JUDGMENT OF THE COURT (Second Chamber)

6 November 2008 *

In Case C-405/07 P,

APPEAL under Article 56 of the Statute of the Court of Justice, brought on 30 August 2007,

Kingdom of the Netherlands, represented by M. de Grave and C. Wissels, acting as Agents,

appellant,

the other party to the proceedings being:

Commission of the European Communities, represented by M. Patakia, A. Alcover San Pedro and H. van Vliet, acting as Agents, with an address for service in Luxembourg,

defendant at first instance,

* Language of the case: Dutch.

THE COURT (Second Chamber),

composed of C.W.A. Timmermans, President of the Chamber, K. Schiemann, P. Kūris, L. Bay Larsen and C. Toader (Rapporteur), Judges,

Advocate General: J. Kokott,
Registrar: R. Grass,

having regard to the written procedure,

after hearing the Opinion of the Advocate General at the sitting on 17 July 2008,

gives the following

Judgment

1 By its appeal, the Kingdom of the Netherlands seeks the setting-aside of the judgment of 27 June 2007 of the Court of First Instance of the European Communities in Case T-182/06 *Netherlands* v *Commission* [2007] ECR II-1983 ('the judgment under appeal'), by which it dismissed the claim for annulment of Commission Decision 2006/372/EC of 3 May 2006 concerning draft national provisions notified by the Kingdom of the Netherlands under Article 95(5) EC laying down limits on the emissions of particulate matter by diesel-powered vehicles (OJ 2006 L 142, p. 16; 'the contested decision').

Legal context

2 Directive 98/69/EC of the European Parliament and of the Council of 13 October 1998 relating to measures to be taken against air pollution by emissions from motor vehicles and amending Directive 70/220/EEC (OJ 1998 L 350, p. 1) lays down, in Section 5.3.1.4 of its Annex I, a limit on concentrations of particulate mass (PM) of 25 mg/km for diesel-powered motor vehicles, first, in Category M (passenger cars), as defined in Section A of Annex II to Council Directive 70/156/EEC of 6 February 1970 on the approximation of the laws of the Member States relating to the type-approval of motor vehicles and their trailers (OJ, English Special Edition 1970(I), p. 96) — except vehicles the maximum mass of which exceeds 2 500 kg — and, second, in Category N1, Class I (commercial vehicles with a maximum permissible weight of 1 305 kg).

3 Article 2(1) of Directive 98/69 provides:

'… no Member State may, on grounds relating to air pollution by emissions from motor vehicles:

— refuse to grant EC type-approval pursuant to Article 4(1) of Directive 70/156/EEC,

— refuse to grant national type-approval,

— prohibit the registration, sale or entry into service of vehicles, pursuant to Article 7 of Directive 70/156/EEC,

— if the vehicles comply with the requirements of [Council] Directive 70/220/EEC [of 20 March 1970 on the approximation of the laws of the Member States relating to measures to be taken against air pollution by gases from positive-ignition engines of motor vehicles (OJ, English Special Edition 1970(I), p. 171)], as amended by this directive.'

4 Regulation (EC) No 715/2007 of the European Parliament and of the Council of 20 June 2007 on type approval of motor vehicles with respect to emissions from light passenger and commercial vehicles (Euro 5 and Euro 6) and on access to vehicle repair and maintenance information (OJ 2007 L 171, p. 1) will replace, in particular, Directives 70/220 and 98/69 from 2 January 2013. It establishes, in Table 1 of its Annex I, the 'Euro 5' emission standard providing for the lowering of the limit on concentrations of particulate mass (PM) to 5 mg/km for all categories and classes of vehicles in that table. As regards vehicles in Categories M and N1, Class I, that new limit will be mandatory, under Article 10(2) and (3) of Regulation No 715/2007, from 1 September 2009 for new types of vehicles and from 1 January 2011 for new vehicles.

5 The 2nd and 12th recitals in the preamble to Council Directive 96/62/EC of 27 September 1996 on ambient air quality assessment and management (OJ 1996 L 296, p. 55) state:

'… in order to protect the environment as a whole and human health, concentrations of harmful air pollutants should be avoided, prevented or reduced and limit values and/or alert thresholds set for ambient air pollution levels;

…

… in order to protect the environment as a whole and human health, it is necessary that Member States take action when limit values are exceeded in order to comply with these values within the time fixed'.

6 Article 7 of Directive 96/62, entitled 'Improvement of ambient air quality — General requirements', provides:

'1. Member States shall take the necessary measures to ensure compliance with the limit values.

2. Measures taken in order to achieve the aims of this Directive shall:

…

(b) not contravene Community legislation on the protection of safety and health of workers at work;

(c) have no significant negative effects on the environment in the other Member States.

3. Member States shall draw up action plans indicating the measures to be taken in the short term where there is a risk of the limit values and/or alert thresholds being exceeded, in order to reduce that risk and to limit the duration of such an occurrence. Such plans may, depending on the individual case, provide for measures to control and, where necessary, suspend activities, including motor-vehicle traffic, which contribute to the limit values being exceeded.'

7 Under Article 8(3) of Directive 96/62, in the zones and agglomerations in which the levels of one or more pollutants are higher than the limit value plus the margin of tolerance, Member States are to take measures to ensure that a plan or programme is prepared or implemented for attaining the limit value within the specified time-limit. Under that provision, that plan or programme is to incorporate at the very least the information listed in Annex IV to that directive. That information is to include, under paragraphs 5 and 6 of that annex, information on the origin of pollution, in particular a list of the main emission sources responsible for pollution, and an analysis of the situation including details of, in particular, the factors, like transport, including cross-border transport, responsible for the excess.

8 Article 8(6) of Directive 96/62 states:

'When the level of a pollutant exceeds, or is likely to exceed, the limit value plus the margin of tolerance or, as the case may be, the alert threshold following significant pollution originating in another Member State, the Member States concerned shall consult with one another with a view to finding a solution. The Commission may be present at such consultations.'

9 Under Article 11(1)(a)(i) of Directive 96/62, Member States are to inform the Commission of the occurrence of pollution levels exceeding the limit values plus the margin of tolerance in the nine-month period after the end of each year.

10 Directive 96/62 does not itself set the limit values, but states, in its Article 4, read in conjunction respectively with its Annexes I and II, the atmospheric pollutants for which such values must be set and the factors of which account is to be taken when setting them. Among those factors is the degree of exposure of sections of the population to those pollutants.

11 The limit values for fine particulate matter, and particularly PM10, are laid down by Council Directive 1999/30/EC of 22 April 1999 relating to limit values for sulphur dioxide, nitrogen dioxide and oxides of nitrogen, particulate matter and lead in ambient air (OJ 1999 L 163, p. 41). PM10 is defined in Article 2(11) of that directive as 'particulate matter which passes through a size-selective inlet with a 50% efficiency cut-off at 10 μm aerodynamic diameter'.

12 Article 5(1) of Directive 1999/30 provides:

'Member States shall take the measures necessary to ensure that concentrations of PM10 in ambient air, as assessed in accordance with Article 7, do not exceed the limit values laid down in Section I of Annex III as from the dates specified therein.

The margins of tolerance laid down in Section I of Annex III shall apply in accordance with Article 8 of Directive 96/62/EC.'

13 Annex III to Directive 1999/30 sets the limit values and margins of tolerance applicable to PM10 for two successive stages stating, for each of them, the date by which the limit value must be met. Thus, the limits and tolerances laid down for the first stage have been mandatory since 1 January 2005.

14 Directive 2008/50/EC of the European Parliament and of the Council of 21 May 2008 on ambient air quality and cleaner air for Europe (OJ 2008 L 152, p. 1) will, by virtue of its Article 31, replace, in particular, Directives 96/62 and 1999/30 from 11 June 2010. Under Article 22(2) of Directive 2008/50, where, in a given zone or agglomeration, conformity with the specified limit values for PM10 cannot be achieved because of site-specific dispersion characteristics, adverse climatic conditions or transboundary contributions, a Member State is, provided that certain conditions are fulfilled, to be exempt, until 11 June 2011, from the obligation to apply those limit values.

Facts

15 By letter of 2 November 2005, the Kingdom of the Netherlands notified the Commission, pursuant to Article 95(5) EC, of its intention to adopt a decree subjecting, from 1 January 2007 and by derogation from the provisions of Directive 98/69, new diesel-powered vehicles in Categories M1 and N1, Class I, to a limit on emissions of particulate matter of 5 mg/km.

16 In support of its request for derogation, the Kingdom of the Netherlands stated that the limits on concentrations of particulate matter laid down by Directive 1999/30 were exceeded in several areas of its territory and that, therefore, it did not consider itself in a position to comply with its obligations under that directive. It emphasised, in that context, its high demographic density and greater concentration of infrastructure than in other Member States, which gives rise to a higher rate of emissions of particulate matter per square kilometre. Residents are thus very exposed to air pollution because, particularly, of the immediate proximity of automobile traffic zones and residential zones. In addition, a large proportion of the pollution comes from the neighbouring Member States, so that only 15% of the national average of concentrations of particulate matter can be affected by national standards of environmental protection.

17 The Kingdom of the Netherlands stated that, in order to reduce concentrations of particulate matter, it gives priority to the reduction of emissions of particulate matter generated by passenger cars and commercial vehicles, which are responsible for 70% of those emissions from road traffic. The derogating measure notified would form an integral part of a regulatory framework based on, among other factors, the promotion of vehicles and fuels which are less pollutant. Practically, it would involve the installation, in diesel-powered vehicles registered in the Kingdom of the Netherlands, of a filter reducing the quantity of particulate matter in diesel exhaust.

18 It explained that the decree notified would apply only to vehicles registered in the Netherlands and in no way change either the EC type-approval procedure or the conditions for registration of vehicles having obtained such approval in other Member States. On the other hand, the Netherlands police and authorities responsible for the periodical testing of vehicles could verify, after the decree's entry into force, whether the passenger car or light commercial vehicle could comply with the new limit of 5 mg/km on emissions of particulate matter.

19 By letter of 23 November 2005, the Commission acknowledged receipt of the Kingdom of the Netherlands' notification and informed it that the period of six months imposed upon it by Article 95(6) EC to make a decision on requests for derogation had commenced on 5 November 2005.

20 On 8 February 2006, the report on the air quality assessment in the Netherlands relating to the year 2004 ('the assessment report for 2004'), established pursuant to Directive 96/62, was sent to the Commission. It was registered by the Commission on 10 February 2006.

21 By letter of 10 March 2006, the Netherlands authorities informed the Commission of the existence of a report established during March 2006 by the Milieu- en Natuurplanbureau (Netherlands Environmental Assessment Agency; 'the MNP'), entitled 'Nieuwe inzichten in de omvang van de fijnstofproblematiek' ('New information on the extent of the problem of particulate matter') ('the MNP's report').

22 In order to evaluate the soundness of the arguments advanced by the Netherlands authorities, the Commission asked for the scientific and technical opinion of a team of consultants coordinated by the Nederlandse Organisatie voor toegepast-natuurwandenschappelijk onderzoek (Netherlands Organisation for Applied Scientific Research; 'the TNO'). That organisation submitted its report ('the TNO's report') on 27 March 2006.

23 By the contested decision, the Commission, on 3 May 2006, rejected the draft decree notified, on the ground that 'the Kingdom of the Netherlands [had] failed to prove

the existence of a specific problem with regard to Directive 98/69' and that, in any event, 'the notified measure [was] not proportionate to the objectives pursued'.

The action before the Court of First Instance and the judgment under appeal

24 By application lodged on 12 July 2006 at the Registry of the Court of First Instance, the Kingdom of the Netherlands brought an action for annulment of the contested decision together with an application for its action to be decided under the expedited procedure.

25 By the judgment under appeal, the Court of First Instance, under the accelerated procedure, dismissed the action. To do so it rejected the first two pleas in law advanced by the Kingdom of the Netherlands based on the Commission's determination as to whether there was a problem specific to the Netherlands.

26 In paragraphs 43 to 49 of the judgment under appeal, the Court of First Instance, first, rejected the plea in law by which the Kingdom of the Netherlands claimed that the Commission breached its duties of care and to state the reasons for its decisions, by failing, without explanation, to take account, in its determination as to the specificity of the problem of ambient air quality in the Netherlands, of the data concerning that problem relating to the year 2004. The Commission had, in that context, admitted that, contrary to its statement in recital 41 in the contested decision, the Kingdom of the Netherlands had, in fact, officially lodged its quality assessment report for 2004 before that decision was adopted.

27 The Court of First Instance found, in particular, in that regard, in paragraphs 44 to 46 of the judgment under appeal:

'44 It is clear, however, from the explanations in the [contested decision] on the question of the specificity of the ambient air quality in the Netherlands that the most recent data provided by the Netherlands authorities was included in the TNO's report. In particular, the TNO states on page 29 … in that document:

"[a] preliminary submission by [the Kingdom of] the Netherlands on [excesses] in 2004 gives a picture that is different from 2003: in all zones, at least one of the [limits plus the margin of tolerance] for PM10 is exceeded."

45 In addition, the TNO, on page 29 of its report, and the Commission, in recital 41 in the [contested decision], reproduce certain conclusions from the MNP's report …

46 Finally, as is clear from recital 42 in the [contested decision], it was also in view of the new information transmitted by the Netherlands Government and contained in the MNP's report that the Commission refused to take as established the existence of a specific problem of compliance by the Kingdom of the Netherlands with the limits on concentrations of particulate matter laid down by Directive 1999/30.'

28 The Court of First Instance found, in paragraphs 47 and 48 of the judgment under appeal, that in those circumstances the Commission could not be accused either of having failed to examine the recent information which the Netherlands Government had sent it or of having failed to state the reasons for that alleged failure.

29 The Court of First Instance, next, rejected the plea in law that the Commission denied, wrongly, that there was a specific problem of ambient air quality in the Netherlands.

30 As regards the first argument, that the Commission wrongly applied the criterion, established by Article 95(5) EC, of the problem's national specificity by requiring that the problem relied upon affected the Kingdom of the Netherlands exclusively, the Court of First Instance found, in paragraphs 66 to 72 of the judgment under appeal, that the complaint lacked any factual basis. In that regard, it pointed out, in particular, that the contested decision, like the TNO's report, refers to the situation of other Member States and that it follows from that comparison that the Kingdom of the Netherlands is not faced with a specific problem of environmental protection which would justify the adoption of a derogating measure.

31 The second argument, which alleged that the Commission did not take account of the Kingdom of the Netherlands' impotence to deal with the problem of emissions of particulate matter generated by inland navigation and marine transport, was rejected in paragraphs 78 to 84 of the judgment under appeal. The Court of First Instance held, in that regard, that, in any event, that argument lacked any factual basis, because, contrary to the Kingdom of the Netherlands' submission, the Commission

did not make the possibility of approving the notified measure subject to the condition that the excesses over the limits arise, for the most part, from the emissions generated by diesel-powered road vehicles.

32 As regards the third argument, that the problem of ambient air quality is specific because it is impossible, for the Kingdom of the Netherlands, to combat cross-frontier pollution, the Court of First Instance decided, in paragraphs 87 to 94 of the judgment under appeal, that such impossibility could not be taken as establishing that that Member State was faced with a specific problem of air quality.

33 The Court of First Instance held, in paragraphs 88 and 91 of the judgment under appeal, that in geographically small countries, like the Netherlands, a greater proportion of particulate matter is, almost by definition, from an exogenous source. It found that it had, none the less, not been established that the emissions of cross-frontier particulate matter affected the air quality in the Netherlands to such an extent that the problem of limiting emissions of particulate matter arises there in a different way to that in which it arises in the rest of the European Community.

34 It, furthermore, observed, in paragraph 92 of the judgment under appeal, that it is in the light of the standards established by Directive 1999/30 that the specificity of the problem is to be determined. Annex III to Directive 1999/30 establishes only limits on concentrations of particulate matter, without taking into consideration the origin of the particulate matter present.

35 Finally, the Court of First Instance, in paragraphs 105 to 116 of the judgment under appeal, rejected the fourth argument, that the Commission denied, wrongly, the particularly serious nature of the excesses over the limits on concentrations of particulate matter observed in the ambient air in the Netherlands.

36 In paragraph 107 of the judgment under appeal, the Court of First Instance held, in that regard, that it was not apparent from the documents in the Court file that the excesses recorded in the Netherlands were so acute, as against those observed in other Member States, as to constitute a specific problem. Thus, the Court of First Instance particularly pointed out, in paragraph 109 of the judgment under appeal, that it follows from the list established on the basis of the national air quality assessment reports relating to the year 2004 that the Kingdom of the Netherlands forms part of a group of five Member States for which were recorded, for that year and for all their zones, rates of concentration of particulate matter exceeding the daily limits.

37 The Court of First Instance also decided, in paragraph 115 of the judgment under appeal that, apart from the fact that they are not criteria under Directive 1999/30, it was not established that the demographic density, the intensity of the road traffic in many zones of the Netherlands and the location of the population along the road traffic routes combined to constitute, for that Member State, a problem distinguishing it significantly from other regions, particularly those of the Benelux, the central part of the United Kingdom and western Germany.

38 The Court of First Instance having, accordingly, found, in paragraphs 117 to 120 of the judgment under appeal, that the Kingdom of the Netherlands had not succeeded in establishing that there was a problem specific to its territory, which is one of the cumulative conditions required by Article 95(5) and (6) EC, it decided that the Commission was obliged to reject the draft decree notified. Therefore, it proceeded by keeping the pleas considered to a minimum and not adjudicating on that Member State's other pleas in law, which put in issue both the Commission's determination and its statement of reasons relating, first, to the proportionality of the draft notified and, second, to the international legal context.

Forms of order sought by the parties

39 By its appeal, the Kingdom of the Netherlands claims that the Court should:

— set aside the judgment under appeal and refer the case back to the Court of First Instance in order that it may rule on the other pleas in law in the action, and

— order the Commission to pay the costs.

40 The Commission contends that the Court should:

— primarily, declare the appeal inadmissible;

— in the alternative, dismiss it, and

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

The appeal

41 The Kingdom of the Netherlands raises two grounds in support of its appeal. First, it submits that the Court of First Instance misconstrued the duty of care and the duty, referred to in Article 253 EC, to state reasons, in ruling that the Commission had not

breached those duties when the relevant information contained in the assessment report for 2004 was, without specific reasons, left out of account in the contested decision. Secondly, the Kingdom of the Netherlands submits that the Court of First Instance applied incorrect legal criteria to determine whether there was a specific problem of ambient air quality in that country.

Admissibility

42 The Commission raises an objection that the appeal is inadmissible. As regards the first ground of appeal, it contends that the Kingdom of the Netherlands has no right to invoke the alleged failure to take account of the assessment report for 2004 since it submitted that report after the expiry of the time-limit imposed by Directive 96/62 and three months after the request for derogation was made. The Commission submits, moreover, that the Court of First Instance held that, in fact, the Commission did take account of that report and that that finding of fact is not subject to appeal. As regards the second ground of appeal, the Commission submits that the Court of First Instance's conclusions are based on numerous factors, most of which are not challenged, and that those conclusions would still be justified even were the Court of Justice to accept the Kingdom of the Netherlands' arguments.

43 In that regard, first, the question whether, in this case, the Commission was obliged to take account of the assessment report for 2004 despite the alleged lateness with which it was submitted, is, as the Advocate General considered in points 32 to 34 of her Opinion, not one of admissibility but of substance.

44 As regards, next, the argument that the Kingdom of the Netherlands is, by its first ground of appeal, seeking to put findings of fact in issue, it is sufficient to observe that such is not the case. In fact, the Kingdom of the Netherlands is in no way challenging the Court of First Instance's findings in that context, from which it is clear, in particular, that the data for the year 2004 was incorporated in the TNO's report and that the Commission, apart from that report, also took account of the MNP's report. On the other hand, that Member State does challenge the conclusions which the Court of First Instance drew from those findings of fact. The question whether the Court of First Instance could, properly in law, conclude from those facts that the Commission failed neither in its duty of care nor in its duty to state reasons for its decisions, is a question of law subject to the review of the Court of Justice on appeal (see Case C-188/96 P *Commission* v *V* [1997] ECR I-6561, paragraph 24, and Joined Cases C-189/02 P, C-202/02 P, C-205/02 P to C-208/02 P and C-213/02 P *Dansk Rørindustri and Others* v *Commission* [2005] ECR I-5425, paragraph 453).

45 Finally, as regards the Commission's objection to the second ground of appeal, the fact that an appeal, or a plea in support of an appeal, does not refer to all the reasons which led the Court of First Instance to adopt a position on a question does not result in the plea being inadmissible (see Case C-458/98 P *Industrie des poudres sphériques* v *Council* [2000] ECR I-8147, paragraph 67, and the order of 23 September 2005 in Case C-357/04 P *Andolfi* v *Commission*, paragraph 24).

46 It follows that the appeal must be declared admissible.

Substance

The first ground of appeal, alleging misconstruction of the duty of care and of the duty referred to in Article 253 EC to state reasons

— Arguments of the parties

47 The Kingdom of the Netherlands, in its first ground of appeal, emphasises that the assessment report for 2004 is extremely important because it shows that, for that year, the daily limits, even plus the tolerance, were exceeded in all zones and agglomerations of the Netherlands. Also, the data for that year gives a different picture to that of the year 2003, which the Court of First Instance itself recognised in paragraph 44 of the judgment under appeal, referring to the TNO's report.

48 The Kingdom of the Netherlands deduces from the judgment under appeal that the Court of First Instance considers it sufficient if the Commission confines itself to forwarding the relevant data submitted by the Member State to a research organisation, even though, first, it does not examine that data in the contested decision, disputing there even the fact that the data was sent to the Commission, and, second, it does not refer, in the contested decision, to the research organisation's finding that such data discloses a fundamentally different more problematic picture of the situation of the Member State in question. By that interpretation, the Court of First Instance thus incorrectly applied the safeguards in respect of care and giving reasons,

which include, particularly, the obligation for the Commission to examine carefully and impartially all the relevant elements of the individual case and to give an adequate statement of the reasons for its decision.

49 In that Member State's submission, the Court of First Instance in the end gives, wrongly, great importance to the fact that the Commission took account of the MNP's report. It notes, in that regard that while the Commission supported its position with the aid of that report, which was, moreover, sent to it a month and a half before the contested decision was adopted, it did not, on the other hand, without giving reasons why, take any account of the assessment report for 2004 which was, in fact, sent to the Commission three months before such adoption, but the data in which was less favourable to its position. Furthermore, the TNO's report clearly demonstrates that the findings in the MNP's report make no difference to the findings as to the limits based on the data in the assessment report for 2004.

50 The Commission — apart from the argument, rehearsed in paragraph 42 of the present judgment, that the assessment report for 2004 was submitted late — contends that it is not obliged to incorporate in its decisions all the elements of the expert studies to which it resorts. It follows, moreover, from certain paragraphs of the judgment under appeal, that the Court of First Instance considered that it was clear from the assessment report for 2004 and from the MNP's report that the air quality in the Netherlands improved compared to the year 2003 and earlier estimates.

— Findings of the Court

51 Under Article 95(5) EC, after the adoption of harmonisation measures, Member States are obliged to submit to the Commission for approval all national derogating provisions which they deem necessary.

52 That provision requires that the introduction of such provisions be based on new scientific evidence relating to the protection of the environment or the working environment made necessary by reason of a problem specific to the Member State concerned arising after the adoption of the harmonisation measure, and that the proposed provisions as well as the grounds for introducing them be notified to the Commission (Case C-512/99 *Germany* v *Commission* [2003] ECR I-845, paragraph 80, and Joined Cases C-439/05 P and C-454/05 P *Land Oberösterreich and Austria* v *Commission* [2007] ECR I-7141, paragraph 57).

53 Those conditions are cumulative in nature and must therefore all be satisfied if the derogating national provisions are not to be rejected by the Commission (see *Germany* v *Commission*, paragraph 81, and *Land Oberösterreich and Austria* v *Commission*, paragraph 58).

54 To determine whether those conditions are, in fact, satisfied, which can, depending on the circumstances, necessitate complex technical evaluations, the Commission has a wide discretion.

55 The exercise of that discretion is not, however, excluded from review by the Court. According to the case-law of the Court of Justice, not only must the Community judicature establish whether the evidence relied on is factually accurate, reliable and consistent but also whether that evidence contains all the information which must be taken into account in order to assess a complex situation and whether it is capable of substantiating the conclusions drawn from it (see Case C-525/04 P *Spain* v *Lenzing* [2007] ECR I-9947, paragraph 57 and the case-law cited).

56 Moreover, it must be recalled that, where a Community institution has a wide discretion, the review of observance of guarantees conferred by the Community legal order in administrative procedures is of fundamental importance. The Court of Justice has had occasion to specify that those guarantees include, in particular for the competent institution, the obligations to examine carefully and impartially all the relevant elements of the individual case and to give an adequate statement of the reasons for its decision (see Case C-269/90 *Technische Universität München* [1991] ECR I-5469, paragraph 14; Joined Cases C-258/90 and C-259/90 *Pesquerias De Bermeo and Naviera Laida* v *Commission* [1992] ECR I-2901, paragraph 26; and *Spain* v *Lenzing*, paragraph 58).

57 The review of observance of those procedural guarantees is even more important in the procedure under Article 95(5) EC since the right to be heard does not apply to it (see *Land Oberösterreich and Austria* v *Commission*, paragraph 44).

58 In this case, the Kingdom of the Netherlands accuses the Commission of having breached its duty of care and its duty to give reasons by failing to examine, in the contested decision, without specific reasons, the data contained in the assessment report for 2004.

59 The contested decision finds, in that regard, in its recital 41, that '[t]he annual reports under Council Directive 96/62/EC indicate that the Netherlands had no especially high exceedance problems in 2003 compared to other Member States (such as Belgium, Austria, Greece, the Czech Republic, Lithuania, Slovenia and Slovakia). Since the Netherlands has not submitted official data yet for 2004, it is not possible to compare the air quality situation in the Netherlands with that in other Member States in 2004'.

60 It is established that the official data for that year contained in the assessment report for 2004 was submitted to the Commission on 8 February 2006 and registered by it on 10 February 2006, that is several months before the contested decision was adopted.

61 Under the first indent of Article 174(3) EC, the Commission is, as a rule, obliged to take account, in its decisions in the field of the environment, of all available new scientific and technical data. That obligation applies, particularly, to the procedure under Article 95(5) and (6) EC, for which taking account of new data forms the very foundation.

62 The Commission was therefore, in this case, obliged to take account of the data contained in the assessment report for 2004. That obligation was not particularly weakened by the fact that the Kingdom of the Netherlands had submitted that report to it outside the time-limit laid down by Directive 96/62, since that time-limit is unconnected with the procedure under Article 95(5) and (6) EC. It is also established that it was still actually possible for the Commission to take account of that report in the preparation of the contested decision, since the TNO's and MNP's reports, on which the Commission based the contested decision, were submitted to it even later.

63 The Commission's findings contained in recitals 41 and 42 in the contested decision, from which it is clear that it made its determination as to the existence of a problem specific to the Kingdom of the Netherlands on the basis of the annual reports relating to the year 2003 and not to the year 2004, raise serious doubts as regards the taking into account, in the contested decision, of the data relating to the latter year.

64 Whilst it is true, as the Court of First Instance observes in paragraph 44 of the judgment under appeal, that the TNO's report also incorporates some preliminary data submitted by the Kingdom of the Netherlands for the year 2004, the fact remains that the contested decision makes no reference to that fact or to the TNO's findings relating to that data.

65 Unlike the judgment under appeal, the contested decision makes no reference to the TNO's assessment that the preliminary data for the year 2004 gives a different picture to that of the preceding year: in all zones of the Netherlands, at least one of the limits plus tolerance for PM10 was exceeded.

66 Therefore, in particular in the light of that finding by the TNO, the Commission, in order to fulfil adequately its obligation both to examine all the relevant elements of the individual case and to give an adequate statement of the reasons for its decision, was obliged to explain, in the contested decision, the reasons for which it decided, also on the basis of the data relating to the year 2004 and in spite of the differences pointed out by the TNO between that data and the data for the preceding year, that it had not been demonstrated that there was a specific problem.

67 In fact, while the Court of Justice has recognised that the Commission, as part of its assessment of the merits of a request for derogation under Article 95(5) EC, may have to have recourse to outside experts in order to obtain their advice on new scientific evidence adduced in support of such request (see *Land Oberösterreich and Austria* v *Commission*, paragraph 32), the primary responsibility for making that assessment rests on the Commission, which must itself, if appropriate on the basis of the experts' advice, properly take account of all the relevant evidence and explain, in its final decision, the essential considerations which led it to adopt that decision.

68 It follows that the mere fact that the TNO's report incorporated the preliminary data relating to the year 2004 cannot justify the Commission's failure, in the contested decision, either to examine the data relating to that year or to state the reasons for that omission.

69 The same applies to the fact that the Commission set out, in the contested decision, certain findings in the MNP's report and, in the light of the new information contained in it, determined whether there was a problem specific to the Netherlands.

70 Thus, the MNP's findings, set out by the Commission in recital 41 in the contested decision, contain no statement relating to the question whether there was, when the contested decision was adopted and particularly having regard to the data relating to the year 2004, a specific problem of ambient air quality in the Netherlands.

71 Indeed, those findings — from which it is clear that, according to a re-evaluation, the levels of PM10 are 10 to 15% lower than previously assumed and the number of zones where the limits are exceeded will be halved in 2010 compared to 2005 and in 2015 compared to 2010 — do not put in question the veracity of the data relating to the year 2004, which demonstrates that the limits were exceeded throughout the Netherlands, and do not exclude the possibility that there was, at the date of the contested decision's adoption, a specific problem in that Member State.

72 It follows from the foregoing that the Court of First Instance made an error of law in holding that the Commission's adoption of the contested decision had breached neither its duty of care nor its duty to state the reasons for the decision.

73 Since the Commission, in order to determine whether there was a specific problem of ambient air quality in the Netherlands, did not properly take account of all the relevant data, and particularly that relating to the year 2004, that determination is necessarily vitiated by an error, and that regardless of whether the Commission, in that determination, also applied incorrect legal criteria, as the Kingdom of the Netherlands had submitted.

74 In those circumstances, the Court of First Instance could not, without falling into error of law, dismiss the Kingdom of the Netherlands' action as unfounded, by concluding that the Commission had correctly decided that the problem of compliance with the Community limits on concentrations of particulate matter in ambient air was not a specific problem.

75 It follows that the judgment under appeal must be set aside. Since dealing with the second ground of appeal, by which the Kingdom of the Netherlands complains that the Court of First Instance applied incorrect legal criteria in its determination of whether there was a specific problem of ambient air quality, cannot, therefore, whatever the result of deciding it, affect the outcome of the appeal, it is appropriate to forego its examination.

76 Under the first paragraph of Article 61 of the Statute of the Court of Justice, the Court, when quashing the decision of the Court of First Instance, may itself give final judgment in the matter, where the state of the proceedings so permits. That is the case here.

77 In that regard, the Commission's incomplete analysis of the relevant scientific evidence is apt to vitiate not only its determination as to whether there was a specific problem but the entirety of its determination of the conditions for applying Article 95(5) and (6) EC, and, particularly, that of the proportionality of the measure notified, since a fuller evaluation of the available scientific evidence may, by its very nature, affect the determination as to such a measure's proportionality.

78 In those circumstances, the contested decision must be annulled in order that the Commission may again evaluate, on the basis of all the relevant scientific evidence, the measure notified to determine whether it satisfies the requirements of Article 95(5) and (6) EC.

Costs

79 Under Article 122 of the Rules of Procedure, where the appeal is well founded and the Court itself gives final judgment in the case, the Court is to make a decision as to costs.

80 Under Article 69(2) of those rules which applies, pursuant to Article 118 thereof, to the procedure on appeal, 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 Kingdom of the Netherlands has applied for costs against the Commission and the latter has been unsuccessful, the Commission must be ordered to pay the costs of the proceedings at both instances.

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

1. **Sets aside the judgment of 27 June 2007 of the Court of First Instance of the European Communities in *Kingdom of the Netherlands* v *Commission* (T-182/06);**

2. **Annuls Commission Decision 2006/372/EC of 3 May 2006 concerning draft national provisions notified by the Kingdom of the Netherlands under Article 95(5) EC laying down limits on the emissions of particulate matter by diesel-powered vehicles;**

3. **Orders the Commission of the European Communities to pay the costs.**

[Signatures]