific evidence and that the need to introduce new national provisions results from a problem specific to the Member State concerned arising after the adoption of the harmonisation measure.

42 It is clear from the foregoing that the legal rules laid down in former Article 100a of the Treaty differ from those laid down in Article 95 EC.

43 In order to establish whether the Commission should have based its decision on the former Article 100a of the Treaty or was right to base it on the current Article 95 EC, account must be taken of the fact that, in the present case, the legal situation is characterised by the fact that a Member State initiated a procedure to obtain authorisation from the Commission to introduce national provisions derogating from a harmonisation measure.

44 That procedure is initiated by a Member State notifying derogating national provisions to the Commission, followed by a phase during which the Commission carries out an assessment of the facts in the file to determine whether the requisite conditions are fulfilled, and ends with the Commission's decision approving or rejecting those national provisions. To that end, it falls to the Commission to examine whether the grounds put forward by the Member State are well founded. It is not to decide until it has verified that the national provisions are not a means of arbitrary discrimination or a disguised restriction on trade between Member States.

45 In that context, no new legal situation can be said to have been established before the final step in that procedure has been taken. It is only then that, through

approval or rejection by the Commission, a measure likely to affect the earlier legal situation arises (Case C-319/97 *Kortas* [1999] ECR I-3143, paragraphs 27 and 28).

46 It is also settled case-law that, in the absence of transitional provisions, new rules apply immediately to the future effects of a situation which arose under the old rules (see, *inter alia*, Case C-162/00 *Pokrzeptowicz-Meyer* [2002] ECR I-1049, paragraph 50).

47 Since the contested decision was adopted on 26 October 1999 — that is, after the entry into force of Article 95 EC — it is plain that application of the contested provisions, notified in accordance with Article 100a(4) of the Treaty, did not reflect a legal situation already settled before the entry into force of the new provisions of the EC Treaty.

48 Therefore, the Commission was fully entitled to adopt the contested decision on the basis of Article 95(6) EC.

49 It must also be determined whether it was correct for the Commission to consider the grounds for the German Government's application to introduce new national provisions under Article 95(5) EC rather than Article 95(4).

50 As is clear from the file, the contested provisions, notified to the Commission on 11 December 1998, were not in force at the time Directive 97/69 was adopted. It was only after it had transposed that directive into national law that the German Government decided, on the basis of an alleged carcinogenic risk posed by some MMF, to draw up stricter labelling criteria than those provided for in that directive.

51 The Commission was therefore right to assess the German Government's application under Article 95(5) EC.

52 In the light of the foregoing considerations, the first plea must be rejected as unfounded.

The second plea

Arguments of the parties

53 In its second plea, the applicant alleges that the Commission infringed the right to a fair hearing and the duty to cooperate flowing from Article 10 EC.

54 It maintains that, since it could not know in advance that the Commission would adopt the contested decision on the basis of Article 95 EC, the Commission

should have made known its intention to examine the notification of the contested provisions on the basis of the criteria set out in Article 95(5) EC, giving the German Government time to justify an additional proposal on a new legal basis, under the duty to cooperate which flows from Article 10 EC, with which the Commission has complied in the past in similar cases.

55 The applicant states that it is not surprising that one of the decisive grounds for rejecting the application was the absence of new scientific evidence. Since the application was based on the conditions laid down in Article 100a(4) of the Treaty, it could not take account of the new conditions required under Article 95(5) EC, which was not then in force. The Commission's conduct was unreasonable inasmuch as it did not allow the German Government the opportunity to supplement its initial proposition by the new scientific evidence available to it. The grounds for the rejection, that is to say, the absence of new scientific knowledge, could have arisen only from infringement of the right to a fair hearing.

56 The Commission maintains that there is no legal principle or rule which requires it to inform a Member State of the provisions of Community law which are applicable at a given time. The general principle that ignorance of the applicable law is no excuse also applies to Member States.

57 Moreover, the German Government was aware that the Treaty of Amsterdam did not contain transitional provisions concerning the replacement of paragraphs 3 to 5 of Article 100a of the Treaty by paragraphs 3 to 10 of Article 95 EC. Since the Commission was not required to inform the Government of the new legal situation, it is of no importance that, in a similar case, that information was provided to the Member State concerned.

58 The Commission adds that it was not unaware that the relevant assessment criteria had changed following notification of the contested provisions, since the former system did not require such notification to be substantiated by new scientific evidence. Accordingly, it would have assessed that notification in the light of that fact.

Findings of the Court

59 It should be recalled that, as is clear from paragraphs 43 to 48 of the present judgment, Article 95 EC constitutes the appropriate legal basis for the contested decision.

60 It is established that the German Government could not have been unaware of the entry into force, on 1 May 1999, of the new provisions relating to the approximation of the laws of the Member States introduced into the EC Treaty by the Treaty of Amsterdam.

61 In those circumstances, the German Government was deemed to know, after that date, that the decision which the Commission would adopt concerning its application to implement the contested provisions would necessarily be based on the new legal basis, Article 95 EC. No other legal provision conferred on the Commission the power to take a decision in that area.

62 Moreover, the German Government could on its own initiative have supplemented the file which it sent to the Commission on 11 December 1998 to substantiate its application.

63 It follows that the Commission was in no way required to inform the German Government that the notification of the contested provisions would be assessed in the light of Article 95 EC. Therefore, in not doing so, the Commission infringed neither the right to a hearing of the applicant Member State nor the principle which imposes on the Member States and the Community institutions a reciprocal duty of cooperation.

64 In the light of the foregoing considerations, the second plea for annulment must be rejected.

The third plea

Arguments of the parties

65 In its third plea, the applicant claims that the Commission misinterpreted the conditions for applying Article 95(5) EC.

66 It maintains that, after Directive 97/69 was adopted, several publications appeared in 1998 and 1999 which contained new scientific evidence concerning the issue of MMF. That evidence would have confirmed the risks posed by MMF and the German Government's position that Community testing methods for MMF cannot ensure an assessment which reliably protects man and the environment.

67 The contested provisions seek to protect the environment and the working environment, as the Commission in any case acknowledged in the contested decision.

68 Those provisions are justified by a problem specific to the Federal Republic of Germany, both as regards the extent of the use of MMF and the structure of the user group.

69 Germany not only has the highest consumption of MMF insulation materials in the European Union, exposing a greater number of workers to fibre dust than in other Member States, but significant use of those materials is also made by individuals to whom the relevant provisions on industrial safety do not apply and who are less used to taking the necessary safety measures.

70 The specific nature of the German situation also results from a stricter environmental policy, which has resulted in a strengthening of the legal rules relating to thermal insulation, while Germany experiences very severe winters.

71 Moreover, for the applicant, the MMF problem appeared only after the harmonisation measure was adopted. The use of MMF in Germany increased after 5 December 1997, the date when Directive 97/69 was adopted, because of both national energy-saving measures and international obligations to decrease emissions of greenhouse gases which the Federal Republic of Germany endorsed by signing the Kyoto Protocol on 10 December 1997.

72 As regards the justification for stricter labelling of MMF under the conditions set out in Article 95(6) EC, the applicant maintains that such a measure is not a means of arbitrary discrimination, since it applies equally to both national products and products imported into Germany.

73 Nor is it a disguised restriction on trade between Member States. Since all national and foreign manufacturers have already directed their production towards products composed of biodegradable fibres, they are easily able technically to manufacture MMF for use in thermal and acoustic insulation without incurring disproportionate economic cost.

74 Finally, the requirement for stricter labelling laid down in the contested provisions is not a prohibition on marketing and therefore does not constitute an obstacle to the functioning of the internal market.

75 As regards the new scientific evidence relating to the protection of the environment or of the working environment, the Commission states that the applicant, in its action, refers to research which was not published until 1999, that is, after notification of the contested provisions, which took place on 11 December 1998. In its application to the Commission, the German Government did not even refer to the studies published in 1998 which also were cited in the action.

76 Consequently, according to the Commission, the contested decision could only be based on the information which had been communicated to it when the contested provisions were notified. The Commission and the Republic of Finland take the view that that information does not contain any new scientific evidence.

77 In addition, the Commission acknowledged, in the contested decision, that the purpose of the contested provisions was in fact the protection of the working environment and that they therefore satisfied the second condition laid down in Article 95(5) EC.

78 As regards the condition relating to the problem being specific to the Federal Republic of Germany, the Commission considers that the specificity required under Article 95(5) EC cannot result from the fact that individuals are increasingly using MMF in Germany, because the market in products used by individuals has also undergone considerable growth in other Member States. Moreover, the specific situation in the Federal Republic of Germany as regards its energy policy does not satisfy that condition, since the Kyoto Protocol has not yet entered into force and it is therefore not possible to anticipate whether it will have an effect on the use of MMF insulating materials.

79 Finally, the Commission maintains that assessment of the conditions laid down in Article 95(6) EC is pointless when the conditions mentioned in paragraph 5 of that article are not satisfied.

Findings of the Court

80 Article 95(5) EC requires that the introduction of national provisions derogating from a harmonisation measure be based on new scientific evidence relating to the protection of the environment or the working environment on grounds of a problem specific to the Member State concerned arising after the adoption of the harmonisation measure, and that the proposed provisions as well as the grounds for introducing them be notified to the Commission.

81 Since the conditions are clearly cumulative, they must all be satisfied if the national derogating provisions are not to be rejected by the Commission.

82 As regards the condition relating to the presentation of new scientific evidence, the Scientific Committee for Toxicology, Ecotoxicology and the Environment adopted an opinion on 10 September 1999 in which it found that the arguments put forward in the notification of the contested provisions did not allude to any scientific evidence which arose after the adoption of Directive 97/69.

83 On the basis of that opinion, the Commission held, in the contested decision, that that condition had not been satisfied.

84 The applicant challenges that assessment, admittedly in a rather vague manner, claiming it was not able to communicate to the Commission the new scientific evidence available to it for the purpose of introducing the contested provisions, because the Commission had not indicated that it would assess the grounds for its application under Article 95(5) EC, thereby preventing it from supplementing its application.

85 That argument cannot be upheld.

86 It should be recalled that Article 95(5) EC expressly requires, in addition to notification of the proposed provisions, notification of the grounds for introducing them. Those reasons must include, *inter alia*, new scientific evidence justifying, together with the other conditions mentioned, the introduction of the national provisions which are the subject of the notification. However, as is clear from paragraphs 62 and 63 above, the German Government cannot reasonably maintain that it could not supplement the file sent to the Commission on its own initiative but, rather, that the Commission was required to inform it that the notification of the contested provisions would be assessed in the light of Article 95(5) EC, requiring notification of the grounds for the national derogations.

87 It must therefore be held that the German Government failed to notify the grounds for the adoption of the contested provisions as required under Article 95(5) EC and that, as a result, that condition was not satisfied.

88 Given the cumulative nature of the requirements of Article 95(5) EC, there is no need to consider the conditions relating to the protection of the environment or the working environment and to the problem specific to the Federal Republic of Germany.

89 As regards the analysis with a view to verifying whether or not the contested provisions are a means of arbitrary discrimination or a disguised restriction on trade between Member States and whether or not they constitute an obstacle to the functioning of the internal market, as provided by Article 95(6) EC, it is clear

that such an analysis is to be carried out by the Commission only if it has first established that the Member State in question has in fact satisfied the conditions set out in paragraph 5 of that article. That was not the case here.

90 It follows that the Commission was right, in the contested decision, to reject the contested provisions.

91 The third plea must therefore be rejected, as well as the action as a whole.

Costs

92 Under Article 69(2) of the Rules of Procedure, the unsuccessful party is to be ordered to pay the costs if they have been applied for. Since the Commission asked for costs and the Federal Republic of Germany has been unsuccessful, costs must be awarded against the Federal Republic of Germany.

93 Under the second subparagraph of Article 69(4) of the Rules of Procedure, the Republic of Finland, which intervened in these proceedings, is to bear its own costs.

On those grounds,

THE COURT

hereby:

1. **Dismisses the action;**

2. **Orders the Federal Republic of Germany to pay the costs;**

3. **Orders the Republic of Finland to bear its own costs.**

Rodríguez Iglesias	Puissochet	Wathelet	
Schintgen	Timmermans	Gulmann	Edward
La Pergola	Jann	Skouris	Macken
Colneric	von Bahr	Cunha Rodrigues	Rosas

Delivered in open court in Luxembourg on 21 January 2003.

R. Grass — Registrar

G.C. Rodríguez Iglesias — President