OPINION OF ADVOCATE GENERAL TIZZANO delivered on 16 June 2005 [1]

I — Introduction

1. The Greek Government claims that the Court should annul Decision 2003/3/EC ('the contested decision') [2] by which the Commission denied its request to use heavy fuel oils with a sulphur content greater than the 1% limit laid down in general in Directive 1999/32/EC ('Directive 1999/32' or 'the directive'). [3]

2. In particular, the Court is asked to rule whether the Commission infringed Community law when it refused the Greek Government authorisation to exceed that limit.

II — Legal background

3. For the purposes of this case it should be recalled at the outset that by Decision 98/686/EC [4] the Community approved the protocol on reductions of sulphur emissions [5] to the United Nations Convention on long-range transboundary air pollution. [6]

4. In order to help attain the objectives set out in these instruments of international law, the Community first adopted Directive 93/12/EEC [7] and then the abovementioned Directive 1999/32 whose purpose, according to Article 1(1) thereof, 'is to reduce the emissions of sulphur dioxide resulting from the combustion of certain types of liquid fuels and thereby to reduce the harmful

1 — Original language: Italian.

2 — Commission Decision of 17 December 2002 on a request from Greece for authorisation to use heavy fuel oils with a maximum sulphur content of 3% by mass in part of its territory (OJ 2003 L 4, p. 16).

3 — Council Directive of 26 April 1999 relating to a reduction in the sulphur content of certain liquid fuels and amending Directive 93/12/EEC (OJ 1999 L 121, p. 13).

4 — Council Decision of 23 March 1998 on the conclusion by the European Community of the Protocol to the 1979 Convention on long-range transboundary air pollution on further reductions of sulphur emissions, OJ 1998 L 326, p. 34.

5 — Protocol to the 1979 Convention on long-range transboundary air pollution on further reductions of sulphur emissions, signed at Oslo on 14 June 1994.

6 — Convention on long-range transboundary air pollution, signed at Geneva on 13 November 1979.

7 — Council Directive of 23 March 1993 relating to the sulphur content of certain liquid fuels (OJ 1993 L 74, p. 81).

effects of such emissions on man and the environment'.

5. To this end, Article 3(1) of the directive provides that 'Member States shall take all necessary steps to ensure that as from 1 January 2003 within their territory heavy fuel oils are not used if their sulphur content exceeds 1.00% by mass'.

6. However, this limit is not absolute since under Article 3(2) of this directive 'a Member State may authorise heavy fuel oils with a sulphur content of between 1.00 and 3.00% by mass to be used in part or the whole of its territory'. Such authorisation may be granted (i) provided that 'the air quality standards for sulphur dioxide laid down in Directive 80/799/EEC [8] or in any Community legislation which repeals and replaces these standards and other relevant Community provisions are respected' and (ii) 'the emissions [in the Member State which intends to grant the authorisation] do not contribute to critical loads being exceeded in any Member State [9]'. In this connection the directive specifies that 'critical load' means 'a quantitative estimate of exposure to one or more pollutants below which significant harmful effects on sensitive elements of the environment do not occur according to current knowledge'. [10]

7. The importance of the second of the abovementioned conditions is confirmed by the final sentence of Article 3(2) which reasserts that 'authorisation shall apply only while emissions from a Member State do not contribute to critical loads being exceeded in any Member State'.

8. As regards the procedure which must be followed to grant the authorisation in question, Article 3(5) of the directive provides that '[i]f a Member State avails itself of the possibilities referred to in paragraph 2, it shall, at least 12 months beforehand, inform the Commission and the public' and provide 'sufficient information to assess whether the criteria ... are met'. Within six months of the date on which it receives the information from the Member State, the Commission is to take a decision after consulting the committee set up pursuant to Article 9 of the directive. In this regard it provides that:

'The Commission shall be assisted by a committee of an advisory nature composed of the representatives of the Member States and chaired by the representative of the Commission.

8 — Council Directive of 15 July 1980 on air quality limit values and guide values for sulphur dioxide and suspended particulates (OJ 1980 L 229, p. 30).

9 — The Italian and Spanish versions of the directive state that the emissions must not contribute to critical loads being exceeded 'in modo significativo', 'de manera significativa' [significantly]. The other language versions, however, contain no reference to the extent of the contribution.

10 — Article 2(6)

The representative of the Commission shall submit to the committee a draft of the measures to be taken. The committee shall deliver its opinion on the draft, within a time-limit which the chairman may lay down according to the urgency of the matter, if necessary by taking a vote.

The opinion shall be recorded in the minutes; in addition, each Member State shall have the right to ask to have its position recorded in the minutes.

The Commission shall take the utmost account of the opinion delivered by the committee. It shall inform the committee of the manner in which its opinion has been taken into account.'

III — Facts and procedure

9. By letter of 11 December 2001 the Hellenic Republic requested from the Commission permission to grant authorisation under Article 3(2) of Directive 1999/32 in the whole of its territory, except for the Attica Basin.

10. In the view of the Greek Government, all the relevant conditions laid down by this provision were satisfied in the present case since the sulphur dioxide emissions in Greece complied with the limits imposed by Community law and the Greek contribution to critical loads being exceeded in the other Member States had to be regarded as virtually zero (the contribution amounted at most to 1% in the case of Italy).

11. After having requested and received further information from the Greek Government, the Commission requested the help of the cooperative programme for monitoring and evaluation of the long range transmission of air pollutants in Europe ('EMEP'), and in particular the Norwegian meteorological institute (Meteorological Synthesizing Centre — West; 'MSC-W') which is the scientific coordination centre for this programme. The institute conducted more detailed analyses of the Greek contribution to the sulphur deposition encountered in Italy.

12. It is clear from the contested decision that these analyses, which were contained in the reports of 22 February and 22 March 2002, had shown that the Greek emissions were contributing to critical loads for acidity being exceeded in Italy in at least six of the grid squares into which it is divided for this purpose. In those grid squares the contribution from Greece did not exceed 0.5%. EMEP therefore concluded that this analysis was

consistent with the calculations attributing 1% of the total sulphur deposition in Italy to emissions from Greece. [11]

13. On receiving the abovementioned results, the Commission convened for 15 April 2002 a meeting of the advisory committee referred to in Article 9 of the directive to discuss the request from the Greek Government. On that occasion the committee supported the draft decision of the Commission which rejected the Greek request on the grounds that it did not satisfy the condition concerning transboundary pollution.

14. However, the Commission did not adopt this draft immediately since on 4 June and 5 July 2002 the Greek Government had asked for the matter to be reviewed and submitted further information for assessment.

15. This information was in fact submitted on 30 July and then supplemented, at the Commission's request, on 3 October.

16. On the basis of the analysis of this information, which was submitted by the Commission and examined with the support of the Coordination Centre for Effects on Mapping of Critical Levels and Loads ('CCE'), EMEP confirmed in a report of 19 November that Greek emissions contribute to deposits which exceed the critical loads for acidification in other Member States, in particular Italy. [12]

17. On 4 December 2002 the Commission convened a further meeting of the advisory committee for 10 December and also sent the Greek Government the documents to be discussed at that meeting.

18. The contested decision, which endorsed the opinion unfavourable to the Greek Government that had been expressed by the above committee, was adopted on 17 December 2002. A summary of the minutes of the committee meeting which had been submitted to the Commissioners at the time the decision was adopted was also sent to the Greek Government.

19. On 10 January 2003 the Greek Government requested clarification of certain items in the minutes. However, upon receipt of a new version on 14 February it requested further amendments thereto by a letter of 17 February 2003.

11 — See the 9th and 10th recitals in the preamble to the contested decision.

12 — See the 13th recital in the preamble to the contested decision.

20. On the following 26 February the Hellenic Republic finally made the present application in which it claims, essentially, that the Court should annul the contested decision and declare Directive 1999/32 inapplicable under Article 241 EC in the event that it is interpreted as it is by the Commission.

21. The Council intervened in support of the Commission. It, like the Commission, considers that the part of the action seeking to have Directive 1999/32 declared inapplicable is inadmissible in that no grounds are stated therefor.

22. On conclusion of the written procedure, during which a reply and a rejoinder also were submitted, the parties presented oral argument at the hearing on 28 April 2005.

IV — Appraisal

23. As stated above, the Greek Government is seeking the annulment of the contested decision on the grounds that it is vitiated by infringements of Community law of a procedural as well as of a substantive nature.

A — *Procedural infringements*

24. The applicant government complains that in the proceedings which led to the contested decision the Commission infringed the principle of *audi alteram partem* in several respects.

25. In general, it points out that according to settled case-law of the Court respect for the rights of the defence, in all proceedings which are initiated against a person or a Member State and which are liable to culminate in a measure adversely affecting that person or Member State is a fundamental principle of Community law. [13] The Greek Government goes on to state that it follows from this principle that before a decision is adopted the party concerned must receive within 'a reasonable time to prepare his defence' [14] 'an exact and complete statement of the objections which the Commission intends to raise against it'. [15]

26. In the present case, however, the consultation of the committee referred to in Article 9 of the directive took place, in the view of the applicant government, in breach of its rights of defence and did so for a number of reasons which I shall come to shortly.

13 — See, inter alia, Joined Cases C-48/90 and C-66/90 *Netherlands and Others* v *Commission* [1992] ECR I-565, paragraphs 44 and 45.

14 — Case 319/85 *Misset* v *Council* [1988] ECR 1861, paragraph 8.

15 — *Netherlands and Others* v *Commission*, paragraph 45.

27. The Commission disputes, always in general terms, the notion that the principle of the rights of the defence applies in cases such as that at issue in the present case. With reference to the clarifications provided in *Denmark* v *Commission*, [16] it points out that according to the Court the obligation to observe this principle exists only in proceedings which Community institutions bring against Member States such as, for example, in the case of the monitoring of aid. However, the same cannot be said where, as in the present case, the proceedings concerned are brought on the initiative of the Member States themselves.

28. I should observe that there may even be some disagreement as to whether the case-law cited is completely applicable to the present case. However, to me it seems important to stress that in actual fact, as the Commission also notes, the complaints of the Greek Government do not concern compliance with the principle of *audi alteram partem* in relation to the State in question, but formal regularity and therefore compliance with the procedure for consulting the advisory committee. All the above-mentioned complaints must be relevant from this point of view if there is to be no confusion between the participation of the representatives of the Member States in that committee — where they form part of a procedure of an institutional nature and operate within it — and relations, so to speak 'outside' this procedure, between the Commission and the Member State per se.

16 — Case C-3/00 [2003] ECR I-2643.

29. I now come to the specific complaints of a procedural nature which I referred to earlier.

30. (a) Firstly, the Greek Government objects that there was too short a period between the date on which the advisory committee members were sent the documents to be discussed at the meeting of the committee (5 December 2002) and the date of that meeting (10 December 2002).

31. Accordingly, it refers to the draft rules of procedure for that committee which provide for a period of 14 days in which to send documents which can, however, be shortened to 5 days in urgent cases and where the measures to be adopted must be applied immediately.

32. The Greek Government considers that the conditions for a shortened period are not satisfied in the present case. Although under Article 3(1) of the directive Member States are to take all necessary steps to ensure that as from 1 January 2003 only heavy fuel oils with a sulphur content of less than 1.00% by mass are used, the Commission was not required to take a decision on requests for derogation before that date.

33. The applicant government goes on to state that there is even less justification for the delay in convening the committee and sending the documents when one considers that the Commission had had the results of the fresh analyses conducted by EMEP since November 2002 (see point 16 above).

34. For my part, I would observe, first of all, that the directive says nothing about the period which must elapse between the date the documents to be discussed are sent to the members of the committee and the date of the meeting. As we have seen (point 8 above), Article 9 thereof merely states that once the committee has received the draft of the measures which the Commission intends to adopt it must deliver its opinion within a time limit which its chairman, that is to say the representative of the Commission, lays down according to the urgency of the matter.

35. It would add that not even Decision 1999/468/EC, [17] which was adopted by the Council to lay down general rules on the exercise of implementing powers conferred on the Commission, imposes precise time-limits thereon. It merely provides that '[e]ach committee shall adopt its own rules of procedure ..., on the basis of standard rules of procedure which shall be published in the *Official Journal of the European Communities*' and which were in fact subsequently adopted and published. [18]

36. In so far as it is relevant to this case, the standard rules of procedure provide that the documents to be discussed within the committee are to be communicated to its members 14 days before the meeting but that this period may be shortened to 5 days in urgent cases. These are precisely the provisions laid down in the draft rules of procedure drawn up for the committee referred to in Directive 1999/32 (as already stated above at point 31).

37. Therefore, the specific rules relevant to this case are silent on the matter at issue which is addressed only by the draft rules of procedure referred to above (which are precisely still only in draft form) that are modelled on the standard rules of procedure referred to in Decision 1999/468. However, even if this draft is regarded as providing useful information in the quest for a reasonable solution to the matter under consideration, I consider that the consultation of the committee at issue must be deemed to be lawful since the Commission complied with the five-day time limit granted by the draft rules of procedure in respect of urgent cases.

38. As the Commission argues in the alternative, in the present case the urgency derived from the need to avoid situations of legal uncertainty. Since as from 1 January 2003 the directive required the Member States to permit only the use of heavy fuel oils with a sulphur content of less than 1%, the derogation from that limit also had to be

17 — See Article 3(2) of Council Decision of 28 June 1999 laying down the procedures for the exercise of implementing powers conferred on the Commission (OJ 1999 L 184, p. 23).

18 — Article 7(1). The standard rules of procedure are published in OJ 2001 C 38, p. 3.

granted by that date. Otherwise, Greek traders who used the fuel at issue would not have known in time and with certainty whether or not they could still use fuel oil with a higher sulphur content in future.

39. Nor can it be claimed, as the Greek Government does, that the Commission itself created the urgency by unduly prolonging consideration of the request for derogation. In this regard it should be noted that the Greek Government did not submit all the information requested until 3 October 2002 and that the analysis of those data conducted by EMEP was received by the Commission on 21 November 2002. In order to be certain of being able to adopt a valid decision by the end of the year, which would therefore be taken before the committee delivered its opinion, the Commission could not, under those circumstances, abide by the 'normal' 14-day time-limit and was merely required to comply with the 5-day time-limit applicable to urgent cases, as it in fact did.

40. Consequently, I consider that the procedure for consulting the committee was lawful from this point of view.

41. (b) Secondly, the Greek Government objects that the documents which the Commission submitted to the members of the committee were incomplete since they did not include an information note drawn up by the Directorate-General for the Environment in which the Commission conceded that EMEP's finding that there was a Greek contribution to critical loads being exceeded in other Member States might be due to the mathematical model used in the analysis.

42. However, I must state in response, as the Commission has stated in its defence and the Greek Government has not denied, that the information note had been drawn up after the committee meeting in and for the purposes of procedures within the Commission. I therefore take the view the complaint is unfounded.

43. (c) Thirdly, the Hellenic Republic regards as a procedural defect the fact that at the committee meeting of 10 December 2002 most of the Member States were not represented by the same individuals who had attended the previous meeting of 15 April 2002 (see point 13 above).

44. However, this argument too cannot be accepted. It is sufficient to observe that the sending of those representatives and the choice thereof is entirely within the discretion of the Member States and there is no rule which requires that the committee must always consist of the same individuals.

45. (d) Finally, the Greek Government complains that the Commission adopted the contested decision before the Committee members had been able to verify the accuracy of the minutes of the committee meeting. Consequently, the Commission had deliberated on the basis of minutes which the Hellenic Republic did not regard as complete (see point 19 above). However, the draft rules of procedure for the committee provide that minutes of meetings are to be sent to committee members in good time to allow them to submit comments.

46. In this respect it should be noted that Directive 1999/32 simply provides that the committee's opinion is to be recorded in the minutes, each committee member is to have the right to ask to have his position recorded in the minutes, and the Commission is to take the utmost account of the opinion. [19] For their part, the abovementioned draft rules of procedure provide that the minutes must be sent to the committee members who are to send any written comments they may have on the minutes to the chairman. Proposed amendments are to be discussed by the committee and in the event of persistent disagreement they are to be annexed to the minutes.

47. Even disregarding the non-binding nature of these draft rules of procedure, I do not consider that I should dwell here on whether the Greek representative was actually given all the time to which he was entitled (in the light of the draft itself and, above all, of the directive) to respond to the draft minutes. I would simply point out that in its communications to the Commission the Greek Government had merely asked to clarify the position of its representative and that this position remained, at any rate, largely a minority position within the committee. Therefore, the Commission can rightly claim that in any event the contested decision was adopted in conformity with the opinion (of the majority of the members) of the committee.

48. In any case, even if a procedural defect in the Commission's conduct were established, as the applicant government claims, I consider that here it would be necessary to apply the Court's case-law according to which '[a] procedural irregularity would involve the annulment ... of the decision only if it were shown that in the absence of such irregularity the contested decision might have been different'. [20]

49. Therefore, this complaint too must be rejected.

19 — See Article 9 reproduced at point 8 above.

20 — Joined Cases 209/78 to 215/78 and 218/78 *Van Landewyck* v *Commission* [1980] ECR 3125, paragraph 47. See also Case C-142/87 *Belgium* v *Commission* [1990] ECR I-959, paragraph 48.

50. In the light of the foregoing, I am able to say in conclusion that none of the objections raised by the Greek Government can be sustained.

52. In this connection I would observe, as the Commission does, that the statements contained in the letter cannot be regarded as a personal opinion since the author of that letter is the director of the institute which carried out the study who signed the letter precisely in his official capacity.

B — *Substantive infringements*

Existence of the contribution to the critical loads being exceeded

51. As to the substance, the applicant government primarily contends that the analyses conducted by EMEP, which formed the scientific basis for the contested decision, in no way demonstrate that the second of the conditions laid down for the Member State to be able to authorise the use of fuel oils with a higher sulphur content (see point 6 above) have not been satisfied. In particular, it is in no way 'substantiated beyond any reasonable doubt that Greek emissions do contribute to excess deposition above the critical loads for acidification in other Member States, particularly Italy', as stated by the 13th recital in the preamble to the decision. It claims that this statement, which is contained only in the letter accompanying the study sent to the Commission, is the personal opinion of the director of MSC-W (the institute charged with conducting the analyses; see point 11 above) and not the result of the scientific study carried out.

53. As to the substance, I would merely point out that the examination conducted by the abovementioned institute substantiates the Commission's conclusion that the Greek situation does not satisfy the second of the conditions necessary for the grant of a derogation (see points 6 and 7 above). The study clearly states that on the basis of scientific knowledge acquired over the last 30 years it has been proven that Greek emissions contribute to critical loads being exceeded in Austria, Germany, Italy and Switzerland, although the extent of the contribution is minimal and amounts to at most 0.5%.

54. I consider that since we are dealing here with the exercise of discretion by the Commission whose examination includes an assessment of a technical nature it is necessary to apply the well-known case-law of the Court according to which in such cases the Community judiciary '... cannot, save in the event of manifest error of fact or law or misuse of power, find fault with the contents of a decision which the Commis-

sion had adopted in conformity with [a] committee's opinion'. [21]

55. There is nothing in the documents before the Court in this case which enables such an error or misuse of power to be established. On the one hand, the Commission has clearly complied with the opinion of an authoritative scientific institute and, on the other, the Greek Government has furnished no proof that such an error exists other than making general objections and referring to the same arguments which were put forward earlier in the committee and which were rejected by it.

56. I therefore consider that the complaint should be rejected.

The notion of contributing to critical loads being exceeded

57. The Greek Government maintains that even if certain sulphur dioxide particles from Greece do reach Italy it is not possible to identify any contribution to critical loads being exceeded for the purposes of Article 3 (2) of the directive. The notion of 'contributing to critical loads being exceeded' means that in the absence of the Greek emissions the Italian ecosystems encountering a deposit of sulphur dioxide greater than the critical load fall below the level at which such load is deemed to have been exceeded. In other words, the Greek Government considers that the contribution must a decisive factor in the critical load being exceeded, which is not so in the present case.

58. In support of its proposed, less rigid interpretation the Greek Government further contends that the Italian and Spanish versions of the directive state that emissions are not to contribute to critical loads being exceeded 'significantly'.

59. On the other hand, the Greek Government goes on to state, the strict interpretation of the condition under consideration advocated by the Commission would deprive Article 3(2) of the directive of any useful effect since it would never be applicable as a result.

60. For my part, however, I consider that the Commission is right to point out that the directive speaks of emissions which 'contribute' to critical loads being exceeded in other Member States not which 'cause' them. Therefore, the interpretation placed on Article 3(2) by the Greek Government appears to be inconsistent with the actual wording thereof.

21 — Case 216/82 *Universität Hamburg* [1983] ECR 2771, paragraph 14. See also Case 185/83 *Rijksuniversiteit te Groningen* [1984] ECR 3623, paragraphs 14 and 15.

61. Furthermore, as the Commission points out, the need to place a strict interpretation on the condition in question is also demonstrated by the preparatory work on the directive. According to the proposal submitted by the Commission, the derogation could be granted provided that 'the contribution to transboundary pollution [was] negligible'. [22] However, the Council was stricter [23] since it stipulated that a derogation could be granted only where a Member State did not, as a consequence, contribute to the critical loads being exceeded in the other Member States, that is to say irrespective of the extent of such 'contribution'.

62. Nor do I consider that it is possible to find any evidence for a more liberal interpretation in the Italian and Spanish versions of the directive which state that emissions must not contribute 'significantly' to critical loads being exceeded.

63. On the assumption that these versions cannot per se prevail over the more numerous different versions, including the Greek version, I would simply add that the condition at issue is laid down twice in Article 3(2) of the directive (see point 7 above). When it reaffirms the condition in question in the final sentence, the provision specifies, also in the Italian and Spanish versions, that the derogation may be granted only while emissions 'do not contribute to critical loads being exceeded' and adds nothing as to the extent of the contribution.

64. The observations above lead me to believe that this choice by the Commission is the only correct interpretation of the condition under examination.

65. Consequently, having established in the present case that deposits from Greece were 'contributing' to the critical loads being exceeded in certain regions of Italy in which problems with acidification caused by sulphur dioxide were already being encountered the Commission could not grant the request submitted by the Greek Government even though the contribution did not exceed 0.5%.

66. Nor can it be objected, as the Greek Government does, that the interpretation which it disputes would deprive the directive of any useful effect. Although this interpretation places considerable limits on the scope for granting the derogation, precisely because it involves derogating measures, it certainly cannot be regarded as surprising or unjustified. However, in spite of that it appears to me that the provision in question still retains a certain degree of scope in terms

22 — Article 3(2) of the Proposal for a Council Directive relating to a reduction of the sulphur content of certain liquid fuels and amending Directive 93/12/EEC (OJ 1997 C 190, p. 9).

23 — Council Presidency paper No 9271/98 of 11 June 1998 states that '[t]he Presidency *has sharpened* the conditions under which a derogation may be granted' (emphasis added).

of its applicability and does so in particular, as provided precisely in Article 3(2) of the directive, in all cases in which the deposit of sulphur from the requesting Member State does not contribute at all (or, if you will, more or less negligibly) to critical loads being exceeded in other Member States.

67. I therefore consider that these arguments must also be rejected.

Method of estimation used

68. The Greek Government further contends that in considering its request the Commission should, for the purpose of estimating the contributions to the critical loads being exceeded in other Member States, have applied the same method as that used in the preparatory work on the directive. It claims that the change of mathematical model used by the Commission has serious consequences in the present case since the new model, unlike the previous one, displays technical characteristics such that the estimations of the contributions can never come to zero but always reveal the presence of such contributions, albeit at infinitesimal levels.

69. Since this change fundamentally altered the scope of the derogation's application, the Commission should not have carried it out without having recourse to the cooperation procedure referred to in Article 252 EC which, although intended to apply to the adoption of the directive, should also apply to amendments thereto.

70. For my part, I would note from the outset that, as the Commission demonstrated in its rejoinder, it is very doubtful that the new and different mathematical model used to estimate the contributions could never produce zero results. For example, in relation to Italy the estimates of the contributions from Luxembourg, Sweden and Finland were zero.

71. That said, I would observe there is nothing in the directive which requires the Commission to choose a specific mathematical model. Therefore, it is free to take its decision on the basis of the scientific analyses deemed to be most suitable and reliable. In the present case, it appears to me that the Commission cannot be criticised for having turned to an internationally renowned institute such as the MSC-W and using the method of estimation which it regarded as most appropriate even though it differs from that taken as a basis during the preparatory work.

72. Therefore, it follows that these arguments are also unfounded.

Principle of protection of legitimate expectations

73. In addition, the Greek Government considers that by denying it the derogation the Commission infringed the principle of protection of legitimate expectations since before the directive was adopted it had indicated clearly that it would be possible to continue to use heavy fuel oil with a higher sulphur content in Greece.

74. In particular, the Greek Government objects that in the Communication to the Council and the European Parliament on a Community strategy to combat acidification ('the communication on acidification'), [24] submitted together with the proposal for a directive and to which the ninth recital in the preamble to the final version of the directive refers, the Commission had mentioned the Hellenic Republic as one of the Member States which could qualify for the derogation.

75. For my part, I would note from the outset that, according to settled case-law of the Court, 'the principle of the protection of legitimate expectations may be invoked as against Community rules, only to the extent that the Community itself has previously created a situation which can give rise to a legitimate expectation'. [25] Furthermore, although this principle is intended to protect traders on the part of whom 'an institution has inspired reasonable expectations ... there is nothing to prevent a Member State from claiming in an action for annulment that an act of the institutions frustrates the legitimate expectations of' such persons. [26]

76. However, I consider that in this case the conditions for relying on this case-law have not been satisfied.

77. It could not have escaped the notice of the Hellenic Republic that both the above-mentioned communication and the subsequent proposal were Commission guidelines which still had to be converted into a legislative act of the Council and that in the course of the legislative process the Council could make amendments (even far-reaching amendments) to the proposal, as often happens and did in fact happen in the

24 — COM(97) 88 final of 12 March 1997.

25 — Case C-177/90 *Kühn* [1992] ECR I-35, paragraph 14, and Case C-375/96 *Zannotto* [1998] ECR I-6629, paragraph 50.

26 — Case C-342/03 *Spain* v *Council* [2005] ECR I-1975, paragraph 47, and the case-law cited therein.

present case, at least in so far as it is relevant here. [27]

78. Nor is it relevant that in the ninth recital of the preamble to the directive the Council referred explicitly to the communication because that obviously does not mean that the directive 'incorporated' and therefore gave legislative value to all the statements contained in that communication, thereby confirming in some way the 'expectations' which had purportedly been inspired in the Hellenic Republic as a consequence of this communication.

79. As I have already mentioned (point 61 above), in the course of the legislative process the Council changed, precisely in the relevant respect, the strategy set out in the communication and therefore it had to be regarded as valid, in legislative terms, only as regards the part actually incorporated into the final wording of the directive.

80. Therefore, no expectation worthy of legal protection could be based on the proposal (or on the underlying strategy) per se.

27 — See, to that effect, Joined Cases 87/77 and 130/77, 22/83, 9/84 and 10/84 *Salerno* v *Commission and Council* [1985] ECR 2523, which states that 'a resolution of the Parliament is not binding and cannot give rise to the legitimate expectation that the institutions will comply with it' (paragraph 59).

81. In my view, it must be concluded that the argument based on the protection of legitimate expectations must be regarded as unfounded.

Principle of proportionality

82. Finally, the Greek Government contends that in the abovementioned communication the Commission had stated that the strategy which the Community had adopted to combat acidification had to entail measures that were economically rational, that is to say which took account of cost effectiveness. However, the contested decision entails costs to the Hellenic Republic which exceed the advantages gained in relation to the environment. This constitutes an infringement of the principle of proportionality which, however, the Commission is required to comply with when exercising the discretion that, in the view of the applicant government, the directive grants it.

83. Since it follows from the foregoing analysis that in adopting the contested decision the Commission did no more than apply the sole possible interpretation of the second condition laid down by the directive

concerning the grant of a derogation, it appears to me that in actual fact the proportionality test ultimately relates not so much to the decision as to the directive itself.

84. Furthermore, this is indirectly confirmed by the applicant government itself. If, as I propose, the Court concludes that the directive requires the Commission to deny the derogation without taking account of cost effectiveness, the Greek Government requests that the directive be declared inapplicable under Article 241 EC on the grounds that it infringes the principle of proportionality.

85. However, the Commission and the Council challenge the admissibility of this part of the action because, in their view, the Greek Government has failed to state clearly and precisely the grounds put forward in support of the objection of unlawfulness.

86. In my view, however, the Greek Government did indeed state in the application, albeit very briefly, the reasons why the directive had to be declared inapplicable under Article 241 EC. It claimed infringement of the principle of proportionality by the Community legislature in so far as the conditions laid down in respect of the derogation did not meet the cost effectiveness criteria to which the communication on acidification refers.

87. Therefore, I consider that the condition relating to the statement of grounds can, in any event, be deemed to have been satisfied, in particular in the light of the Court's case-law according to which 'the requirements of form imposed by Article 38 of the Rules of Procedure' are satisfied if 'the principles of law which, according to the applicant, have been infringed' are mentioned 'with sufficient clarity'. [28]

88. That said, I should immediately add that even if it is admissible the objection is, in my view, unfounded as regards the substance. The Greek Government bases the infringement of the principle of proportionality on the fact that in certain passages of the communication on acidification the Commission had observed that for certain Member States, including Greece, the reduction in the sulphur content of heavy fuel oils may not be a valid option from a cost point of view.

89. As I have already stated at points 77 to 79, the appraisals contained in the commu-

28 — Case 62/65 *Serio* [1966] 561.

nication were not incorporated in their entirety by the Council when it adopted the directive. Therefore, the proportionality test will have to be applied solely in respect of the provisions of the directive.

90. In that respect it hardly need be recalled that 'according to settled case-law, in order to establish whether a provision of Community law complies with the principle of proportionality, it must be ascertained whether the means which it employs are suitable for the purpose of attaining the desired objective and whether they go beyond what is necessary for that purpose'.[29]

91. As regards the first matter, I have pointed out earlier on several occasions that the purpose of the directive is to reduce emissions of sulphur dioxide. Since, as the eighth recital states 'sulphur ... has for decades been recognised as the dominant source of [such] emissions which are one of the main causes of "acid rain"', it appears clear to me that a restrictive condition on the derogation to the limit on the sulphur content of heavy fuel oils can be considered as appropriate for the attainment of the stated objective.

92. As regards the need for the restrictive condition laid down by the Council, it appears to me that the appraisal made by the Council is properly explained in the preamble to directive, and in particular in the 10th recital which did not feature in the proposal for a directive and which appears precisely to allude to the principle of proportionality.

93. This recital states that 'studies have shown that benefits from reducing sulphur emissions by reductions in the sulphur content of fuels will often be considerably greater than the estimated costs to industry in this Directive and whereas the technology exists and is well established for reducing the sulphur level of liquid fuels'. To this the 15 recital adds that it is appropriate to provide for derogations to the limit on sulphur content for Member States 'where the environmental conditions allow', that is to say, as stipulated in Article 3(2), where, inter alia, there is no contribution to the critical loads in the other Member States being exceeded.

29 — See, inter alia, Case C-284/95 *Safety Hi-Tech* [1998] ECR I-4301, paragraph 57, and Case C-233/94 *Germany* v *Parliament and Council* [1997] ECR I-2405, paragraph 54.

94. Therefore, as the Commission observes, in laying down a limit on the sulphur content of heavy fuel oils the Council took account of the requirements associated with the principle of proportionality by framing the conditions for derogation in the actually very restrictive terms mentioned several times above. It clearly did so having regard to the fact that Community environment policy is based on the precautionary principle (Article 174 EC) and that, consequently, '[w]here there is uncertainty as to the existence or extent of risks to human health, the institutions may take protective measures without having to wait until the reality and seriousness of those risks become fully apparent'. [30]

95. Although, as the Commission itself has stated on another occasion, [31] even measures based on the precautionary principle cannot disregard the requirements associated with the principle of proportionality, the appraisal of proportionality must be made in relation to the level of protection chosen by the legislature and, as has been seen, it opted in the present case for a very high level of protection.

96. On the other hand, the Court has stressed that, in view of the broad margin of discretion which the Council enjoys in attaining the objectives of Community environment policy 'review by the Court must necessarily be limited to the question whether [it] ... committed a manifest error of appraisal'. [32]

97. However, it does not appear that such an error of appraisal has been demonstrated in this case. Even though denial of the derogation entails great cost to Greece, it must be concluded that the objective of avoiding critical loads being exceeded further in other Member States where they are already high can justify the restrictive measure at issue and its consequences. [33]

98. In the light of these considerations, I consider that the directive does not infringe the principle of proportionality and that therefore the objection of unlawfulness must be rejected.

30 — Case C-157/96 *National Farmers' Union and Others* [1998] ECR I-2211, paragraph 63, and Case C-180/96 *United Kingdom* v *Commission* [1998] ECR I-2265, paragraph 99.

31 — Communication from the Commission on the precautionary principle of 2 February 2000, COM(2000) 1 fin., section 6.3.1.

32 — *Safety Hi-Tech*, paragraph 37.

33 — See Case C-331/88 *Fedesa and Others* [1990] ECR I-4023, paragraph 17, and Case C-183/95 *Affish* [1997] ECR I-4315, paragraph 42.

V — Costs

99. Under Article 69(2) of the Rules of Procedure, the unsuccessful party is to be ordered to pay the costs if they have been applied for. Since the Commission has applied for costs, and the Hellenic Republic has been unsuccessful, that Member State must be ordered to pay its own costs and those incurred by the Commission. Under Article 69(4) of the Rules of Procedure, the Member States and institutions which intervene in the proceedings are to bear their own costs. The Council, an intervening party, must therefore bear its own costs.

VI — Conclusion

100. In light of the foregoing considerations, I suggest that the Court should:

(1) dismiss the action.

(2) order the Hellenic Republic to pay the costs incurred by the Commission.

(3) order the Council to bear its own costs.