

JUDGMENT OF THE COURT (Grand Chamber)

1 April 2008 (*)

(Directive 2002/95/EC – Electrical and electronic equipment – Restriction of use of certain hazardous substances – Decabromodiphenyl ether ('DecaBDE') – Commission Decision 2005/717/EC – Exemption of DecaBDE from the prohibition on use – Actions for annulment – Commission's implementing powers – Infringement of the enabling provision)

In Joined Cases C-14/06 and C-295/06,

ACTIONS for annulment under Article 230 EC, brought on 11 January 2006 (C-14/06) and on 9 January 2006 (C-295/06, originally registered at the Registry of the Court of First Instance of the European Communities as Case T-5/06),

European Parliament, represented by K. Bradley, A. Neergaard and I. Klavina, acting as Agents, with an address for service in Luxembourg,

applicant in Case C-14/06,

Kingdom of Denmark, represented by J. Molde, B. Weis Fogh and J. Bering Liisberg, acting as Agents,

applicant in Case C-295/06,

supported by:

Kingdom of Denmark (Case C-14/06), represented by J. Molde, B. Weis Fogh and J. Bering Liisberg, acting as Agents,

Portuguese Republic, represented by L. Fernandes and M.J. Lois, acting as Agents,

Republic of Finland, represented by A. Guimaraes-Purokoski, acting as Agent, with an address for service in Luxembourg,

Kingdom of Sweden, represented by A. Kruse, acting as Agent,

Kingdom of Norway, represented by I. Djupvik, K. Waage and K.B. Moen, acting as Agents, and by E. Holmedal, advokat,

interveners,

v

Commission of the European Communities, represented by X. Lewis, M. Konstantinidis and H. Støvlbæk, acting as Agents, with an address for service in Luxembourg,

defendant,

supported by:

United Kingdom of Great Britain and Northern Ireland, represented by V. Jackson, acting as Agent, and by J. Maurici, barrister,

intervener,

THE COURT (Grand Chamber),

composed of V. Skouris, President, C.W.A. Timmermans, A. Rosas (Rapporteur), K. Lenaerts and L. Bay Larsen, Presidents of Chambers, K. Schiemann, J. Makarczyk, P. Kūris, E. Juhász, E. Levits and A. Ó Caoimh, P. Lindh and J.-C. Bonichot, Judges,

Advocate General: Y. Bot,

Registrar: H. von Holstein, Deputy Registrar,

having regard to the written procedure and further to the hearing on 4 December 2007,

having decided, after hearing the Advocate General, to proceed to judgment without an Opinion,

gives the following

Judgment

- 1 By application registered as Case C-14/06 the European Parliament seeks the annulment of Commission Decision 2005/717/EC of 13 October 2005 amending for the purposes of adapting to technical progress the Annex to Directive 2002/95/EC of the European Parliament and of the Council on the restriction of the use of certain hazardous substances in electrical and electronic equipment (OJ 2005 L 271, p. 48) ('the contested decision').
- 2 By Order of the President of the Court of 10 July 2006, the Kingdom of Denmark, the Portuguese Republic, the Republic of Finland, the Kingdom of Sweden and the Kingdom of Norway were granted leave to intervene in support of the form of order sought by the Parliament, while the United Kingdom of Great Britain and Northern Ireland was granted leave to intervene in support of the form of order sought by the Commission of the European Communities.
- 3 By application lodged at the Registry of the Court of First Instance of the European Communities on 9 January 2006, registered as Case T-5/06, the Kingdom of Denmark also sought annulment of the contested decision. By Order of 27 June 2006, the Court of First Instance declined jurisdiction under the fourth paragraph of Article 54 of the Statute of the Court of Justice and Article 80 of the Rules of Procedure of the Court of First Instance, so that the Court of Justice could rule on the application for annulment. The case was registered at the Court of Justice as Case C-295/06.
- 4 By Order of the President of the Court of 13 September 2006, the Portuguese Republic, the Republic of Finland, the Kingdom of Sweden and the Kingdom of Norway were granted leave to intervene in support of the form of order sought by the Kingdom of Denmark, while the United Kingdom of Great Britain and Northern Ireland was granted leave to intervene in support of the form of order sought by the Commission.
- 5 By Order of the President of the Court of 16 November 2006, Cases C-14/06 and C-295/06 were joined for the purposes of the written procedure, to the extent to which it had not yet been completed, and for the purposes of the oral procedure and the judgment.

Legal context

- 6 The fifth, sixth and eleventh recitals in the preamble to Directive 2002/95/EC of the European Parliament and of the Council of 27 January 2003 on the restriction of the use of certain hazardous substances in electrical and electronic equipment (OJ 2003 L 37, p. 19) state as follows:

'(5) The available evidence indicates that measures on the collection, treatment, recycling

and disposal of waste electrical and electronic equipment (WEEE) as set out in Directive 2002/96/EC of 27 January 2003 of the European Parliament and of the Council on waste electrical and electronic equipment [OJ 2003 L 37, p. 24] are necessary to reduce the waste management problems linked to the heavy metals concerned and the flame retardants concerned. In spite of those measures, however, significant parts of WEEE will continue to be found in the current disposal routes. Even if WEEE were collected separately and submitted to recycling processes, its content of mercury, cadmium, lead, chromium VI, [polybrominated biphenyls (PBB)] and [polybrominated diphenyl ethers (PBDE)] would be likely to pose risks to health or to the environment.

(6) Taking into account technical and economic feasibility, the most effective way of ensuring the significant reduction of risks to health and the environment relating to those substances which can achieve the chosen level of protection in the Community is the substitution of those substances in electrical and electronic equipment by safe or safer materials. Restricting the use of these hazardous substances is likely to enhance the possibilities and economic profitability of recycling of WEEE and decrease the negative health impact on workers in recycling plants.

...

(11) Exemptions from the substitution requirement should be permitted if substitution is not possible from the scientific and technical point of view or if the negative environmental or health impacts caused by substitution are likely to outweigh the human and environmental benefits of the substitution. Substitution of the hazardous substances in electrical and electronic equipment should also be carried out in a way so as to be compatible with the health and safety of users of electrical and electronic equipment (EEE).'

7 Paragraphs 1 and 2 of Article 4 of Directive 2002/95, entitled 'Prevention', state:

'1. Member States shall ensure that, from 1 July 2006, new electrical and electronic equipment put on the market does not contain lead, mercury, cadmium, hexavalent chromium, [PBB] or [PBDE]. National measures restricting or prohibiting the use of these substances in electrical and electronic equipment which were adopted in line with Community legislation before the adoption of this Directive may be maintained until 1 July 2006.

2. Paragraph 1 shall not apply to the applications listed in the Annex.'

8 Paragraph 1 of Article 5, which is entitled 'Adaptation to scientific and technical progress', provides:

'1. Any amendments which are necessary in order to adapt the Annex to scientific and technical progress for the following purposes shall be adopted in accordance with the procedure referred to in Article 7(2):

...

(b) exempting materials and components of electrical and electronic equipment from Article 4 (1) if their elimination or substitution via design changes or materials and components which do not require any of the materials or substances referred to therein is technically or scientifically impracticable, or where the negative environmental, health and/or consumer safety impacts caused by substitution are likely to outweigh the environmental, health and/or consumer safety benefits thereof;

...'

9 Article 7 of Directive 2002/95 provides that the Commission is to be assisted by the Committee set up by Article 18 of Council Directive 75/442/EEC of 15 July 1975 on waste (OJ 1975 L 194, p. 39).

- 10 The Annex to Directive 2002/95 is entitled 'Applications of lead, mercury, cadmium and hexavalent chromium, which are exempted from the requirements of Article 4(1)'.
- 11 Point 10 of that Annex states:
- 'Within the procedure referred to in Article 7(2), the Commission shall evaluate the applications for:
- Deca BDE,
 - mercury in straight fluorescent lamps for special purposes,
 - lead in solders for servers, storage and storage array systems, network infrastructure equipment for switching, signalling, transmission as well as network management for telecommunications (with a view to setting a specific time-limit for this exemption), and
 - light bulbs,
- as a matter of priority in order to establish as soon as possible whether these items are to be amended accordingly.'
- 12 On 13 October 2005 the Commission adopted the contested decision. It is based on Directive 2002/95 and, in particular, on Article 5(1)(b) thereof.
- 13 The second, third, fourth, and seventh recitals in the preamble to that decision state as follows:
- (2) Certain materials and components containing lead, mercury, cadmium, hexavalent chromium, polybrominated biphenyls (PBB) or polybrominated diphenyl ethers (PBDE) should be exempt from the prohibition, since the elimination or substitution of these hazardous substances in those specific materials and components is still impracticable.
- (3) Since the risk assessment of DecaBDE, under Council Regulation (EEC) No 793/93 of 23 March 1993 on the evaluation and control of the risks of existing substances [(OJ 1993 L 84, p. 1), as amended by Regulation (EC) No 1882/2003 of the European Parliament and of the Council (OJ 2003 L 284, p. 1)], has concluded that there is at present no need for measures to reduce the risks for consumers beyond those which are being applied already, but additional studies are required under the risk assessment, DecaBDE can be exempted until further notice from the requirements of Article 4(1) of Directive 2002/95/EC. Should new evidence lead to a different conclusion of the risk assessment, this decision would be re-examined and amended, if appropriate. In parallel industry is implementing a voluntary emissions reduction programme.
- (4) Exemptions from the prohibition for certain specific materials or components should be limited in their scope, in order to achieve a gradual phase-out of hazardous substances in electrical and electronic equipment, given that the use of those substances in such applications will become avoidable.
- ...
- (7) The Commission submitted the measures provided for in this Decision for vote in the Committee established under Article 18 of Directive 75/442/EEC [...]. There was no qualified majority in favour of these measures. Thus, in accordance with the procedure set out in Article 18 of Directive 75/442/EEC, a Proposal for a Council Decision was submitted to Council on 6 June 2005. Since on the expiry date of the period laid down in Article 7(2) of Directive 2002/95/EC the Council had neither adopted the proposed measures nor indicated its opposition to them in accordance with Article 5(6) of Council Decision 1999/468/EC of 28 June 1999 laying down the procedures for the exercise of implementing powers conferred on the Commission [(OJ 1999 L 184, p. 23)] the measures should be adopted by the Commission.'

- 14 The sole article of the contested decision states that the Annex to Directive 2002/95 is amended as set out in the Annex to that Decision.
- 15 The Annex to the contested decision states:
 ‘The Annex to Directive 2002/95/EC is amended as follows:
1. The title is replaced by the following:
 “Applications of lead, mercury, cadmium, hexavalent chromium, polybrominated biphenyls (PBB) or polybrominated diphenyl ethers (PBDE) which are exempted from the requirements of Article 4(1)”;
 2. The following point 9a is added:
 “9a. DecaBDE in polymeric applications;”
 3. The following point 9b is added:
 “9b. Lead in lead-bronze bearing shells and bushes”.’

The product at issue

- 16 DecaBDE is a type of bromine-based flame retardant and a member of the PBDE family. It is principally used as a flame retardant in polymers, particularly those used in casings for electrical and electronic equipment, and also in textile coating.
- 17 DecaBDE underwent assessments in accordance with Regulation No 793/93. The United Kingdom was responsible for evaluating its impact on the environment, while France was responsible for the examination of its impact on human health.
- 18 A first report – the ‘European Union Risk Assessment Report’ of 2002 (‘the 2002 Report’) – was submitted to the Scientific Committee on Toxicity, Ecotoxicity and the Environment (‘CSTEE’), which gave an opinion.
- 19 In May 2004 the United Kingdom adopted an update of the environmental section of the first DecaBDE risk assessment, entitled ‘Final Environmental Assessment Report for DecaBDE’ (‘the 2004 Report’). That report was referred to the Commission’s Scientific Committee on Health and Environmental Risks (‘SCHER’). That committee had replaced the CSTEE pursuant to Commission Decision 2004/210/EC of 3 March 2004 setting up Scientific Committees in the field of consumer safety, public health and the environment (OJ 2004 L 66, p. 45). The SCHER delivered an opinion on 18 March 2005.
- 20 In August 2005 the United Kingdom rapporteur circulated a document entitled ‘Addendum to the May 2004 Environmental Risk Assessment Report for DecaBDE’. That document concluded that it did not seem necessary to amend the 2004 Report in the light of the new data that had meanwhile become available.

The subject-matter of the action

Arguments of the parties

- 21 The Parliament is seeking the annulment of the contested decision. The Kingdom of Denmark is seeking the annulment of point 2 of the Annex to the contested decision and, as a consequence, the annulment of point 1.
- 22 The Commission considers that the Parliament sets out no reasons as to why points 1 and 3 of

the Annex to the contested decision should be annulled and requests that the action be restricted to point 2 of the Annex.

- 23 The Parliament responds that the title set out in point 1 of the Annex refers to DecaBDE, and points out that there is no statement of reasons for point 3 of that Annex, relating to the exemption in respect of 'Lead in lead-bronze bearing shells and bushes'. In the alternative, the Parliament claims that the Court should declare its application admissible in so far as it concerns points 1 and 2 of the Annex to the contested decision.
- 24 In its rejoinder in Case C-14/06, the Commission draws attention to the fact that the adoption of Decision 2005/618/EC of 18 August 2005 amending Directive 2002/95/EC of the European Parliament and of the Council for the purpose of establishing the maximum concentration values for certain hazardous substances in electrical and electronic equipment (OJ 2005 L 214, p. 65) may, inasmuch as it applies to the impurities in PBDE and makes the marketing of DecaBDE difficult, reduce the scope of the present dispute.

Findings of the Court

- 25 The examination of the Parliament's action reveals no plea specifically referring to point 3 of the Annex to the contested decision. On the other hand, the annulment of point 2 could lead, as a consequence, to the annulment of point 1.
- 26 The amendment of the title of the Annex to Directive 2002/95, which point 1 of the Annex to the contested decision brings about by inserting, inter alia, a reference to PBDE, seems to reflect the need to ensure a link between the title of the Annex to Directive 2002/95 and the content of that Annex, as amended by point 2 of the Annex to the contested decision.
- 27 Point 2 of the Annex to the contested decision inserts in the Annex to Directive 2002/95 a new point 9a, devoted to DecaBDE, a substance belonging to the PBDE family. It follows that points 1 and 2 of the Annex to the contested decision may not be mutually independent in the context of the possible annulment of point 2. It is therefore necessary to restrict the subject-matter of the Parliament's action to those two points.
- 28 As regards the adoption of Decision 2005/618 which, according to the Commission, could make it difficult to market DecaBDE, that does not appear to have divested the actions of their purpose, since a marketing problem does not have the same effect as a total prohibition on use, which would be the consequence of an annulment of the decision exempting that product.

The actions

- 29 The Parliament and the Kingdom of Denmark rely on the following pleas in law, which can be grouped together and summarised as follows: (i) they claim that the Commission, in adopting the contested decision, did not comply with the conditions laid down in Article 5(1)(b) of Directive 2002/95 and that it thus exceeded the powers conferred upon it by the legislature; (ii) they claim that the contested decision is vitiated by failure to state reasons, in that it in no way indicates how the conditions laid down in Article 5(1)(b) of Directive 2002/95 were met; (iii) they submit that the Commission, in adopting the contested decision, has breached the precautionary principle. Furthermore, the Parliament puts forward a plea alleging breach of the principle of proportionality in that the contested decision exempts all the polymeric applications of DecaBDE.

The first plea in law: infringement of Article 5(1)(b) of Directive 2002/95, and action ultra vires and/or misuse of powers

Arguments of the parties

- 30 The Parliament and the Kingdom of Denmark claim that the Commission did not comply with the conditions laid down in Article 5(1)(b) of Directive 2002/95 and that it thus exceeded the

powers conferred on it by the Community legislature.

- 31 The Kingdom of Denmark points out that, when the Parliament and the Council confer implementing powers on the Commission in accordance with Article 202 EC, the Commission must, pursuant to the principle of conferred powers, take pains to act in conformity with the aims laid down by the Community legislature and to apply the criteria that it has set. The Kingdom of Denmark claims that, in the present case, the Commission has not only infringed the conditions laid down in Directive 2002/95 but has also used the powers conferred on it to impose its own risk assessment in place of that of the legislature, thus misusing the powers conferred on it.
- 32 The applicants consider that, in so far as Directive 2002/95 lays down in Article 4(1) the principle that the substances listed in that provision are prohibited, the possibility of exemption, provided for in Article 5(1)(b), must be strictly interpreted. The possibility of exemption can arise only in respect of the application of substances and not to a substance as such, since that would infringe Article 4 of that directive.
- 33 In support of that argument, the applicants refer to the other decisions adopted on the basis of Article 5(1)(b) of Directive 2002/95, which cover only specific applications, and to the fourth recital of the contested decision, according to which '[e]xemptions from the prohibition for certain specific materials or components should be limited in their scope.'
- 34 The applicants claim, first, that the condition indicated in Article 5(1) of Directive 2002/95, which covers amendments 'necessary in order to adapt the Annex to scientific and technical progress' is not met. On the contrary, the scientific data available after the adoption of the directive reinforce the existing doubts regarding the dangers of DecaBDE.
- 35 According to the applicants, the Commission did not show that one of the two conditions laid down in Article 5(1)(b) of Directive 2002/95 was met, but used a criterion which is not provided for in that directive – and which is therefore unlawful – stating, in the third recital of the contested decision, that 'the risk assessment of DecaBDE, under Regulation (EEC) No 793/93 [...] has concluded that there is at present no need for measures to reduce the risks for consumers beyond those which are being applied already'.
- 36 The applicants maintain that, in so doing, the Commission relied on a study adopted in the context of a regulation which is based on a different philosophy, a study which was not prepared with a view to compliance with the precautionary principle and which did not seek to determine whether one of the conditions laid down in Article 5(1)(b) of Directive 2002/95 had been met. The Commission carried out a new general assessment of the risk and, by exempting, on the basis of that assessment, the substance at issue itself, it circumvented the decision of the Community legislature and thwarted the practical effect of Directive 2002/95.
- 37 The Kingdom of Denmark claims that the Commission in no way examined the possibilities of replacing DecaBDE even though many producers have stopped using it and point that out in the context of their environmental policy. The second recital of the contested decision, according to which 'the elimination or substitution of these hazardous substances [...] is still impracticable' is incorrect in that regard. The first condition laid down in Article 5(1)(b) of the Directive is therefore not, on any view, met.
- 38 The Kingdom of Norway claims that the Commission used the findings of the various reports presented in the context of Regulation No 793/93 in a selective manner, underestimating the genuine concerns which are apparent from those reports and the opinions of the scientific committees and the growing realisation of the dangers linked to DecaBDE. In the third recital of the contested decision, in particular, the Commission refers only to the risk to consumers, while the reports dealt with workers, consumers and people indirectly exposed through the environment.
- 39 The Commission emphasises the difficulties surrounding the adoption of the contested

decision and contends that Article 5 of Directive 2002/95 need not be interpreted strictly.

- 40 The Commission points out, first, that Article 4(1) of that directive, which prohibits the use of certain dangerous substances, is immediately followed by Article 4(2) thereof which provides for exemptions from that prohibition, and argues that those provisions therefore have the effect of establishing a prohibition which is narrower in scope than it appears to be.
- 41 The Commission notes, secondly, that the effect of Article 5(1) of Directive 2002/95 is not to confer on the Commission a narrowly defined discretionary power but rather to place it under an obligation to act where one of the conditions laid down in Article 5(1)(b) is met, which does not allow the Commission any room for manoeuvre.
- 42 Lastly, the Commission contends that, although Article 5(1)(b) of Directive 2002/95 constitutes the legal basis for the contested decision, it is nevertheless necessary to take into account point 10 of the Annex to that directive. That point has legal effects, in that it brings any action on the part of the Commission regarding DecaBDE within the scope of Article 5(1) of Directive 2002/95. Consequently, the Commission is not required to show that particular action that it has taken with regard to DecaBDE and which falls within the scope of Article 5(1) of Directive 2002/95 constitutes an adaptation to scientific and technical progress.
- 43 In that regard, the United Kingdom adds that point 10 reflects the hesitation of the Community legislature, which recognised that further evaluation was justified. The United Kingdom considers, in addition, that the Commission has a broad discretion as regards the evaluation of such technical problems, and it is necessary to show that it has committed a manifest error.
- 44 The Commission notes that, in the present case, the second condition laid down in Article 5(1)(b) of Directive 2002/95 was met. The 2002 report shows that ‘there is at present no need for further information and/or testing or for risk reduction measures beyond those which are being applied already’.
- 45 That finding was confirmed by the CSTE and by the policy recommendation drawn up in the framework of the 2004 Report, in which it was agreed that a voluntary emissions reduction programme should be put into operation in parallel with the collection of further data. The 2005 draft addendum concluded that the findings of the 2004 Report did not need to be amended in the light of the new data but that it was advisable to extend the existing monitoring programmes.
- 46 The Commission maintains that, having regard to the fact that the prohibition of DecaBDE was never proposed in the scientific opinions, it was under no obligation to examine the environmental, health and safety impact of substitute products. Such an examination would only have been necessary if there had been such a prohibition in the first place. By the same token, there was no reason to restrict the exemption to specific applications of DecaBDE.
- 47 The Commission notes additionally that it is not obliged to consult the SCHER or to take account of its opinion, since Article 7 of Directive 2002/95 provides that the Commission is to be assisted by the Committee created under Article 18 of Directive 75/442, that is to say, by the Technical Adaptation Committee.
- 48 According to the Parliament, the Kingdom of Denmark, the Kingdom of Sweden and the Kingdom of Norway, the effect of point 10 of the Annex to Directive 2002/95 is only to create a priority in time, not to empower or to create an evaluation procedure separate from that provided for in Directive 2002/95. That interpretation of point 10 is supported by the context in which that directive was adopted.
- 49 Responding to the United Kingdom’s argument that the Commission has a broad discretion in assessing such technical problems, the Parliament stresses that the grounds of annulment on which it relies – breach of the precautionary principle, breach of the principle of proportionality and breach of the obligation to provide a statement of reasons – are autonomous pleas in law

and subsidiary to its first plea in law, which concerns the Commission's obligation to comply with the conditions and limits of its implementing powers.

Findings of the Court

- 50 At the outset, it should borne in mind that, in accordance with the second subparagraph of Article 7(1) EC, the Community institutions may act only within the limits of the powers conferred upon them by the EC Treaty (Case C-403/05 *Parliament v Commission* [2007] ECR I-0000, paragraph 49).
- 51 Under the third indent of Article 202 EC, in order to ensure that the objectives set out in the Treaty are attained and in accordance with its provisions, the Council is to confer on the Commission, in the acts which the Council adopts, powers for the implementation of the rules which the Council lays down. The Council may impose certain requirements in respect of the exercise of those powers and may also reserve the right, in specific cases, to exercise directly implementing powers itself (*Parliament v Commission*, paragraph 50).
- 52 Within the framework of those powers, the limits of which must be determined by reference amongst other things to the essential general aims of the legislation in question, the Commission is authorised to adopt all the measures which are necessary or appropriate for the implementation of the basic legislation, provided that they are not contrary to it (see, to that effect, Case C-478/93 *Netherlands v Commission* [1995] ECR I-3081, paragraphs 30 and 31; Case C-159/96 *Portugal v Commission* [1998] ECR I-7379, paragraphs 40 and 41; and *Parliament v Commission*, paragraph 51).
- 53 As the legal basis for the contested decision is Directive 2002/95 and, in particular, Article 5(1) (b) thereof, it is necessary to examine that provision.
- 54 Article 5 of Directive 2002/95 deals with the question of amendments to the Annex to that directive. Under Article 4(2) of that directive, the Annex lists the applications to which the prohibition of lead, mercury, cadmium, hexavalent chromium, PBB or PBDE in electrical and electronic equipment put on the market, as laid down in Article 4(1), does not apply.
- 55 Article 5 of Directive 2002/95 is entitled 'Adaptation to scientific and technical progress'. It is clear from the introductory words of Article 5(1) that, in order to adapt the Annex to that directive to scientific and technical progress and to amend it, consequently, for the purposes provided for in points (a) to (c) of Article 5(1), the procedure referred to in Article 7(2) of that directive must be complied with.
- 56 Article 5(1)(b) of Directive 2002/95 deals specifically with the exemption of materials and components of electrical and electronic equipment from the prohibition laid down in Article 4(1) of that directive. Such an exemption can arise only if one or other of the two conditions set out is met, that is to say, only if their elimination or substitution via design changes or materials and components which do not require any of the materials or substances referred to therein is technically or scientifically impracticable, or if the negative environmental, health and/or consumer safety impacts caused by substitution are likely to outweigh the environmental, health and/or consumer safety benefits thereof.
- 57 There is nothing in the wording of that legislation to suggest that the alternative condition for exemption set out in Article 5(1)(b) of Directive 2002/95 can be interpreted independently of the title of Article 5 or of the introductory words of Article 5(1). On the contrary, since Directive 2002/95 contains only one Annex, and that Annex lists only the exempted materials and components, the pre-condition for any extension of that list – in addition to meeting one of the two conditions laid down in Article 5(1)(b) of that directive – is that the amendment be necessary in order to adapt that annex to scientific and technical progress.
- 58 Accordingly, failing fulfilment of the conditions laid down in the introductory words of Article 5 (1) of Directive 2002/95, or one of the conditions set out in Article 5(1)(b) thereof, the placing

- on the market of the electrical and electronic equipment at issue cannot escape the prohibition laid down in Article 4(1) of that directive.
- 59 In that regard, it must be stated that, with the exception of the condition relating to the assistance of the Committee referred to in Article 7 of Directive 2002/95, the conditions laid down in Article 5(1) of that directive were not complied with by the Commission when it adopted the contested decision.
- 60 For the adoption of that decision, account was taken of the findings of the 2002 Report, findings which were not amended by the reports of 2004 and 2005. It follows that, with regard to the date on which Directive 2002/95 was adopted – 27 January 2003 – the condition referred to in the introductory words of Article 5(1) of that directive, concerning the need to adapt the Annex to scientific and technical progress, was not met.
- 61 The Commission contends that the inclusion of DecaBDE in point 10 of the Annex to Directive 2002/95 means that it is not required to show that particular action that it has taken with regard to DecaBDE and which falls within the scope of Article 5(1) of Directive 2002/95 constitutes an adaptation to scientific and technical progress. However, even if that were so, it would not relieve the Commission of the obligation to establish that one of the conditions set out in Article 5(1)(b) of that directive was met.
- 62 In its written observations, the Commission maintains in that regard that, in the present case, it is the second condition laid down in Article 5(1)(b) of Directive 2002/95 which is met, since the various assessment reports stated that there was no need for further risk reduction measures beyond those which were being applied already. The Commission argues that it follows from the third recital of the contested decision – which, according to the Commission, was drafted by the Council – that that condition was met.
- 63 It is necessary, however, to point out that neither the third recital of the contested decision, nor the findings of the reports to which the Commission refers, shows that the second condition laid down in Article 5(1)(b) of Directive 2002/95 is met.
- 64 Those reports do not examine at all the possibility of substituting DecaBDE; nor, in consequence, do they consider the negative effects that substitution could have. According to the Parliament's submissions during the hearing, which were not disputed by the Commission, it was not until June 2006 that the Commission requested a study on the possibility of replacing DecaBDE.
- 65 The Commission and the United Kingdom maintain, however, that Article 5 of Directive 2002/95 must be viewed in the context of its adoption; that it should be read in the light of Article 4(2) of that directive, a provision that need not be interpreted strictly; that point 10 of the Annex to that directive required the Commission to act as it has; and that the Commission had a broad discretion.
- 66 Admittedly, as the Commission and the United Kingdom state, point 10 of the Annex to Directive 2002/95 states that the Commission is to evaluate the applications for, inter alia, DecaBDE as a matter of priority 'in order to establish as soon as possible whether these items are to be amended accordingly'. However, nothing in Directive 2002/95 lends support to the proposition that that provision relieves the Commission of any obligation to comply with the conditions laid down in Article 5(1) of that directive, a finding that was moreover accepted by the Commission at the hearing.
- 67 According to settled case-law, in interpreting a provision of Community law it is necessary to consider not only its wording, but also the context in which it occurs and the objectives pursued by the rules of which it is part (see, inter alia, Case C-156/98 *Germany v Commission* [2000] ECR I-6857, paragraph 50, and Case C-306/05 *SGAE* [2006] ECR I-11519, paragraph 34).
- 68 It should be stated, first, that it is clear from the wording of Article 4(1) of Directive 2002/95 that

- the use of PBDE, the category of substances to which DecaBDE belongs, is prohibited in electrical and electronic equipment with effect from 1 July 2006.
- 69 It is true that, under Article 4(2), the prohibition does not apply to the applications listed in the Annex to Directive 2002/95. Nevertheless, as is clear from the wording of point 10 of that Annex, DecaBDE is named, not as an exempted substance, but as a substance which must undergo an assessment by the Commission in the context of the procedure referred to in Article 7(2) of that directive. The amendment of the Annex to Directive 2002/95 in accordance with that procedure, for the purposes of exempting materials and components of electrical and electronic equipment, requires – according to the clear and precise wording of Article 5(1) of that Directive – the conditions laid down in that provision to be met and those conditions make no mention of point 10 of the Annex to that directive.
- 70 As the Parliament, the Kingdom of Denmark, the Kingdom of Sweden and the Kingdom of Norway have correctly pointed out, point 10 of the Annex to Directive 2002/95 therefore had the sole effect of creating a priority in time, not of empowering the Commission nor of creating an evaluation procedure separate from that already provided for in that directive.
- 71 If Article 5 of that directive is then examined in context, it should be borne in mind that Article 5 specifies the conditions for exemption from the principle of prohibition laid down in Article 4(1) of that directive and must therefore be interpreted strictly.
- 72 As the applicants have pointed out, Article 4(2) of Directive 2002/95 allows for the possibility of exemption only as regards the applications of substances, not for any substance *per se*.
- 73 In that regard, the Commission did not dispute the applicants' argument that as DecaBDE is principally used in polymers, the exemption 'in polymeric applications', as referred to in the contested decision, is equivalent to a general exemption for the use of DecaBDE in electrical and electronic equipment. The Commission stated at the hearing that DecaBDE could be used in textiles, but it must be noted that textiles are not covered by Directive 2002/95 which, as its title indicates, concerns only electrical and electronic equipment.
- 74 Finally, as regards the objectives of Directive 2002/95, it is clear from the fifth, sixth and eleventh recitals thereto that the intention of the legislature is to prohibit products referred to in the directive and to grant exemptions only in accordance with carefully defined conditions.
- 75 Such an objective, in compliance with Article 152 EC, according to which a high level of human health protection is to be ensured in the definition and implementation of all Community policies and activities (see, to that effect, Case C-504/04 *Agrarproduktion Staebelow* [2006] ECR I-679, paragraph 39), and in compliance with Article 174(2) EC, according to which Community policy on the environment is to aim at a high level of protection and is based on the principles of precaution and preventive action (see Case C-127/02 *Waddenvereniging and Vogelbeschermingsvereniging* [2004] ECR I-7405, paragraph 44) justifies the strict interpretation of the conditions for exemption.
- 76 In the present case, without it being necessary to rule on the extent of the Commission's discretion, it is sufficient to state that the contested decision, which is equivalent to a general exemption for the use of DecaBDE in electrical and electronic equipment, was adopted when the conditions laid down by the Community legislature in Article 5(1) of Directive 2002/95 had not been met and runs counter to the objective pursued by that legislature of establishing the principle of the prohibition of the components referred to in that directive.
- 77 The Commission and the United Kingdom also rely on the existence of a voluntary emissions reduction programme, mentioned in the third recital of the contested decision. Such a programme is not relevant, however, in relation to the conditions laid down in Directive 2002/95 for the delegation of powers.
- 78 It follows from all of the foregoing that, in adopting the contested decision as regards the

exemption of DecaBDE, the Commission infringed Article 5(1) of Directive 2002/95.

79 In view of that finding, it is not necessary to rule on the issues of action *ultra vires* and/or misuse of powers, raised in the context of the first plea in law.

The second, third and fourth pleas in law

80 As the first plea in law is well-founded, it does not appear necessary to examine the second, third and fourth pleas.

81 It follows from the foregoing that point 2 of the Annex to the contested decision must be annulled. It is for the Commission to confirm whether, as a consequence, it is necessary to adapt the title of the Annex to Directive 2002/95 to which point 1 of the Annex to the contested decision refers.

Maintenance of the effects of the annulled provision

82 At the hearing, the Commission and the United Kingdom requested the Court, should it annul the disputed provisions of the contested decision, to maintain the effects of those provisions during a period of at least nine months, which was the adaptation period which undertakings producing or using DecaBDE would have benefited from if, in October 2005, the Commission had decided not to exempt DecaBDE and had decided that the product was subject to the prohibition laid down in Article 4(1) of Directive 2002/95.

83 The applicants and the other intervening parties opposed that request on the ground that it should have been included in the written pleadings and that, in any event, the undertakings concerned should have known, following the adoption of Directive 2002/95, that DecaBDE had been prohibited by the Community legislature.

84 Under the second paragraph of Article 231 EC the Court, if it considers it necessary, is to state which of the effects of a regulation which it has declared void are to be considered as definitive. Such a provision can also be applied to a decision adopted to amend an Annex contained in a directive (with regard to the directive itself, see, to that effect, *inter alia*, Case C-21/94 *Parliament v Council* [1995] ECR I-1827, paragraph 31).

85 In view of the wording of that provision, from which it is clear that, if the Court considers it necessary, it may, even of its own motion, limit the annulling effect of its judgment, it is not necessary to rule on the consequences of the request –allegedly out of time – from the Commission and the United Kingdom.

86 In the present case, account taken of the fact that the dispute has essentially arisen over the manner in which Directive 2002/95 was drafted, particularly over the very complex relationship between Articles 4 and 5 of that directive and point 10 in the Annex thereto, and the fact that the Commission adopted the contested decision on 13 October 2005 – that is to say, nine months before the prohibition on DecaBDE took effect on 1 July 2006 – it is appropriate, in order to take account of the interests of the undertakings concerned, that the effects of the annulled provision be maintained, on grounds of legal certainty, for a strictly necessary adaptation period, that is until 30 June 2008.

Costs

87 Under Article 69(2) of the Rules of Procedure, the unsuccessful party is to be ordered to pay the costs if they have been applied for in the successful party's pleadings. As the Parliament and the Kingdom of Denmark, in Case C-295/06, have applied for costs against the Commission and, as the Commission has been unsuccessful in its pleadings, it must be ordered to pay the costs of the Parliament and the Kingdom of Denmark in Case C-295/06.

88 In accordance with the first subparagraph of Article 69(4) of the Rules of Procedure, the Kingdom of Denmark in Case C-14/06, the Portuguese Republic, the Republic of Finland, the Kingdom of Sweden and the Kingdom of Norway, all of which intervened in support of the form of order sought by the applicants, and the United Kingdom of Great Britain and Northern Ireland, which intervened in support of the form of order sought by the defendant, must be ordered to bear their own costs.

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

1. **Annuls Point 2 of the Annex to Commission Decision 2005/717/EC of 13 October 2005 amending for the purposes of adapting to technical progress the Annex to Directive 2002/95/EC of the European Parliament and of the Council on the restriction of the use of certain hazardous substances in electrical and electronic equipment;**
2. **Declares that the effects of point 2 of the Annex to Decision 2005/717 are maintained until 30 June 2008 inclusive;**
3. **Orders the Commission of the European Communities to pay the costs of the European Parliament and those of the Kingdom of Denmark in Case C-295/06;**
4. **Orders the Kingdom of Denmark, in Case C-14/06, the Portuguese Republic, the Republic of Finland, the Kingdom of Sweden, the United Kingdom of Great Britain and Northern Ireland and the Kingdom of Norway to bear their own costs.**

[Signatures]

* Languages of the cases: English and Danish.