JUDGMENT OF THE COURT OF FIRST INSTANCE
(Fifth Chamber, Extended Composition)

8 November 2007 *

In Case T-234/04,

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

applicant,

supported by

Kingdom of Denmark, represented by J. Molde, acting as Agent,

intervener,

v

Commission of the European Communities, represented by F. Simonetti and M. van Beek, acting as Agents,

defendant,

* Language of the case: Dutch.

ACTION for annulment of Commission Decision 2004/1/EC of 16 December 2003 concerning national provisions on the use of short-chain chlorinated paraffins notified by the Kingdom of the Netherlands under Article 95(4) [EC] (OJ 2004 L 1, p. 20), in so far as, in that decision, the Commission takes the view that its approval under Article 95(6) EC is required for the maintenance of Netherlands legislation on the uses of short-chain chlorinated paraffins to which no reference is made in Directive 2002/45/EC of the European Parliament and of the Council of 25 June 2002 amending for the 20th time Council Directive 76/769/EEC relating to restrictions on the marketing and use of certain dangerous substances and preparations (short-chain chlorinated paraffins) (OJ 2002 L 177, p. 21),

THE COURT OF FIRST INSTANCE OF THE EUROPEAN COMMUNITIES
(Fifth Chamber, Extended Composition),

composed of M. Vilaras, President, M.E. Martins Ribeiro, F. Dehousse, D. Šváby and K. Jürimäe, Judges,

Registrar: C. Kristensen, Administrator,

having regard to the written procedure and further to the hearing on 7 September 2006,

gives the following

Judgment

Legal framework

International provisions

1 The European Community and some of its Member States were contracting parties to the Convention for the prevention of marine pollution from land-based sources, signed in Paris on 4 June 1974 ('the Paris Convention'). Within the framework of that convention, the Paris Commission had adopted Decision 95/1 ('PARCOM Decision 95/1'), which provides for the phasing-out of the use of short-chain chlorinated paraffins ('SCCPs'). The European Community is not a signatory to PARCOM Decision 95/1.

2 The Paris Convention was replaced by the Convention for the protection of the marine environment of the North-East Atlantic, which was approved on behalf of the Community by Council Decision 98/249/EC of 7 October 1997 on the conclusion of the Convention for the protection of the marine environment of the North-East Atlantic (OJ 1998 L 104, p. 1) ('the OSPAR Convention'); a new Commission ('the OSPAR Commission') replaced the Paris Commission.

Community provisions

3 Article 95(4) and (6) EC provides:

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

...

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

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

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

4 Council Directive 76/769/EEC of 27 July 1976 on the approximation of the laws, regulations and administrative provisions of the Member States relating to restrictions on the marketing and use of certain dangerous substances and preparations (OJ 1976 L 262, p. 201) includes provisions restricting the marketing and use of certain dangerous substances and preparations.

5 According to Article 1(1) of Directive 76/769, the directive applies to the dangerous substances and preparations listed in the Annex thereto. Article 2 of the directive states that Member States are to take all necessary measures to ensure that the dangerous substances and preparations listed in the Annex may be placed on the market or used only subject to the conditions specified therein.

6 Directive 76/769 has been amended many times, in particular in order to add new dangerous substances and preparations to the Annex and — on grounds of protecting human health or the environment — to restrict the marketing or use of those dangerous substances and preparations.

7 Directive 2002/45/EC of the European Parliament and of the Council of 25 June 2002 amending for the 20th time Directive 76/769 relating to restrictions on the marketing and use of certain dangerous substances and preparations (short-chain chlorinated paraffins) (OJ 2002 L 177, p. 21; 'the SCCPs Directive') added a point 42 to the Annex to Directive 76/769, which lays down rules for the marketing and use of SCCPs.

8 According to point 42.1 of the Annex to Directive 76/769, as amended by the SCCPs Directive, SCCPs '[m]ay not be placed on the market for use as substances or as constituents of other substances or preparations in concentrations higher than 1%:

— in metalworking,

— for fat liquoring of leather'.

9 Under point 42.2 of the abovementioned Annex, '[b]efore 1 January 2003 all remaining uses of SCCPs will be reviewed by the European Commission, in cooperation with the Member States and the OSPAR Commission, in the light of any relevant new scientific data on risks posed by SCCPs to health and the environment. The European Parliament will be informed of the outcome of this review'.

10 Article 2(1) of the SCCPs Directive provides that Member States are to adopt and publish, not later than 6 July 2003, the laws, regulations and administrative provisions necessary to comply with the Directive, forthwith inform the Commission thereof and apply those measures from 6 January 2004 at the latest.

National provisions

11 In order to fulfil its international obligations under the Paris Convention and PARCOM Decision 95/1, the Kingdom of the Netherlands on 3 November 1999

adopted the Besluit houdende regels inzake het beperken van het gebruik van kortketenige gechloreerde paraffines (Besluit gechloreerde paraffines WMS) (Decree laying down rules prohibiting certain uses of SCCPs (Law on Chemical Substances), Staatsblad van het Koninkrijk der Nederlanden, 1999, p. 478; 'the Decree'). In accordance with Article 4 of the Decree, it entered into force on 31 December 1999.

12 Article 1 of the Decree provides that it applies to chlorinated alkanes with a chain of from 10 to 13 inclusive carbon atoms and a chlorination degree of not less than 48% by weight.

13 Under Article 2(1) of the Decree, the SCCPs referred to in Article 1 may not be used:

(a) as plasticisers in paints, coatings or sealants;

(b) in metal-working fluids;

(c) as flame-retardant in rubber, plastics or textiles.

14 However, pursuant to Article 2(2) of the Decree, SCCPs may continue to be used until 31 December 2004 in dam sealants or as flame-retardants in conveyor belts for exclusive use in mining.

Background

15 Following adoption of the SCCPs Directive, the Netherlands Government informed the Commission by letter of 17 January 2003 that it considered that the scope of the harmonisation under the SCCPs Directive affected only the uses of SCCPs expressly prohibited in point 42.1 of the Annex to Directive 76/769, as amended by the SCCPs Directive. Consequently, other uses — including those set out in PARCOM Decision 95/1 — were not within the field of harmonisation under the SCCPs Directive; therefore, Member States could authorise or prohibit those uses without having to resort to the procedure under Article 95(4) and (6) EC.

16 In its letter of 17 January 2003, the Netherlands Government also invoked Article 95(4) EC — 'so far as relevant and required by law' — by stating, in accordance with that provision, the grounds for maintaining the prohibitions contained in PARCOM Decision 95/1 in its national legislation. Finally, in that same letter, the Netherlands Government expressed 'hope that the Commission [would] soon adopt the same position as the [Kingdom of] the Netherlands on the latter's discretion to maintain its national provisions and that the Commission [would] take a favourable decision on its request under Article 95(4) EC'.

17 By letter of 25 March 2003, the Commission informed the Kingdom of the Netherlands that it had received the notification under Article 95(4) EC and that the six-month period for its examination had started on 22 January 2003, the day following that on which the notification was received. The Commission also stated in that letter that a copy of the notification would be sent to the other Member States for any observations they might have, and that a notice regarding the notification would be published in the Official Journal.

18 In Decision 2003/549/EC of 17 July 2003 extending the period referred to in Article 95(6) [EC] in relation to the national provisions on the use of SCCPs notified by the Netherlands under Article 95(4) [EC] (OJ 2003 L 187, p. 27), the Commission concluded, first, that the application that the Kingdom of the Netherlands had notified to it on 21 January 2003 with a view to obtaining approval of its national provisions on the use of SCCPs was admissible and, second, that in view of the complexity of the matter and of the absence of evidence highlighting a danger for human health, it was justified to extend the period referred to in the first subparagraph of Article 95(6) EC for a further period expiring on 20 December 2003.

19 Article 1 of Decision 2003/549 is worded as follows :

'Pursuant [to] Article 95(6), third subparagraph, of the Treaty, the period referred to in the first subparagraph of the said Article to approve or reject the national provisions on SCCPs notified by [the Kingdom of] the Netherlands on 21 January 2003 pursuant to Article 95(4) is extended until 20 December 2003.'

20 By its Decision 2004/1/EC of 16 December 2003 concerning national provisions on the use of SCCPs notified by the Kingdom of the Netherlands under Article 95(4) [EC] (OJ 2004 L 1, p. 20, 'the contested decision'), the Commission approved the maintenance, in part, of the national provisions in issue for a limited period.

21 In the contested decision, the Commission stated, first, that it had concluded in Decision 2003/549 that the application submitted by the Kingdom of the Netherlands was admissible and referred, in that respect, to that decision. Nonetheless, the Commission recalled the respects in which the notified provisions were incompatible with the requirements of the SCCPs Directive. Further, as regards

the merits of the application made by the Kingdom of the Netherlands pursuant to Article 95(4) EC, seeking permission to maintain its national provisions derogating from the SCCPs Directive, the Commission concluded that some of those provisions could be temporarily maintained (until 31 December 2006) but that others were not justified on grounds relating to the protection of the environment and could therefore not be maintained.

22 Articles 1 to 3 of the contested decision are worded as follows:

'Article 1

The national provisions on SCCPs notified by [the Kingdom of] the Netherlands on 21 January 2003 pursuant to Article 95(4) [EC] are approved in so far as they do not apply to the use of SCCPs as constituents of other substances and preparations in concentrations lower than 1% intended for use as:

— plasticisers in paints, coatings or sealants,

— flame retardants in rubber or textiles.

Article 2

This decision shall apply until 31 December 2006.

Article 3

This Decision is addressed to the Kingdom of the Netherlands.'

Procedure

23 By application lodged at the Registry of the Court of Justice on 26 February 2004, the Kingdom of the Netherlands brought an action, which was registered under number C-103/04.

24 By separate document lodged at the Registry of the Court of Justice on 14 May 2004, the Commission raised an objection of inadmissibility pursuant to Article 91(1) of the Rules of Procedure of the Court of Justice.

25 By order of the Court of Justice of 8 June 2004, Case C-103/04 was referred to the Court of First Instance, in accordance with the provisions of Article 2 of Council Decision 2004/407/EC, Euratom of 26 April 2004 amending Articles 51 and 54 of the Protocol on the Statute of the Court of Justice (OJ 2004 L 132, p. 5), and was registered under number T-234/04.

26 By document lodged at the Registry of the Court of First Instance on 24 September 2004, the Kingdom of Denmark sought leave to intervene in the present proceedings in support of the Kingdom of the Netherlands. By order of 15 November 2004, the President of the Fifth Chamber of the Court granted leave to intervene.

27 By document lodged at the Court Registry on 6 July 2004, the Kingdom of the Netherlands submitted its observations on the objection of inadmissibility raised by the Commission.

28 On 6 June 2006, the Court, having heard the parties, assigned the present case to the Fifth Chamber, Extended Composition, of the Court.

29 Pursuant to Article 114(3) of the Rules of Procedure, the oral procedure was opened following the Commission's request for a decision on admissibility.

30 As a measure of organisation of procedure, the Court requested the parties to reply in writing to certain questions. The parties complied with that request within the prescribed period.

31 The parties presented oral argument and replied to the Court's questions at the hearing held on 7 September 2006.

Forms of order sought by the parties

32 In its application, the Kingdom of the Netherlands claims that the Court should:

— annul the contested decision in so far as, in that decision, the Commission takes the view that its approval under Article 95(6) EC is required for the maintenance of Netherlands legislation on the uses of SCCPs to which no reference is made in the SCCPs Directive;

— order the Commission to pay the costs.

33 In its objection of inadmissibility, the Commission claims that the Court should:

— dismiss the action as inadmissible;

— order the Kingdom of the Netherlands to pay the costs.

34 In its observations on the objection of inadmissibility, the Kingdom of the Netherlands claims that the Court should reject the Commission's claim to the effect that the Court should rule on admissibility before examining the substance of the case.

Law

35 Under Article 114(1) of the Rules of Procedure, if a party makes an application to this effect, the Court may rule on the objection of inadmissibility without going to the substance of the case. In accordance with Article 114(3), the remainder of the proceedings is to be oral, unless the Court otherwise decides.

36 In accordance with Article 113 of the Rules of Procedure, the Court may at any time, even of its own motion, after hearing the parties, examine whether there exists any absolute bar to proceeding with an action and give its decision for that purpose in accordance with Article 114(3) and (4) of those Rules.

Arguments of the parties

37 The Commission submits in the first place that, in response to the notification made by letter of 17 January 2003, it informed the Kingdom of the Netherlands by letter of 25 March 2003 that it had received the notification and that the period for its examination had started on 22 January 2003, the day following that on which the notification was received. According to the Commission, this showed clearly that it considered that the notified national provisions fell within the scope of the SCCPs Directive since, if that had not been the case, there would have been no need to follow the procedure.

38 In the second place, the Commission submits that — contrary to what the Kingdom of the Netherlands claims — the letter of 17 January 2003 does not indicate in any way that it intended to submit to the Commission two specific and different requests, requiring two separate responses. Even though the Netherlands Government requested the Commission — in section 5 of the letter of 17 January 2003, headed 'Conclusions' — to take a decision, within a short period, on the discretion it had to maintain its national legislation, the fact remains that it also asked the Commission to take a favourable decision on the request that it had submitted under Article 95(4) EC. Accordingly, the Commission considers that, having regard to the wording and the presentation of the letter of 17 January 2003, it was logical for it to conclude — irrespective of the Kingdom of the Netherlands' views on the extent of harmonisation carried out by the SCCPs Directive — that it had made a notification for the purposes of Article 95(4) EC.

39 In the third place, the Commission submits that it implicitly replied in its Decision 2003/549 to the request concerning the scope of the SCCPs Directive, by checking the admissibility of the notification, as is customary. The Commission's views on this issue were clearly set out in recitals 32 to 39 in the preamble to the Decision, and it concluded that the request submitted by the Kingdom of the Netherlands had to be considered admissible. In particular, the Commission stated in recital 34 in the

preamble to Decision 2003/549 that the SCCPs Directive had to be interpreted as having introduced harmonisation of all the current uses of SCCPs and that it thus prevented Member States from introducing or maintaining national restrictions on the use of SCCPs going further than those laid down in that Directive.

40 Contrary to the claims made by the Kingdom of the Netherlands in its application, Decision 2003/549 does not simply extend the period provided for in Article 95(6) EC, which is confirmed by the fact that, in the contested decision, the Commission no longer addresses the issue of the extent of harmonisation carried out by the SCCPs Directive. As regards that question, the contested decision is thus only confirmatory and does not have any independent legal effects capable, as such, of being the subject of an action for annulment for the purposes of Article 230 EC.

41 If the Kingdom of the Netherlands did not agree with the Commission's analysis in respect of the assessment of the admissibility of its notification of 17 January 2003, it ought to have contested Decision 2003/549. Having failed to do so within the period prescribed by Article 230 EC, it cannot now contest the position on admissibility taken by the Commission in that decision by availing itself of the possibility to bring an action against a later Commission decision. That would amount to an unjustified extension of the time-limit prescribed by Article 230 EC.

42 The Kingdom of the Netherlands submits in the first place that the contested decision represents far more than a mere confirmation of Decision 2003/549, which concerned only the extension of the time-limit. The Commission's position, according to which approval under Article 95(6) EC is required, would entail, first, that national measures could be maintained only for a limited period and, second, that the scope of the prohibition of SCCPs as provided for under Netherlands legislation would be more limited than intended. It is therefore the contested

decision which brought about a distinct change in the legal position of the Netherlands, in that it limited its freedom to maintain its national provisions, both in terms of scope and duration.

43 In the second place, the Netherlands Government recalls that it always stated in its contacts with the Commission that it considered that uses of SCCPs to which no reference is made in the SCCPs Directive did not fall within the scope of that directive and that, for that reason, it could maintain them in its national legislation without having to resort to Article 95(4) EC. Therefore, the Netherlands Government submits that it primarily asked the Commission to take a decision on whether a notification under Article 95(4) EC was required, which can be inferred from the fact that, in the letter of 17 January 2003, the Netherlands Government first explained why a notification under Article 95(4) EC was not required in the present case, at the same time expressing hope that the Commission would take a decision, within a short period, on the discretion it had to maintain its national legislation and, further, requested the Commission to adopt a position on the need for such a notification, which was made only 'so far as relevant and required by law'. It was therefore only in the alternative — that is 'in the event that the Commission consider[ed] that uses prohibited by PARCOM Decision 95/1 which [were] not equally prohibited by the Directive of 25 June 2002 [fell] within the scope of that Directive' — that it requested the Commission to approve the maintenance of the national measures in question.

44 In the third place, while acknowledging that the admissibility of the notification was assessed in recitals 32 to 39 in the preamble to Decision 2003/549, the Netherlands Government stresses that the operative part of the decision concerns only the extension of the period referred to in Article 95(6) EC, so that an action against that decision would not have been admissible. Positions expressed in the statement of reasons on which a measure is based are not the proper subject of actions for annulment unless they constitute the essential basis for the operative part of that measure (Order in Case C-164/02 *Netherlands* v *Commission* [2004] ECR I-1177, paragraph 21), which is not the case here.

45 In the fourth place, there is no doubt that, in relation to the contested decision, Decision 2003/549 is a provisional decision. According to the case-law, in the case of acts or decisions adopted by a procedure involving several stages, in particular where they are the culmination of an internal procedure, an act is open to review only if it is a measure definitively laying down the position of the institution at the end of that procedure, and not a provisional measure intended to pave the way for that final decision (Case T-37/92 *BEUC and NCC* v *Commission* [1994] ECR II-285, paragraph 27; and Case T-277/94 *AITEC* v *Commission* [1996] ECR II-351, paragraph 51; Order in Case T-219/01 R *Commerzbank* v *Commission* [2001] ECR II-3501, paragraph 33).

46 In addition, the Kingdom of the Netherlands submits that — assuming that Decision 2003/549 was a measure against which actions may be brought — the fact that it was not challenged cannot constitute an impediment to the admissibility of the action brought against the contested decision. In this respect, it relies on the case-law according to which a failure to challenge a decision to initiate the formal State aid investigation procedure cannot render an action brought against the final decision inadmissible (Case T-129/96 *Preussag Stahl* v *Commission* [1998] ECR II-609, paragraph 31; Joined Cases T-164/96 to T-167/96, T-122/97 and T-130/97 *Moccia Irme and Others* v *Commission* [1999] ECR II-1477, paragraph 65, and Case T-190/00 *Regione Siciliana* v *Commission* [2003] ECR II-5015, paragraph 47).

Findings of the Court

47 According to consistent case-law, a measure producing binding legal effects capable of affecting the interests of the applicant is an act or decision which may be the subject of an action for annulment under Article 230 EC (Case 60/81 *IBM* v *Commission* [1981] ECR 2639, paragraph 9, and Case C-147/96 *Netherlands* v

Commission [2000] ECR I-4723, paragraph 25; Order in *Netherlands* v *Commission*, cited in paragraph 44 above, paragraph 18; Order of 30 March 2006 in Case T-2/04 *Korkmaz and Others* v *Commission*, not published in the ECR, paragraph 33).

48 However, the mere fact that a document is sent by a Community institution to its addressee in response to a request made by the latter is not enough for it to be treated as a decision within the meaning of Article 230 EC, thereby enabling the addressee to bring an action for annulment (see, to that effect, Order in Case C-25/92 *Miethke* v *Parliament* [1993] ECR I-473, paragraph 10; *AITEC* v *Commission*, cited in paragraph 45 above, paragraph 50, and Joined Cases T-93/00 and T-46/01 *Alessandrini and Others* v *Commission* [2003] ECR II-1635, paragraph 60; Order in Case T-29/03 *Comunidad Autónoma de Andalucía* v *Commission* [2004] ECR II-2923, paragraph 29). Moreover, it is not disputed that a mere written expression of opinion by an institution cannot constitute a decision of such a nature as to form the basis of an action for annulment since it is neither capable of producing nor intended to produce any legal effects (Case C-308/95 *Netherlands* v *Commission* [1999] ECR I-6513, paragraph 27).

49 In the present case, by letter of 17 January 2003, the Netherlands Government submitted two requests to the Commission. First, it requested the Commission to adopt a position on the question of the scope of the SCCPs Directive, by putting forward the view that uses prohibited by PARCOM Decision 95/1 that were not expressly prohibited by the SCCPs Directive were not within the field of harmonisation under the Directive, so that they could be authorised or prohibited by national legislation without a Commission decision being required for that purpose. Second, it requested that — should the Commission find that the notified national provisions fell within the scope of the SCCPs Directive — the Commission take a view on their maintenance in accordance with the procedure provided for in Article 95(4) and (6) EC. The Kingdom of the Netherlands used the same letter to ask the Commission to decide on the need for approval under Article 95(6) EC, which it disputes, and formally to request such approval because — as explained by

the Netherlands Government — the end of the period for transposition of the SCCPs Directive was approaching and it wanted to be able to comply with its obligations under the Directive in due time.

50 It is apparent from the letters sent to the Commission and the Council on 25 June 2001 that the Netherlands Government had expressed concerns during the procedure for adopting the SCCPs Directive that the draft directive did not provide the same level of protection as that provided for in PARCOM Decision 95/1, and that it had questioned the appropriateness of adopting a Community harmonisation measure which would prevent it, as a party to the OSPAR Convention, from complying with its international obligations. That position was confirmed at the time of adoption of the SCCPs Directive, with the Netherlands delegation voting against that directive and stating in a voting declaration made on 24 April 2002 that the implementation of a directive on SCCPs would make it impossible for the Kingdom of the Netherlands to discharge its international obligations under the Paris Convention and PARCOM Decision 95/1. The question of how those obligations are to be fulfilled was raised once more in Section 5(6) of the letter of 17 January 2003.

51 By requesting that the contested decision be annulled only in so far as the Commission took the view that the maintenance of the national provisions at issue required its approval under Article 95(6) EC, the Kingdom of the Netherlands seeks to contest the position adopted by the Commission in relation to the first request set out in the letter of 17 January 2003, namely the request concerning the extent of harmonisation under the SCCPs Directive. In other words, the Commission's assessment of the merits of the grounds put forward by the Kingdom of the Netherlands for maintaining notified national provisions in force is not part of the subject-matter of the proceedings, which concern only the interpretation by the Commission of the extent of harmonisation under the SCCPs Directive.

52 It must therefore be determined whether the position which the Commission adopted and which the Kingdom of the Netherlands contests — in so far as it implied that authorisation for the purposes of Article 95(6) EC was required to maintain in force the notified national provisions — constitutes a challengeable act.

53 In the first place, the terms of and the rationale for the procedure provided for in Article 95(4) and (6) EC should be recalled.

54 First, Article 95(4) EC provides that if, after the adoption of a Community harmonisation measure, a Member State deems it necessary to maintain national provisions on grounds of major needs referred to in Article 30 EC, or relating to the protection of the environment or the working environment, it is to notify the Commission of these provisions as well as the grounds for maintaining them.

55 It is therefore apparent from the wording of that provision that it is the Member State which has to decide to make a notification and thereby to start the procedure provided for in Article 95(4) and (6) EC, which presupposes that the Member State establishes beforehand whether the national provisions in issue have to be authorised by the Commission in order to be maintained in force. In addition, the grounds referred to in Article 95(4) EC which the Member State is required to provide in support of its request confirm that this procedure is intended to give the Member State concerned the opportunity to obtain authorisation to maintain national provisions that are incompatible with the harmonisation measure.

56 Second, that interpretation is supported by the case-law, the Court of Justice having already held that the procedure provided for in Article 95(4) and (6) EC is initiated not by a Community institution but by a Member State, with the decision of the Community institution being adopted merely in response to that initiative. In its request, that State is at liberty to comment on the decision it asks to have adopted, as is quite clear from Article 95(4) EC, which requires that State to state the grounds for maintaining the national provisions in question (Case C-3/00 *Denmark* v *Commission* [2003] ECR I-2643, paragraphs 47 and 48; see also, to that effect, Joined Case C-281/03 and C-282/03 *Cindu Chemicals and Others* [2005] ECR I-8069, paragraph 47).

57 The Court of Justice has moreover explained that following notification by a Member State of derogating national provisions to the Commission, the procedure continues with a phase during which the Commission carries out an assessment of the facts in the file to determine whether the requisite conditions are fulfilled, and ends with the final decision approving or prohibiting those national provisions. To that end, it falls to the Commission to examine whether the grounds put forward by the Member State are well founded (Case C-512/99 *Germany* v *Commission* [2003] ECR I-845, paragraph 44). A notification of derogating national provisions thus presupposes that the provisions differ from those provided for in the harmonising directive, which means — because they are incompatible with the Community harmonisation measure — that the Member State concerned recognises the need for them to be authorised by way of derogation.

58 Third, it is apparent from the case-law that the national provisions referred to in Article 95(4) EC are provisions that predated the Community harmonisation measure and were therefore known to the Community legislature, but that the Community legislature could not or did not seek to be guided by them for the purpose of harmonisation. It was therefore considered acceptable for the Member State to request that its own rules remain in force, on condition that such national provisions must be justified on grounds of the major needs referred to in Article 30 EC or relating to the protection of the environment or the working environment (*Germany* v *Commission*, cited in paragraph 57 above, paragraph 41, and *Denmark* v *Commission*, cited in paragraph 56 above, paragraph 58).

59 The rationale behind Article 95(4) EC lies in the fact that the Community legislature was aware of the different national laws in place before the harmonisation measure was adopted, which means that the different levels of protection and the grounds for them had already been discussed and taken into consideration at the time that measure was adopted. Therefore, having participated in the procedure for adoption of the measure, every Member State theoretically has all the information needed to determine whether it is necessary to initiate the procedure provided for in Article 95(4) and (6) EC, and, in particular, the information enabling it to decide whether its national provisions are incompatible with the harmonisation measure adopted.

60 It therefore emerges from the terms, the purpose and the broad logic of Article 95(4) and (6) EC that initiation of the procedure under that article presupposes that the Member State itself assesses whether national provisions are incompatible with a Community harmonisation measure and — if it deems it necessary — notifies those provisions to the Commission with a view to obtaining authorisation simply to maintain them in force. In addition, it follows from the above that, in the context of the procedure provided for in Article 95(4) and (6) EC, it is for the Commission to examine the merits of the grounds put forward by the Member State concerned for maintaining the national measures in question. Article 95(6) EC confers on the Commission the power only to decide, following such an examination, whether the request for authorisation must be approved or rejected.

61 It follows that a Member State cannot on the basis of Article 95(4) EC request the Commission to take a decision on the extent of harmonisation under a Community directive and/or on the compatibility of national legislation with such a directive. Since, according to that same provision, it is solely for the Member State concerned to take the decision to notify in order to obtain an authorisation by way of derogation and since, furthermore, no provision in the SCCPs Directive confers on the Commission the power to decide on its interpretation, a position adopted by the Commission on the scope of the harmonisation measure in issue constitutes a mere opinion, which is not binding upon the competent national authorities (see, to that effect, Case 133/79 *Sucrimex and Westzucker* v *Commission* [1980] ECR 1299, paragraphs 16 to 18, and Case 114/86 *United Kingdom* v *Commission* [1988] ECR 5289, paragraph 13; see, to that effect, Order in Case 151/88 *Italy* v *Commission* [1989] ECR 1255, paragraph 22, and Case C-50/90 *Sunzest* v *Commission* [1991] ECR I-2917, paragraphs 12 to 14).

62 In such circumstances, it is not the interpretation of the directive in issue proposed by the Commission which is capable of producing legal effects but, rather, its application to a given situation (Case T-81/97 *Regione Toscana* v *Commission* [1998] ECR II-2889, paragraph 23, and *Alessandrini and Others* v *Commission*, cited in paragraph 48 above, paragraph 61). It follows from the above that application of the SCCPs Directive — including as regards the need to obtain authorisation by way of

derogation to maintain in force national legislation — does not result from the interpretation proposed by the Commission, but is the responsibility of the Member State concerned, which alone, if it deems it necessary, can initiate the notification procedure provided for in Article 95 EC. In other words, while nothing precludes a Member State from asking the Commission for its opinion concerning the interpretation of a Community harmonisation measure, the fact remains that such an opinion does not bind the addressee in any way, in the sense that it does not oblige it to notify its national provisions in order to obtain approval by way of derogation, to abolish them or to amend them

63 Any obligation for the Member State to abolish or to amend its national provisions results directly from the SCCPs Directive and not from the interpretation given by the Commission of the extent of harmonisation under that directive, which means that such an interpretation produces no legal effect. That is supported by the fact that — in accordance with the relevant case-law — a notification made for the purposes of Article 95 EC does not authorise the Member State concerned to apply its national provisions until after it has obtained a decision from the Commission approving them, so that a notification does not in the meantime relieve a Member State of the obligation to meet the requirements of the harmonisation directive (see, to that effect, Case C-319/97 *Kortas* [1999] ECR I-3143, paragraphs 28 and 38).

64 In the second place, it is necessary to examine whether, irrespective of the fact that the Kingdom of the Netherlands made a specific request for a formal response regarding the scope of the SCCPs Directive, the position which the Commission adopted in this respect — in so far as it is part of the assessment of the admissibility of the notification submitted by the Member State concerned — must be considered to be an integral part of the procedure at the end of which the Commission approves or rejects the request to maintain the notified national provisions and whether, accordingly, it constitutes a challengeable act.

65 It is clear from the Commission's practice in this area that decisions adopted following the procedure provided for in Article 95(4) and (6) EC contain — as part

of the assessment of admissibility — information on points in respect of which the notified national provisions differ from the Community harmonisation measure. Such information, which is in no way the result of an analysis at the end of which the Commission finds that the national provisions are incompatible with the harmonisation measure at issue, constitutes a simple reminder of points in respect of which — in accordance with the notification by the Member State — those provisions differ from those provided for in the harmonisation directive.

66 However, it is not impossible that the Commission may be led, as part of the assessment of admissibility, to take a view — at its own initiative or, as in the present case, at the request of the Member State concerned — on the interpretation of the scope of the harmonisation directive at issue. The prior assessment of admissibility of the notification, which may, where appropriate, contain its opinion on the extent of harmonisation under the directive in issue, allows the Commission to determine whether the conditions that must be present for it to adopt a decision on the basis of Article 95(6) EC have been fulfilled and, in this way, also to avoid an unnecessary and pointless examination of the grounds put forward by the Member State for maintaining in force the national legislation that it has notified.

67 Following such an assessment, the Commission may therefore reach the conclusion that no authorisation is necessary for the Member State to maintain in force the provisions that it has notified, precisely because those provisions do not fall within the scope of the harmonisation directive. The fact that, in such a situation, the Commission declares the request for authorisation by way of derogation to be inadmissible (see, to that effect, Commission Decision 2002/65/EC of 25 January 2002 on the national provisions concerning HIV testing kits notified under Article 95(4) [EC] by the United Kingdom as regards Directive 98/79/EC on in vitro diagnostic medical devices (OJ 2002 L 25, p. 47)) confirms that, irrespective of a request by the Member State to that effect, the Commission undertakes a prior examination in order to establish whether the conditions for adopting a decision on the basis of Article 95(6) EC have been fulfilled.

68 However, where the Commission restricts itself, in the context of the assessment of the admissibility of the notification, to recalling the extent of harmonisation by the directive in issue and to confirming the assessment made by the Member State which caused the latter to notify the national provision concerned — as in the present case in respect of the Netherlands Government's second request —, the outcome of such an examination must be regarded as not capable of changing the legal position of the Member State concerned, given that it is the notification by the Member State which initiated the procedure provided for in Article 95(4) and (6) EC and not the Commission's opinion on the interpretation of the harmonisation directive in issue. In the context of that procedure, such an opinion means only that the grounds put forward by the Member State will be examined for the purposes of possibly maintaining the notified national provisions.

69 Given that, in the present case, the Commission has exercised the decision-making powers conferred upon it by Article 95(6) EC by examining the merits of the grounds put forward by the Kingdom of the Netherlands, in order to establish whether the conditions for granting an authorisation by way of derogation were fulfilled, and by deciding to grant that Member State the authorisation requested — even though that authorisation is partial and for a limited period —, it must be concluded that the position adopted by the Commission which that Member State challenges has not changed its legal position and therefore is not capable of being the subject of an application for annulment.

70 Moreover, it cannot be accepted that a Member State is at liberty to notify national provisions on the basis of Article 95(4) EC and then to challenge the final decision only if it rejects — either fully or in part — the derogation requested, by claiming that the Commission's approval was not required and that the latter therefore should not have assessed the notified provisions by following the procedure provided for in Article 95(4) and (6) EC. This would effectively allow that State to obtain — by way of notification — a declaration from the Commission on the compatibility of the Member State's provisions with the Community harmonisation measure, which is not the purpose of that procedure.

71 It follows from all the foregoing that the action, in so far as it seeks the annulment of the alleged Commission decision regarding the interpretation of the extent of harmonisation under the SCCPs Directive, is inadmissible.

Costs

72 Under Article 87(2) of the Rules of Procedure, the unsuccessful party is to be ordered to pay the costs if they have been applied for in the successful party's pleadings. Since the Kingdom of the Netherlands has been unsuccessful, it must be ordered to pay the Commission's costs, in accordance with the form of order sought by the Commission.

73 Under the first subparagraph of Article 87(4) of the Rules of Procedure, Member States which have intervened in the proceedings are to bear their own costs. The Kingdom of Denmark will accordingly bear its own costs.

On those grounds,

THE COURT OF FIRST INSTANCE
(Fifth Chamber, Extended Composition)

hereby:

1. Dismisses the action as inadmissible;

2. **Orders the Kingdom of the Netherlands to bear its own costs and to pay those incurred by the Commission;**

3. **Orders the Kingdom of Denmark to bear its own costs.**

Vilaras Martins Ribeiro

Dehousse Šváby Jürimäe

Delivered in open court in Luxembourg on 8 November 2007.

E. Coulon M. Vilaras

Registrar President