JUDGMENT OF THE COURT (First Chamber)

23 February 2006 *

In Case C-122/04,

ACTION for annulment under Article 230 EC, brought on 5 March 2004,

Commission of the European Communities, represented by C.-F. Durand and M. van Beek, acting as Agents, with an address for service in Luxembourg,

applicant,

v

European Parliament, represented by K. Bradley and M. Gómez-Leal, acting as Agents, with an address for service in Luxembourg,

Council of the European Union, represented by I. Díez Parra and M. Balta, acting as Agents, with an address for service in Luxembourg,

defendants,

* Language of the case: French.

supported by

Kingdom of Spain, represented by M. Muñoz Pérez, acting as Agent, with an address for service in Luxembourg,

Republic of Finland, represented by T. Pynnä, acting as Agent, with an address for service in Luxembourg,

interveners,

THE COURT (First Chamber),

composed of P. Jann, President of the Chamber, N. Colneric (Rapporteur), J.N. Cunha Rodrigues, M. Ilešič and E. Levits, Judges,

Advocate General: L.A. Geelhoed,
Registrar: M. Ferreira, Principal Administrator,

having regard to the written procedure and further to the hearing on 30 June 2005,

after hearing the Opinion of the Advocate General at the sitting on 15 September 2005,

gives the following

Judgment

1 By its application, the Commission of the European Communities asks the Court to annul Article 17(2) of Regulation (EC) No 2152/2003 of the European Parliament and of the Council of 17 November 2003 concerning monitoring of forests and environmental interactions in the Community (Forest Focus) (OJ 2003 L 324, p. 1; 'the Forest Focus regulation'), in so far as it makes the adoption of implementing measures for the Forest Focus programme subject to the regulatory procedure laid down in Article 5 of Council Decision 1999/468/EC of 28 June 1999 laying down the procedures for the exercise of implementing powers conferred on the Commission (OJ 1999 L 184, p. 23; 'the second comitology decision') and to maintain the effects of the above regulation until its amendment, which should be carried out as soon as possible after the judgment of the Court.

2 By order of the President of the Court of Justice of 15 July 2004, the Kingdom of Spain and the Republic of Finland were granted leave to intervene in support of the form of order sought by the European Parliament and the Council of the European Union.

Legal context

The EC Treaty

3 In accordance with the third indent of Article 202 EC:

'To ensure that the objectives set out in this Treaty are attained the Council shall, in accordance with the provisions of this Treaty:

...

— confer on the Commission, in the acts which the Council adopts, powers for the implementation of the rules which the Council lays down. The Council may impose certain requirements in respect of the exercise of these powers. The Council may also reserve the right, in specific cases, to exercise directly implementing powers itself. The procedures referred to above must be consonant with principles and rules to be laid down in advance by the Council, acting unanimously on a proposal from the Commission and after obtaining the opinion of the European Parliament.'

The second comitology decision

4 The second comitology decision was adopted on the basis of the third indent of Article 202 EC.

5 It replaced Council Decision 87/373/EEC of 13 July 1987 laying down the procedures for the exercise of implementing powers conferred on the Commission (OJ 1987 L 197, p. 33).

6 Under Article 2 of the second comitology decision:

'The choice of procedural methods for the adoption of implementing measures shall be guided by the following criteria:

(a) management measures, such as those relating to the application of the common agricultural and common fisheries policies, or to the implementation of programmes with substantial budgetary implications, should be adopted by use of the management procedure;

(b) measures of general scope designed to apply essential provisions of basic instruments, including measures concerning the protection of the health or safety of humans, animals or plants, should be adopted by use of the regulatory procedure; where a basic instrument stipulates that certain non-essential provisions of the instrument may be adapted or updated by way of implementing procedures, such measures should be adopted by use of the regulatory procedure;

(c) without prejudice to points (a) and (b), the advisory procedure shall be used in any case in which it is considered to be the most appropriate.'

7 Articles 3 to 6 of the decision define four procedures entitled 'Advisory procedure' (Article 3), 'Management procedure' (Article 4), 'Regulatory procedure' (Article 5) and 'Safeguard procedure' (Article 6).

8 In accordance with Articles 4(1) and 5(1) of the decision, the Commission is to be assisted by a management committee and a regulatory committee, both composed of the representatives of the Member States and chaired by the representative of the Commission.

9 Article 4(3) and (4) of the second comitology decision provides:

'3. The Commission shall, without prejudice to Article 8, adopt measures which shall apply immediately. However, if these measures are not in accordance with the opinion of the committee, they shall be communicated by the Commission to the Council forthwith. In that event, the Commission may defer application of the measures which it has decided on for a period to be laid down in each basic instrument but which shall in no case exceed three months from the date of such communication.

4. The Council, acting by qualified majority, may take a different decision within the period provided for by paragraph 3.'

10 Article 5(3) to (6) of the decision provides:

'3. The Commission shall, without prejudice to Article 8, adopt the measures envisaged if they are in accordance with the opinion of the committee.

4. If the measures envisaged are not in accordance with the opinion of the committee, or if no opinion is delivered, the Commission shall, without delay, submit to the Council a proposal relating to the measures to be taken and shall inform the European Parliament.

5. If the European Parliament considers that a proposal submitted by the Commission pursuant to a basic instrument adopted in accordance with the procedure laid down in Article 251 of the Treaty exceeds the implementing powers provided for in that basic instrument, it shall inform the Council of its position.

6. The Council may, where appropriate in view of any such position, act by qualified majority on the proposal, within a period to be laid down in each basic instrument but which shall in no case exceed three months from the date of referral to the Council.

If within that period the Council has indicated by qualified majority that it opposes the proposal, the Commission shall reexamine it. It may submit an amended proposal to the Council, resubmit its proposal or present a legislative proposal on the basis of the Treaty.

If on the expiry of that period the Council has neither adopted the proposed implementing act nor indicated its opposition to the proposal for implementing measures, the proposed implementing act shall be adopted by the Commission.'

11 Article 7 of the second comitology decision concerns the committees.

12 Article 8 of the decision governs the situation where the Parliament indicates that draft implementing measures would exceed the implementing powers provided for in the basic instrument.

The Forest Focus regulation

13 The Forest Focus regulation was adopted on the basis particularly of Article 175 EC.

14 According to Article 1 of that regulation, 'a Community scheme for broad-based, harmonised and comprehensive, long-term monitoring of the condition of forests, (hereinafter referred to as "the scheme") is hereby established to:

(a) continue and further develop:

— monitoring of air pollution and air pollution effects and of other agents and factors that have an impact on forests, such as biotic and abiotic factors and factors of anthropogenic origin,

— monitoring of forest fires and their causes and effects,

— forest fire prevention;

(b) assess the requirements for and develop the monitoring of soils, carbon sequestration, climate change effects and biodiversity, as well as protective functions of forests;

(c) continuously evaluate the efficiency of the monitoring activities in the assessment of the condition of forests and the further development of monitoring activity.

...'

15 Pursuant to Article 2(1) of that regulation:

'The scheme shall provide for actions designed to:

(a) promote harmonised collection, handling and assessment of data;

(b) improve data evaluation and promote integrated data evaluation at Community level;

(c) improve the quality of data and information gathered under the scheme;

(d) further develop the monitoring activity of the scheme;

(e) enhance the understanding of forests and, in particular, the impact of natural and anthropogenic stresses;

(f) study the dynamics of forest fires and their causes and impacts on forests;

(g) develop indicators as well as methodologies for risk assessment concerning multiple stresses on forests over time and space.'

16 Sections 2 and 3 of the Forest Focus regulation, entitled 'Monitoring and tools to improve and develop the scheme' and 'National programmes, coordination and cooperation' respectively, contain Articles 4 to 7 and 8 to 11.

17 Article 12 of the Forest Focus regulation provides that the scheme is to run for a period of four years, from 1 January 2003 to 31 December 2006.

18 Article 13 of the regulation provides that the financial framework for the implementation of the scheme for the period 2003 to 2006 is EUR 61 million, of which EUR 9 million can be used for fire prevention measures.

19 Pursuant to the 18th recital in the preamble to the regulation:

'This regulation lays down, for the entire duration of the programme, a financial framework constituting the prime reference, within the meaning of point 33 of the Interinstitutional Agreement of 6 May 1999 between the European Parliament, the Council and the Commission on budgetary discipline and improvement of the budgetary procedure, for the budgetary authority during the annual budgetary procedure.'

20 The 24th recital in the preamble to the regulation states:

'The measures of general scope necessary for the implementation of this regulation should be adopted in accordance with [the second comitology decision].'

21 Article 17(2) of the regulation provides:

'Where reference is made to this paragraph, Articles 5 and 7 of [the second comitology decision] shall apply, having regard to the provisions of Article 8 thereof.

...'

22 The following provisions of the Forest Focus regulation fall within the scope of that paragraph:

'*Article 4*

1. Building on the achievements of [Council] Regulation (EEC) No 3528/86 [of 17 November 1986 on the protection of the Community's forests against atmospheric pollution (OJ 1986 L 326, p. 2)], the scheme shall:

(a) continue and further develop the systematic network of observation points in order to conduct periodic inventories in order to gather representative information on the condition of forests;

(b) continue and further develop the network of observation plots, on which intensive and continuous monitoring of forests is carried out.

2. Detailed rules for the implementation of paragraph 1 shall be laid down in accordance with the procedure referred to in Article 17(2).

Article 5

1. Building on the achievements of [Council] Regulation (EEC) No 2158/92 [of 23 July 1992 on protection of the Community's forests against fire (OJ 1992 L 217, p. 3)], the scheme shall continue and further develop the information system in order to collect comparable information on forest fires at Community level.

2. The scheme shall allow Member States to conduct studies on the identification of the causes and dynamics of forest fires, as well as on their impacts on forests. Those studies shall complement activities and measures relating to forest fires undertaken in accordance with [Council] Decision 1999/847/EC [of 9 December 1999 establishing a Community action programme in the field of civil protection (OJ 1999 L 327, p. 53)], [Council] Regulation (EC) No 1257/1999 [of 17 May 1999 on support for rural development from the European Agricultural Guidance and Guarantee Fund (EAGGF) and amending and repealing certain regulations (OJ 1999 L 160, p. 8)] and [Council] Regulation (EEC) No 1615/89 [of 29 May 1989 establishing a European Forestry Information and Communication System (Efics) (OJ 1989 L 165, p. 12)].

In addition and up to 31 December 2005, awareness-raising campaigns and special training for agents involved in fire prevention interventions shall be financed separately in accordance with Article 13(1), unless such measures are included in the rural development programmes.

...

5. Detailed rules for the implementation of paragraphs 1 and 2 shall be laid down in accordance with the procedure referred to in Article 17(2).

Article 6

1. For the realisation of the objectives set out in Article 1(1)(b) the scheme shall be developed by means of studies, experiments, demonstration projects, testing on a pilot basis and establishment of new monitoring activities. The Commission shall, in cooperation with the Member States, develop the scheme, in particular to:

(a) enhance the knowledge of the condition of forests and other wooded land as well as the relationship between their condition and natural and anthropogenic stress factors;

(b) assess impacts of climate change on forests and other wooded land, including impacts on their biological diversity and their relationship with carbon sequestration and soil;

(c) taking into account the relevant existing indicators, identify key structural and functional ecosystem elements to be used as indicators for assessing status and trends of biological diversity in forests and the protective functions of forests.

2. In parallel with the measures set out in paragraph 1, the Member States may, at the request of the Commission or on their own initiative, carry out studies, experiments, demonstration projects or a monitoring test phase.

3. The measures set out in paragraphs 1 and 2 shall help to identify options for the establishment of new monitoring activities under the scheme, which should contribute substantially to the information and monitoring needs within the fields listed under Article 1(1)(b). The implementation of these activities shall be considered as part of the review referred to in Article 18. When developing the scheme, the Commission shall take account of scientific as well as financial needs and restrictions.

4. Detailed rules for the implementation of paragraphs 1, 2 and 3, including decisions on the implementation of new monitoring activities, shall be laid down in accordance with the procedure referred to in Article 17(2).

Article 7

1. For the realisation of the objectives set out in Article 1(1)(c) and in addition to the actions set out in Article 6, the Commission, in close cooperation with the Member States, shall conduct studies, experiments and demonstration projects in order to:

(a) promote harmonised collection, handling and assessment of data at Community level;

(b) improve data evaluation at Community level;

(c) improve the quality of data and information gathered under the scheme.

...

3. Detailed rules for the implementation of paragraph 1 shall be laid down in accordance with the procedure referred to in Article 17(2).

Article 8

1. The activities provided for in Articles 4, 5, 6(2) and (3) and 7(2) shall be implemented under national programmes, to be drawn up by the Member States for periods of two years.

2. The national programmes shall be submitted to the Commission within 60 days following the entry into force of this regulation and thereafter before 1 November in the year preceding the commencement date of each three-year period.

3. Member States shall adapt their national programmes with the approval of the Commission, in particular in order to allow for the extension of the monitoring activity, developed in accordance with Article 6, when established.

4. The national programmes shall be accompanied by an *ex ante* evaluation when they are submitted to the Commission. The Member States shall also carry out mid-term evaluations at the end of the third year of the period indicated in Article 12 and *ex post* evaluations at the end of that period.

5. The Commission shall, on the basis of the national programmes submitted, or on the basis of any approved adaptations of these national programmes, decide on the financial contributions to the eligible costs.

6. Detailed rules for the implementation of paragraphs 1 to 5 shall be laid down in accordance with the procedure referred to in Article 17(2), taking into account national, European and international monitoring mechanisms in order to avoid any additional administrative burden.

Article 9

...

3. The Commission shall establish a scientific advisory group which shall assist the Standing Forestry Committee in preparing its work, in particular to develop the scheme as referred to in Article 6.

...

6. Detailed rules for the implementation of paragraph 3 shall be laid down in accordance with the procedure referred to in Article 17(2).

Article 10

1. To harmonise the activities referred to in Articles 4, 5 and 6(3) and to ensure the comparability of data, manuals shall specify mandatory and optional parameters and lay down the monitoring methods as well as the data formats to be used for data transmission. Manuals should build on existing systems where available and appropriate.

2. Detailed rules for the implementation of paragraph 1 shall be laid down in accordance with the procedure referred to in Article 17(2).

Article 14

1. Member States shall designate the bodies competent to manage the activities included in the approved national programmes, on the basis of the financial and operational capacity of those bodies. Those bodies may be either national administrations or other entities, subject to the Commission's approval of private entities with a public service mission providing adequate financial guarantees and complying with the conditions provided for in the detailed rules for the implementation of this paragraph.

2. Without prejudice to the existing competent authorities, Member States shall designate the authorities and agencies empowered to carry out the measures adopted in accordance with this regulation.

3. Member States shall be responsible for the sound and efficient management of the Community contribution. To that end, they shall adopt the provisions necessary to:

(a) ensure that the activities financed by the Community are actually carried out and that they are carried out in the proper manner, ensuring the visibility of the contribution of the Community;

(b) prevent any irregularity;

(c) recover payments lost as a result of any irregularity or negligence;

(d) ensure that the bodies mentioned in paragraph 1 have proper internal management and control systems;

(e) ensure that, if the bodies mentioned in paragraph 1 are not public entities, Member States stand guarantee for them.

4. Member States shall provide the Commission with all the necessary information and shall make any arrangements which may facilitate checks, including on-the-spot inspections by the Commission or the European Court of Auditors, which the Commission considers appropriate for the purposes of managing Community financing. Member States shall inform the Commission of any arrangements made to this end.

5. Detailed rules for the implementation of paragraphs 1 to 4 shall be laid down in accordance with the procedure referred to in Article 17(2).

Article 15

1. The Member States shall annually, through the designated authorities and agencies, forward to the Commission the data gathered under the scheme, together with a report on them.

The data shall be geo-referenced and transmitted to the Commission by means of computer telecommunications and/or electronic technology. The Commission shall, in close cooperation with the Member States, establish the format and particulars needed for such transmission.

...

4. Detailed rules for the implementation of paragraph 1 shall be laid down in accordance with the procedure referred to in Article 17(2).

Article 16

...

3. Each Member State shall draw up a report on the national situation regarding matters covered by the monitoring activities referred to in Article 6(3), when established.

Guidelines for the reporting and the reporting period shall be laid down in accordance with the procedure referred to in Article 17(2).'

23 When the Forest Focus regulation was adopted, a declaration was made by the Commission, in which it stated, inter alia:

'Given that the measures set out in the proposal relate to the implementation of programmes with important budget implications, the Commission considers that they must be adopted according to the management procedure.'

The action

24 In support of its action the Commission puts forward a single plea in law, alleging that the Parliament and the Council failed to comply with the obligation to give reasons.

Arguments of the Commission

25 The Commission takes the view that the criteria laid down in Article 2 of the second comitology decision have been disregarded.

26 According to the Commission, the implementing measures to be taken pursuant to the Forest Focus regulation are management measures for an action programme. For the implementation of Community programmes only the management procedure or, as appropriate, the consultative procedure is, in principle, applicable.

27 It submits that, with regard to the implementation of a programme, the implementing measures, even those drafted in wide terms and closely linked to the management and implementation of that programme, fall within the scope of Article 2(a) of the second comitology decision.

28 The Commission considers that the measures to be adopted by the regulatory committee in accordance with Article 2(b) of that decision do not merely relate to the protection of plant safety as such, but also seek to ensure consumer safety,

whether the plants are consumed directly or indirectly, with animals as intermediaries. The measures implementing an act of the Parliament whose main objective is, as in the present case, the protection of the environment and not of agriculture cannot be considered measures for the protection of plant safety. That is all the more so since the implementing measures to be adopted on the basis of the Forest Focus regulation in no way affect the forests themselves but the means of management relating to the implementation of activities liable to be financed by the Community budget.

29 The Commission adds that the measures provided for by the Forest Focus regulation are of exactly the same type as those laid down by Regulation (EC) No 1655/2000 of the European Parliament and of the Council of 17 July 2000 concerning the Financial Instrument for the Environment (LIFE) (OJ 2000 L 192, p. 1; hereinafter 'the LIFE regulation'), which was the subject of the judgment of the Court in Case C-378/00 *Commission* v *Parliament and Council, 'LIFE'*, [2003] ECR I-937.

30 Referring to paragraphs 53 and 54 of the *LIFE* judgment, the Commission submits that the objective of achieving greater consistency and predictability in the choice of type of committee would be compromised if the Community legislature could, when adopting a basic instrument conferring implementing powers on the Commission, depart from the criteria which are laid down in the second comitology decision without being required to state the reasons for doing so.

31 It takes the view that, by the addition of the words 'general scope', the 24th recital in the preamble to the Forest Focus regulation adds nothing in terms of reasoning compared to the standard recital which appears in all acts providing for application of the committee procedure. The duty to give reasons attaching to the choice of the Council and Parliament to use a procedure different from that entailed by the criteria set out in Article 2 of the second comitology decision is therefore infringed.

Findings of the Court

32 It is clear from paragraphs 49 and 56 of the *LIFE* judgment that although the criteria laid down in Article 2 of the second comitology decision are not binding, where the Community legislature departs from those criteria in the choice of a committee procedure, it must give reasons for its choice.

33 It must, therefore, first be considered whether, in the present case, the choice of the Community legislature coincides with the criteria laid down in Article 2(b) of that decision.

34 According to the first subparagraph of that provision, the regulatory procedure should be chosen for measures of general scope designed to apply essential provisions of basic instruments.

35 That concept must be contrasted with the concept of 'management measures' within the meaning of Article 2(a) of the second comitology decision. Management measures include, inter alia, those relating to the implementation of programmes with substantial budgetary implications.

36 It should be recalled in that regard that the second comitology decision was adopted on the basis of the third indent of Article 202 EC.

37 The concept of implementation for the purposes of that article comprises both the drawing-up of implementing rules and the application of rules to specific cases by means of acts of individual application (see Case 16/88 *Commission* v *Council* [1989] ECR 3457, paragraph 11).

38 Although acts of individual application can be covered only by Article 2(a) of the second comitology decision, measures of general application may come under either of the two parts of that article.

39 Thus, in paragraph 61 of the *LIFE* judgment, the Court concurred with the view of the Advocate General that the guidelines laying down the conditions on which projects were able to benefit from financing under the programme in question were closely linked to the implementation of that programme and did not constitute 'measures of general scope designed to apply essential provisions of basic instruments' within the meaning of Article 2(b) of the second comitology decision. The Court classified them as management measures relating to the implementation of programmes within the meaning of Article 2(a) of that decision.

40 In order to define the scope of the first two parts of that article, the characteristics of the two procedures to which they refer should be noted. Compared to the management procedure, the regulatory procedure gives a larger role to the Council. Furthermore, unlike the former, the latter provides in certain situations for the involvement of the Parliament.

41 In the light of those differences, there must be classified as 'management measures ... relating ... to the implementation of programmes' within the meaning of Article 2(a) of the second comitology decision, first, measures of individual application adopted for that purpose (see *Commission* v *Council*, paragraphs 15 and 18) and, second, measures of general application closely linked to them and part of a framework sufficiently developed by the basic instrument itself.

42 The scheme established by the Forest Focus regulation is indeed a Community programme, as is clear from, inter alia, the 18th recital in the preamble to that regulation.

43 However, the Council was entitled to take the view that the following are essential elements of the Forest Focus scheme which are not yet sufficiently developed by the Forest Focus regulation to be the subject of measures of general application adopted as management measures relating to the implementation of programmes:

— observation and tools to improve and develop the scheme pursuant to Articles 4(2), 5(5), 6(4) and 7(3) of the Forest Focus regulation;

— provisions relating to national programmes in respect of which, in accordance with Article 8(6) of the regulation, detailed rules for implementation are to be laid down taking into account national, European and international monitoring mechanisms in order to avoid any additional administrative burden;

— the scientific advisory group referred to in Article 9(6) of the regulation;

— manuals laying down inter alia the monitoring methods, referred to in Article 10(2) of the regulation;

— approval criteria for private entities designated by the Member States as bodies competent to manage the activities included in the approved national programmes, which are to be laid down in detailed rules to be adopted pursuant to Article 14(5) of the Forest Focus regulation;

— general monitoring of the scheme and in particular the management of the Community contribution by the Member States, referred to in the same provision; and

— the obligations on the Member States to provide information under Articles 15(1) and 16(3) of the regulation, which are intended inter alia to promote integrated data evaluation at Community level and to permit monitoring of the efficiency of the scheme, and whose content is to be defined by implementing measures pursuant to Article 15(4) and guidelines pursuant to Article 16(3) of the regulation respectively.

44 Contrary to the Commission's submissions, the *LIFE* judgment does not permit of the conclusion that all the measures in question in the present case are management measures relating to the implementation of programmes. While in the *LIFE* regulation the Community legislature defined very precisely the principles under which the Commission, acting on proposals from the Member States, could approve projects to receive aid, when it adopted the Forest Focus regulation it merely created a wide and general framework for the scheme. As is clear from the preceding paragraph, it is a question of developing a specific scheme rather than of implementing aspects already clearly defined.

45 It follows from all the foregoing considerations that, in the present case, the Community legislature did not depart from the criteria set out in Article 2 of the second comitology decision. It was therefore not required to give reasons for its choice of committee procedure in Article 17(2) of the Forest Focus regulation.

46 Consequently, the Commission's application must be dismissed.

Costs

47 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 in the successful party's pleadings. As the Parliament and the Council have asked for the Commission to be ordered to pay the costs and the Commission has been unsuccessful, it must be ordered to pay the costs. Under the first subparagraph of Article 69(4) of those rules, the Kingdom of Spain and the Republic of Finland are to bear their own costs.

On those grounds, the Court (First Chamber) hereby:

1. **Dismisses the action;**

2. **Orders the Commission of the European Communities to pay the costs;**

3. **Orders the Kingdom of Spain and the Republic of Finland to bear their own costs.**

[Signatures]