

JUDGMENT OF THE COURT (Grand Chamber)

28 November 2006*

In Case C-414/04,

ACTION for annulment under Article 230 EC, brought on 23 September 2004,

European Parliament, represented by A. Baas and U. Rösslein, acting as Agents,
with an address for service in Luxembourg,

applicant,

supported by

Commission of the European Communities, represented by J. Sack and P. Van
Nuffel, acting as Agents, with an address for service in Luxembourg,

intervener,

* Language of the case: French.

v

Council of the European Union, represented by A. Lopes Sabino and M. Bishop,
acting as Agents,

defendant,

supported by

Republic of Estonia, represented by L. Uibo, acting as Agent,

Republic of Poland, represented by M. Węglarz, T. Nowakowski and T. Krawczyk,
acting as Agents,

interveners,

THE COURT (Grand Chamber),

composed of V. Skouris, President, P. Jann, C.W.A. Timmermans, A. Rosas,
K. Lenaerts, P. Kūris and E. Juhász, Presidents of Chambers, K. Schiemann
(Rapporteur), J. Makarczyk, G. Arestis, A. Borg Barthet, A. Ó Caoimh and L. Bay
Larsen, Judges,

Advocate General: L.A. Geelhoed,
Registrar: L. Hewlett, Principal Administrator,

having regard to the written procedure and further to the hearing on 15 March 2006,

after hearing the Opinion of the Advocate General at the sitting on 1 June 2006,

gives the following

Judgment

- 1 By its action, the European Parliament seeks the annulment of Council Regulation No 1223/2004/EC of 28 June 2004 amending Regulation (EC) No 1228/2003 of the European Parliament and of the Council as regards the date of application of certain provisions to Slovenia (OJ 2004 L 233, p. 3, hereinafter 'the contested regulation').

- 2 The Treaty concerning the accession to the European Union of ten new Member States, including the Republic of Slovenia, was signed on 16 April 2003 (OJ 2003 L 236, p. 17, hereinafter 'the 2003 Treaty of Accession'). As provided by Article 1(2) of that Treaty, the conditions of that admission and the adjustments to the Treaties on which the European Union is founded, entailed by such admission, are set out in the Act annexed to that Treaty and form an integral part of it (hereinafter 'the 2003 Act of Accession').

- 3 Regulation (EC) No 1228/2003 of the European Parliament and of the Council of 26 June 2003 on conditions for access to the network for cross-border exchanges in electricity (OJ 2003 L 176, p. 1) was adopted on the basis of Article 95 EC.
- 4 For the purposes of delaying, on a temporary basis, the application of certain provisions of Regulation No 1228/2003 as regards the Republic of Slovenia, the Council of the European Union adopted the contested regulation. It was adopted on the basis of Article 57 of the 2003 Act of Accession.
- 5 In support of its action the European Parliament submits, first, that the contested regulation could not be validly adopted on the basis of the said Article 57 and, second, that it does not comply with the duty to state reasons laid down in Article 253 EC.
- 6 By orders of the President of the Court of 21 December 2004 and 9 March 2005, the Commission of the European Communities, the Republic of Estonia and the Republic of Poland were given leave to intervene in these proceedings, the Commission in support of the Parliament and the two Member States in support of the Council.

Legal background

The 2003 Treaty of Accession

- 7 Article 2(2) and (3) of the 2003 Treaty of Accession provides:

‘2. This Treaty shall enter into force on 1 May 2004

3. Notwithstanding paragraph 2, the institutions of the Union may adopt before accession the measures referred to in Articles 6(2) second subparagraph, 6(6) second subparagraph, ... 38, 39, 41, 42 and 55 to 57 of the Act of Accession, Annexes III to XIV to that Act These measures shall enter into force only subject to and on the date of the entry into force of this Treaty.'

8 Article 20 of the 2003 Act of Accession provides:

'The acts listed in Annex II to this Act shall be adapted as specified in that Annex.'

9 Article 21 of the 2003 Act of Accession reads:

'The adaptations to the acts listed in Annex III to this Act made necessary by accession shall be drawn up in conformity with the guidelines set out in that Annex and in accordance with the procedure and under the conditions laid down in Article 57.'

10 Article 24 of the 2003 Act of Accession provides:

'The measures listed in Annexes V, VI, VII, VIII, IX, X, XI, XII, XIII and XIV to this Act shall apply in respect of the new Member States under the conditions laid down in those Annexes.'

11 Article 55 of the 2003 Act of Accession provides:

‘At the duly substantiated request of one of the new Member States, the Council, acting unanimously on a proposal from the Commission, may, before 1 May 2004, take measures consisting of temporary derogations from acts of the institutions adopted between 1 November 2002 and the date of signature of the Treaty of Accession.’

12 Article 57 of the 2003 Act of Accession states:

‘1. Where acts of the institutions prior to accession require adaptation by reason of accession, and the necessary adaptations have not been provided for in this Act or its Annexes, those adaptations shall be made in accordance with the procedure laid down by paragraph 2. Those adaptations shall enter into force as from accession.

2. The Council, acting by a qualified majority on a proposal from the Commission, or the Commission, according to which of these two institutions adopted the original acts, shall to this end draw up the necessary texts.’

13 It must be pointed out directly that although the French version of Article 57 suggests that adaptations thereunder must be made prior to accession — ‘avant l’adhésion’ — that temporal restriction is not in fact, as is clear from the other language versions of that provision, placed on recourse to Article 57 but on the date of the acts to be amended (see, to that effect, in respect of the identical provision in the Act concerning the conditions of accession of the Republic of Austria, the Republic of Finland and the Kingdom of Sweden and the adjustments to the Treaties

on which the European Union is founded (OJ 1994 C 241, p. 21, hereinafter 'the 1994 Act of Accession'), Case C-259/95 *Parliament v Council* [1997] ECR I-5303, paragraphs 12 to 22).

¹⁴ By an exchange of letters annexed to the final act of the 2003 Treaty of Accession, the European Union and the new Member States agreed on an 'information and consultation procedure for the adoption of certain decisions and other measures to be taken during the period preceding accession' (hereinafter 'the information and consultation procedure') which requires, among other things:

'1. In order to ensure that the [accessing States] are kept adequately informed, any proposal, communication, recommendation or initiative which might lead to decisions by the institutions or bodies of the European Union shall be brought to the knowledge of the acceding States after being transmitted to the Council.

2. Consultations shall take place pursuant to a reasoned request by an acceding State, which shall set out expressly therein its interests as a future member of the Union and its observations.

...

4. Consultations shall take place within an Interim Committee composed of representatives of the Union and of the acceding States.

...

8. If serious difficulties remain after consultations, the matter may be raised at ministerial level at the request of an acceding State.

...'

Regulation No 1228/2003

15 Regulation No 1228/2003 aims, as stated in Article 1, at setting fair rules for cross-border exchanges in electricity, thus enhancing competition within the internal electricity market, taking into account the specificities of national and regional markets.

16 Article 6(1) of that regulation is worded as follows:

'Network congestion problems shall be addressed with non-discriminatory market based solutions which give efficient economic signals to the market participants and transmission system operators involved. Network congestion problems shall preferentially be solved with non transaction based methods, i.e. methods that do not involve a selection between the contracts of individual market participants.'

17 Article 2(2)(c) of that regulation provides that "congestion" means a situation in which an interconnection linking national transmission networks, cannot accommodate all physical flows resulting from international trade requested by market

participants, because of a lack of capacity of the interconnectors and/or the national transmission systems concerned’.

18 Entitled ‘Guidelines on the management and allocation of available transfer capacity of interconnections between national systems’, the annex to that same regulation states, under the heading ‘General’:

1. Congestion management method(s) implemented by Member States shall deal with short-run congestion in a market-based, economically efficient manner whilst simultaneously providing signals or incentives for efficient network and generation investment in the right locations.
2. The [Transmission System Operators] or, where appropriate, Member States, shall provide non-discriminatory and transparent standards, which describe which congestion management methods they will apply under which circumstances. These standards, together with the security standards, shall be described in publicly available documents.
3. Different treatment of the different types of cross-border transactions, whether they are physical bilateral contracts or bids into foreign organised markets, shall be kept to a minimum when designing the rules of specific methods for congestion management. The method for allocating scarce transmission capacity must be transparent. Any differences in how transactions are treated must be shown not to distort or hinder the development of competition.

4. Price signals that result from congestion management systems shall be directional.

...'

- 19 Article 15 of that regulation provides that it would apply from 1 July 2004.

The contested regulation

- 20 Having learned, in the framework of the information and consultation procedure, of the Commission's proposal on the basis of which Regulation No 1228/2003 was adopted, and availing itself of Article 57 of the 2003 Act of Accession, the Republic of Slovenia, by letter of 23 June 2003, lodged a request with the Commission seeking to obtain a transitional period running until 1 July 2007 as regards the application of the provisions of that future regulation. The regulation was adopted on 26 June 2003.
- 21 At the end of bilateral discussions between the Commission and the Republic of Slovenia, the latter, on 19 November 2003, provided the Commission with further explanations of the reasons underlying its request for transitional derogation.
- 22 It was in those circumstances that the Commission, on 27 April 2004, formulated a proposal for a regulation aimed at delaying, on a transitional basis, the application of certain provisions of Regulation No 1228/2003 to the Republic of Slovenia (COM(2004) 309 final). That proposal was based on Article 95 EC.

23 Although ratifying that proposal, the terms of which are substantially reproduced, the contested regulation was adopted by the Council, on 28 June 2004, on the basis of Article 57 of the 2003 Act of Accession.

24 The Parliament was informed of that adoption by the Secretary-General of the Council by a letter of 9 July 2004 which stated that '[in view] of the link between the Treaty of Accession and [this] proposal ... and in view of the need to adopt [this] measure in time, and in any event before 1 July 2004, ... the date from which Regulation No 1228/2003 is to apply, the Council decided to use Article 57 of the [2003 Act of Accession] as the legal basis ... , a basis which does not require the participation of the European Parliament in the legislative process'.

25 Article 1 of the contested regulation provides for the addition to Article 15 of Regulation No 1228/2003 of a new paragraph worded as follows:

'As regards interconnections between Slovenia and neighbouring Member States, Article 6(1), as well as rules 1 to 4 contained in the chapter entitled "General" of the Annex, shall apply from 1 July 2007. This paragraph shall apply only to the interconnection capacity which is allocated by the Slovenian transmission system operator and only insofar as such capacity does not exceed half of the total available interconnection capacity.'

26 Recitals 5 to 7 in the preamble to the contested regulation state:

'(5) Slovenia has demonstrated that without a transitional period certain Slovenian energy-intensive industries would be adversely affected by higher prices for electricity imported from Austria and certain electricity producers by lower

incomes from export sales to Italy. That situation would impede the ongoing efforts of the industries concerned to restructure and respectively comply with Community acquis applicable to electricity production.

- (6) The reasons provided by Slovenia justify a derogation. Furthermore, due to the small interconnection capacity of the two interconnections concerned and given that that situation is unlikely to change before 1 July 2007, the practical impact on the internal market of such a derogation will be very small.
- (7) The derogation should be limited to what is strictly necessary in view of the Slovenian request. It should, therefore, only cover the part of the interconnection capacity allocated by the Slovenian transmission system operator and apply only insofar as such capacity does not exceed half of the total capacity available.'

The action

- ²⁷ The Parliament relies on two pleas in law in support of its action, alleging, first, that the legal basis of the contested regulation is incorrect and, second, breach of the duty to state reasons.

The first plea in law

- ²⁸ By its first plea in law, the Parliament submits that the contested regulation, which establishes transitional derogations as regards the application of Regulation

No 1228/2003, could not validly be adopted on the basis of Article 57 of the 2003 Act of Accession and that it should have been adopted in accordance with the ordinary legislative procedure prescribed by the EC Treaty, namely, in this case, on the basis of Article 95 EC which served as the legal basis for the adoption of Regulation No 1228/2003. Article 57 in fact allows only adaptations intended to enable acts of the institutions to apply fully to the acceding States and not the grant of transitional derogations from them.

29 In that regard, it is appropriate to observe that, as the Parliament pointed out, it follows from the wording of Article 57 of the 2003 Act of Accession that that provision authorises the adoption of 'adaptations' which are made 'necessary' by reason of accession but which were not provided for in the Act of Accession or its annexes.

30 As the Commission rightly argued, it is clear from Articles 20 and 21 of the 2003 Act of Accession, which together make up Title I, entitled 'Adaptations to acts adopted by the institutions', of Part Three of that act, itself entitled 'Permanent provisions', that the 'adaptations' to which those articles refer correspond, in principle, to amendments necessary to ensure the full applicability of acts of the institutions to the new Member States and which are intended, with that in view, to supplement those acts in the long term.

31 Such 'adaptations', do not, on the other hand, usually cover temporary derogations from the application of Community acts, which are, for their part, the subject of Article 24 of the 2003 Act of Accession in Title I, entitled "Transitional measures", of Part Four of that act, entitled "Temporary provisions".

32 There is nothing to suggest that the term 'adaptation' should be given a different meaning depending on whether it is used in the context of Articles 20 and 21 of the 2003 Act of Accession or of Article 57 of that act. Article 21 moreover itself refers to

the provisions of Article 57 as regards the procedure for, and the conditions governing, the drawing up of the adaptations for which that article provides, whilst Article 57 which refers to adaptations which have 'not been provided for in this Act or its Annexes' suggests, for its part, that the adaptations to be adopted on the basis of that provision are of the same type as those for which, in particular, Articles 20 and 21 of that act provide.

33 Furthermore, the grant of temporary derogations in view of the prospect of imminent accession is, as correctly pointed out by the Parliament and the Commission, the specific subject of another provision of the 2003 Act of Accession, namely Article 55, and it is, in that regard, difficult to imagine that the signatories to that act intended to lay down two distinct provisions for the purpose of enabling the adoption of the same measure.

34 That is all the more true as Article 55 makes the grant of such temporary derogations subject to conditions markedly more restrictive than those which Article 57 prescribes for the adoption of adaptation measures. First, Article 55 authorises derogations only as regards Community acts which were adopted between 1 November 2002 (the date on which the accession negotiations were concluded) and 16 April 2003 (the date of signature of the 2003 Treaty of Accession). Second, such grant is subject to the requirement of unanimity within the Council.

35 It follows from the foregoing that the measures which can be adopted on the basis of Article 57 of the 2003 Act of Accession are limited, in principle, to adaptations intended to render earlier Community measures applicable in the new Member States, to the exclusion of all other amendments (see, by way of analogy, in respect of the identical provision contained in the 1994 Act of Accession, *Parliament v Council*, paragraphs 14 and 19), and, particularly, to the exclusion of temporary derogations.

- 36 It follows that temporary derogations such as those enacted by the contested regulation in favour of the Republic of Slovenia, whose sole object and purpose is to delay temporarily the effective application of the Community act concerned as regards a new Member State, cannot be described as 'adaptations' within the meaning of Article 57 of the 2003 Act of Accession.
- 37 As to the circumstance that a certain number of measures establishing derogations of the type of those provided for by the contested regulation are said to have been adopted on the basis of the article of the 1994 Act of Accession corresponding to Article 57 of the 2003 Act of Accession, that cannot, contrary to the submissions of the Council and the Polish Government, have any effect on the scope of the latter provision. In fact, it is settled case-law that what is merely Council practice cannot derogate from the rules laid down in the EC Treaty, and cannot therefore create a precedent binding on the Community institutions with regard to the correct legal basis (see, in particular, Case C-84/94 *United Kingdom v Council* [1996] ECR I-5755, paragraph 19).
- 38 It follows from the above reasoning that, as regards Community measures adopted after the date of signature of the 2003 Treaty of Accession, that Treaty and the 2003 Act of Accession contain no provision of general application intended to permit the adoption of transitional derogations in favour of the new Member States and that Article 57 of that act cannot, in principle, be used for that purpose.
- 39 Contrary to the Council's submission, it does not, however, follow that there is a legal vacuum. Once the 2003 Treaty of Accession was signed, and subject to the application of the particular procedures for which that Treaty provides for the purposes of deciding on certain types of transitional measures, such as, for example, those established by Articles 41 or 42 of the 2003 Act of Accession, there is no objection in principle to Community measures adopted after that signature and before the entry into force of the 2003 Treaty of Accession and containing temporary derogations in favour of a future acceding State being adopted directly on the basis of the provisions of the EC Treaty.

40 Such derogations, which are intended to apply only subject to and on the date of actual entry into force of the 2003 Treaty of Accession, cannot, contrary to the Council's submission, disregard either the second and third paragraphs of Article 249 EC and Article 299 EC, under which the acts adopted by the institutions apply to the Member States, or Article 2(2) and (3) of the 2003 Treaty of Accession.

41 First, such specific provisions, like, moreover, the acts in which they are included and/or from which they derogate, will apply to the acceding States only on the date on which their accession takes effect, when they acquire the status of Member States.

42 Second, the fact that Article 2(2) of the 2003 Treaty of Accession provides that the Treaty is not to enter into force until 1 May 2004 and that Article 2(3) provides that, notwithstanding that principle, certain provisions of that Treaty may be applied earlier does not affect the possibility of provision being made, in acts adopted not under that Treaty but on the basis of the EC Treaty itself, for the conditions under which such acts adopted between the signature of the Treaty of Accession and its entry into force will apply to the future Member States once accession has taken place.

43 Rather, as regards acts that must be thus adopted during the period between the date of signature of the Treaty of Accession and the date when the accession takes effect, the Community institutions are fully aware of the imminent accession of new Member States whilst the latter have the opportunity to assert their interests where necessary, in particular through the information and consultation procedure (see, to that effect, Joined Cases 39/81, 43/81, 85/81 and 88/81 *Halyvourgiki and Helleniki Halyvourgia v Commission* [1982] ECR 593, paragraph 10).

- 44 It is therefore, in principle, in the framework of that procedure and by making use of the observer status which they have in the Council, with the opportunities for dialogue and cooperation which those special mechanisms afford them, that the future Member States may, once informed of the future adoption of new Community acts, assert their interest in obtaining the necessary transitional derogations; these might be needed, for example, because it would be impossible to ensure immediate application of those acts on accession, or because of major socio-economic problems to which such application might give rise.
- 45 It is by means of those mechanisms that the special interests thus invoked can, in particular, be appropriately balanced against the general interest of the Community and that the considerations relating to the principles of equality, good faith and solidarity among current and future Member States cited by the Polish Government will, where appropriate, be called into play.
- 46 The existence of those mechanisms, specific to the accession process underway, confirms therefore that it is, in principle, by means of the ordinary legislative procedure under the Treaty and not in the framework of the special procedure under Article 57 of the 2003 Act of Accession that a measure such as the contested regulation should have been adopted.
- 47 Likewise, the Court cannot accept the Council's argument concerning the urgent nature of the adoption of the contested regulation on the basis of Article 57 prior to the entry into force of Regulation No 1228/2003 from which it derogates, rather than by following the legislative co-decision procedure which takes much longer, in order to avoid creating legal uncertainty and adversely affecting the legitimate interests of operators on the Slovenian electricity market.

- 48 First, as has been pointed out in paragraphs 43 to 45 of this judgment, when the Community envisaged the adoption of a legislative act during the period between signature of the 2003 Treaty of Accession and its entry into force, the information and consultation procedure could lead to the grant of possible transitional derogations in favour of an acceding State as regards application of the provisions of the act the adoption of which was so envisaged.
- 49 On that point, none of the parties has provided evidence to suggest that the information and consultation procedure was not properly followed and that the Slovenian Government was not in a position to assert its interests as regards the proposal for a regulation which led to the adoption of Regulation No 1228/2003, as provided for by that procedure (see, by way of analogy, *Halyvourgiki and Helleniki Halyvourgia v Commission*, paragraph 15).
- 50 Second, and as the Parliament observed, once a Commission proposal is before it, the Council has, where appropriate, the opportunity to draw the Parliament's attention to the possible urgency of adopting a particular measure. The co-decision procedure under Article 251 EC in no way precludes a relatively rapid adoption of a legislative text, particularly if there are no significant differences of opinion between the Parliament and the Council.
- 51 As to the legal uncertainty which could arise from the lapse of time inherent in the ordinary legislative procedure, this could be remedied, as the Commission rightly maintained, only by giving possible retrospective effect to the requested transitional derogation should it be granted.

52 It follows, in that regard, from the Court's case-law that although the principle of legal certainty precludes, in general, a Community measure from taking effect from a point in time before its publication, it may exceptionally be otherwise where the purpose to be achieved so demands and where the legitimate expectations of those concerned are duly respected (see Case C-331/88 *Fedesa and Others* [1990] ECR I-4023, paragraph 45, and *Parliament v Council*, paragraph 21).

53 It is also appropriate to point out that it is of course possible, as the Polish Government in particular maintained, that the lack of a general provision in the 2003 Act of Accession enabling transitional derogations to be granted as regards the application to the new Member States of acts adopted between the date of signature of the 2003 Treaty of Accession and that of its entry into force and the mere existence, for such purposes, of the information and consultation procedure appear in retrospect to have been insufficient. It is also possible that that circumstance gave rise to the fact that Article 55 of the Act concerning the conditions of accession to the European Union of the Republic of Bulgaria and of Romania and the adjustments to the Treaties on which the European Union is founded (OJ 2005 L 157, p. 203), cited by various parties, the purpose of which is similar to that of Article 55 of the 2003 Act of Accession, provides expressly that the power of the Council to adopt temporary derogations extends also to acts of the institutions adopted between the date of signature of the Treaty of Accession and that of the accession itself. However, the possible imperfections which the 2003 Act of Accession harbours in that regard cannot authorise recourse to an incorrect legal basis.

54 Having regard to all the foregoing, the Parliament's action must be upheld and the contested regulation annulled.

The second plea in law

- 55 Since the contested regulation must be annulled because of its incorrect legal basis, there is no need to consider the second plea in law, alleging failure to state reasons.

The temporal effects of the annulment

- 56 Citing the second paragraph of Article 231 EC and the need to avoid a situation of uncertainty for the economic operators and investors in the electricity sector in Slovenia and for the workers concerned, the Council, supported to that effect by the Estonian Government and by the Commission, requested the Court, should it annul the contested regulation, to maintain its effects until a new regulation is adopted.
- 57 Stressing that its action does not concern the substantive justification for the Republic of Slovenia's request for a derogation, but solely the legal basis on which the contested regulation was adopted, the Parliament indicated that it did not wish to express a view on the Council's request.
- 58 In that regard, it is clear both from the Commission's proposal which led to the Council's adoption of the contested regulation and from recital 5 in the latter's preamble that that regulation was adopted because the Republic of Slovenia had, in the view of those institutions, demonstrated that, if Regulation No 1228/2003 were fully and immediately applied and the transitional period requested by that new Member State were not granted, the ongoing efforts of certain Slovenian energy-intensive industries and certain electricity producers to restructure and comply respectively with Community *acquis* applicable to electricity production would be seriously impeded. Recitals 6 and 7 in the preamble to the contested regulation point

out, furthermore, that the derogation granted for those purposes to the Republic of Slovenia was to be limited to what was strictly necessary in view of that new Member State's request and that it would have only a small impact on the internal market.

- 59 In those circumstances, the Court considers that, on grounds of legal certainty and, in particular, the need to avoid serious negative consequences for undertakings whose restructuring or compliance with the Community acquis applicable to electricity production it was the contested regulation's aim to facilitate — such consequences resulting from the doubt cast on and discontinuity of that transitional derogation system provided for under the regulation to that end — the effects of that regulation must be maintained until such time as a new act has been adopted within a reasonable period on an appropriate legal basis, as a consequence of this judgment, without however prolonging those effects beyond 1 July 2007, the date on which that derogation system would have expired.

Costs

- 60 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 Parliament has applied for costs and the Council has been unsuccessful, the Council must be ordered to pay the costs. In accordance with the first subparagraph of Article 69(4) of those Rules, the Republic of Poland, the Republic of Estonia and the Commission, which intervened in the proceedings, must bear their own costs.

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

- 1. Annuls Council Regulation (EC) No 1223/2004 of 28 June 2004 amending Regulation (EC) No 1228/2003 of the European Parliament and of the Council as regards the date of application of certain provisions to Slovenia;**

- 2. Maintains the effects of Regulation No 1223/2004 until the adoption, within a reasonable period, of a new regulation founded on an appropriate legal basis, without however prolonging those effects beyond 1 July 2007;**

- 3. Orders the Council of the European Union to pay the costs;**

- 4. Orders the Republic of Poland, the Republic of Estonia and the Commission of the European Communities to bear their own costs.**

[Signatures]