OPINION OF ADVOCATE GENERAL KOKOTT

delivered on 17 July 2008 [1]

I — Introduction

1. Community law lays down the limit values for the emissions of particulate matter by diesel vehicles. However, the Netherlands is planning to authorise only vehicles complying with stricter limits. The measure is intended to help reduce the proportion of particulate matter in the ambient air. In many parts of the country the limit values under Community law for particulate matter in the ambient air are being exceeded.

2. The Netherlands therefore made a request to the Commission pursuant to Article 95(5) of the EC Treaty for an exemption from the rules governing limit values for emissions of particulate matter. However, the Commission declined that request by the contested decision. [2] The Court of First Instance dismissed the action brought by the Netherlands against the Commission decision. [3]

3. By the present appeal the Netherlands alleges that the Commission failed to take account of a report submitted in due time containing recent data on air pollution in the Netherlands. In rejecting that submission, the Court of First Instance failed to appreciate the duty of care and the duty to state reasons incumbent on the Commission. Furthermore, the Court of First Instance's examination of the question whether there is a problem specific to the Netherlands within the meaning of Article 95(5) EC was vitiated by an error in law.

II — Relevant provisions

4. The Court of First Instance gave the following description of the relevant provisions in paragraphs 1 to 9:

1 — Original language: German.

2 — Decision 2006/372/EC of 3 May 2006 concerning draft national provisions notified by the Kingdom of the Netherlands under Article 95(5) of the EC Treaty laying down limits on the emissions of particulate matter by diesel-powered vehicles, OJ 2006 L 142, p. 16.

3 — Case T-182/06 *Netherlands* v *Commission* [2007] ECR II-1983.

‘1 Paragraphs 4 to 6 of Article 95 EC provide:

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

5. Moreover, without prejudice to paragraph 4, if, after the adoption by the Council or by the Commission of a harmonisation measure, a Member State deems it necessary to introduce national provisions based on new scientific evidence relating to the protection of the environment or the working environment on grounds of a problem specific to that Member State arising after the adoption of the harmonisation measure, it shall notify the Commission of the envisaged provisions as well as the grounds for introducing them.

6. The Commission shall, within six months of the notifications as referred to in paragraphs 4 and 5, approve or reject the national provisions involved after having verified whether or not they are a means of arbitrary discrimination or a disguised restriction on trade between Member States and whether or not they shall constitute an obstacle to the functioning of the internal market.

In the absence of a decision by the Commission within this period the national provisions referred to in paragraphs 4 and 5 shall be deemed to have been approved.

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

2. Article 7(3) of Council Directive 96/62/EC of 27 September 1996 on ambient air quality assessment and management (OJ 1996 L 296, p. 55) provides that Member States are to draw up action plans indicating the measures to be taken in the short term where there is a risk of the limits and/or alert thresholds for the levels of ambient air pollutants 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 limits being exceeded.

3. Under Article 11(1)(a) of Directive 96/62, Member States are, within the nine-month period after the end of each annual reporting period, to inform the Commission of the occurrence of levels of pollution exceeding the limits plus the margin of tolerance.

4. Directive 98/69/EC of the European Parliament and of the Council of 13 October 1998 relating to the measures to be taken against air pollution by emissions from motor vehicles and amending Council Directive 70/220/EEC (OJ 1998 L 350, p. 1) entered into force on 28 December 1998, the date of its publication in the *Official Journal of the European Communities*.

5. That [directive] subjects to a limit on concentrations of particulate mass ('PM') of 25 mg/km diesel-powered vehicles, first, in Category M (passenger cars), as defined in Annex II, Section A, 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).

6. Article 2(1) of Directive 98/69 is in the following terms:

"… 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, or

— refuse to grant national type-approval, or

— 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 Directive 70/220/EEC, as amended by this directive."

7. 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), lays down, in conjunction with Directive 96/62, limits applicable to, among others, concentrations of PM10 particulate matter in ambient air, which have been mandatory since 1 January 2005.

8 For the purposes of applying Directive 1999/30:

"'PM10' shall mean particulate matter which passes through a size-selective inlet with a 50% efficiency cut-off at 10 μm aerodynamic diameter".

9. Article 5 of Directive 1999/30 provides that the Member States are to take the measures necessary to ensure that concentrations of PM 10 in ambient air do not exceed the limits laid down in Section I of Annex III to that directive.'

5. Since then, 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 [4] has been adopted. The Euro 5 emission standard provides for a reduction of the limit value for the particulate mass (PM) concentration to 5 mg/km. In principle, new types of diesel-powered light passenger and commercial vehicles must be fitted with particle filters from September 2009, whilst this applies from January 2011 for new vehicles which have already been type-approved.

6. Furthermore, on 21 May 2008 Directive 2008/50/EC of the European Parliament and of the Council on ambient air quality and cleaner air for Europe was signed. [5] The dir-

4 — OJ 2007 L 171, p. 1.
5 — OJ 2008 L 152, p. 1.

ective replaces in particular Directive 96/62 and Directive 1999/30. Article 22(1) and (2) of the new directive exempts the Member States temporarily from applying the limit values under certain conditions. For PM10 that exemption applies for three years from entry into force, i.e. until 2011.

III — Administrative procedure

7. On 2 November 2005 the Netherlands made a request to the Commission for the approval of stricter requirements for emissions of particulate matter by certain diesel vehicles than provided for under Community law. The Commission gives the following description of the measures submitted for approval in paragraph 6 of Decision 2006/372/EC:

'The Kingdom of the Netherlands has notified the Commission of a draft decree intended to impose a mandatory limit value for the emissions of particulate matter of 5 mg per kilometre on commercial vehicles with a maximum permissible weight of 1 305 kg (N1 vehicles, class I) and passenger cars (M1 vehicles) as defined in Article 1.1(h) and 1.1(at) of the *Voertuigreglement*. The decree would apply to all such vehicles first used after 31 December 2006, which have a diesel engine. This would imply that these vehicles are fitted with particulate filters.'

8. The subsequent procedure is described in paragraphs 21 to 26 of the judgment under appeal:

'21. By letter of 23 November 2005, the Commission acknowledged receipt of the Netherlands Government's 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 commenced on 5 November 2005, the day after the notification was received.

22. The report on the air quality assessment in the Netherlands for the year 2004, established pursuant to Directive 96/62, was sent to the Commission on 8 February 2006 and registered by it on 10 February 2006.

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

24. 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-natuur-wetenschappelijk onderzoek (Netherlands Organisation for Applied Scientific Research…).

25. That organisation submitted its report to the Commission on 27 March 2006.

26. By Decision 2006/372/EC…, the Commission 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 "the notified measure [was] not proportionate to the objectives pursued".'

IV — Proceedings at first instance and forms of order sought

9. On 12 July 2006 the Netherlands brought an action for the annulment of Decision 2006/372 before the Court of First Instance.

10. According to paragraph 33 of the judgment under appeal, the Netherlands Government pleaded that the decision contravened the basic rules of Article 95 EC and the duty to state reasons under Article 253 EC, *first*, because it dismissed the existence of a problem specific to the Netherlands which arose after the adoption of Directive 98/69, in particular without having examined the relevant information submitted by the Member State concerned and, *secondly*, because it found that the draft decree notified was not proportionate to the objectives pursued by the Kingdom of the Netherlands.

11. The Court of First Instance ruled on the action, following an expedited procedure, by judgment of 27 June 2007. It examined only the first plea in law, namely whether account was taken of the information submitted by

the Netherlands and whether a problem specific to the Netherlands was proven. On both points it rejected the submissions made by the Netherlands Government.

12. The Netherlands brought the present appeal against that judgment. The Netherlands Government objects to both parts of the examination at first instance and claims that the Court should:

— set aside the judgment under appeal, refer the case back to the Court of First Instance for judgment on the other pleas in law, and

— order the other party to pay the costs.

13. The Commission contends that the Court should:

— declare the appeal inadmissible or, in the alternative, dismiss the appeal, and

— order the appellant to pay the costs.

14. Each party submitted a written pleading. No hearing took place.

V — Legal assessment

15. The Netherlands and the Commission are in dispute as to whether it is compatible with Community law to lay down stricter limit values for emissions of particulate matter by motor vehicles in the Netherlands than are provided for in Directive 98/69.

16. The Netherlands may introduce national provisions which derogate from Directive 98/69 only after the Commission has approved them. This follows from Article 95(5) and (6) EC, as the Netherlands provisions would derogate subsequently from a measure based on Article 100a of the EC Treaty (now, after amendment, Article 95 EC).

17. Under Article 95(5) EC, the Member State in question must notify the Commission of the grounds for introducing the

contested domestic provisions. [6] It is therefore for the Member State to prove the existence of those grounds. [7]

18. First of all, the Member State must show that the introduction of national provisions derogating from a harmonisation measure is based on new scientific evidence relating to the protection of the environment or the working environment. It must also prove that it is based on a specific problem arising after the adoption of the harmonisation measure. [8]

19. Once that proof has been provided, the Commission must verify, pursuant to Article 95(6) EC, whether the proposed national provisions are a means of arbitrary discrimination or a disguised restriction on trade between Member States and whether they constitute an obstacle to the functioning of the internal market.

20. The present appeal concerns exclusively the application of Article 95(5) EC. In this respect the Commission found that the Netherlands had submitted new scientific evidence, [9] but that there was no problem specific to the Netherlands. The Court of First Instance rejected the objections raised by the Netherlands in this regard and confirmed that finding.

21. With its ground of appeal the Netherlands Government alleges, first of all, that the Court of First Instance wrongly considered that the Commission had taken account of a report submitted by it (see under A) and, secondly, objects that the Court of First Instance held that the Commission's verification whether there was a problem specific to the Netherlands was sufficient (see under B).

22. Since both grounds of appeal highlight errors in law in the grounds of the judgment under appeal, I will then examine whether the operative part appears well founded on other legal grounds (see under C). In that case the appeal would also have to be dismissed. [10]

6 — Case C-512/99 *Germany* v *Commission* [2003] ECR I-845, paragraph 80 et seq.

7 — With regard to Article 95(4) EC, see Case C-3/00 *Denmark* v *Commission* [2003] ECR I-2643, paragraph 84.

8 — Case C-512/99 *Germany* v *Commission* (cited in footnote 6, paragraph 80) and Joined Cases C-439/05 P and C-454/05 P *Land Oberösterreich* v *Commission* [2007] ECR I-7141, paragraph 57.

9 — See paragraphs 25 to 32 of the contested decision.

10 — Case C-30/91 P *Lestelle* v *Commission* [1992] ECR I-3755, paragraph 28; Case C-210/98 P *Salzgitter* v *Commission* [2000] ECR I-5843, paragraph 58; and Case C-167/04 P *JCB Service* v *Commission* [2006] ECR I-8935, paragraph 186.

A — *The first ground of appeal — handling of a Netherlands report*

23. This ground of appeal claims that in the contested decision the Commission falsely stated that the report on ambient air quality in the Netherlands in 2004 had not yet been submitted.

1. The different reports

24. Under Article 11(1)(a)(i) of Directive 96/62, the Member States must submit to the Commission each year a report on ambient air quality which describes the zones and agglomerations where the levels of one or more pollutants exceed the limit value plus the margin of tolerance.

25. In paragraph 41 of the contested decision, the Commission found that the Netherlands had not submitted official data yet for 2004. However, it is common ground that that finding is incorrect. In paragraph 22 of the judgment under appeal, the Court of First Instance states that that report was sent to the Commission on 8 February 2006 and registered by it on 10 February 2006. The contested decision was not adopted until three months later.

26. A distinction must be drawn in particular between that report on ambient air quality for 2004 and two other reports.

27. First, in March 2006 the Netherlands submitted a report produced by the Netherlands environment agency,[11] the 'MNP report'. In paragraph 41 of the contested decision, the Commission found that this report indicated that the levels of particles were 10-15% lower than previously assumed. In addition, according to the report, the number of areas where the limit values are exceeded would be halved in 2010 in comparison with 2005 and in 2015 in comparison with 2010.

28. Second, the Commission commissioned a team of consultants coordinated by the Netherlands Organisation for Applied Scientific Research[12] to study the request made

11 — Milieu- en Natuurplanbureau (MNP).

12 — Nederlandse Organisatie voor toegepast-natuurwetenschappelijk onderzoek (TNO).

by the Netherlands. The results of that study were set out in the 'TNO report' of 27 March 2006. The Commission essentially relied on that report when it adopted the contested decision.

29. The TNO report shows that the Commission experts at least were aware of the most recent data regarding ambient air quality in the Netherlands in 2004. The Court of First Instance thus cites the following extract from that report in paragraph 44 of the judgment under appeal:

'[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.'

2. Legal assessment of the ground of appeal

30. With this ground of appeal, the Netherlands Government alleges that the Court of First Instance committed an error in law in applying the duty of care and the duty to state reasons incumbent on the Commission.

Admissibility

31. The Commission considers that argument to be inadmissible. First of all, the Netherlands had forfeited its right to lodge complaints in relation to the report for 2004 because it had made them only after a considerable delay. Furthermore, with this ground of appeal the Netherlands only calls into question factual findings made by the Court of First Instance.

32. The first plea raised by the Commission against the admissibility of this ground of appeal must be rejected because it is wholly unfounded, at least in the present case. The question whether the Commission must take into consideration a submission made out of time by a Member State in an administrative procedure is in principle a question of the merits of an action.

33. Only under extraordinary circumstances may the prohibition of the abuse of rights be an obstacle to the admissibility of

an action or certain pleas. For that to occur the Member State would, for example, have to have created the legitimate expectation in the Commission that it would not submit any further information or at least would not under any circumstances bring an action with regard to the consideration of specific documents. The Commission does not submit any evidence to suggest such an extraordinary case exists, in particular any legitimate expectation, nor are such circumstances apparent.

34. Moreover, this plea could possibly be raised against the admissibility of the action at first instance, but not against the admissibility of the appeal. However, the Commission does not argue that the Court of First Instance was wrong to admit the action brought by the Netherlands in this regard.

35. On the other hand, the second plea raised by the Commission against the admissibility of this ground of appeal is based on a recognised principle of the law governing appeals. It is clear from Article 225 EC and Article 58 of the Statute of the Court of Justice that an appeal lies on points of law only. The Court of First Instance thus has exclusive jurisdiction to find and appraise the relevant facts and to assess the evidence. The appraisal of those facts and the assessment of that evidence thus does not, save where they distort the evidence, constitute a point of law which is subject, as such, to review by the Court of Justice on appeal. [13]

36. Nevertheless, contrary to the view taken by the Commission, the complaint made by the Netherlands Government does not relate to the factual findings made by the Court of First Instance. Those findings are undisputed. The question is whether the Court of First Instance correctly inferred from those facts that the Commission infringed neither its duty of care nor its duty to state reasons. That is a point of law. This plea raised by the Commission must therefore also be rejected.

13 — Case C-390/95 P *Antillean Rice Mills and Others* v *Commission* [1999] ECR I-769, paragraph 29; Case C-237/98 P *Dorsch Consult* [2000] ECR I-4549, paragraph 35 et seq.; Joined Cases C-204/00 P, C-205/00 P, C-211/00 P, C-213/00 P, C-217/00 P and C-219/00 P *Aalborg Portland and Others* v *Commission* [2004] ECR I-123, paragraph 49; and Joined Cases C-442/03 P and C-471/03 P *P&O European Ferries (Vizcaya)* v *Commission* and *Diputación Foral de Vizcaya* v *Commission* [2006] ECR I-4845, paragraph 60.

37. The first ground of appeal is therefore admissible.

Substance

38. The duty of care and the duty to state reasons incumbent on the Commission must be seen against the background of the powers which it has exercised in the present case. Because under Article 95(5) and (6) EC the Commission must undertake complex technical assessments, it must be recognised as enjoying a broad discretion. [14]

39. However, where review by the Court is restricted as a result of the Commission's wide power of appraisal, respect for the rights guaranteed by the Community legal order in administrative procedures is of particularly fundamental importance. Those guarantees include in particular the duty of the competent institution to examine carefully and impartially all the relevant aspects of the individual case and to give adequate reasons for its decisions. [15] The review by the Community judicature must therefore also extend to whether the evidence on which the decision is based 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. [16]

40. It must therefore be examined, first of all, whether the report for 2004 contained relevant data. In this respect, the TNO report states that the recent data would give a picture that is *different* from the earlier data. A different situation as regards data is inevitably of importance in assessing the situation in the Netherlands. Those more recent data were therefore relevant.

41. However, the date when those data were transmitted raises the question whether the Commission was permitted not to take them into account when it took the decision on the request by the Netherlands.

14 — See Case C-326/05 P *Industrias Químicas del Vallés* v *Commission* [2007] ECR I-6557, paragraph 75, and Case C-127/95 *Norbrook Laboratories* [1998] ECR I-1531, paragraph 90.

15 — 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 Case T-374/04 *Germany* v *Commission* [2007] ECR II-4431, paragraph 81.

16 — Case C-12/03 P *Commission* v *Tetra Laval* [2005] ECR I-987, paragraph 39; Case C-326/05 P *Industrias Químicas del Vallés* v *Commission* (cited in footnote 14, paragraph 77); and Case C-525/04 P *Spain* v *Lenzing* [2007] ECR I-9947, paragraph 57.

42. Under Article 11(1)(b) of Directive 96/62, the Netherlands should have forwarded that report on 1 October 2005, one month prior to its request under Article 95(5) EC. Yet it submitted it five months late. Nevertheless, the time-limits under Directive 96/62 are not related to the procedure under Article 95(6) EC. Failure to observe those time-limits therefore has no importance in terms of the derogation procedure.

43. Article 95 EC does not contain any express provision on the date on which documents in support of a request for derogation must be submitted. The Court of Justice takes the view that the Member State must in principle put forward its arguments with its request, [17] but it also permits the documents submitted to be supplemented. [18]

44. Furthermore, taking account of information submitted subsequently is consistent with fundamental principles of Community environmental and administrative law. Under the first indent of Article 174(3) EC, in preparing its policy on the environment, the Community must take account, in particular, of available scientific and technical data. [19] Taking account of more recent data is also the basis for the procedure under Article 95(5) and (6) EC. [20] Under the rules on administrative procedure, the validity of a measure must be assessed on the basis of the information which is available when the decision is taken. [21]

45. On the basis of these requirements, the Commission expressly took account of the 'MNP report'. It received it even later than the report on ambient air quality in the Netherlands in 2004. At the same time, the fact that the MNP report supports the Commission's position shows the handling of the report for 2004 in a particularly unfavourable light.

17 — Case C-3/00 *Denmark* v *Commission* (cited in footnote 7, paragraph 48) and Joined Cases C-439/05 P and C-454/05 P *Land Oberösterreich* v *Commission* (cited in footnote 8, paragraph 38).

18 — Case C-512/99 *Germany* v *Commission* (cited in footnote 6, paragraph 62).

19 — Case C-341/95 *Bettati* [1998] ECR I-4355, paragraph 49 et seq. With regard to application to Member States, see Case C-127/02 *Waddenvereniging and Vogelbeschermingsvereniging* [2004] ECR I-7405, paragraph 54; Case C-60/05 *WWF Italia and Others* [2006] ECR I-5083, paragraph 27; and Case C-418/04 *Commission* v *Ireland* [2007] ECR I-10947, paragraph 63.

20 — Case C-512/99 *Germany* v *Commission* (cited in footnote 6, paragraph 41), and Case C-3/00 *Denmark* v *Commission* (cited in footnote 7, paragraph 58).

21 — Case 74/74 *CNTA* v *Commission* [1975] ECR 533, paragraphs 29/32; Joined Cases 15/76 and 16/76 *France* v *Commission* [1979] ECR 321, paragraph 7; Joined Cases C-248/95 and C-249/95 *SAM Schiffahrt and Stapf* [1997] ECR I-4475, paragraph 46; and Case C-504/04 *Agrarproduktion Staebelow* [2006] ECR I-679, paragraph 38.

46. Nevertheless, failure to take account of data submitted belatedly might be justified exceptionally in an individual case on the basis of the strict time-limits provided for in the procedure under Article 95(6) EC, [22] for example where it would no longer be possible to conduct a verification within the time-limits. If the Commission were to refuse to take account of information submitted belatedly, however, that decision would have to be subject to judicial review. As a result, the Commission should have justified its reasons for not taking account of the report for 2004. However, that did not happen in this case.

47. The report on ambient air quality in the Netherlands in 2004 should therefore have been taken into account in taking the decision on the request for derogation.

48. However, it is not clear from the contested decision that those data were taken into account. Rather, the Commission stated in paragraph 41 that the report had not been submitted.

49. In contrast, in paragraphs 43 and 44 of the judgment under appeal the Court of First Instance found that the Commission's experts took account of those figures in the TNO report and the Commission based its findings on that report. The Court of First Instance also refers to the assessment of the subsequently submitted MNP report. In paragraph 47 the Court of First Instance concludes that the Commission cannot be accused of having failed to verify recent information sent to it by the Netherlands Government prior to the adoption of the decision.

50. The TNO report does indeed show that the Commission must have been aware of the figures for 2004 and that account was taken of those figures in the procedure, indirectly through the TNO report.

51. It is not sufficient, however, for the Commission to take account of relevant information in some form or another. Rather it must duly take such information into account. [23]

52. It is nevertheless not evident from the Commission's decision what importance it attaches to the limit values being exceeded throughout the Netherlands. Whilst the TNO report to which reference is made does contain some explanations of this situation, it is not clear from them whether or not there is a problem specific to the Netherlands in this regard.

22 — See Case C-3/00 *Denmark* v *Commission* (cited in footnote 7, paragraph 48) and Joined Cases C-439/05 P and C-454/05 P *Land Oberösterreich* v *Commission* (cited in footnote 8, paragraph 39).

23 — Case C-3/00 *Denmark* v *Commission* (cited in footnote 7, paragraph 114).

53. Only the Court of First Instance addresses this point in paragraphs 109 and 110 of the judgment under appeal. It points out that in 2004 four other Member States exceeded the limit values in all their areas and that ambient air quality in the Netherlands had even seen an amelioration in absolute terms as against the previous year.

54. However, those findings made by the Court of First Instance cannot rectify the deficiencies in the contested decision. Rather, the obligation to state reasons for a measure must disclose in a clear and unequivocal fashion the reasoning followed by the institution which adopted the measure in question in such a way as to enable the persons concerned to ascertain the reasons for the measure and to enable the competent court to exercise its power of review. [24] Failure to state adequate reasons cannot therefore be rectified subsequently in judicial proceedings, not even by the Community judicature.

55. In so far as the Court of First Instance itself compares the Netherlands with other Member States, it exceeds its powers and takes the place of the Commission. [25] The Commission should have made the comparison itself in the contested decision or at least referred to a relevant report. The comments made by the Court of First Instance regarding the comparison with other Member States are therefore irrelevant.

56. The Court of First Instance's finding that the Commission did take account of the Netherlands report for 2004 therefore constitutes an error in law, as the Commission did not duly take account of that report. However, it is possible to assess definitively whether an error in law results in, or is a factor in, the setting aside of the judgment under appeal only after considering the second ground of appeal.

B — *The second ground of appeal — non-existence of a problem specific to the Netherlands*

57. The second ground of appeal concerns the question whether there is a problem specific to the Netherlands. The Netherlands contests two lines of argument pursued in the judgment at first instance.

24 — Case 1/69 *Italy* v *Commission* [1969] ECR 277, paragraph 9; Case C-310/99 *Italy* v *Commission* [2002] ECR I-2289, paragraph 48; Case C-66/02 *Italy* v *Commission* [2005] ECR I-10901, paragraph 26; and Joined Cases C-182/03 and C-217/03 *Belgium and Forum 187* v *Commission* [2006] ECR I-5479, paragraph 137.

25 — See Case T-374/04 *Germany* v *Commission* (cited in footnote 15, paragraph 81).

58. First of all, the Court of First Instance declined to take into account the special causes of the limit values being exceeded in the Netherlands, because Directive 1999/30 makes no mention of them. Those causes are the influence of cross-frontier emissions of particulate matter, demographic density, road traffic, and the level of residential development along roads.

59. Secondly, whilst the Court of First Instance recognised that the problem does not have to be unique, in practice it nevertheless required a difference from *all* other Member States, that is to say a unique problem.

60. The judgment of the Court of First Instance is formulated in such a way that both lines of argument run in parallel and form the basis for the decision irrespective of one another. The Netherlands must therefore prevail with both limbs of that ground of appeal in order for the judgment to be set aside.

1. The criteria under Directive 1999/30

61. In paragraphs 92 and 115, the Court of First Instance declined to take account of cross-frontier emissions of particulate matter, demographic density, the intensity of the road traffic in many areas of the Netherlands and the location of the population along the road traffic routes. These were not criteria referred to in Directive 1999/30.

62. Since Directive 1999/30 only lays down limit values, this view could therefore mean that only the extent to which the limit values are exceeded can be a suitable criterion for the existence of a specific problem. However, the Court of First Instance does not explain why it takes the view that the causes of the limit values being exceeded should be mentioned in Directive 1999/30.

63. The Netherlands rejects this view taken by the Court of First Instance. The Commission does not contest the appeal in this regard, but stresses the alternative reasoning in the judgment under appeal, based on insufficient differences from other Member States. Furthermore, the Commission refers to Article 8(6) of Directive 96/62, under

which Member States must consult with one another when limit values are exceeded in one Member State as a result of emissions in another Member State. However, the Netherlands did not initiate any such consultations.

64. Directive 96/62 is crucial for assessing the arguments put forward by the Court of First Instance concerning the criteria not mentioned in Directive 1999/30. Directive 1999/30 cannot be applied in isolation, but only together with Directive 96/62. Thus, provision is made for the adoption of Directive 1999/30 in Article 4 and Annex I of Directive 96/62. Moreover, the measures which the Member States are required to take in particular, but not only where the limit values in relation to ambient air quality are exceeded, are laid down not in Directive 1999/30, but in Directive 96/62.

65. There is nothing in either of the directives to suggest that they aim to lay down rules to determine which causes of air pollution could establish a specific problem. They are formulated in relatively general terms in order to be able to accommodate the differences between the various Member States. They therefore stipulate only monitoring of ambient air quality, the aim to be achieved, namely the limit values, and the development of programmes to achieve that aim, without requiring specific measures to reduce emissions. Moreover, according to the fourth recital in the preamble to Directive 1999/30, the limit values for pollution of ambient air are minimum requirements which apply generally in all the Member States. Stricter rules are possible. [26]

66. Furthermore, a joint analysis of Directive 1999/30 and Directive 96/62 shows that the criteria rejected by the Court of First Instance are entirely relevant in assessing ambient air quality.

67. Article 8 and Annex IV of Directive 96/62 lay down in particular which information the Member States must collect and communicate to the Commission where levels are higher than the limit values. Under point 5 of Annex IV, the origin of the pollution is to be identified, in particular the main emission sources and pollution imported from other regions. The analysis of the situation provided for in point 6 is to include details of those factors responsible for the excess, in particular transport, including cross-border transport, and formation.

26 — See also Case C-320/03 *Commission* v *Austria* [2005] ECR I-9871, paragraph 80.

68. Article 8(6) of Directive 96/62 stresses in this connection, contrary to paragraph 92 of the judgment under appeal, that cross-frontier emissions of particulate matter are indeed an important criterion under Community law for assessing ambient air quality, as was argued by the Netherlands.

69. Contrary to the findings of the Court of First Instance in paragraph 115 of the judgment under appeal, the intensity of road traffic cannot be ignored either. Although it is not emphasised in the same way as cross-frontier pollution, it is nevertheless also a cause which must be taken into account under Article 8 of Directive 96/62.

70. Lastly, under the first indent of Annex II to Directive 96/62, the degree of exposure of sectors of the population is a factor which may be taken into account when setting the Community limit values. That factor is therefore also a suitable criterion for assessing the severity of the exceeding of limit values in certain Member States. Because demographic density, the intensity of the road traffic in many areas of the Netherlands and the location of the population along the road traffic routes are relevant to the exposure of sectors of the population, paragraph 115 of the judgment under appeal is also vitiated by an error in law in so far as the Court of First Instance rejected these factors on the ground that they are not mentioned in Directive 1999/30.

71. Accordingly, in paragraphs 92 and 115, the Court of First Instance wrongly declined, with reference to Directive 1999/30, to take account of cross-frontier pollution, demographic density, the intensity of the road traffic in many areas of the Netherlands and the location of the population along the road traffic routes.

2. Non-existence of a specific problem

72. It is thus necessary to consider the second line of argument developed by the Court of First Instance, which concerns the non-existence of a problem specific to the Netherlands.

73. On the one hand, the Court of First Instance states in paragraph 63 of the judgment under appeal that 'any problem which arises in terms which are on the whole comparable throughout the Member States and which lends itself, therefore, to harmonised solutions at Community level… is, consequently, not specific within the meaning of Article 95(5) EC.'

74. The Court of First Instance also concurs with the Netherlands Government in paragraph 65 of the judgment under appeal that

'for a problem to be specific to a Member State within the meaning of the relevant provision, it is not necessary that it is the result of an environmental danger within that State alone.'

75. With this ground of appeal, however, the Netherlands objects that, in contradiction with the abovementioned arguments, in paragraphs 53 and 106 the Court of First Instance required differences from the other Member States in order for a specific problem to exist. The individual arguments in favour of a specific problem were therefore rejected by the Court on the ground that the situation is similar in other Member States.

76. Paragraph 53 of the judgment under appeal states that approval of the Netherlands measures requires that the excesses observed in the Netherlands 'were so acute as to distinguish them significantly from those observed in other Member States'. According to paragraph 106 the Member State in question must establish that it faces particular problems 'which differentiate it from the other Member States'. In those paragraphs the Court of First Instance therefore requires a difference from *all* the other Member States.

77. Paragraphs 63 and 65 of the judgment under appeal, on the one hand, and paragraphs 53 and 106, on the other, are therefore contradictory. Despite that contradiction, however, it is clear that the Court of First Instance based the judgment under appeal only on the argument made in paragraphs 53 and 106, that the Netherlands had not established any difference from all the other Member States. The Court of First Instance does not examine whether the number of Member States faced with similar problems is too large to recognise a problem specific to the Netherlands. It merely mentions examples of similarly affected Member States.

78. However, this view taken by the Court of First Instance contains an error in law. According to the judgment in *Land Oberösterreich* v *Commission*, a specific problem within the meaning of Article 95(5) EC is not limited to 'unique problems'. [27] Rather, the Court of First Instance and the Commission correctly interpreted 'specific' in *Land Oberösterreich* as meaning 'unusual'. [28]

79. The findings made by the Court of First Instance regarding a comparison of the Member States do not therefore form an appropriate basis for the judgment under appeal.

27 — Cited in footnote 8, paragraph 65.
28 — Cited in footnote 8, paragraph 66 et seq.

C — *The possibility of other grounds for the judgment under appeal*

80. Whilst the judgment under appeal does contain errors in law, the ground of appeal would also have to be dismissed if the operative part is well founded on other legal grounds.[29] It must therefore be examined whether the Commission rightly found that there was no problem specific to the Netherlands within the meaning of the judgment in *Land Oberösterreich*, i.e. a problem which is not unusual, but is general in nature.

81. The problem in the Netherlands is that the proportion of PM10 in the ambient air exceeds the limit values laid down in Directive 96/62 in conjunction with Directive 1999/30.

82. The Court of First Instance and the Commission apply the existing case-law in examining whether that problem is specific, comparing the situation in different Member States. In the present case, however, a conflict of objectives between provisions of Community law in itself substantiates the existence of a specific problem (see below under 1). The substantiation of the existence of a specific problem through a comparison with other Member States will therefore be examined only in the alternative (see below under 2).

1. Existence of a specific problem substantiated by the conflict of objectives of rules of Community law

83. In the present case, the problem which the Netherlands seeks to counter by securing a derogation from Directive 98/69 lies in the requirements of *other* provisions of Community law: the ambient air in the Netherlands does not achieve the state stipulated in Directive 96/62 in conjunction with Directive 1999/30.

84. This may not *actually* be unusual and may also apply to other Member States. Nevertheless, the stipulations of Community law regarding ambient air quality describe the desired state of ambient air throughout the Community. The infringement of that quality standard cannot therefore be regarded as 'usual' in a *legal* sense. Compliance with Community law, and not its infringement, is the basic normative rule. The infringement of the standard is therefore to be regarded as specific within the meaning of Article 95(5) EC.

29 — See the reference in footnote 10.

2. The comparison with other Member States

85. In the event that the Court of Justice does not concur with or follow my view because the parties have not yet commented on it, I will examine below whether there is a problem specific to the Netherlands on the basis of a comparison with other Member States.

86. As regards the judicial review criterion, as has been stated, the Commission must be recognised as enjoying a broad discretion in so far as a comparison of the situation in different Member States requires complex technical assessments. In return, it must examine carefully and impartially all the relevant aspects of the individual case and give adequate reasons for its decisions. The review by the Community judicature must therefore also extend to whether the evidence on which the decision is based 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. [30]

87. It should also be borne in mind that the burden of proof of the existence of a specific problem lies with the Member State making the request, in this case the Netherlands. [31] The Commission does not therefore have to prove that there is no specific problem. However, if it does not recognise any specific problem, it must explain in detail why it rejects the relevant submissions made by the Member State.

88. As has already been stated, contrary to the judgment under appeal, in the present case account must be taken in particular of cross-frontier pollution, demographic density, the intensity of the road traffic in many areas of the Netherlands and the location of the population along the road traffic routes, as well as the report on ambient air quality in 2004.

89. In paragraphs 41 to 43 of the contested decision, the Commission essentially relies on two arguments. First of all, particulate matter emissions in the Netherlands are in general no higher than in seven other Member States. Secondly, the existence of a problem with regard to Directive 98/69 is doubtful because the particular particulate

30 — See above, point 38 et seq.

31 — See above, point 17 et seq.

matter emissions in the Netherlands are not based on emissions from the vehicles registered there.

90. The first argument is convincing in principle if it is assumed — contrary to the view taken here — that exceeding the Community limit values under these circumstances does not substantiate the existence of any specific problem. However, the argument does not hold in the present case because the Commission did not consider the particulate matter emissions, as referred to in the report on the Netherlands for 2004.

91. The second argument put forward by the Commission, the absence of a specific problem with regard to diesel vehicles, is capable of refuting some of the Netherlands' arguments in the request for derogation. As is now no longer disputed by the Netherlands, fewer diesel vehicles are authorised there than in most other Member States.

92. However, this does not mean that there are no problems specific to the Netherlands in respect of the other abovementioned points. It is irrelevant, in terms of the verification of the specific problem, whether these potential problems justify measures in relation to diesel vehicles. This should instead be examined in the subsequent verification under Article 95(6) EC.

93. As regards the other relevant submissions made by the Netherlands, the Commission acknowledges in paragraph 40 of the contested decision that the percentage contribution of transboundary transport of particulate matter in the Netherlands is high. It states, however, that that percentage is no higher than in other Benelux countries.

94. I do not find that argument convincing, however, since a specific problem does not need to be exclusive in nature. The fact that the Benelux countries suffer particularly from cross-frontier particulate matter emissions on account of their central location and their small size is a problem peculiar to them, which certainly may be regarded as specific.

95. In paragraph 40 of the contested decision the Commission also confirms the considerable indirect influence of the port of Rotterdam on particulate matter emissions, although it does not explain why this does not constitute a specific problem.

96. In paragraphs 34 to 36 of the contested decision, the Commission also mentions demographic density, the intensity of the road traffic in many areas of the Netherlands and the location of the population along the road traffic routes. Whilst it does not comment whether this may substantiate the existence of a specific problem, there are at least statements to that effect in the Commission experts' report to which reference is made. According to that report, the situation in the Netherlands is comparable in this respect with other Benelux countries, the middle of the United Kingdom and western Germany.

97. However, these findings are not sufficient as there is no view expressed as to whether or not this geographically relatively limited part of the Community may nevertheless be sufficiently unusual to be affected by a specific problem.

98. The Commission did not therefore assess relevant characteristics of the Netherlands, or did so only insufficiently, when it declined to recognise a problem specific to the Netherlands. Its findings on the non-existence of a problem specific to the Netherlands cannot therefore substantiate the contested decision.

3. Interim conclusion

99. The judgment under appeal cannot therefore be upheld on other grounds. In the present case, the infringement of Directive 96/62 in conjunction with Directive 1999/30 in itself establishes the existence of a problem specific to the Netherlands. However, the review of the comparison of the Member States conducted in the alternative also leads to this conclusion, as the Commission did not sufficiently assess relevant submissions made by the Netherlands.

D — *The decision on the appeal*

100. Under the second sentence of the first paragraph of Article 61 of its Statute, in the event that a judgment under appeal is quashed, the Court of Justice may itself give judgment in the matter, where the state of the proceedings so permits. Otherwise it refers the case back to the Court of First Instance for judgment.

101. The examination thus far does not allow a ruling to be given on the action brought by the Netherlands for the annulment of the contested Commission decision. The decision is based not only on the rejection of the existence of a problem specific to the Netherlands. The Commission also relied on a second ground, likewise contested by the Netherlands. It claimed that the Netherlands measure was not compatible with Article 95(6) EC.

102. The Court of First Instance did not make any finding on this point, nor is it the subject-matter of the proceedings before the Court of Justice. There must therefore be significant doubts whether the matter is ready to proceed to judgment.

103. It could merely be asked whether the contested decision must be annulled simply because in conducting the verification under Article 95(6) EC the Commission also failed to take account of the Netherlands report on ambient air quality in 2004. However, a decision on this question would require the parties to be heard. Since this has not happened so far in the proceedings before the Court of Justice, it is not able to give a ruling on the case as a whole.

104. The case must therefore be referred back to the Court of First Instance for judgment.

VI — Costs

105. Where the Court refers the case back to the Court of First Instance for judgment, no decision as to costs is to be made under Article 122 of the Rules of Procedure and that decision is reserved for the final judgment.

VII — Conclusion

106. Accordingly I propose that the Court:

1. Sets aside the judgment of the Court of First Instance of 27 June 2007 in Case T-182/06 *Netherlands* v *Commission* [2007] ECR II-1983;

2. Refers the case back to the Court of First Instance of the European Communities for judgment;

3. Reserves the decision as to costs.