OPINION OF ADVOCATE GENERAL GEELHOED

delivered on 1 June 2006 [1]

I — Introduction

1. In this action brought under Article 230 EC, the European Parliament seeks the annulment of Directive 2004/85 [2] granting Estonia a temporary derogation as regards the application of certain provisions of Directive 2003/54 concerning common rules for the internal market in electricity. [3] The action is based on the ground that Directive 2004/85 was based incorrectly on Article 57 of the Act of Accession of 23 September 2003. [4] In parallel with this application, the European Parliament brought a similar action against the Council in respect of a temporary derogation granted to Slovenia on the basis of the same provision. [5] My Opinion in that case will be presented together with my Opinion in this case.

2. In the following section, I will only cite the relevant procedural provisions of the Act of Accession. The other substantive provisions relating to the derogation as such will be described in Section III in which the background to the dispute is explained.

II — Relevant provisions

3. The European Parliament's application concerns the correct interpretation to be given to Article 57 AA which provides:

1 — Original language: English.

2 — Council Directive 2004/85/EC of 28 June 2004 amending Directive 2003/54/EC of the European Parliament and of the Council as regards the application of certain provisions to Estonia (OJ 2004 L 236, p. 10; ('Directive 2004/85').

3 — Directive 2003/54/EC of the European Parliament and of the Council of 26 June 2003 concerning common rules for the internal market in electricity and repealing Directive 96/92/EC (OJ 2003 L 176, p. 37; ('Directive 2003/54').

4 — Act concerning the conditions of accession of the Czech Republic, the Republic of Estonia, the Republic of Cyprus, the Republic of Latvia, the Republic of Lithuania, the Republic of Hungary, the Republic of Malta, the Republic of Poland, the Republic of Slovenia and the Slovak Republic and the adjustments to the Treaties on which the European Union is founded of 23 September 2003 (OJ 2003 L 236, p. 33; ('Act of Accession' or 'AA').

5 — Case C-414/04 *European Parliament* v *Council*, pending before the Court.

'1. Where acts of the institutions prior to accession require adaptation by reason of accession, and the necessary adaptations have not been provided for in this Act or its annexes, those adaptations shall be made in accordance with the procedure laid down by paragraph 2. Those adaptations shall enter into force as from accession.

2. The Council, acting by a qualified majority on a proposal from the Commission, or the Commission, according to which of these two institutions adopted the original acts, shall to this end draw up the necessary texts.'

4. In order to examine Article 57 AA in its proper context, it is necessary to cite Article 55 AA which provides as follows:

'At the duly substantiated request of one of the new Member States, the Council, acting unanimously on a proposal from the Commission, may, before 1 May 2004, take measures consisting of temporary derogations from acts of the institutions adopted between 1 November 2002 and the date of signature of the Treaty of Accession.'

5. Reference should also be made to an information and consultation procedure laid down in an exchange of letters between the European Union and the new Member States, which was annexed to the Final Act to the Treaty of Accession. Under this procedure, it was agreed that the European institutions would adequately inform the acceding States of any proposal, communication, recommendation or initiative which might lead to decisions by the institutions or bodies of the European Union. Following a reasoned request of an acceding State, setting out its interests as a future member of the Union, consultations could take place on such a decision in an interim committee, composed of representatives of the Union and of the acceding States. If serious difficulties remained after consultations, the matter could be raised at ministerial level at the request of an acceding State.

III — Background to the dispute

6. The electricity sector in Estonia is characterised by the fact that oil shale is the most important fuel used for the production of electricity. Ninety per cent of the electricity produced in Estonia is from this solid fuel, which is the only indigenous energy source in that country. It is therefore of great strategic importance for security of supply in Estonia. For reasons of increasing efficiency and meeting Community environment standards, the sector is currently being

reformed. Investments made for that purpose need to be guaranteed for a period extending beyond 2008 which is only possible by means of a gradual introduction of competition. [6]

7. In view of these specific characteristics, during the negotiations on its accession to the European Union, Estonia requested a transitional period for applying Article 19(2) of the first electricity directive, Directive 96/92, [7] which required the Member States to have opened their national electricity markets as regards large-scale consumers of electricity (defined in terms of an annual electricity consumption of 40 GWh to be reduced first to a level of 20 GWh and subsequently to 9 GWh) by 1 July 2004. Estonia was granted a derogation until 31 December 2008 in respect of this obligation which was laid down in Annex VI to the Act of Accession. [8]

8. In addition, in view of the intention expressed in the conclusions of the Lisbon and Barcelona European Councils to accelerate the process of liberalisation in the Community electricity and gas sectors, a declaration (No 8) was annexed to the Treaty of Accession on the effects of these developments for Estonia. [9] In this declaration, the Union notes that Estonia reserves its position on future legislative developments regarding the market for electricity. It also recognises that the specific situation related to the restructuring of the oil shale sector in Estonia will require particular efforts until the end of 2012 and that the Estonian electricity market for non-household customers can only be opened gradually until that date. [10]

9. The acceleration of the opening of the Member States' electricity markets envisaged in the conclusions of the European Councils was agreed upon by the European Parliament and the Council in June 2003, some two months after the signature of the Treaty of Accession. This agreement was laid down in Directive 2003/54 which was based on Articles 47(2) EC, 55 EC and 95 EC and

6 — Paragraphs 12 to 15 of the explanatory memorandum to the Commission's proposal for a directive of the European Parliament and of the Council amending Directive 2003/54/EC of the European Parliament and of the Council as regards the application of certain provisions in Estonia (COM(2004) 318 final).

7 — Directive 96/92/EC of the European Parliament and of the Council of 19 December 1996 concerning common rules for the internal market in electricity (OJ 1997 L 27, p. 20).

8 — Annex VI to the Act of Accession, Section 8, point 2: 'In Estonia, Article 19(2) of Directive 96/92/EC shall not apply until 31 December 2008'.

9 — Declaration No 8 on oil shale, the internal electricity market and Directive 96/92/EC of the European Parliament and of the Council of 19 December 1996 concerning common rules for the internal market in electricity (electricity directive): Estonia.

10 — The second paragraph of this declaration reads as follows: 'The Union draws Estonia's attention to the conclusions of the Lisbon and Barcelona European Councils, related to accelerated market opening in — among others — the electricity and gas sectors, with the aim of achieving a fully operational internal market in these areas, and notes Estonia's earlier statements made in this regard on 27 May 2002 in the context of the accession negotiations. Notwithstanding the need for the early implementation of an operational internal electricity market, the Union takes note that Estonia reserves its position regarding future legislative developments in this area. The Union recognises in this respect the specific situation related to the restructuring of the oil shale sector which will require particular efforts until the end of 2012, and the need for gradual opening of the Estonian electricity market for non-household customers until that date.'

which wholly replaced and repealed Directive 96/92. Article 21 of Directive 2003/54 provides for the complete opening of the electricity markets for all categories of customers, both industrial and household, as from 1 July 2007. More specifically, Article 21(1) of Directive 2003/54 provides for the opening of the electricity market for the various categories of eligible customers according to the following time schedule:

'(a) until 1 July 2004, the eligible customers as specified in Article 19(1) to (3) of Directive 96/92/EC. ...;

(b) from 1 July 2004, at the latest, all non-household customers;

(c) from 1 July 2007, all customers.'

10. The second paragraph of Article 29 of Directive 2003/54 determines that references made to the repealed directive are to be construed as being made to the new directive in accordance with the correlation table annexed to the latter. According to this correlation table, Article 21 of Directive 2003/54 corresponds to Article 19 of Directive 96/92.

11. In these new circumstances, by letter of 17 September 2003, Estonia requested the Commission to take the necessary steps under Article 57 AA, on the one hand, to adapt the derogation granted in Annex VI to the Act of Accession in respect of Article 19(2) of Directive 96/92 so that it applied to Article 21(1)(a) of Directive 2003/54, and, on the other hand, to grant it a transitional period for applying Article 21(1)(b) of Directive 2003/54. At that stage it reserved its position with regard to the full opening of its electricity market as provided for in Article 21(1)(c), though later indicated in response to a request by the Commission that it was planning to comply with this provision by 31 December 2015.

12. The Commission thereupon drafted a proposal for a directive of the European Parliament and of the Council on the basis of Articles 47(2) EC, 55 EC and 95 EC aimed at amending Directive 2003/54 to the effect that Estonia be granted a temporary derogation from the application of Article 21(1)(b) and (c) until 31 December 2012.[11] This resulted in the adoption of Directive 2004/85 by the Council on the basis of Article 57 AA, rather than on the basis of the provisions of the EC Treaty invoked by the Commission.

11 — COM(2004) 318 final.

Article 1 of Directive 2004/85 provides that the following paragraph shall be added to Article 26 of Directive 2003/54:

'3. Estonia shall be granted a temporary derogation from the application of Article 21(1)(b) and (c) until 31 December 2012. Estonia shall take the measures necessary to ensure the opening of its electricity market. This shall be carried out gradually over the reference period with the aim of complete opening of the market by 1 January 2013. On 1 January 2009, the opening of the market must represent at least 35% of consumption. Estonia shall communicate annually to the Commission the consumption thresholds extending eligibility to final customers.'

13. In a letter of 9 July 2004 addressed to the President of the European Parliament, the Secretary-General of the Council explained that the Council had decided to base the directive on Article 57 AA in view of the close link between the Commission's proposal and the Treaty of Accession and in view of the need to adapt Directive 2003/54 in time, that is before 1 July 2004, the date from which it was to apply. Article 57 AA does not require the participation of the European Parliament.

IV — Procedure and forms of order sought

14. In its application which was brought on 27 September 2004 under Article 230 EC, the European Parliament requests the Court to:

— annul Directive 2004/85;

— order the Council to pay all the costs.

15. The Council requests the Court to:

— dismiss the application;

— order the European Parliament to pay the costs.

16. By order of 21 December 2004, the President of the Court granted leave to the Commission to intervene in support of the form of order sought by the European Parliament.

17. By order of 9 March 2005, the President of the Court granted leave to the Republic of Estonia and the Republic of Poland to intervene in support of the form of order sought by the Council.

18. The European Parliament, the Council, the Commission and the Estonian and Polish Governments presented oral argument at the hearing on 15 March 2006. The case was heard together with Case C-414/04, referred to above.

V — Summary of the parties' submissions

A — *First ground for annulment: inappropriate legal base*

1. The European Parliament, supported by the Commission

19. The European Parliament maintains, first, that Article 57 AA is not the appropriate legal base for the adoption of Directive 2004/85. In its view, this directive should have been adopted according to the normal legislative procedure under Articles 47(2) EC, 55 EC and 95 EC, as proposed by the Commission. Legislative practice provides various examples of temporary derogations being granted to new Member States under these provisions and Article 15 EC in order to take account of differences in development between economies. It points out that Article 57 AA provides for a procedure for adapting Community legislation by reason of accession and for applying to the new Member States Community acts which have not been adapted by the Act of Accession itself. Amendments going beyond this objective cannot be based on Article 57 AA. That provision cannot be used to introduce derogations to Community acts, particularly those which go beyond those expressly granted by and delimited in the Act of Accession.

20. Derogations to Community acts which were not included in the Act of Accession itself can only be based on Article 55 AA. However, this provision is only applicable in respect of Community acts which were adopted between the date of the conclusion of the accession negotiations, the so-called 'cut-off date' (1 November 2002), and the date of the signature of the Treaty of Accession (16 April 2003). The restricted character of this provision is also emphasised by the fact that it requires decision-making with unanimity in the Council. It is therefore inconceivable that Article 57 AA, which only concerns 'adaptations' to Community acts, which is not restricted to acts adopted within a defined period and which provides for

decision-making by a qualified majority, could be used for granting derogations from Community acts adopted after the date of signature of the Treaty of Accession.

21. This reading is confirmed by the fact that the parallel provision to Article 55 AA in the Act of Accession of 2005 concerning the conditions of accession of Bulgaria and Romania to the European Union [12] explicitly provides for the possibility of the Council granting derogations to Community acts adopted in the period between the cut-off date and the date of accession, rather than just between the cut-off date and the date of signature. This demonstrates that the former possibility is not provided for in the Act of Accession of 2003 and that Article 57 AA act cannot be used as a basis for granting derogations.

22. As the basic principle in respect of accession is the complete acceptance by the new Member States of the *acquis communautaire* and the full application of Community law, the provisions permitting derogations to be granted are to be interpreted restrictively. In this regard, the European Parliament points out that where the 'adaptations' provided for in Article 57 AA are aimed at facilitating the application of Community law in the new Member States, 'derogations' have the opposite effect of rendering certain provisions of Community law temporarily inapplicable. This means that one of the conditions for applying Article 57 AA as a basis for decision-making is not fulfilled. It also implies that it cannot be used for extending derogations which have already been granted and delimited in the Act of Accession.

23. The European Parliament observes that the transitional period laid down in the contested directive, which runs until the end of 2012, even derogates from the Act of Accession itself, as the latter only provides for a transitional period until the end of 2008.

24. As to the urgency referred to in the Council's letter of 9 July 2004, the European Parliament notes that the Council did not request it to apply the urgency procedure after the Commission had submitted its proposal. At any rate, the derogation under Annex VI to the Act of Accession applied until the end of 2008.

25. In its submissions in support of the European Parliament's application, the Commission states that the Act of Accession provides for a coherent system of provisions for making technical adaptations to Community acts and for dealing with developments in the *acquis communautaire* in the period between the cut-off date and the date of accession. Article 55 AA represents a kind

12 — Act concerning the conditions of accession of the Republic of Bulgaria and Romania and the adjustments to the Treaties on which the European Union is founded of 25 April 2005 (OJ 2005 L 157, p. 203).

of continuation of the accession negotiations, as it permits new Member States to request derogations from acts adopted between the cut-off date and the date of signature. After the latter date, the information and consultation procedure applies. In this context, the new Member States enjoy observer status within the institutions and can submit their requests for derogations during the legislative procedure.

26. Article 57 AA pursues a different objective than Article 55 AA. Indeed, the very coexistence of both provisions demonstrates that the one cannot be substituted for the other. Article 57 AA is intended as a legal base for making the necessary adaptations to Community acts which are indispensable for facilitating accession. Derogations, by contrast, are never indispensable in this sense. Where no choice exists in respect of whether or not an adaptation is necessary, derogations require a political choice to be made. This also explains why qualified majority voting is sufficient in Article 57 AA, whereas Article 55 AA requires unanimity.

27. In the light of the different wording of these two provisions in the Act of Accession, their role and place in the system of that Act and the different decision-making procedures, it is clear that Article 57 AA cannot be used as a basis for granting derogations to Community acts. Even regarded in isolation, Article 57 AA cannot be used for this purpose as 'derogations' are not to be regarded as mere 'adaptations'. Whereas the latter are necessary for integration, the former, rather, constitute an element of disintegration.

28. The Commission concludes that as neither Article 55 AA nor Article 57 AA was applicable in the present case, the normal legislative procedure under the EC Treaty should have been followed. It adds that it is possible in that context to take account of requests by newly acceding Member States for derogations or otherwise to adopt them after accession and give them retroactive effect.

29. The Commission also observes that the derogation granted to Estonia in Annex VI to the Act of Accession remains in force, as primary Community law cannot be deprived of its effect or amended by the Community legislator.

2. The Council, supported by the Estonian and Polish Governments

30. The Council submits that Articles 55 AA and 57 AA should not be interpreted in a

literal manner, but should be interpreted in the light of their objectives and context, which is to facilitate the accession of the new Member States, at the same time guaranteeing the full and uniform application of Community law as from accession.

31. Article 55 AA allows the new Member States to request temporary derogations to Community acts adopted between the cut-off date and the date of signature of the Act of Accession. It thus reflects the principle of international law that treaties remain the subject of negotiation until they have been signed. This also explains why Article 55 AA requires derogations to be formally requested and decisions on granting them to be taken with unanimity. After the signature of the Act of Accession, it is more appropriate that modifications to Community acts are adopted within the Community legislative framework under Article 57 AA.

32. Article 57 AA is to be regarded as a *lex specialis* vis-à-vis the relevant provisions in the EC Treaty which serve as the legal base for the adoption of Community acts according to the normal legislative procedure. Its objective is to provide for a flexible procedure for the adaptation of acts which had not been adapted in the Act of Accession itself. [13] The Council observes that there is nothing to indicate that an 'adaptation' within the meaning of Article 57 AA cannot take the form of a derogation. This provision can be applied for the adaptation of Community acts if the conditions laid down in this provision are complied with. In the present case, the Council points out that Directive 2004/85 was adopted to adapt Directive 2003/54 for reasons related to the accession of Estonia to the European Union and that this adaptation had not been provided for in the Act of Accession. It was, therefore, correctly based on Article 57 AA. The Council adds that its interpretation is confirmed by previous legislative practice, in that similar derogations have been adopted on the parallel provisions to Article 57 AA in earlier Acts of Accession.

33. The Council next maintains that it was not possible to use the normal legislative procedure for the purpose of granting the derogation requested by Estonia. The provisions in the EC Treaty cannot be used to regulate the situation in respect of acceding Member States prior to the ratification of the Treaty of Accession. The information and consultation procedure, which applied after the date of signature of the Treaty of Accession, provided for a framework distinct from that of the Community institutions. The Council therefore takes the view that it was not possible to include the derogation requested by Estonia in Directive 2003/54. It could only be granted separately on the basis of the relevant provisions in the Act of Accession.

13 — Case C-259/95 *European Parliament* v *Council* [1997] ECR I-5303, paragraph 27 concerning the European Home and Leisure Accident Surveillance System; hereinafter also referred to as the '*EHLASS* judgment'.

34. After accession, derogations may be granted on the basis of the EC Treaty and in the present case this could even have been an option, as Directive 2004/85 was adopted some two months after the date of accession. Nevertheless, the Council states that it was still preferable to use Article 57 AA in view of its *lex specialis* character. It refers to the Court's observation in its *EHLASS* judgment that 'since the objective pursued was the uniform application of the *acquis communautaire* throughout the Union, it was necessary to give effect to the adaptation measures as from the date of accession, even if they were adopted subsequently'. [14] Moreover, applying the co-decision procedure would have meant that the contested directive could only have been adopted with a delay of about two years which would have created a situation of legal uncertainty and adversely affected the legitimate interests of the electricity sector in Estonia.

35. The Council asserts that Directive 2004/85 must be regarded as an adaptation and that it remains within the limits set by Article 57 AA. The directive provides for an analogous derogation to that provided for in Annex VI to the Act of Accession. It does not extend that derogation. On the one hand, the derogation contained in Annex VI has lapsed following the repeal of Article 19 of Directive 96/92. On the other hand, the provisions in respect of which the new derogation applies, Article 21(1)(b) and (c) of Directive 2003/54, differ as to their scope *ratione materiae* from Article 19(2) of Directive 96/92. The contested directive provides for a new derogation taking the new legislative context and the objective of achieving a greater degree of liberalisation of the national electricity markets into account.

36. As to the fact that the Act of Accession of 2005 concerning the conditions of accession of Bulgaria and Romania now contains an express provision permitting derogations to be granted between the cut-off date and the date of accession, the Council remarks that this provision must be regarded as a clarification of the existing situation and was included as a guarantee in case the Court were not to subscribe to its interpretation of Article 57 AA.

37. The Estonian Government supports the Council's submissions with the exception of its claim that the derogation laid down in Annex VI in respect of the application of Article 19(2) of Directive 96/92 lapsed on the repeal of that directive. It therefore asserts that that derogation remains valid in the context of Directive 2003/54. If this were otherwise, there would be an insurmountable contradiction between the derogation granted in Annex VI, which provides for the opening of 35% of Estonia's electricity market as from 2009, and Directive 2003/54, which requires the opening of the electricity market in all Member States for all non-household consumers as from 1 July 2004 which in Estonia represents far more than 35% of the national electricity market, and the extension of this market opening to all household consumers as from 1 July 2007. In this situation, the adoption of Directive

14 — Cited in the previous footnote, at paragraph 22 of the judgment.

2004/85 granting a derogation in respect of the new obligations laid down in Directive 2003/54 was indispensable. Without it, the electricity sector in Estonia would be faced with a situation of legal uncertainty, whilst there is a need for long-term planning in order to realise the huge investments needed for the modernisation of this sector and to avoid serious social and environmental problems. The Estonian Government emphasises the importance of Declaration No 8, in which the need for a gradual opening of the Estonian electricity market, ultimately as from 2013, is recognised by all Member States. This declaration must be regarded as an instrument in interpreting the provisions of the Act of Accession.

38. The Polish Government submits that Article 57 AA should be interpreted in the light of the objective of the Act of Accession to facilitate the accession of the new Member States and in the light of the principles of solidarity and loyalty between Member States. This means that there should be a possibility of granting temporary derogations to Community acts adopted after the date of signature of the Act of Accession where the immediate entry into force on accession of such an act would be impossible or would have serious social and economic consequences for a new Member State. The interpretation defended by the European Parliament would make it impossible to provide for transitional periods in respect of Community acts adopted after the date of signature. This would undermine the autonomy of the acceding Member States, contrary to the international law principle of equality between States. The Polish Government doubts whether the necessary derogations could be granted on the basis of Article 95 EC which is aimed primarily at eliminating restrictions to freedom of movement and distortions of competition. [15]

B — *Second ground for annulment: insufficient statement of reasons*

39. As its second ground for the annulment of Directive 2004/85, the European Parliament submits that there has been a failure to give sufficient reasons for the directive, as the justification for using Article 57 AA as a legal basis, rather than the provisions invoked by the Commission in its proposal, is not in any way apparent from the recitals in the preamble to the contested directive. The reasons for adopting this course, set out in the letter sent by the Council's Secretary-General to the President of the European Parliament, cannot be regarded as a statement of reasons within the meaning of Article 253 EC. Be that as it may, the Council did not request the European Parliament to apply the urgent procedure for adopting the contested directive.

15 — Case C-491/01 *British American Tobacco (Investments) and Imperial Tobacco* [2002] ECR I-11453, at paragraphs 60 and 61.

40. The Council, supported by the Estonian Government, retorts that it is sufficient that the legal base of an act is clearly reflected by the content of that act without detailed reasons having to be given for that choice. The fact that the Council applies a different legal base from that proposed by the Commission does not need to be explained specifically. At any rate, the preamble to the contested directive clearly sets out the reasons underlying the derogation granted to Estonia for applying Article 21(1)(b) and (c) of Directive 2003/54.

C — *Limitation of the temporal effects of the judgment in case of annulment*

41. In view of the need to avoid a situation of uncertainty for economic participants, investors and workers in the electricity sector in Estonia, pursuant to the second paragraph of Article 231 EC, the Council requests the Court, in case the European Parliament's application is successful, to maintain the effects of Directive 2004/85 until a new directive replacing it is adopted. This request is supported by the Estonian Government which points out that the consequence of a simple annulment of the contested directive would be to immediately open the Estonian electricity market to imports of electricity from neighbouring Member States. This would endanger the financial position of Estonian producers and their capability of financing the immense investments required to modernise electricity infrastructure in Estonia.

42. The Commission, too, agrees with the Council's request, indicating that a simple annulment of the contested directive would put Estonia in a situation of breach of Community law without its being responsible for this.

43. The European Parliament observes that its application does not concern the question whether or not the derogation granted to Estonia is justified, but that it is restricted to challenging the legal base of the contested directive. It therefore does not deem it necessary to take a stance on the Council's request.

VI — Assessment

A — *The first plea of illegality: Article 57 AA as a legal base for Directive 2004/85*

44. As was pointed out by both the European Parliament and the Council, it is settled

case-law that the choice of the legal basis for a Community measure must rest on objective factors amenable to judicial review, which include in particular the aim and the content of the measure. [16]

45. In the present case, the central question is whether Article 57 AA can be used in order to grant a derogation, such as that included in Directive 2004/85. This involves an examination of, on the one hand, the substantive and temporal scope of Article 57 AA and, on the other hand, a determination of the nature of the modification to Directive 2003/54 laid down in Directive 2004/85. Must it be regarded as an adaptation of the derogation from Article 19(2) of Directive 96/92 laid down in Annex VI to the Act of Accession or is it a wholly new, self-standing derogation from the corresponding provision in Directive 2003/54 which replaced and repealed Directive 96/92? This is relevant in view of the wording of Article 57 AA which provides a basis for the adaptation of Community acts by reason of accession.

46. The Council considers that, following the repeal of Directive 96/92 by Directive 2003/54, the derogation granted in Annex VI of the Act to Accession lapsed. It claims that no legal significance should be attached to the fact that the correlation table annexed to the latter directive indicates that Article 21 of Directive 2003/54 is the corresponding provision to Article 19 of Directive 96/92. Estonia takes the opposite view, asserting that the first derogation is laid down in a Treaty provision which cannot be altered by a directive. It also explains which consequences the Council's understanding would have for its electricity sector (see point 37 above). The European Parliament takes the view that Directive 2004/85 extended the derogation granted in Annex VI until the end of 2013.

47. In determining the effects of the derogation granted in Directive 2004/85, it must first be observed that whereas Article 19 of Directive 96/92 only required the liberalisation of the national electricity markets for the largest consumers of electricity, Article 21(1) of Directive 2003/54 provides for comprehensive market opening in three stages for three distinct categories of customers. Of these three categories, there is substantive correspondence between the consumers referred to in Article 19(2) of Directive 96/92 and Article 21(1)(a) of Directive 2003/54. The obligations laid down for the Member States in Article 21(1)(b) and (c) in respect of the remaining non-household and household consumers are new. It is to these categories that the contested directive applies. The category referred to in Article 21(1)(a) of Directive 2003/54 is not affected by the contested directive.

16 — See, inter alia, Case C-300/89 *Commission* v *Council* [1991] ECR I-2867, paragraph 10; Case C-281/01 *Commission* v *Council* [2002] ECR I-12049, paragraph 33; and Case C-178/03 *Commission* v *Parliament and Council* [2006] ECR I-107, paragraph 41.

48. I agree with Estonia that the derogation contained in Annex VI to the Act of Accession did not lapse for the formal reason that the provision to which it refers was repealed. What is relevant is that the obligation in respect of which the derogation was granted remains intact, albeit in the context of a new directive. Besides there being substantive correspondence in the obligation concerned, it must also be pointed out that a provision laid down in a treaty cannot be amended by a Community act, unless the treaty provides otherwise, as is confirmed by Article 7 of the Act of Accession. [17] Under the existing arrangements, Estonia is required to open its electricity market to the category of consumers referred to in Article 21(1)(a) of Directive 2003/54 as from 2009 and to the other categories of consumers as from 2013. This outcome is in line with the intentions set out in Declaration No 8 annexed to the Treaty of Accession. [18]

49. It is clear from the above that Directive 2004/85 did not replace or adapt the derogation laid down in Annex VI, nor did it extend the latter to a later date. It must be regarded as a new derogation in respect of the new obligations laid down for the Member States in Article 21(1)(b) and (c) of Directive 2003/54.

50. It should therefore be considered whether Directive 2004/85 was correctly based on Article 57 AA.

51. Article 57 AA constitutes one element of the system laid down in Part Five, Title II, of the Act of Accession which determines the conditions governing the applicability of Community acts in the new Member States. The basic rule is that directives and decisions within the meaning of Article 249 EC apply to the new Member States upon accession and that by that date the necessary implementation measures should have been adopted, unless other time-limits have been provided for in the Act of Accession or its annexes (Articles 53 AA and 54 AA).

52. As the *acquis communautaire* continues to evolve after the conclusion of the accession negotiations and the finalisation of the text of the Act of Accession, there is obviously a need for the possibility of granting temporary derogations to such acts. Article 55 AA provides for this possibility. It is, however, expressly restricted to Community acts which were adopted before the date of signature of the Treaty of Accession. Derogations granted under this provision must be formally requested by a new

17 — The provisions of this Act may not, unless otherwise provided herein, be suspended, amended or repealed other than by means of the procedure laid down in the original Treaties enabling those Treaties to be revised.

18 — Cited in footnote 10.

Member State and are granted by unanimous decision of the Council on a proposal of the Commission.

53. Article 57 AA provides the basis for Community acts being adapted by reason of accession where the necessary adaptations have not been provided for in the Act of Accession or its annexes. This provision does not contain a similar temporal restriction to that laid down in Article 55 AA: all acts adopted prior to accession can be adapted on the basis of this provision. Adaptations are adopted by the Council acting by a qualified majority on a proposal of the Commission, or by the Commission alone, depending on the authorship of the act requiring adaptation. To this end, the 'necessary texts' are to be drawn up by these institutions (Article 57(2) AA).

54. If Article 57 AA is read in conjunction with Article 55 AA, it is evident that both provisions serve a different purpose in the period prior to the formal accession of the new Member States to the European Union. This is apparent both from the differences in terminology and the procedural requirements for the adoption of measures under each provision.

55. The terminological difference focuses on the concepts 'temporary derogations' in Article 55 AA and 'adaptations' (necessary by reason of accession) in Article 57 AA. As was pointed out by the European Parliament and the Commission, the essential difference between these two concepts is that whereas 'derogations' are aimed at temporarily rendering an element of the *acquis communautaire* inapplicable in a Member State in order to grant it the sufficient time to take the necessary steps to permit it to comply fully with its Community obligations, 'adaptations' are aimed at the opposite effect of making the *acquis* applicable on accession. In other words, whereas the former delays the application of a given Community act in a new Member State, the latter is indispensable for the immediate application of a Community act on accession.

56. In its *EHLASS* judgment,[19] the Court had the occasion to pronounce on the substantive scope of the parallel provision to Article 57 AA in the Act of Accession of 1994.[20] As regards Article 169 of that Act of Accession, which is identical to Article 57 AA, the Court held that 'the sole purpose of the adaptations made on the basis of Article 169 is to extend to the new Member States the application of Community measures which have not been adapted by the Act of Accession itself. No other

19 — Cited in footnote 13.

20 — Act concerning the conditions of accession of the Kingdom of Norway, the Republic of Austria, the Republic of Finland and the Kingdom of Sweden and the adjustments to the Treaties on which the European Union is founded (OJ 1994 C 241, p. 8).

amendments can, therefore, be based on Article 169 of that Act'. [21] In the same judgment, it repeated that 'Article 169 may be relied on solely for the enactment of adaptations designed merely to render the measures concerned applicable in the new Member States, to the exclusion of all other amendments'. [22]

57. The necessary implication of these observations is that the concept of 'adaptations', which at first sight appears to be more general in scope, cannot, in the context of Article 57 AA, be construed as encompassing substantive amendments to Community acts or measures permitting derogations to these acts. It therefore only covers inescapable adaptations to a Community measure which are incited by technical necessity rather than political opportunity. The fact that the term 'adaptation' has not been defined in the Act of Accession and that it does not exclude it from encompassing derogations, as was submitted by the Council and the Polish Government, is of no relevance as this difference in meaning between the two concepts can be clearly derived from the function of Articles 55 AA and 57 AA.

58. The procedures prescribed for adopting the measures under each provision reflect the difference. As the grant of a temporary derogation amounts to the authorisation of the non-compliance with certain Community law obligations for a given period, which is primarily in the interest of a particular acceding Member State, the underlying decision is of a political nature. This explains why Article 55 AA prescribes decision-making with unanimity and that the decision is taken at the request of the new Member State concerned. By contrast, the adaptation of Community acts in order to make them fully applicable in the new Member States at the date of accession flows directly from the principle that the new Member States must adopt and apply the *acquis communautaire* in full upon accession. Such adaptations are, by definition, not political in character, so that they can be made, independently of a request by a new Member State, by the Council acting by a qualified majority on a proposal from the Commission, or by the Commission alone in respect of acts adopted by it.

59. I would like to point out that, if it were possible to base temporary derogations on Article 57 AA, Article 55 AA would serve no independent purpose in view of the fact that the former provision also applies to acts adopted in the period immediately after the cut-off date. It would even mean that, if a derogation could not be granted under Article 55 AA for lack of unanimity within the Council, it might nevertheless be possible to grant it, through the mere passage of time, after the date of signature of the Treaty of Accession by qualified majority within the

21 — Cited in footnote 13, at paragraph 14 of the judgment.

22 — At paragraph 19 of the judgment.

Council. As this would amount to a circumvention of the procedural guarantees laid down in the Act of Accession for the adoption of derogations, this clearly could not have been the intention of the authors of the instruments of accession.

60. As the contested directive was adopted after the date of accession (1 May 2004), the question as to the temporal scope of Article 57 AA also arises. In other words, can this provision be used as a legal base for the adoption of adaptations after the date of accession to Community acts adopted prior to accession?

61. This question was also dealt with by the Court in the *EHLASS* judgment. Again in relation to Article 169 of the Act of Accession of 1994, which, as pointed out above, is identical to Article 57 AA, the Court noted that 'under Article 2(3) of the Treaty of Accession, the Community institutions "may" adopt before accession certain measures referred to in, inter alia, Article 169 of the Act of Accession. Consequently, Article 2(3) does not place any restriction on the use of Article 169 after the entry into force of the Treaty of Accession, but merely authorises its use before that date.' [23]

23 — Cited in footnote 13, at paragraph 18 of the judgment.

62. The European Parliament's objections that such an interpretation would amount to the unrestricted use of Article 169 and that that provision provided for the entry into force of adaptations as from the date of accession, thus implying that acts adopted subsequently would be endowed with retroactive effect, were dismissed by the Court. As to the first, it answered that the contested act had been adopted within 'a reasonable period after the entry into force of the Treaty of Accession'. As to the second, it accepted the necessity of the entry into force of the contested act as from the date of accession, pointing out that it had not been alleged that this would infringe legal certainty or the protection of legitimate expectations.

63. Although not entirely convinced by the Court's refutation of the European Parliament's arguments on this point, I do consider that the very fact of accepting the possibility of adaptations adopted under Article 57 AA having retroactive effect in itself confirms the finding that such adaptations must necessarily be restricted in scope and certainly cannot amount to a substantive amendment or temporary suspension of obligations flowing from a Community act.

64. In view of the fact that the derogation granted to Estonia could be based neither on Article 55 AA, as it falls outside its scope *ratione temporis*, nor on Article 57 AA, as it falls outside its scope *ratione materiae*, the necessary implication is that, in the absence of any other explicit provision relating to this particular situation, the contested directive

should have been based on the provisions which served as the legal base for Directive 2003/54, that is Articles 47(2) EC, 55 EC and 95 EC. In this respect, as was pointed out by the Commission, after the signature of the Treaty of Accession the information and consultation procedure, referred to in point 5 above, provided the necessary framework for accommodating requests of the acceding States to take their interests into account in the preparation of new Community legislation. In this context, it might be added that, given the particular interests of Estonia underlying its request for a derogation, reference might also have been made to Article 15 EC as a supplementary legal base. This article permits temporary derogations to be made to Community acts in order to take account of differences in development between the economies of the Member States.

65. It may be true, as was asserted by the Council, that adopting the contested directive under the co-decision procedure prescribed by the relevant provisions in the EC Treaty would have been somewhat cumbersome. Under that procedure the necessary modification of Directive 2003/54 would only have been adopted at a much later date, giving rise to a prolonged period of legal uncertainty for the electricity sector in Estonia and to a situation in which Estonia was temporarily in breach of its Community law obligations. However, the fact that there certainly are drawbacks to the normal legislative procedure being applied cannot serve as justification for creating the required legal base through an extensive interpretation of 57 AA.

66. Where there was an obvious need for an explicit possibility for granting temporary derogations from Community acts adopted prior to the date of accession of the new Member States, the absence of such a provision created a regulatory gap in the transitional arrangements in the Act of Accession which could only be remedied by having recourse to existing legislative powers of the Community institutions. The existence of this regulatory gap is highlighted by the Act of Accession of 25 April 2005 relating to the imminent accession of Bulgaria and Romania to the European Union. [24] By contrast with the situation under the Act of Accession of 2003, the Act of Accession of 2005 now does provide for an explicit provision permitting temporary derogations to be granted in respect of Community acts adopted in the period between the cut-off date and the date of accession. [25] To my mind, this adaptation in the most recent Act

24 — Cited in footnote 12.

25 — Article 55 of the Act of Accession (2005) which provides as follows: 'At the duly substantiated request of Bulgaria or Romania submitted to the Commission no later than the date of accession, the Council acting on a proposal from the Commission, or the Commission, if the original act was adopted by the Commission, may take measures consisting of temporary derogations from acts of the institutions *adopted between 1 October 2004 and the date of accession*. The measures shall be adopted according to the voting rules governing the adoption of the act from which a temporary derogation is sought. Where these derogations are adopted after accession they may be applied as from the date of accession' (emphasis added).

of Accession only serves to emphasise the fact that Article 57 AA could not be used as a basis for granting temporary derogations. In this regard, it is also significant that it was not the scope *ratione materiae* of the parallel provision to Article 57 AA which was adapted in such a way as to permit derogations to be adopted, but that it was the scope *ratione temporis* of the parallel provision to Article 55 AA which was extended. In this light, the Council's explanation of this adaptation in the Act of Accession of 2005 vis-à-vis the Act of Accession of 2003 that an express legal base was created in the former because there was no guarantee that the Court would interpret Article 57 AA along the lines suggested by the Council appears to be somewhat implausible.

67. The Council's argument that the Community legislature cannot legislate in respect of acceding States which are not yet full Member States of the Union must also be rejected. Indeed, Article 2(3) of the Treaty of Accession lays down that very principle in respect of the provisions granting legislative powers in the Act of Accession. [26] Where no explicit competence is created in the Act of Accession, there is no inherent restriction on the Community legislature to anticipate the accession of new Member States in legislation adopted under the EC Treaty prior to accession. The fact that the acceding States are, at that time, not involved in the legislative process does not affect the Community legislature's competence to adopt such Community acts. In addition, it may be presumed that where the Community legislature takes account of the situation in an acceding Member State in legislation prior to accession this will be on the basis of information it has received from these States in the context of the information and consultation procedure. Any such provision will be aimed at facilitating accession of the Member State concerned and may be regarded as an expression of the loyal cooperation between the Community institutions and the acceding States in the period prior to accession. The only legal requirement in respect of such provisions would be that their entry into force be made conditional on the actual accession of the State concerned.

68. As Article 57 AA cannot serve as a legal base for the contested directive, its scope being restricted *ratione materiae* to the adaptation of Community acts, the Council's contention that Article 57 AA must be regarded as a *lex specialis* vis-à-vis the provisions in the EC Treaty is no longer relevant and does not need to be considered further.

69. Finally, the Council and the Polish Government observe that past legislative

26 — This article provides: 'Notwithstanding paragraph 2 [entry into force on 1 May 2004], the institutions of the Union may adopt before accession the measures referred to in Articles ... 55 to 57 of the Act of Accession ... . These measures shall enter into force only subject to and on the date of the entry into force of this Treaty.'

practice provides various examples of temporary derogations being based on the parallel provisions to Article 57 AA in earlier Acts of Accession.[27] Clearly, the fact that this provision has been used for this purpose in the past does not in itself indicate that this practice was lawful. As the validity of the Community acts in question apparently has not been challenged before the Court, this practice has not yet been subject to judicial scrutiny and, consequently, there is no case-law sanctioning it. At any rate, it should have been abundantly clear as from 2 October 1997, following the Court's unequivocal ruling in *EHLASS* that provisions such as Article 57 AA cannot be used for adopting amendments to Community acts,[28] that the practice of granting derogations under this provision was legally perilous.

70. I therefore conclude that, as Article 57 AA does not constitute the appropriate legal base for Directive 2004/85, the directive was adopted in infringement of an essential procedural requirement within the meaning of Article 230 EC and consequently should be annulled.

27 — See, for example, Council Directive 94/72/EC of 19 December 1994 amending Directive 91/439/EEC on driving licences (OJ 1994 L 337, p. 86).

28 — Cited in footnote 13, at paragraph 14 of the judgment.

B — *Second plea of illegality: insufficient reasons*

71. As I consider the first plea of illegality to be well founded, there is no reason to examine the second ground advanced by the European Parliament.

C — *Maintenance of the effects of Directive 2004/85*

72. The Council requested that, should the Court decide to annul the contested directive, its effects be maintained, as provided for in the second paragraph of Article 231 EC. The European Parliament observes that its application concerns only the legal base of the contested directive and not its content.

73. As the substance of Directive 2004/85 is not contested by the applicant and the simple annulment of the directive would lead, as was pointed out by the Council, the Estonian and Polish Governments and the Commission, to a situation of great uncertainty for the electricity sector in Estonia, there is sufficient reason to accede to the Council's request to maintain the effects of Directive 2004/85.

VII — Conclusion

74. On the basis of the foregoing observations, I would recommend the Court to:

— annul Council Directive 2004/85/EC of 28 June 2004 amending Directive 2003/54/EC of the European Parliament and of the Council as regards the application of certain provisions to Estonia;

— maintain the effects of the annulled directive;

— order the Council of the European Union to pay the costs;

— order the Republic of Estonia, the Republic of Poland and the Commission of the European Communities to bear their own costs.