JUDGMENT OF THE GENERAL COURT (Eighth Chamber)

9 December 2010 *

In Case T-69/08,

Republic of Poland, represented initially by M. Dowgielewicz, and subsequently by M. Dowgielewicz, B. Majczyna and M. Jarosz, and finally by M. Szpunar, acting as Agents,

applicant,

supported by

Czech Republic, represented by M. Smolek, acting as Agent,

by

Hellenic Republic, represented by A. Samoni-Rantou and M. Tassopoulou, acting as Agents,

* Language of the case: Polish.

and by

Republic of Austria, represented initially by E. Riedl, and subsequently by E. Riedl and C. Pesendorfer, and finally by E. Riedl, C. Pesendorfer, G. Hesse and M. Fruhmann, acting as Agents,

interveners,

v

European Commission, represented by M. Patakia, C. Zadra and K. Herrmann, acting as Agents,

defendant,

ACTION for annulment of Commission Decision 2008/62/EC of 12 October 2007 relating to Articles 111 and 172 of the Polish Draft Act on Genetically Modified Organisms, notified by the Republic of Poland pursuant to Article 95(5) of the EC Treaty as derogations from the provisions of Directive 2001/18/EC of the European Parliament and of the Council on the deliberate release into the environment of genetically modified organisms (OJ 2008 L 16, p. 17),

THE GENERAL COURT (Eighth Chamber),

composed of M. E. Martins Ribeiro (Rapporteur), President, S. Papasavvas and A. Dittrich, Judges,

Registrar: K. Pocheć, Administrator,

having regard to the written procedure and further to the hearing on 28 October 2009,

gives the following

Judgment

Legal context

1 Paragraph 4 of Article 100a of the EC Treaty (now, after amendment, Article 95 EC) provided:

'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 [of the EC Treaty; now, after amendment, Article 30 EC], 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 [of the EC Treaty; now, after amendment, Articles 226 EC and 227 EC], 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.'

2 The Treaty of Amsterdam, which entered into force on 1 May 1999, substantially amended Article 100a of the EC Treaty. Article 95 EC provides:

'1. By way of derogation from Article 94 [EC] and save where otherwise provided in this Treaty, the following provisions shall apply for the achievement of the objectives set out in Article 14 [EC]. The Council shall, acting in accordance with the procedure referred to in Article 251 [EC] and after consulting the Economic and Social Committee, adopt the measures for the approximation of the provisions laid down by law, regulation or administrative action in Member States which have as their object the establishment and functioning of the internal market.

2. Paragraph 1 shall not apply to fiscal provisions, to those relating to the free movement of persons nor to those relating to the rights and interests of employed persons.

3. The Commission, in its proposals envisaged in paragraph 1 concerning health, safety, environmental protection and consumer protection, will take as a base a high

level of protection, taking account in particular of any new development based on scientific facts. Within their respective powers, the European Parliament and the Council will also seek to achieve this objective.

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 [EC], 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.'

3 Article 254 EC provides:

'1. Regulations, directives and decisions adopted in accordance with the procedure referred to in Article 251 [EC] shall be signed by the President of the European Parliament and by the President of the Council and published in the *Official Journal of the European Union*. They shall enter into force on the date specified in them or, in the absence thereof, on the 20th day following that of their publication.

2. Regulations of the Council and of the Commission, as well as directives of those institutions which are addressed to all Member States, shall be published in the *Official Journal of the European Union*. They shall enter into force on the date specified in them or, in the absence thereof, on the 20th day following that of their publication.

3. Other directives, and decisions, shall be notified to those to whom they are addressed and shall take effect upon such notification.'

Background to the dispute

4 Directive 2001/18/EC of the European Parliament and of the Council of 12 March 2001 on the deliberate release into the environment of genetically modified organisms and repealing Council Directive 90/220/EEC (OJ 2001 L 106, p. 1) was adopted

on the basis of Article 95 EC. In accordance with Article 1 of Directive 2001/18, the objective of that directive is to approximate the laws, regulations and administrative provisions of the Member States and to protect human health and the environment when carrying out the deliberate release into the environment of genetically modified organisms ('GMOs') for any purposes other than placing on the market within the Community and when placing on the market GMOs as or in products within the Community.

5 By letter of 13 April 2007, the Republic of Poland notified the Commission of the European Communities (now 'the European Commission'), pursuant to Article 95(5) EC, of Articles 111 and 172 of a draft Polish Act ('the draft Act') concerning GMOs, as derogations from the provisions of Directive 2001/18.

6 The following elements of the draft Act were in derogation from that directive:

— the obligation on the person applying for authorisation for the deliberate release of GMOs into the environment to produce written declarations from the owners of holdings neighbouring the site of the deliberate release, in which they state that they do not object to the release, and a certificate from the mayor of the municipality, town or city confirming that, as regards the need to protect the local environment, nature and the cultivated landscape of the area concerned, the local land development plan provides for the possibility of deliberate release (points (5) and (6) of Article 111(2) of the draft Act);

— the prohibition of the cultivation of genetically modified plants in the national territory, subject to the possibility of cultivating those plants in areas specifically designated by the Minister responsible for agriculture (Article 172 of the draft Act).

7 By letter of 9 July 2007 to the Permanent Representation of the Republic of Poland to the European Union, the Secretariat General of the Commission acknowledged receipt of the Republic of Poland's notification under Article 95(5) EC. In that letter, the Commission stated, inter alia, that it would examine that notification within six months of 17 April 2007, that is to say, within six months of the first working day following the Commission's receipt of the application, and that, in accordance with the third subparagraph of Article 95(6) EC, the Commission might extend that period for a further period of six months if that was justified by the complexity of the matter and in the absence of danger to human health.

8 On 26 July 2007, the Commission published in the *Official Journal of the European Union* the notification given by the Republic of Poland under Article 95(5) EC (OJ 2007 C 173, p. 8).

9 On 12 October 2007, the Commission adopted, by means of expedited written procedure E/2254/2007, Decision C(2007) 4697 rejecting, on the basis of Article 95(6) EC, the derogations from the provisions of Directive 2001/18 as notified by the Republic of Poland ('the contested decision').

10 Article 1 of the contested decision provides that '[p]oints 5 and 6 of Article 111(2) and Article 172 of the draft Act … notified by Poland pursuant to Article 95(5) [EC], are rejected'.

11 By email of 12 November 2007, the Commission sent the Republic of Poland a copy of the contested decision. That email stated as follows:

'Dear [Madam], please find attached the Decision of the Commission concerning the Polish notification, as adopted and notified to the Republic of Poland on 12 October 2007 …'

12 By email of 30 November 2007, the Republic of Poland replied to the Commission as follows:

'Dear [Sir],

With regard to our most recent contacts (and to your email below), I must ask you whether the Commission has officially sent its response to the Polish authority concerning the Polish notification relating to the draft Act on GMOs. We can regard the documents attached to your latest email as no more than a draft Commission decision (of 11 October 2007), which was the subject-matter of the Commission's written procedure of the following day.

I hope that we are both aware that, in the absence of an official response from the Commission, there are certain consequences for the later stages of the procedure, in accordance with the Treaty.

I shall be grateful for your reply and clarification of this question.'

13 On 4 December 2007, the Commission, acting pursuant to Article 254 EC, notified the contested decision to the Republic of Poland.

14 By email of 5 December 2007, the Republic of Poland asked the Commission if it had been able to obtain confirmation that the contested decision had in fact been adopted and notified to the Republic of Poland. By email of the same day, the Commission replied that the contested decision had been notified on the previous day.

15 By letter of 20 December 2007, addressed to the Deputy Permanent Representative of the Republic of Poland to the European Union, the Deputy Secretary General of the European Commission stated, inter alia, as follows:

'With regard to the lodging of the draft Act on genetically modified organisms, received on 13 April 2007, the Commission adopted a decision on 12 October 2007 rejecting that draft Act for failure to produce new scientific evidence in accordance with Article 95(5) EC.

Owing to a technical error, the information did not reach Poland on the day on which that decision was adopted. On finding that the information had not reached the addressee, the Commission communicated its decision to Poland on 4 December 2007 …

Despite that delay in the communication of the information, the Commission would ask Poland to comply, within the six-month period laid down in Article 95(6) EC, with the terms of the decision adopted and to refrain from adopting any legal act entailing provisions in derogation from Directive 2001/18. We would also point out that Member States cannot rely on reasons relating to procedure as justification for

infringements of certain essential aspects of Community law; nor may they hinder the functioning of the internal market'.

16 The contested decision was published in the *Official Journal of the European Union* on 19 January 2008 (OJ 2008 L 16, p. 17).

17 During the period between 12 October and 4 December 2007, the Republic of Poland did not adopt the draft Act.

Procedure and forms of order sought

18 By application lodged at the Registry of the Court of First Instance (now 'the General Court') on 12 February 2008, the Republic of Poland brought the present action.

19 By documents lodged at the Registry of the General Court on 14 May, 23 May, 26 May and 30 May 2008 respectively, the Kingdom of Denmark, the Czech Republic, the Hellenic Republic and the Republic of Austria applied for leave to intervene in support of the form of order sought by the Republic of Poland.

20 By order of 4 July 2008, the President of the Eighth Chamber of the General Court granted the applications for leave to intervene referred to in paragraph 19 above.

21 On 20 August and 17 September 2008 respectively, the Czech Republic and the Republic of Austria lodged their statements in intervention. The main parties submitted their observations on those statements. The Hellenic Republic has not lodged a statement in intervention.

22 By document lodged at the Registry of the General Court on 12 March 2009, the Kingdom of Denmark applied to withdraw its application for leave to intervene.

23 By order of 20 April 2009, the President of the Eighth Chamber of the General Court granted that application.

24 The Republic of Poland claims that the General Court should:

— annul the contested decision;

— order the Commission to pay the costs.

25 The Commission contends that the General Court should:

— dismiss the action;

— order the Republic of Poland to pay the costs.

26 The Czech Republic claims that the General Court should:

— annul the contested decision;

— order the Commission to pay the costs.

27 The Republic of Austria claims that the General Court should:

— annul the contested decision;

— order the Commission to pay the costs.

28 Acting upon a report of the Judge-Rapporteur, the General Court (Eighth Chamber) decided to open the oral procedure and, by way of measures of organisation of procedure under Article 64 of its Rules of Procedure, to put a written question to the Commission, to which it replied within the period prescribed.

29 By letters lodged at the Registry of the General Court on 3 August, 18 September and 2 October 2009 respectively, the Republic of Austria, the Hellenic Republic and the Czech Republic informed the Court that they would not be represented at the hearing.

30 At the hearing on 28 October 2009, the main parties presented oral argument and answered oral questions put to them by the Court.

Law

31 The Republic of Poland raises three pleas in law in support of its action: (i) infringement of Article 95(6) EC, read in conjunction with Article 254(3) EC; (ii) breach of an essential procedural requirement; and (iii) breach of the principle of legal certainty.

32 It is appropriate first to examine the first of those pleas.

Arguments of the parties

33 The Republic of Poland, supported by the Czech Republic and the Republic of Austria, submits that Article 95(6) EC, read in conjunction with Article 254(3) EC, has been infringed.

34 In the first place, the Republic of Poland submits that the time-limit laid down in Article 95(6) EC is mandatory, given that the essential material effect of its expiry is that the notified national provisions are deemed to have been approved.

35 First, the mandatory nature of that time-limit reflects the intention of the Member States. Thus, from the entry into force of the Treaty of Amsterdam, the possibility of

adopting national provisions derogating from harmonised measures was made conditional on approval of that legislation by the Commission. On the other hand, the Commission's silence was regarded as indicating tacit consent to the adoption of the national measures.

36 Secondly, the mandatory nature of that time-limit, as well as the fact that, on its expiry, the national provisions are deemed to have been approved, were confirmed by the Court of Justice in Joined Cases C-439/05 P and C-454/05 P *Land Oberösterreich and Austria* v *Commission* [2007] ECR I-7141, paragraphs 40 and 41. Since the Commission did not, within the six-month period laid down in the first subparagraph of Article 95(6) EC, notify the Republic of Poland of its decision to approve or reject the national provisions, and since it did not inform the Republic of Poland of any extension of that period in accordance with the third subparagraph of that provision, Articles 111 and 172 of the draft Act are deemed to have been approved with effect from 14 October 2007.

37 Thirdly, the Republic of Poland submits that, although Article 95(6) EC makes express mention of an obligation to notify in respect of national provisions, but does not do so in respect of the Commission's decision, the reason for this is that Article 254(3) EC imposes such an obligation in respect of all Community decisions, but not in respect of national provisions. Furthermore, the Community judicature has already used the phrase 'adoption of the decision' in the broad sense so as to refer both to the internal adoption of a decision and to its notification (Case C-398/00 *Spain* v *Commission* [2002] ECR I-5643, paragraph 34, and *Land Oberösterreich and Austria* v *Commission*, paragraph 36 above, paragraph 37).

38 In the second place, the Republic of Poland — supported by the Czech Republic and the Republic of Austria — submits that only the date on which a decision is notified to its addressees is decisive for the purposes of its taking effect.

39 Thus, first, the mere adoption of a decision has no legal effect as regards the addressees. On the contrary, a decision takes effect, for the purposes of Article 254(3) EC, upon its notification to them, that is to say, at the time when the addressees of the decision are first able to acquaint themselves with its content. Accordingly, the adoption of the contested decision on 12 October 2007 had no effect as regards compliance with the six-month time-limit laid down in Article 95(6) EC.

40 In the present case, the contested decision was notified to the Republic of Poland on 4 December 2007, that is to say, after the six-month time-limit laid down in Article 95(6) EC had expired. The Republic of Poland was not aware of the adoption of the contested decision on 12 October 2007 or of its content, since that adoption was merely an internal act of the Commission. Accordingly, the contested decision was unable to produce any legal effects and could not have prevented the national provisions from taking effect, pursuant to the second subparagraph of Article 95(6) EC, upon expiry of the six-month time-limit laid down in the first subparagraph of that provision.

41 Secondly, the contested decision was notified on 4 December 2007 pursuant to Article 254 EC, by virtue of which decisions take effect upon their notification to those to whom they are addressed. *A contrario*, decisions do not take effect before they have been notified to their addressees. That analysis was confirmed by the Court in Case 98/78 *Racke* [1979] ECR 69, paragraph 15, and most recently stated in *Spain* v *Commission*, paragraph 37 above.

42 As regards the reference made by the Commission to the judgments of the Court of Justice in Case 48/69 *Imperial Chemical Industries* v *Commission* [1972] ECR 619, Case 52/69 *Geigy* v *Commission* [1972] ECR 787, and Case 185/73 *König* [1974] ECR 607, the Republic of Poland argues that those cases concerned the irregularity of the notification or of the publication of acts of Community law. None of those cases,

however, related to the infringement of Article 95(6) EC or a similar provision fixing a time-limit for notification or publication of an act and attaching an essential material effect to the expiry of that time-limit. It is true that *König* concerned a time-limit laid down in the Treaty. Unlike that time-limit, however, the time-limit laid down in Article 95(6) EC is an 'essential time-limit'. Consequently, in the view of the Republic of Poland, the delayed notification of the contested decision has an 'essential legal effect', that is to say, that the national provisions are deemed to have been approved.

43 Thirdly, in *Spain* v *Commission* (paragraph 37 above, paragraph 31), relating to a decision on State aid, the Court of Justice held that the adoption of the decision at issue could not have had the effect of interrupting the time-limit of 15 working days laid down in Article 4(6) of Council Regulation (EC) No 659/1999 of 22 March 1999 laying down detailed rules for the application of Article [88] EC (OJ 1999 L 83, p. 1) since, under Article 254(3) EC those decisions are to be notified to those to whom they are addressed and are to take effect upon such notification. The Court also stated in that judgment that the obligation of notification follows from the general provision laid down in Article 254(3) EC and that, in the case of all decisions, the time at which they take effect depends on their notification.

44 Fourthly, in accordance with the fifth paragraph of Article 230 EC, an action for annulment of a decision cannot be brought until after the decision has been notified, which rules out the possibility that a decision can take effect before notification: otherwise, where a decision is not notified or notified out of time, it would be impossible for the Courts to review its legality (Opinion of Advocate General Alber in *Spain* v *Commission*, paragraph 37 above, at ECR I-5646, point 69). In such circumstances, the Republic of Poland submits that it would have been in a paradoxical situation, since it would have been bound by the contested decision since 12 October 2007, but unable to bring an action against it before its notification by the Commission on 4 December 2007.

45 The Commission contends that the arguments raised by the Republic of Poland are unfounded.

46 In the first place, the Commission maintains that it fulfilled its obligation under Article 95(6) EC by adopting the contested decision within the time-limit fixed.

47 First, with regard to the *ratio legis* of Article 95(6) EC, the Commission states that Article 100a(4) of the EC Treaty did not lay down any time-limit within which the Commission was required to examine the provisions, notified by a Member State, which derogated from the provisions of the Community directives on the internal market. The Commission was merely required, pursuant to its duty of cooperation in good faith under Article 10 EC, to act with all due diligence and as swiftly as possible. The second subparagraph of Article 95(6) EC, introduced by the Treaty of Amsterdam, imposed a certain discipline as regards review. On the basis of the judgment in Case C-319/97 *Kortas* [1999] ECR I-3143, paragraphs 36 to 38, the Commission argues that the second subparagraph of Article 95(6) EC relates, however, to a situation where there is no Commission decision, not to a situation where the decision has not been notified.

48 Secondly, independently of the fact that notification of the contested decision was out of time, the Commission rejected Articles 111 and 172 of the draft Act and adopted the contested decision on 12 October 2007, that is to say, before the six-month period dating from notification of the national provisions in question expired. Accordingly, the Commission fulfilled its obligation under Article 95(6) EC. Thus, notification of the contested decision after the expiry of the six-month period (the adoption of the contested decision on 12 October 2007 not having been disputed by the Republic of

Poland) does not trigger the legal fiction provided for in the second subparagraph of Article 95(6) EC, which can arise only in the event of inaction on the part of the Commission. The Commission argues that, if Article 95(6) EC clearly placed the Commission under an obligation to notify its decisions within six months of notification of the national provisions and if, failing such notification within that period, the national provisions were to be deemed approved, the reliance by the Republic of Poland on Article 254(3) EC would be superfluous. In the Commission's view, for there to be any implied approval of the national legislation upon the expiry of a six-month period dating from its notification in the event that the Commission did not notify its decision within that period, express provision to that effect would have had to be made in Article 95(6) EC. Moreover, in *Spain* v *Commission* (paragraph 37 above, paragraph 30), the Court of Justice held that the measure adopted by the members of the Commission in the expedited written procedure, in accordance with Article 12 of the Commission's Rules of Procedure and authenticated by signature of the Secretary-General, became a decision of the Commission for the purposes of Article 249 EC on the same day as its adoption. According to the Commission, the position is the same in the present case.

49 Thirdly, in the view of the Commission, the Republic of Poland appears to be arguing that the fact that the contested decision of 12 October 2007 was out of time gave rise to a second decision, that is to say, an *actus contrarius* rejecting the alleged approval of the derogations proposed by the draft Act notified. That reasoning is manifestly incorrect and contrary to the very content of the application, since the Republic of Poland does not dispute that the contested decision was adopted on 12 October 2007.

50 Fourthly, the Commission's interpretation is supported, it contends, by the wording of the first and third subparagraphs of Article 95(6) EC, which refer expressly to a 'notification', unlike the second subparagraph of that provision. Thus, according to the Commission, a literal interpretation of Article 95(6) EC enables the view to be taken that the sole condition that must be met if the Commission is to fulfil its review obligation is that the Commission must adopt its decision within the six-month period allowed for that purpose. That interpretation was confirmed by the Court of Justice in *Land Oberösterreich and Austria* v *Commission* (paragraph 36 above, paragraphs 37

and 40). The Republic of Poland recognises, moreover, that the requirement of notification within a six-month period shortens the time that is effectively available for adoption of the decision by the Commission, to the detriment of the review procedure and to the obligation to state reasons for that decision. That interpretation is necessary also in view of the objective of Article 95(6) EC, which is to define a temporal framework within which the Commission must rule on the national provisions notified to it with a view to derogation from the harmonisation measures of the internal market.

51 In the second place, although, under the EC Treaty, the notification of a Commission decision has implications as regards the taking effect of that decision in relation to those to whom it is addressed and on the determination of the point at which time starts to run for the purposes of bringing proceedings, it has no effect on the validity of that decision.

52 First, in *Imperial Chemical Industries* v *Commission* (paragraph 42 above, paragraph 39), the Court of Justice found that irregularities in the procedure for notifying a decision under Article 254(3) EC are extraneous to that measure and cannot therefore invalidate it. In the present case, the delay in notifying the contested decision, brought about by a technical error, could constitute such an irregularity. Furthermore, in *Geigy* v *Commission* (paragraph 42 above, paragraph 18), the Court of Justice considered the issue of notification in the light of the time-limit for bringing proceedings laid down in Article 230 EC. After finding that irregularities in notification had not prevented the applicant from instituting proceedings, the Court accordingly considered the plea in law alleging infringement of Article 254(3) EC to be inadmissible for lack of a legal interest in bringing proceedings. Furthermore, in *König* (paragraph 42 above, paragraphs 6 to 8), the Court of Justice held that the late publication of a regulation does not affect its validity, but only the date from which that measure can be applied and produce legal effects. Lastly, in Case C-149/96 *Portugal* v *Council* [1999] ECR I-8395, paragraph 54, the Court of Justice also pointed

out that the belated publication of a Council decision in the *Official Journal of the European Union* does not affect the validity of that measure.

53 Secondly, the applicant's reference to *Spain* v *Commission* (paragraph 37 above), fails to take into account the specific context and the legal effects of the procedure laid down in Article 95(6) EC. Thus, for the Commission, Article 95(6) EC concerns provision made under the draft legislation of a Member State which manifestly derogates from the rules of the internal market but which could be tolerated under certain conditions. If a decision adopted pursuant to Article 95(6) EC were to be regarded as unlawful because it had not been notified within the six-month period specified, the Commission would be deprived of any opportunity to carry out subsequently a legal verification of the national derogating provisions, which would certainly not be in accordance with the intentions of the authors of the Treaty. However, in *Spain* v *Commission* (paragraph 37 above), the annulment of the disputed decision, on the ground that it had been notified out of time, merely entailed a new legal categorisation of the State aid project, thus leaving it open for the Commission to check the legal aspects. Furthermore, *Spain* v *Commission* (paragraph 37 above) concerns a factual and legal situation which is completely different from that in the present case. In particular, the requirement for immediate notification of a decision adopted on the basis of Regulation No 659/1999 is expressly provided for in Article 25 of that regulation, which is not the case as regards Article 95(6) EC or Article 254(3) EC. Accordingly, the Court's reasoning is not absolute.

54 Thirdly, the legal effects of the notification of the contested decision on 4 December 2007 are that it causes the time-limit laid down in the fifth paragraph of Article 230 EC for the purposes of bringing proceedings to begin to run and makes it possible to rely on the contested decision as against the Republic of Poland. In the present case, the Commission contends that the Republic of Poland did not adopt Articles 111 and 172 of the draft Act either during the period preceding notification of the contested decision or after its notification and that, in support of its action, the Republic of Poland relies only on the notification of the contested decision on 4 December 2007. It is clear from the case-law that that notification does not affect the validity

of the contested decision but constitutes merely an obstacle to its enforceability as against the Republic of Poland during the period from 12 October 2007 to 4 December 2007. In addition, it is arguable that the Republic of Poland knew of the rejection of the draft Act before the contested decision was officially notified.

Findings of the Court

55 It should be recalled at the outset that the EC Treaty seeks progressively to establish the internal market, which comprises an area without internal borders, within which the free movement of goods, persons, services and capital is assured. To that end, the EC Treaty provides for the adoption of measures for the approximation of the laws of the Member States. In the course of the evolution of primary law, the Single European Act introduced a new provision, Article 100a, into that Treaty (Case C-3/00 *Denmark* v *Commission* [2003] ECR I-2643, paragraph 56), which was replaced, upon the entry into force of the Treaty of Amsterdam on 1 May 1999, by Article 95 EC.

56 The Treaty of Amsterdam thus 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 (Case C-512/99 *Germany* v *Commission* [2003] ECR I-845, paragraph 38).

57 Under Article 100a(4) of the EC Treaty, applicable prior to the entry into force of the Treaty of Amsterdam, where, 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 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 (Case C-41/93 *France* v *Commission* [1994] ECR I-1829, paragraph 27, and *Germany* v *Commission*, paragraph 56 above, paragraph 39). Accordingly, a Member State was not authorised to apply the national provisions notified by it under Article 100a of the EC Treaty until after it had obtained a decision from the Commission confirming them (*France* v *Commission*, paragraph 30).

58 Article 100a(4) of the EC Treaty did not provide for any time-limit within which the Commission was to confirm the provisions notified to it. Nevertheless, the Court of Justice considered that the fact that there was no time-limit could not absolve the Commission from the obligation to act with all due diligence in discharging its responsibilities (*Kortas*, paragraph 47 above, paragraph 34).

59 Article 95 EC, which, by virtue of the Treaty of Amsterdam, replaced and amended Article 100a of the EC Treaty, distinguishes between notified provisions according to whether they are national provisions which existed prior to harmonisation or national provisions which the Member State concerned wishes to introduce. In the first case, provided for in Article 95(4) EC, the maintenance of existing national provisions must be justified on grounds of major needs referred to in Article 30 EC or relating to the protection of the environment or the working environment. In the second case, provided for in Article 95(5) EC, the Member States are required to submit for approval by the Commission all national derogating provisions which they believe are necessary (Case C-405/07 P *Netherlands* v *Commission* [2008] ECR I-8301, paragraph 51). In such circumstances, 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 (*Germany* v *Commission*, paragraph 56 above, paragraph 40).

60 It should be emphasised that, under the second subparagraph of Article 95(6) EC, national derogating provisions are deemed to have been approved if the Commission does not adopt a decision within a period of six months following the notifications referred to in Article 95(4) and (5) EC. In addition, under the third subparagraph of

Article 95(6) EC, no extension of that period is allowed if the matter is not complex and where there is a danger for human health (*Land Oberösterreich and Austria* v *Commission*, paragraph 36 above, paragraph 40).

61 Thus, it is apparent from that provision that the Community legislature considered it necessary, in the Treaty of Amsterdam, to impose a certain time-limit on the Commission within which it was to verify national provisions notified to it (see, to that effect, *Kortas*, paragraph 47 above, paragraph 33).

62 According to the case-law, it is apparent from the second subparagraph of Article 95(6) EC that the authors of the Treaty intended, in the interests both of the notifying Member State and of the proper functioning of the internal market, that the procedure laid down in Article 95 EC should be swiftly concluded (see, to that effect, *Denmark* v *Commission*, paragraph 55 above, paragraph 49; *Land Oberösterreich and Austria* v *Commission*, paragraph 36 above, paragraphs 40 and 41; and Joined Cases T-366/03 and T-235/04 *Land Oberösterreich and Austria* v *Commission* [2005] ECR II-4005, paragraph 43).

63 In the present case, it is common ground that the contested decision was notified to the Republic of Poland on 4 December 2007, that is to say, after the expiry of the six-month period laid down in the first subparagraph of Article 95(6) EC.

64 Nevertheless, the Commission contends, in that regard, that the contested decision was adopted on 12 October 2007, that is to say, before the expiry of the six-month period laid down in the second subparagraph of Article 95(6) EC, and that, accordingly, the Commission fulfilled its obligation under that provision.

65 In support of that assertion, the Commission has produced a number of documents relating to the adoption procedure for the contested decision: a copy of a note for the members of the Commission of 9 October 2007 concerning expedited written procedure E/2254/2007, with a view to adoption of the contested decision; a copy of an addendum of 11 October 2007 to that note (which bears a stamp stating 'APPROVED 12 OCT. 2007 SGAII – 11:00'); and a copy of the note for the members of the Commission of 12 October 2007, entitled 'Approval of the written proceedings', by which the Director of the Registry of the Secretariat-General of the Commission gives formal notice to the members of the Commission that it has, inter alia, adopted the contested decision, on 12 October 2007, under the written procedure.

66 It is apparent from those documents that the members of the Commission were in effect called upon to take a position on 12 October 2007, by means of the expedited written procedure, on the proposal from the Directorate-General for the 'Environment', approving the draft Commission decision concerning the draft Act.

67 None the less, contrary to the assertions made by the Commission, adoption of the contested decision on that date could not have had the effect of interrupting the six-month time-limit laid down in the first subparagraph of Article 95(6) EC. In accordance with the terms of Article 254(3) EC, the contested decision took effect upon its notification to the addressee: in the present case, the Republic of Poland (see, to that effect, Case 130/78 *Salumificio di Cornuda* [1979] ECR 867, paragraph 23, and Case C-18/08 *Foselev Sud-Ouest* [2008] ECR I-8745, paragraph 18).

68 Admittedly, as the Commission points out, the second subparagraph of Article 95(6) EC refers, unlike the third subparagraph of that provision, to the 'absence of a decision' of the Commission. Nevertheless, it must be held, with regard to a decision the object of which is to prevent the adoption of national provisions notified to the

Commission by a Member State, that its taking of effect — which by definition coincides with the interruption of the six-month time-limit laid down in the first subparagraph of Article 95(6) EC — cannot arise before the date on which it becomes enforceable as against that Member State, that is to say, the date on which it is notified (see, by analogy, *Spain* v *Commission*, paragraph 37 above, paragraph 32). In reply to a question from the Court at the hearing, the Commission also stated in that regard that, since the entry into force of the Treaty of Amsterdam, no Commission decision adopted on the basis of Article 95(6) EC had been notified to the Member State concerned after the expiry of the six-month period referred to in the first subparagraph of that provision.

69 In view of the foregoing considerations, the second subparagraph of Article 95(6) EC, which refers to 'the absence of a decision by the Commission within [the] period [of six months referred to in the first subparagraph of this provision]', cannot therefore be interpreted as meaning that the mere adoption of the decision interrupts that period, irrespective of when that decision is notified. As the Republic of Poland points out, the internal decision-making process of the Commission is not, as a general rule, perceptible to the Member State concerned. Accordingly, if the basis for interrupting the time-limit were to be taken as the adoption of the decision and not as its notification to the Member State concerned, that time-limit would be extended as regards the latter (see, to that effect, Opinion of Advocate General Alber in *Spain* v *Commission*, paragraph 37 above, points 66 and 67).

70 That finding cannot be called in question by the Commission's argument that a 'technical error' occurred in connection with the notification of the contested decision, which was omitted from the list prepared by the Commission Secretariat-General of the decisions to be notified, since such an error is solely attributable to the Commission.

71 It follows from those considerations that the contested decision, adopted on 12 October 2007, but not notified to the Polish authorities until 4 December 2007, was adopted after the expiry of the six-month period laid down in the first subparagraph of Article 95(6) EC. With effect from the expiry of that period, the draft Act was therefore deemed to have been approved and, as a consequence, could not be rejected by the Commission by the contested decision.

72 It follows from all the foregoing considerations that the present plea in law must be upheld and that the contested decision must be annulled.

Costs

73 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 successful party's pleadings. Since the Commission has been unsuccessful, it must be ordered to pay the costs in accordance with the form of order sought by the Republic of Poland.

74 In accordance with Article 87(4) of the Rules of Procedure, the Czech Republic, the Hellenic Republic and the Republic of Austria must bear their own costs.

On those grounds,

THE GENERAL COURT (Eighth Chamber)

hereby:

1. **Annuls Commission Decision 2008/62/EC of 12 October 2007 relating to Articles 111 and 172 of the Polish Draft Act on Genetically Modified Organisms, notified by the Republic of Poland pursuant to Article 95(5) of the EC Treaty as derogations from the provisions of Directive 2001/18/EC of the European Parliament and of the Council on the deliberate release into the environment of genetically modified organisms;**

2. **Orders the European Commission to bear its own costs and to pay those incurred by the Republic of Poland;**

3. **Orders the Czech Republic, the Hellenic Republic and the Republic of Austria to bear their own costs.**

Martins Ribeiro Papasavvas Dittrich

Delivered in open court in Luxembourg on 9 December 2010.

[Signatures]