JUDGMENT OF THE COURT (First Chamber)

15 December 2005 *

In Case C-86/03,

ACTION for annulment under Article 230 EC, brought on 26 February 2003,

Hellenic Republic, represented by P. Mylonopoulos and A. Samoni-Rantou, acting as Agents, with an address for service in Luxembourg,

applicant,

v

Commission of the European Communities, represented by M. Konstantinidis and G. Valero Jordana, acting as Agents, with an address for service in Luxembourg,

defendant,

* Language of the case: Greek.

supported by:

Council of the European Union, represented by S. Kyriakopoulou and B. Hoff-Nielsen, acting as Agents,

intervener,

THE COURT (First Chamber),

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

Advocate General: A. Tizzano,
Registrar: H. von Holstein, Deputy Registrar,

having regard to the written procedure and further to the hearing on 28 April 2005,

after hearing the Opinion of the Advocate General at the sitting on 16 June 2005,

gives the following

Judgment

1 By its application the Hellenic Republic seeks the annulment of Commission Decision 2003/3/EC 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) ('the contested decision'). In the alternative, it seeks a declaration, on the basis of Article 241 EC, that Council Directive 1999/32/EC 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) ('the Directive') is inapplicable.

Legal and factual background

The Directive

2 Article 1(1) and (2) of the Directive, which was adopted on the basis of Article 130s of the EC Treaty (now, after amendment, Article 175 EC), provides:

'1. The purpose of this Directive is to reduce the emissions of sulphur dioxide resulting from the combustion of certain types of liquid fuels and thereby to reduce the harmful effects of such emissions on man and the environment.

2. Reductions in the emissions of sulphur dioxide resulting from the combustion of certain petroleum-derived liquid fuels shall be achieved by imposing limits on the sulphur content of such fuels as a condition for their use within the territory of the Member States.

...'

3 According to Article 3(1), (2) and (5) of the Directive:

'1. 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.

2. Provided that the air quality standards for sulphur dioxide laid down in Directive 80/779/EEC ... or in any Community legislation which repeals and replaces these standards and other relevant Community provisions are respected and the emissions do not contribute to critical loads being exceeded in any Member State, 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 shall apply only while emissions from a Member State do not contribute to critical loads being exceeded in any Member State.

...

5. If 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. The Commission shall be given sufficient information to assess whether the criteria mentioned in paragraph 2 are met. The Commission shall inform the other Member States.

Within six months of the date on which it receives the information from the Member State, the Commission shall examine the measures envisaged and, in accordance with the procedure set out in Article 9, take a decision which it shall communicate to the Member States. This decision shall be reviewed every eight years on the basis of information to be provided to the Commission by the Member States concerned in accordance with the procedure set out in Article 9.'

4 According to Article 2(6), for the purposes of the Directive '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'.

5 Article 9 of the Directive states:

'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.

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.'

The contested decision

6 It is clear from the recitals in the preamble to the contested decision that the procedure which led to its adoption was conducted as follows.

7 On 17 December 2001, the Hellenic Republic sought, on the basis of Article 3(2) of the Directive, the Commission's consent to use heavy fuel oils with a maximum sulphur content of 3% by mass in the whole of its territory with the exception of the Attica Basin (third recital).

8 On 23 January 2002, the Commission requested further information from the Greek authorities which it received on 19 February 2002. On 4 June 2002, the Greek Government amended its request and applied for a temporary derogation until 2008 with a review for the remaining period (fourth recital).

9 According to the seventh recital, Greece submitted, inter alia, that it makes virtually no contribution to the deposition of sulphur or to critical loads for acidity being exceeded in other Member States. It acknowledges that it contributes 1% of the sulphur deposition in Italy.

10 The Commission requested the help of the cooperative programme for monitoring and evaluation of the long-range transmission of air pollutants in Europe ('EMEP'). For that purpose, the Norwegian meteorological institute (Meteorological Synthesising Centre-West, 'the Institute') conducted a more detailed analysis of the Greek contribution to sulphur deposition, particularly in Italy, where critical loads for acidity are exceeded in 5% of the ecosystems sensitive to acidification (eighth recital).

11 The results of that investigation, which are set out in two reports of 22 February and 22 March 2002, show that Greek emissions contribute to critical loads for acidity being exceeded in at least six grid squares where it was established that critical loads have been exceeded. In those grid squares, the contribution from Greece does not exceed 0.5% and EMEP thereby concluded that that analysis is consistent with calculations that attribute to Greece 1% of the total sulphur deposition in Italy (9th and 10th recitals).

12 The advisory committee referred to in Article 9 of the Directive ('the advisory committee') met for the first time on 15 April 2002. It is common ground that during the meeting the committee declared itself to be in favour of the Commission's draft decision to refuse the Greek Government's request.

13 According to the 11th recital, the Greek Government asked the Commission, on 5 July 2002, to reconsider its request on the ground that the notification already submitted was incomplete and that additional information would be submitted by the end of July. By letter of 15 July 2002, the Commission requested the Greek authorities to provide the information promised as soon as possible, stating that the period of six months laid down in Article 3(5) of the Directive would start to run when such information was received.

14 On 30 July 2002, the Greek authorities submitted data on sulphur dioxide emissions in Greece for 2000 and suggested that their request should be examined on the basis of that data. On 3 October 2002, the Greek authorities also submitted a recent assessment of the level of protection of ecosystems in Italy taking account of the Greek contribution to critical loads for acidity being exceeded (12th recital).

15 It is clear from the 13th recital that EMEP, supported by the Coordination Centre for Effects on Mapping of Critical Levels and Loads ('CCE'), confirmed the earlier conclusion that Greek emissions of sulphur dioxide, as reported by Greece for the year 2000, contribute to critical loads for acidity being exceeded in Italy. The results are summarised in a report of 19 November 2002, according to which it is substantiated beyond any reasonable doubt that Greek emissions do in fact contribute to excess deposition above the critical loads for acidification in other Member States, particularly in Italy.

16 In the light of the data submitted by the Hellenic Republic on ambient air quality and the analysis conducted by EMEP supported by CCE on the Greek contribution to critical loads being exceeded, the Commission, by the contested decision, refused to grant the derogation requested by the Hellenic Republic on the ground that the condition relating to critical loads being exceeded had not been satisfied (14th recital).

17 Finally, it appears from the 15th recital that the contested decision is in accordance with the opinion issued by the advisory committee at the meeting held on 10 December 2002.

Forms of order sought

18 The Greek Government claims that the Court should:

— annul the contested decision;

— declare, in the event that the interpretation of the Directive put forward by the Commission is accepted, that the Directive is inapplicable on the basis of Article 241 EC;

— order the Commission to pay the costs.

19 The Commission contends that the Court should:

— dismiss the action;

— order the Hellenic Republic to pay the costs.

20 By order of 10 September 2003, the Council of the European Union was granted leave to intervene in support of the Commission's arguments. It asked the Court to

dismiss the Hellenic Republic's request for a declaration that the Directive is inapplicable on the basis of Article 241 EC as inadmissible and to order the applicant to pay the costs.

The action

21 In support of its annulment action, the Greek Government relies on four pleas: infringement of the rights of the defence, infringement of Article 3(2) of the Directive, failure to comply with the principle of the protection of legitimate expectations and infringement of the principle of proportionality.

The first plea: infringement of the rights of the defence

Arguments of the parties

22 The Greek Government observes that, according to settled case-law, respect for the rights of the defence constitutes a fundamental principle of Community law. In particular, before a decision is adopted the party concerned must be informed in order to have a reasonable period in which to prepare his defence and should be sent an exact and complete statement of the complaints against him, together with a statement of the facts and considerations on which the decision is to be based. That was not the position in this case, particularly in the light of the conduct of the procedure before the advisory committee at its meeting on 10 December 2002.

23 First of all, as neither the notice of the meeting and the Commission's draft decision nor the documents on which the Commission based its draft were sent to the national delegations until Wednesday 4 December 2002 at 14.30 and 5 December 2002 at approximately 11.00 respectively, the Greek Government had only two clear working days to prepare its defence. Thus, the advisory committee failed to observe the time-limits laid down in its own draft rules of procedure, according to which the notice of the meeting and any working documents must be sent at least 14 days in advance, except in urgent cases and where the measures envisaged are to be applied immediately, in which case the time-limit is reduced to five days before the date of the meeting. In this case, there was no justification for the use of the emergency procedure.

24 Second, the documents submitted to the advisory committee did not contain the update of an information note from the Commission Directorate-General for the Environment, of 10 December 2002 ('the note of 10 December 2002'), in which the Commission acknowledged that the Greek contribution to critical loads being exceeded in other Member States might depend on the mathematical model used in the investigation.

25 Third, the composition of the advisory committee was substantially changed between the meeting on 15 April 2002 and the meeting on 10 December 2002. Only two members took part in both meetings. According to the Greek Government, the members who took part in the second meeting were unable to fully acquaint themselves with the facts considered, so that the procedure is also invalid for that reason.

26 Fourth, the minutes of the advisory committee's meeting of 10 December 2002 were not sent to the Greek authorities for comment until 20 December 2002, that is three days after the contested decision was adopted, and contained a number of inaccuracies and/or omissions of substance having a direct relationship, in particular, with the data submitted by EMEP. In accordance with the advisory

committee's draft rules of procedure, any disagreement must be discussed and, where appropriate, inserted in an annex to the minutes so that the Commission is fully informed of the various points of view before adopting its decision. That is a fortiori so since, according to Article 9 of the Directive, the Commission must take the utmost account of the opinion delivered by the advisory committee.

27 The Commission contends that the procedure laid down in Article 3(5) of the Directive is instituted at the request of a Member State and that, by that request, the Member State has all the time necessary in which to express its views on the decision it seeks to have adopted, as is clearly apparent from that provision. Moreover, the Greek Government asked for and obtained a second review of its request on the basis of new data which it had itself submitted to the Commission. The principle that the parties should be heard is not applicable to a procedure of this kind. In those circumstances, the plea based on infringement of the rights of the defence is unfounded.

28 In any event, the complaints relating to the notice of the advisory committee meeting, its composition and the content of the minutes of its meeting must be dismissed.

29 The Commission observes in that connection that, following the request by the Greek authorities in June 2002 for a review of its position, it sent the Greek authorities the notice of the meeting, the agenda and the revised draft decision on 4 December 2002, together with the scientific assessment of the data provided by the government the following day, that is five days before the meeting on 10 December 2002, in accordance with the committee's draft rules of procedure. The urgency of the situation was justified, in particular, by the fact that a decision had to enter into force by 1 January 2003. The Greek authorities could have submitted their counter arguments in writing at the meeting of 10 December 2002.

30 As regards the note of 10 December 2002, it is an internal document drafted after that meeting which does not contain any new matters which could have changed the course of the meeting.

31 The composition of the advisory committee is a matter for the Member States' discretion.

32 Finally, as to the contentions relating to the minutes of the advisory committee's meeting, the Commission replies that the only objections to the revised draft minutes distributed to the national delegations were by the Greek delegation on 17 February 2003, that they did not concern 'substantial inaccuracies' and that, in any event, the point of view expressed in the advisory committee's opinion and taken into consideration by the Commission is that of the majority not the minority on the committee.

Findings of the Court

33 As the Advocate General observes, in point 28 of his Opinion, the complaints set out by the Greek Government in its first plea do not concern the application of the principle of the respect for the rights of the defence of the Member State concerned in its relations with the Commission, but the proper conduct of the procedure before the advisory committee, so that it is unnecessary to examine whether and to what extent the principle applies to a procedure such as that laid down in Article 3 (5) of the Directive.

34 As regards the first complaint, that the periods were too short between the notice of the advisory committee's meeting and the transmission of the relevant documents received on 4 and 5 December 2002, on the one hand, and the meeting of 10 December 2002, on the other, it must be observed that Article 9 of the Directive does not require a specific time-limit to be observed for the transmission of the notice of a meeting, the agenda, the draft measures on which an opinion is requested and any other working document of the advisory committee before its meetings are held. That article merely provides that the advisory committee is to deliver its opinion on draft measures which are submitted to it by the Commission 'within a time-limit which the chairman may lay down according to the urgency of the matter'.

35 Furthermore, the committee's draft rules of procedure, relied on by the Greek Government in support of its argument, apart from the fact that they are not in force, provided, in any event, for the possibility of reducing the time-limit for the notice of the meeting and the transmission of working documents to five days in urgent cases.

36 Contrary to the Greek Government's submissions, this case was urgent in so far as economic operators in Greece had to know whether on 1 January 2003, the date on which the Directive required Member States to stop using heavy fuel oils with a sulphur content greater than 1%, they could continue to use fuel oils whose sulphur content did not satisfy the requirements of Article 3(1) of the Directive.

37 Although the Greek authorities submitted the further information requested to the Commission on 3 October 2002, and although EMEP's report summarising the assessment of that information reached the Commission on 21 November 2002, the use of short deadlines was necessary in order that the Commission's decision, which had to take the utmost account of the committee's opinion, could be adopted before the end of 2002.

38 The first complaint is therefore unfounded.

39 As regards the second complaint, alleging failure to send the note of 10 December 2002 to the advisory committee members to enable them to prepare effectively for the meeting of that date, it suffices to observe that the Greek Government does not deny that it is a purely internal document which was drawn up after the meeting in the course of the Commission's decision-making procedure. Therefore, that complaint is also unfounded.

40 As regards the third complaint, alleging a change in the composition of the advisory committee between its first and second meetings, it must be observed that, in accordance with the first paragraph of Article 9 of the Directive, the appointment of representatives of the Member States to the advisory committee is within the Member States' discretion, although they are not required to ensure that the same persons take part in the various meetings on the same request for an opinion.

41 As far as concerns the fourth complaint, relating to the supposedly late transmission to the Greek delegation of the minutes of the meeting of 10 December 2002, it should be made clear, first, that the third and fourth paragraphs of Article 9 of the Directive provide simply that the advisory committee's opinion is to be recorded in the minutes, that each Member State may ask for its position to be recorded in the minutes and that the Commission must take the utmost account of that opinion. Second, the advisory committee's draft rules of procedure, relied on by the Greek Government in support of its complaint, apart from the fact that they were not in force, stated only that the minutes are to be sent to the committee members within 15 working days of the meeting and that they are to inform the president in writing of any comments they may have, which are discussed by the advisory committee and, in the event of continuing disagreement, are to be annexed to the minutes.

42 In any event, even assuming that sending the draft minutes of the meeting of 10 December 2002 to the national delegations three days after the adoption of the contested decision constitutes a procedural irregularity, an irregularity of that nature would not entail the annulment of that decision, in so far as it is not established that, were it not for that irregularity, that decision, which was adopted in conformity with the decision delivered by the committee, could have led to a different result (see, to that effect, Joined Cases C-465/02 and C-466/02 *Germany and Denmark* v *Commission* [2005] ECR I-9115, paragraph 37).

43 In those circumstances, that complaint is also unfounded.

44 Since none of the four complaints relied on by the Greek Government in support of its first plea is well founded, that plea must be dismissed.

The second plea: infringement of Article 3(2) of the Directive

Arguments of the parties

45 The Greek Government claims, first of all, that Greece's contribution to critical loads being exceeded is based on a projection that has not been verified by measurements, and that the results of EMEP's analyses do not show that the second condition for the grant of a derogation, pursuant to Article 3(2) of the Directive, is not satisfied. It argues that, contrary to what is stated in the 13th recital in the preamble to the contested decision, it is not clear from EMEP's report of 19 November 2002 and it is not established 'beyond all reasonable doubt' that the

Greek emissions do in fact contribute to excess deposition above the critical loads for acidification in Italy. That statement is not part of the report, but appears only in an accompanying letter and expresses the author's personal opinion, namely that of the Director-General of the Institute.

46 At the time of the procedure for the adoption of the Directive, EMEP's reports for 1997 and 1998 estimated the amount of the Greek contribution to the sulphur depositions in Italy at zero. As regards the contributions for 2002, currently regarded as 'existing' but 'negligible', the amount of between 0.1 and 0.2% is derived from the method of calculation now used by EMEP and the Commission. Applying the method of calculation used in 1998 to the data currently available, the Greek contribution to critical loads being exceeded in each of the grid squares in northern Italy is 0%. The derogation mechanism can function properly only if account is taken of the scientific background against which the Directive was adopted, and the possibility of a derogation must be interpreted in the light of the information, data, models and scientific methods and techniques which were used during the procedure for the adoption of the Directive.

47 The Greek Government further submits that by applying a method of calculation different from that used in 1998, the Commission has substantially modified the scope of the Directive, which it could not do without complying with the cooperation procedure in Article 189c of the EC Treaty (now Article 252 EC) under which the Directive was adopted.

48 In any event, a deposition, in the technical sense of the word, of such a low level (below 0.5%) cannot be equivalent to a 'contribution' within the meaning of Article 3 (2) of the Directive. Furthermore, the Commission wrongly submits that it is unnecessary for the contribution to be decisive for exceeding of the critical loads and that a finding of a contribution is sufficient in itself to justify a refusal to grant a derogation. The Directive's aim is primarily to protect ecosystems from the harmful consequences of sulphur dioxide emissions. Having regard to its wording, that

provision concerns emissions capable of contributing to critical loads being exceeded in a particular ecosystem, so that the refusal of a request presupposes that it is established beyond any doubt that sulphur depositions from that Member State in an EMEP grid square in which it has been observed that critical loads have been exceeded are decisive for those loads being exceeded.

49 A coherent interpretation of the Directive shows that the benefit of the derogation laid down in Article 3(2) may be refused only if that refusal results in an increase in the number of protected ecosystems. None of the unprotected ecosystems in the six EMEP grid squares in which it has been observed that critical loads were exceeded, and which might be affected by the sulphur dioxide depositions from Greece, will be protected as a result of the refusal of the request for a derogation. Furthermore, accepting the request would not have the effect of removing protection from a protected ecosystem in the grid squares.

50 Furthermore, the EMEP standard referred to by the Commission is a mathematical model for which there is no threshold below which the hypothetical deposition is 'undetectable'. The Greek Government argues that it is necessary to ensure the effective application of the possibility for a derogation, the importance of which is noted by the Directive. The consequence of the interpretation put forward by the Commission is that no Member State may benefit from a derogation where its emissions contribute in any manner whatsoever to the depositions in the regions of a Member State in which the critical loads have been exceeded.

51 The Commission argues that the Directive refers to a 'contribution' whether large or small. The Directive does not have a concept of 'technical deposition under 0.5%' as opposed to the concept of 'contribution'. It is not necessary that that contribution be decisive for the exceeding of critical loads since the finding of a contribution is sufficient to justify refusing to grant a derogation. Communication COM(97) 88 final of the Commission to the Council and the Parliament of 12 March 1997 on a

Community strategy to combat acidification ('the communication on acidification'), cited in the ninth recital in the preamble to the Directive concerning the derogation provided for in Article 3(2), does not refer to the law in force, and the Council deliberately made the conditions for the grant of derogations more strict in the text which was finally adopted. Thus the Greek Government cannot reasonably rely on that communication in support of its argument.

52 The Greek contribution is shown by the updated results of projections relying on general knowledge of atmospheric processes of long-range transfer acquired by the scientific community over the last 30 years. A projection is necessary for calculating the contribution to pollution in each Member State for the purpose of the Directive. The Institute is the scientific centre best placed to determine whether sulphur dioxide emissions originating in a Member State contribute to critical loads being exceeded in another Member State.

53 The findings in the EMEP reports demonstrate the existence of a sulphur deposition from Greek emissions which contributes to raising depositions to the point where critical loads of acidification are exceeded in the territory of other Member States, particularly in Italy. The contested decision is based on data on emissions for 2000 and 2001. The Greek contribution to the sulphur deposits in Italy is certainly small but not negligible. For three Member States, namely the Grand Duchy of Luxembourg, the Republic of Finland and the Kingdom of Sweden, the sulphur depositions in Italy are stated to be zero.

54 The Commission contends that the interpretation it supports does not alter the effectiveness of the provision at issue and respects the wording and the objective pursued by the Directive. The derogation may apply either where the requesting Member State's contribution is zero, as a result of a deposition lower than the detection limits of the EMEP standard, or where the critical loads in the other Member States have not been exceeded, a situation which is neither theoretical nor without foundation.

55 Finally, the Commission points out that it merely applied the provisions of the Directive so that Article 252 EC was not infringed.

Findings of the Court

56 By its arguments, the Hellenic Republic essentially challenges (i) the Commission's interpretation of the second condition for the grant of a derogation under Article 3 (2) of the Directive, namely that 'the emissions do not contribute to critical loads being exceeded' in the Member States and (ii) the method of evaluation used by the Commission to record such a contribution and, therefore, the very existence of any sulphur depositions from Greece which contribute to critical loads being exceeded in Italy.

57 First, as regards the interpretation of the condition that there must be no contribution to critical loads being exceeded, within the meaning of Article 3(2) of the Directive, the argument put forward by the Greek Government must be rejected.

58 According to the actual wording of that provision, authorisation for the use of heavy fuel oils with a sulphur content of between 1 and 3% by mass is subject, in addition to the condition of compliance with air quality standards set for sulphur dioxide in the relevant Community legislation, to a second condition, namely that the sulphur dioxide emissions 'do not contribute to critical loads being exceeded in any Member State', although that provision does not specify the amount of that contribution or its role in exceeding critical loads. Nothing in the text of that provision supports the conclusion that a derogation may be granted where the contribution is not decisive for the exceeding of the critical loads, or where the contribution, although detectable, does not exceed a particular threshold.

59 A restrictive interpretation of Article 3(2) of the Directive is supported — not only by the rule that exceptions are to be strictly interpreted — but also by an examination of the preparatory documents for the Directive, from which it is clear that although in the draft Council directive the Commission proposed that the derogation could be granted provided that the contribution to transboundary pollution was 'negligible', the Council in the Directive made the grant of the derogation subject to the condition that the emissions 'do not contribute' to critical loads being exceeded, without distinguishing between cases where the contribution is significant or not and without requiring that it be decisive for the purposes of the exceeding of the critical loads in question.

60 It is true that in the Spanish and Italian versions of Article 3(2) of the Directive it is stated in that same sentence that the emissions must not contribute 'significantly' to the critical loads being exceeded in the Member States. However, as the Advocate General pointed out, in point 63 of his Opinion, that terminology cannot prevail as none of the other linguistic versions contains such a notion and, even in the Spanish and Italian versions of the Directive, the second sentence of Article 3(2) provides that such authorisation is to apply only in so far as emissions from a Member State 'do not contribute to critical loads being exceeded' in the Member States, without repeating the expression 'significantly' which was used earlier.

61 Neither does that finding deprive Article 3(2) of the Directive of its effectiveness, since a derogation from the use of heavy fuel oils with a sulphur content of between 1 and 3% by mass may be obtained where, as the Commission observes, the results of the analyses show zero contribution to the critical loads being exceeded in the Member States or where any exceeding of the critical loads would cease to be recorded in the Member States following, in particular, the implementation of Directive 2001/80/EC of the European Parliament and of the Council of 23 October 2001 on the limitation of emissions of certain pollutants into the air from large combustion plants (OJ 2001 L 309, p. 1).

62 Next, as far as concerns the complaint criticising the method used by EMEP and the Commission to evaluate the contribution to the critical loads being exceeded, it must be observed that, contrary to the Greek Government's submissions, no provision of the Directive requires the Commission to use a specific method of evaluation, nor, a fortiori, that the method used after the entry into force of the Directive must be that used as a reference in the Directive's preparatory documents.

63 In those circumstances, the Commission cannot be criticised for relying on the results of analyses undertaken by the Institute using a method of evaluation whose scientific validity is not, otherwise, challenged by the Greek Government.

64 The Greek Government has failed to demonstrate that the Greek contribution to critical loads being exceeded, in particular in Italy, is not confirmed by the updated results relying, as the Director-General of the Institute stated in his accompanying letter of 19 November 2002, on general knowledge of long-distance atmospheric transfer processes which has been acquired by the scientific community over the last 30 years.

65 Contrary to the Hellenic Republic's submissions, the statement in the 13th recital in the preamble to the contested decision (that it is proved beyond all reasonable doubt that the Greek emissions do in fact contribute to the excess deposits exceeding the critical loads for acidification in other Member States, particularly in Italy), which is contained in the letter from the Director-General of the Institute that carried out the analyses in question, is expressed by the author of that letter in his capacity as Director-General in the light of those analyses. Far from representing his personal opinion, that statement repeats the Institute's views in the light of the analyses it carried out.

66 In any event, the contested decision was adopted in conformity with the opinion of the advisory committee so that the Community judicature cannot, save in the event of manifest error of fact or law or misuse of power, find fault with such a decision (see, to that effect, Case 216/82 *Universität Hamburg* [1983] ECR 2771, paragraph 14). However, proof of such an error or misuse of power has not been provided.

67 It is clear from all of the foregoing that the Commission, without infringing either Article 3(2) of the Directive or Article 252 EC, was able to adopt the contested decision, which is in conformity with the advisory committee's opinion, by basing that decision on the results of the Institute's analyses, according to which the depositions from Greece contributed to the critical loads being exceeded in a number of regions in Italy, even though that contribution did not exceed 0.5% of the sulphur deposits in question, and that it was not decisive for the critical loads being exceeded.

68 In those circumstances, the second plea must also be dismissed.

The third plea: infringement of the principle of the protection of legitimate expectations

Arguments of the parties

69 The Hellenic Republic submits that it could reasonably expect to benefit from a derogation under Article 3(2) of the Directive having regard, in particular, to the communication on acidification submitted by the Commission together with the initial proposal for a directive. That communication clearly suggested that the Hellenic Republic was to benefit from such a derogation in the parts of its territory

which did not significantly contribute to the acidification problem. The sulphur depositions in Italy attributable to the Hellenic Republic represent in total for the period 1985 to 1996 a contribution which, at the time the Directive was adopted, was, on the basis of the EMEP report for 1998, deemed to be zero in terms of the overall contribution load for sulphur in Italy, a factor which further strengthened the Hellenic Republic's legitimate expectation that it would be able to benefit from the derogating provision.

70 The Commission replies that the preparatory documents and the communication on acidification which led to the drawing-up of the draft Council directive cannot be regarded as firm assurances giving rise to expectations by the applicant that a particular situation would come into being. It is accepted that draft directives are often amended during the negotiations, which is what happened in this case.

Findings of the Court

71 Any trader to whom an institution has given justified hopes may rely on the principle of the protection of legitimate expectations. Further, 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 particular traders (Case C-342/03 *Spain* v *Council* [2005] ECR I-1975, paragraph 47).

72 However, it cannot be accepted that a communication submitted by the Commission together with a draft directive, even where that communication is mentioned in the recitals in the preamble to that directive, gave rise to a legitimate expectation that the policies contained in it would be adhered to, where it is clear from Article 189a

of the EC Treaty (now Article 250 EC) and Article 189c of the EC Treaty that the Commission may amend such a proposal at any time and that the Council may adopt an act constituting an amendment to the proposal (see, to that effect, Joined Cases C-13/92 to C-16/92 *Driessen and Others* [1993] ECR I-4751, paragraph 33), which is in fact the position in this case as regards the conditions in which a derogation may be authorised for the use of heavy fuel oils with a content of more than 1% by mass.

73 Accordingly, since the contested decision did not infringe the principle of the protection of legitimate expectations, the plea to that effect must be dismissed.

Fourth plea: infringment of the principle of proportionality

Arguments of the parties

74 The Greek Government claims that the principle of proportionality requires a flexible approach to the grant of a derogation under Article 3(2) of the Directive. As the concepts of critical loads, exceeding critical loads and contribution to exceeding critical loads are vague, the very restrictive interpretation applied by the Commission is contrary to any flexibility which takes account of 'the complexity of the territorial structure of the environmental problems covered' to which the Commission makes reference in the communication on acidification.

75 The imbalance between the costs of the refusal and the minimal advantages to the environment should have led the Commission to grant the request. The cost borne by the Hellenic Republic is 50 times greater than that which the Italian Republic has

to assume in order to reach the same level of environmental protection on its territory. The Commission's submission would mean that Member States would have to assume substantial and disproportionate costs in order to reduce the sulphur content of heavy fuel oils, although the reduction obtained would not contribute in any way to achieving the environmental objectives pursued by the Directive, since there would be no change in the number of ecosystems exposed in each grid square where it is observed that critical loads are exceeded. Not a single unprotected ecosystem in the Italian region in question would be better protected if the sulphur dioxide emissions from the combustion of heavy fuel oils or any other source in Greece were to disappear. Furthermore, not one of the protected ecosystems in that area would be made vulnerable simply by granting the derogation. Since it is neither desirable nor necessary, the contested decision is contrary to the principle of proportionality.

76 The Greek Government adds that if the Commission's very restrictive interpretation is in accordance with the spirit of the Directive, that would mean that the Directive itself does not comply with the principle of profitability and that it infringes the principle of proportionality.

77 The Commission argues that the fact that the Council tightened the conditions for granting a derogation, by withdrawing from Article 3 the concept of 'negligible' contribution proposed by the Commission, confirms that it does not have discretion when examining an application for a derogation.

78 The Council, for its part, has already taken account of the principle of proportionality. The evidence that the contested provision is appropriate is to be found in the eighth recital in the preamble to the Directive. The need for the measure is also based on the 9th, 10th and 15th recitals in the preamble to the Directive.

79 Furthermore, according to settled case-law, the importance of the objectives pursued may justify adverse economic consequences, and even substantial ones, for certain operators. Only where a measure adopted in the sphere of environmental policy is manifestly inappropriate in relation to the objective that the competent institution intends to pursue may the legality of such a measure be affected, which is not so in this case.

Findings of the Court

80 It is clear from examining the plea alleging infringement of Article 3(2) of the Directive that the Commission has no discretion to grant a derogation under that provision where a contribution to exceeding critical loads is recorded, independently of the extent of that contribution and its role in exceeding them. In those circumstances, as the Commission also noted, the question whether the principle of proportionality was observed in this case amounts, in fact, to a challenge to the Directive itself.

81 To the same effect, the Greek Government argues in the alternative that if the interpretation of the Directive put forward by the Commission were accepted by the Court the Directive itself would infringe the principle of proportionality, so that that directive should be declared inapplicable pursuant to Article 241 EC.

82 The Commission and the Council take the view that the Greek Government's plea that the Directive is unlawful is inadmissible in the absence of any pleas in law in the originating application in support of that plea.

83 That argument cannot be accepted.

84 In its originating application, the Greek Government argued in the alternative that the Community legislature has disregarded the principle of proportionality since the conditions laid down by the Directive for the purposes of the derogation do not comply with the criteria of economic rationality to which the Commission refers in its communication on acidification.

85 The application sets out with sufficient clarity the reasons why the principle of proportionality is infringed. The plea of illegality cannot, therefore, be declared inadmissible on that ground

86 However, even assuming that a Member State were authorised, in the context of an annulment action before the Community judicature, to plead the illegality of a Community directive addressed to it and against which it had not brought an annulment action within the period prescribed for that purpose by the fifth paragraph of Article 230 EC, that plea is, in any case, unfounded.

87 In accordance with the case-law of the Court (see, in particular, Case C-110/03 *Belgium* v *Commission* [2005] ECR I-2801, paragraph 61), a breach of the principle of proportionality presupposes that the Community measure imposes on those to whom it is addressed an obligation which goes further than is appropriate and necessary in order to attain the aim pursued by that measure.

88 Furthermore, in view of the need to strike a balance between certain of the objectives and principles mentioned in Article 130r of the EC Treaty (now, after amendment, Article 174 EC), the Directive, having paragraph 1 of Article 130s of the Treaty as its legal basis (which was intended to achieve the objectives of Article 130r), and in view of the complexity of implementing the criteria which the Community legislature must observe in conducting environmental policy, review by the Court must necessarily be limited to the question whether the Council, by adopting the Directive, committed a manifest error of appraisal (see, to that effect, Case C-284/95 *Safety Hi-Tech* [1998] ECR I-4301, paragraph 37).

89 It should be observed from the outset that, in so far as the Greek Government's complaints are based on the declarations contained in the communication on acidification, it is common ground that the Council deliberately sharpened the conditions for the grant of a derogation for the use of heavy fuel oils with a sulphur content of more than 1% by mass. Therefore, that communication cannot reasonably be relied on in support of a claim of infringement by the Community legislature of the principle of proportionality.

90 According to Article 1(1) of the Directive, its aim is to reduce the emissions of sulphur dioxide resulting from the combustion of certain types of liquid fuels. For that purpose, Article 3(1) of the Directive provides that heavy fuels with a sulphur content of more than 1% by mass must no longer be used on the territory of the Member States from 1 January 2003.

91 As it is clear, in particular, from the third, fourth and eighth recitals in the preamble to the Directive, the sulphur present in oil has for decades been recognised as the main source of sulphur dioxide emissions, which are largely responsible for the acid rain and air pollution experienced in many urban and industrial areas. Furthermore, the problem of acidification is, as was stated notably in the fifth recital in the preamble to the Directive, a transboundary phenomenon.

92 Making an authorisation to use heavy fuel oils with a sulphur content of more than 1% by mass subject to strict conditions, such as those laid down in Article 3(2) of the Directive, constitutes, therefore, a measure capable of achieving the objective pursued by the Directive.

93 As regards the need for strict application of the condition relating to the emissions' contribution to critical loads in the Member States being exceeded, the 10th recital in the preamble to the Directive 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 ... the technology exists and is well established for reducing the sulphur level of liquid fuels'. As the Commission argues, that recital was added by the Council to explain that the principle of proportionality was taken into consideration when it tightened the Commission's proposal.

94 The 15th recital, with regard to the sulphur content of heavy fuel oils authorised by the Directive, in the preamble to the Directive states that it is appropriate to provide for derogations in Member States and regions where the environmental conditions allow.

95 Having regard, in particular, to the effects of sulphur dioxide emissions on human health and on the environment and to the important contribution of those emissions to the transboundary problem of acidification, the Council was able, without committing a manifest error of assessment, to take the view that it was necessary to make the grant of derogations for the use of heavy fuel oils with a sulphur content of more than 1% by mass subject to the condition that the sulphur emissions of a Member State do not contribute to critical loads being exceeded in the territory of the Member States, even if the economic costs of such a measure may be substantial and even if that contribution does not significantly contribute to the deterioration of the situation in the Member States.

96 The importance of the objectives pursued is such as to justify even substantial negative financial consequences for certain operators (see, to that effect, 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), a fortiori, since the protection of the environment constitutes one of the essential objectives of the Community (see, in particular, Case C-176/03 *Commission* v *Council* [2005] ECR I-7879, paragraph 41, and Case C-320/03 *Commission* v *Austria* [2005] ECR I-9871, paragraph 72).

97 Accordingly, the plea alleging that the Directive is unlawful must also be dismissed as being unfounded.

98 Taking account of all of the foregoing, the action must be dismissed in its entirety.

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 in the successful party's pleadings. Since the Commission has applied for costs and the Hellenic Republic has been unsuccessful, the Hellenic Republic must be ordered to pay the costs. Pursuant to Article 69(4), the Council must bear its own costs.

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

1. Dismisses the action;

2. Orders the Hellenic Republic to pay the costs;

3. Orders the Council of the European Union to bear its own costs.

[Signatures]