

JUDGMENT OF THE COURT (Full Court)

13 July 2004^{*}

In Case C-27/04,

Commission of the European Communities, represented by M. Petite, A. van Solinge and P. Aalto, acting as Agents, with an address for service in Luxembourg,

applicant,

v

Council of the European Union, represented by J.-C. Piris, T. Middleton and J. Monteiro, acting as Agents,

defendant,

* Language of the case: French.

APPLICATION for annulment of Council measures of 25 November 2003, namely:

- decisions not to adopt, in respect of the French Republic and the Federal Republic of Germany, the formal instruments contained in Commission recommendations pursuant to Article 104(8) and (9) EC;
- conclusions adopted in respect of each of those two Member States, entitled ‘Council conclusions on assessing the actions taken by [the French Republic and the Federal Republic of Germany respectively] in response to recommendations of the Council according to Article 104(7) of the Treaty establishing the European Community and considering further measures for deficit reduction in order to remedy the situation of excessive deficit’, in so far as those conclusions involve holding the excessive deficit procedure in abeyance, recourse to an instrument not envisaged by the Treaty and modification of the recommendations decided on by the Council under Article 104(7) EC,

THE COURT (Full Court),

composed of: V. Skouris, President, P. Jann, C.W.A. Timmermans, A. Rosas, C. Gulmann (Rapporteur), J.-P. Puissochet and J.N. Cunha Rodrigues, Presidents of Chambers, R. Schintgen, F. Macken, N. Colneric, S. von Bahr, R. Silva de Lapuerta and K. Lenaerts, Judges,

Advocate General: A. Tizzano,
Registrar: M.-F. Contet, Principal Administrator,

having regard to the decision of the President of the Court of 13 February 2004 that the case was to be determined in accordance with an expedited procedure pursuant to Article 62a of the Rules of Procedure,

after hearing oral argument from the parties at the hearing on 28 April 2004,

after hearing the Advocate General,

gives the following

Judgment

1 By application lodged at the Court Registry on 27 January 2004, the Commission of the European Communities brought an action under Article 230 EC for annulment of measures of the Council of the European Union of 25 November 2003, namely:

- decisions not to adopt, in respect of the French Republic and the Federal Republic of Germany, the formal instruments contained in Commission recommendations pursuant to Article 104(8) and (9) EC, and

- conclusions adopted in respect of each of those two Member States, entitled ‘Council conclusions on assessing the actions taken by [the French Republic and the Federal Republic of Germany respectively] in response to recommendations of the Council according to Article 104(7) of the Treaty establishing the European Community and considering further measures for deficit reduction in order to remedy the situation of excessive deficit’ (‘the Council’s conclusions’), in so far as those conclusions involve holding the excessive deficit procedure in abeyance, recourse to an instrument not envisaged by the Treaty and modification of the recommendations decided on by the Council under Article 104(7) EC.

Legal context

- 2 Article 104 EC provides:

‘1. Member States shall avoid excessive government deficits.

2. The Commission shall monitor the development of the budgetary situation and of the stock of government debt in the Member States with a view to identifying gross errors. In particular it shall examine compliance with budgetary discipline ...

...

5. If the Commission considers that an excessive deficit in a Member State exists or may occur, the Commission shall address an opinion to the Council.

6. The Council shall, acting by a qualified majority on a recommendation from the Commission, and having considered any observations which the Member State concerned may wish to make, decide after an overall assessment whether an excessive deficit exists.

7. Where the existence of an excessive deficit is decided according to paragraph 6, the Council shall make recommendations to the Member State concerned with a view to bringing that situation to an end within a given period. Subject to the provisions of paragraph 8, these recommendations shall not be made public.

8. Where it establishes that there has been no effective action in response to its recommendations within the period laid down, the Council may make its recommendations public.

9. If a Member State persists in failing to put into practice the recommendations of the Council, the Council may decide to give notice to the Member State to take, within a specified time-limit, measures for the deficit reduction which is judged necessary by the Council in order to remedy the situation.

In such a case, the Council may request the Member State concerned to submit reports in accordance with a specific timetable in order to examine the adjustment efforts of that Member State.

10. The rights to bring actions provided for in Articles 226 and 227 may not be exercised within the framework of paragraphs 1 to 9 of this Article.

11. As long as a Member State fails to comply with a decision taken in accordance with paragraph 9, the Council may decide to apply or, as the case may be, intensify one or more of the following measures:

- to require the Member State concerned to publish additional information, to be specified by the Council, before issuing bonds and securities,
- to invite the European Investment Bank to reconsider its lending policy towards the Member State concerned,
- to require the Member State concerned to make a non-interest-bearing deposit of an appropriate size with the Community until the excessive deficit has, in the view of the Council, been corrected,
- to impose fines of an appropriate size.

The President of the Council shall inform the European Parliament of the decisions taken.

12. The Council shall abrogate some or all of its decisions referred to in paragraphs 6 to 9 and 11 to the extent that the excessive deficit in the Member State concerned

has, in the view of the Council, been corrected. If the Council has previously made public recommendations, it shall, as soon as the decision under paragraph 8 has been abrogated, make a public statement that an excessive deficit in the Member State concerned no longer exists.

13. When taking the decisions referred to in paragraphs 7 to 9, 11 and 12, the Council shall act on a recommendation from the Commission by a majority of two thirds of the votes of its members weighted in accordance with Article 205(2), excluding the votes of the representative of the Member State concerned.

14. Further provisions relating to the implementation of the procedure described in this article are set out in the Protocol on the excessive deficit procedure annexed to this Treaty.

The Council shall, acting unanimously on a proposal from the Commission and after consulting the European Parliament and the ECB, adopt the appropriate provisions which shall then replace the said Protocol.

...

³ Under Article 104(9) and (13) EC, read in conjunction with Article 122(3) and (5) EC, when the Council takes decisions envisaged by Article 104(9) the voting rights of Member States which have not adopted the single currency are suspended.

- 4 The European Council, in its Resolution on the Stability and Growth Pact adopted in Amsterdam on 17 June 1997 (OJ 1997 C 236, p. 1; ‘the Resolution of the European Council of 17 June 1997’), recalled the crucial importance of securing budgetary discipline in stage three of Economic and Monetary Union (‘EMU’) and then adopted guidelines addressed to the Member States, the Commission and the Council.
- 5 The resolution states in the guidelines concerning the Council that the latter:
- ‘1. is committed to a rigorous and timely implementation of all elements of the Stability and Growth Pact in its competence; it will take the necessary decisions under Article [99] and Article [104] as is practicable;
- ...
3. is invited always to impose sanctions if a participating Member State fails to take the necessary steps to bring the excessive deficit situation to an end as recommended by the Council;

...

6. is invited always to state in writing the reasons which justify a decision not to act if at any stage of the excessive deficit or surveillance of budgetary positions procedures the Council did not act on a Commission recommendation and, in such a case, to make public the votes cast by each Member State.'

6 Sections 2 and 3 of Council Regulation (EC) No 1467/97 of 7 July 1997 on speeding up and clarifying the implementation of the excessive deficit procedure (OJ 1997 L 209, p. 6) provide as follows:

'Section 2

Speeding up the excessive deficit procedure

Article 3

...

3. The Council shall decide on the existence of an excessive deficit in accordance with Article [104(6)], within three months of the reporting dates established in Article 4(2) and (3) of Regulation (EC) No 3605/93. When it decides, in accordance with Article [104(6)], that an excessive deficit exists, the Council shall at the same time make recommendations to the Member State concerned in accordance with Article [104(7)].

4. The Council recommendation made in accordance with Article [104(7)] shall establish a deadline of four months at the most for effective action to be taken by the Member State concerned. The Council recommendation shall also establish a deadline for the correction of the excessive deficit, which should be completed in the year following its identification unless there are special circumstances.

Article 4

1. Any Council decision to make public its recommendations, where it is established that no effective action has been taken in accordance with Article [104(8)], shall be taken immediately after the expiry of the deadline set in accordance with Article 3(4) of this Regulation.

...

Article 5

Any Council decision to give notice to the participating Member State concerned to take measures for the deficit reduction in accordance with Article [104(9)] shall be taken within one month of the Council decision establishing that no effective action has been taken in accordance with Article [104(8)].

Article 6

Where the conditions to apply Article [104(11)] are met, the Council shall impose sanctions in accordance with Article [104(11)]. Any such decision shall be taken no

later than two months after the Council decision giving notice to the participating Member State concerned to take measures in accordance with Article [104(9)].

Article 7

If a participating Member State fails to act in compliance with the successive decisions of the Council in accordance with Article [104(7) and (9)], the decision of the Council to impose sanctions, in accordance with paragraph 11 of Article [104], shall be taken within ten months of the reporting dates pursuant to Regulation (EC) No 3605/93 as referred to in Article 3(3) of this Regulation. An expedited procedure shall be used in the case of a deliberately planned deficit which the Council decides is excessive.

...

Section 3

Abeyance and monitoring

Article 9

1. The excessive deficit procedure shall be held in abeyance:

- if the Member State concerned acts in compliance with recommendations made in accordance with Article [104(7)],

- if the participating Member State concerned acts in compliance with notices given in accordance with Article [104(9)].

2. The period during which the procedure is held in abeyance shall be included neither in the ten month period referred to in Article 7 nor in the two month period referred to in Article 6 of this Regulation.

...

Facts

The Council's decisions pursuant to Article 104(6) and (7) EC

- 7 An excessive deficit procedure was initiated in relation to the Federal Republic of Germany in November 2002. By Decision 2003/89/EC of 21 January 2003 on the existence of an excessive deficit in Germany — Application of Article 104(6) of the Treaty establishing the European Community (OJ 2003 L 34, p. 16), the Council decided, on a recommendation from the Commission, that an excessive deficit existed in that Member State. In accordance with Article 104(7) EC and Article 3(4) of Regulation No 1467/97, it recommended the German Government to bring that deficit to an end as rapidly as possible, by implementing various measures. It set 21 May 2003 as the deadline for taking the measures recommended. Since the measures taken by the Federal Republic of Germany were considered to be effective at that date, the excessive deficit procedure was implicitly held in abeyance.

8 An excessive deficit procedure was initiated in relation to the French Republic in April 2003. By Decision 2003/487/EC of 3 June 2003 on the existence of an excessive deficit in France — Application of Article 104(6) of the Treaty establishing the European Community (OJ 2003 L 165, p. 29), the Council decided, on a recommendation from the Commission, that an excessive deficit existed in that Member State. In accordance with Article 104(7) EC and Article 3(4) of Regulation No 1467/97, it recommended the French Government to bring that deficit to an end as rapidly as possible and by 2004 at the latest, by means of various measures. It set 3 October 2003 as the deadline for taking the necessary measures.

The Commission's recommendations pursuant to Article 104(8) and (9) EC

9 On 8 October 2003 the Commission sent to the Council a recommendation for a decision founded on Article 104(8) EC, in order for the Council to establish that the French Republic had undertaken no effective action in response to the Council's recommendation under Article 104(7) EC.

10 On 21 October 2003 the Commission recommended that the Council decide, under Article 104(9) EC, to give notice to the French Republic to take measures to reduce its deficit. It recommended the Council to give that Member State notice, in particular, to put an end to its excessive deficit situation by 2005 at the latest and to achieve in 2004 an annual reduction in the cyclically-adjusted budget deficit equal to 1 % of its gross domestic product ('GDP').

11 As regards the Federal Republic of Germany, the Commission ultimately considered that the measures taken in response to the Council's recommendation under Article 104(7) EC were inappropriate. On 18 November 2003 the Commission therefore

sent to the Council a recommendation for a decision founded on Article 104(8) EC, in order for it to establish that the action taken by the Federal Republic of Germany to correct the excessive deficit situation was proving to be inadequate.

- ¹² On the same day, the Commission recommended that the Council decide, under Article 104(9) EC, to give notice to the Federal Republic of Germany to take measures to reduce its deficit. It recommended the Council to give that Member State notice, in particular, to put an end to its excessive deficit situation by 2005 at the latest and to achieve in 2004 an annual reduction in the cyclically-adjusted balance of 0.8 % of GDP.

The Council meeting (economic and financial affairs) of 25 November 2003

- ¹³ At its meeting of 25 November 2003, the Council took votes on the Commission recommendations for Council decisions under Article 104(8) EC in respect of the French Republic and the Federal Republic of Germany. In accordance with Article 104(13) EC, all the Member States other than the Member State concerned took part in the two votes. Since the required majority was not achieved, the decisions were not adopted.
- ¹⁴ The Council also took votes on the Commission recommendations for Council decisions under Article 104(9) EC in respect of the same Member States. In accordance with Article 104(13) EC and 122(3) and (5) EC, only the Member States which have adopted the single currency, other than the Member State concerned, took part in those two votes. Since the required majority was not achieved, the decisions were not adopted.

- 15 On the same day, applying the voting rules which relate to decisions envisaged by Article 104(9) EC, the Council adopted essentially similar conclusions with regard to each of the two Member States concerned.
- 16 In paragraph 1 of the conclusions, the Council indicates the considerations which it has taken into account in assessing the budgetary situation of the Member State concerned.
- 17 In paragraph 2 of the conclusions, it notes that the Member State concerned adopted several measures following the recommendation made to it under Article 104(7) EC.
- 18 In paragraph 3 it 'welcomes the public commitment by [the Member State concerned] to implement all the necessary measures to ensure that the deficit will be below 3 % of GDP in 2005 at the latest'.
- 19 In paragraph 4 the Council makes recommendations for the Member State concerned 'in the light of the Commission Recommendation and the commitments made by [that Member State]'. The recommendations concern, in particular, the annual deficit reduction for 2004 and 2005 and continuing to seek to achieve budgetary consolidation after 2005. The Council also recommends that the Member State concerned 'put an end to the present excessive deficit situation as rapidly as possible and at the latest by 2005'.

20 Paragraphs 5 and 6 are worded as follows:

‘5. In the light of the recommendations and the commitments by [the Member State concerned] set out above, the Council decided not to act, at this point in time, on the basis of the Commission Recommendation for a Council decision under Article 104(9).

6. The Council agrees to hold the Excessive Deficit Procedure for [the Member State concerned] in abeyance for the time being. The Council stands ready to take a decision under Article 104(9), on the basis of the Commission Recommendation, should [the Member State concerned] fail to act in accordance with the commitments set out in these conclusions as it would emerge from the assessment based on paragraph 7 below.’

21 In paragraph 7 the Council invites the Member State concerned to submit reports, without setting a specific timetable, and recommends assessment by the Council and the Commission of the progress achieved by that State.

Forms of order sought

22 The Commission claims that the Court should:

- annul, first, the decisions of the Council not to adopt the formal instruments contained in the Commission’s recommendations pursuant to Article 104(8) and (9) EC and, second, the Council’s conclusions in so far as they involve

holding the excessive deficit procedure in abeyance, recourse to an instrument not envisaged by the Treaty and modification of the recommendations decided on by the Council under Article 104(7) EC;

- order the Council to pay the costs.

23 The Council contends that the Court should:

- declare the action inadmissible;
- in the alternative, dismiss it;
- order the Commission to pay the costs.

Admissibility of the action

24 The Council pleads that the action is inadmissible in seeking annulment both of the Council's failure to adopt the formal instruments contained in the Commission's recommendations pursuant to Article 104(8) and (9) EC and of the Council's conclusions concerning, respectively, the French Republic and the Federal Republic of Germany.

The claim for annulment of the Council's failure to adopt the formal instruments contained in the Commission's recommendations pursuant to Article 104(8) and (9) EC

Arguments of the parties

25 The Council submits that, in not adopting the Commission's recommendations, it did not take, even implicitly, any actionable decision. It points out that, under the Treaty, the procedure for requiring an institution to act is constituted by the action for failure to act provided for in Article 232 EC. Pursuant to that provision, the Commission may bring an action before the Court for a declaration that the Council has infringed the Treaty by failing to act. However, the conditions for recourse to this legal remedy are not met in the present case: the Council has not first been called upon to act by the Commission, nor was it legally required to adopt the decisions referred to in Article 104(8) and (9) EC. In any event, it cannot be alleged to have failed to act since it took a vote on the Commission's recommendations.

26 The Council contends that the judgment in Case C-76/01 P *Eurocoton and Others v Council* [2003] ECR I-0000, in which the Court held that the Council's failure to adopt a proposal submitted to it by the Commission for a regulation imposing a definitive anti-dumping duty produced legal effects for individuals and constituted an act open to challenge, is not relevant here. Anti-dumping proceedings, unlike the excessive deficit procedure, directly affect certain businesses and it must be ensured that the procedural guarantees granted to them by Community legislation are effective. Furthermore, in anti-dumping proceedings the Council may no longer adopt the Commission's proposal after expiry of the period laid down for that purpose. That is not so in the case of Commission recommendations to the Council pursuant to Article 104(8) and (9) EC. Since no mandatory and definitive period has

expired, the Council remains entitled to adopt those recommendations and the Commission remains entitled to seek the adoption of its recommendations or to draw up fresh ones.

- 27 The Commission states in response that, under the system established by Article 104 EC, the vote by which the Council adopts a position on the Commission's recommendation seeking the determination provided for in Article 104(8) or the giving of notice provided for in Article 104(9) constitutes in every case a decision, be it positive or negative, depending on the result of the vote, and therefore an act open to challenge, in accordance with the case-law resulting from *Eurocoton*, cited above.
- 28 In short, by refusing to determine that the French Republic and the Federal Republic of Germany had taken no effective measures, the Council decided, albeit implicitly, that, contrary to the Commission's view, those two countries had in actual fact taken effective measures.

Findings of the Court

- 29 As provided in Article 104(13) EC, and without prejudice to Article 122(3) and (5) EC, when the Council takes the decisions referred to in Article 104(7), (8) and (9) EC it acts on a recommendation from the Commission by a majority of two thirds of the votes of its members weighted in accordance with Article 205(2) EC, excluding the votes of the representative of the Member State concerned.

- 30 Accordingly, the Council decision, referred to in Article 104(8) EC, to make its recommendations public where it establishes that there has been no effective action in response to them can exist only if it is adopted by the majority stated in the preceding paragraph of this judgment. The same is true of the Council decision, referred to in Article 104(9) EC, to give notice to the Member State concerned to take, within a specified time-limit, measures for the deficit reduction which is judged necessary by the Council in order to remedy the excessive deficit situation.
- 31 Thus, where the Commission recommends to the Council that it adopt decisions under Article 104(8) and (9) EC and the required majority is not achieved within the Council, no decision is taken for the purpose of those provisions.
- 32 Nor is there any provision of Community law prescribing a period on the expiry of which an implied decision under Article 104(8) or (9) EC is deemed to arise and establishing the content of that decision.
- 33 While it is true that, as stated in the 16th recital in the preamble to Regulation No 1467/97, the seriousness of an excessive deficit in stage three calls for urgent action from all those involved and that regulation lays down deadlines which must be observed, the fact remains that expiry of those deadlines does not preclude the Council from adopting the acts recommended by the Commission. As is apparent from the 12th recital in the preamble to Regulation No 1467/97, the deadlines established in that regulation are intended to ensure expeditious and effective implementation of the excessive deficit procedure. It would therefore contradict this objective for expiry of the deadlines to result in the lapse of the Council's power to adopt the acts recommended by the Commission in the course of that procedure. Such lapse would require the procedure to be recommenced where appropriate.

- 34 In light of the foregoing, failure by the Council to adopt acts provided for in Article 104(8) and (9) EC that are recommended by the Commission cannot be regarded as giving rise to acts open to challenge for the purposes of Article 230 EC.
- 35 It should be remembered that, if the Council does not adopt formal instruments recommended by the Commission pursuant to Article 104(8) and (9) EC, the latter can have recourse to the legal remedy provided for by Article 232 EC, in compliance with the conditions prescribed therein.
- 36 Accordingly, the action is inadmissible in so far as it seeks annulment of the Council's failure to adopt the formal instruments contained in the Commission's recommendations pursuant to Article 104(8) and (9) EC.

The claim for annulment of the Council's conclusions concerning, respectively, the French Republic and the Federal Republic of Germany

Arguments of the parties

- 37 The Council submits that its conclusions are texts of a political nature and not acts entailing legal effects. The conclusions do not in any way prejudice the Commission's rights and powers. Their sole aim and effect is to record the situation reached in the ongoing excessive deficit procedures after the Council had considered the matter and not adopted the Commission's recommendations.

- 38 The holding in abeyance of the excessive deficit procedures initiated against the Federal Republic of Germany and the French Republic does not result in the slightest from the conclusions themselves. It results automatically from the fact that the Commission's recommendations were not adopted by the Council, without its having to adopt an express and legally binding decision in that regard.
- 39 The Council points out in this connection that only Article 9(1) of Regulation No 1467/97 provides for holding the excessive deficit procedure in abeyance. This provision merely envisages its being held in abeyance in two particular situations, without indicating in what other circumstances it is possible or prohibited to do so and without establishing any mechanism for determining or declaring that it is being held in abeyance. Holding an ongoing procedure in abeyance is implicit. It flows from expiry of the period laid down by a measure adopted on the basis of Article 104 (7) or (9) EC.
- 40 In any event, the fact that the procedure was expressly stated by the Council in its political conclusions to be held in abeyance does not in any way alter the fact that the conclusions do not have legal effects. It follows that their annulment would not alter in fact or in law the state of the ongoing excessive deficit procedures.
- 41 The Commission contends that if the holding in abeyance of those ongoing procedures against the French Republic and the Federal Republic of Germany had been the automatic consequence of the failure to adopt the decisions recommended by the Commission, the Council could have simply recorded that they were held in abeyance, without so deciding in a formal determination accompanied by new recommendations.
- 42 It is in actual fact possible to hold the excessive deficit procedure in abeyance only in the two situations set out in Article 9(1) of Regulation No 1467/97. Accordingly, inasmuch as the Council refused to determine that the Member States concerned had not taken effective action, thereby deciding that they had complied with the

recommendations adopted under Article 104(7) EC, it could have held the ongoing excessive deficit procedures in abeyance only by decisions taken in accordance with the procedural and voting rules applicable under the latter provision. However, the Council's conclusions were adopted in accordance with the procedural and voting rules applicable under Article 104(9) EC.

- 43 The Council's conclusions are *sui generis* measures whose main legal effect is to free the Council and the Member States concerned from the binding legal framework formed by Article 104 EC and Regulation No 1467/97, replacing it with new guidelines governing assessment of the conditions for applying Article 104(9) EC and a new framework for monitoring the excessive deficits of the Member States concerned.

Findings of the Court

- 44 It is settled case-law that an action for annulment must be available in the case of all measures adopted by the institutions, whatever their nature or form, which are intended to have legal effects (see Case 22/70 *Commission v Council* (the 'ERTA' case) [1971] ECR 263, paragraph 42, and Case C-316/91 *Parliament v Council* [1994] ECR I-625, paragraph 8).
- 45 In the present case, it must be established whether the Council's conclusions are intended to have such effects.

46 In paragraph 6 of those conclusions, the Council stated that it agreed to hold the excessive deficit procedure in abeyance for the time being and it declared itself ready to take a decision under Article 104(9) EC if it were to appear that the Member State concerned was not complying with the commitments which it had entered into, set out in the conclusions.

47 First, inasmuch as the decisions to hold the ongoing excessive deficit procedures in abeyance are conditional on compliance with the commitments made by the Member States concerned, they do not, contrary to the Council's submissions, merely confirm that the procedures are de facto held in abeyance, as a result of the failure to adopt the acts recommended by the Commission within the framework of Article 104(8) and (9) EC.

48 Also, the commitments in question are unilateral commitments, made by the two Member States concerned outside the framework of the recommendations previously decided upon under Article 104(7) EC. The Council thus renders any decision to be taken under Article 104(9) EC conditional on an assessment which will no longer have the content of the recommendations adopted under Article 104(7) EC as its frame of reference, but the unilateral commitments of the Member State concerned.

49 Finally, in acting in that way the Council also in reality modifies the recommendations previously adopted under Article 104(7) EC, particularly inasmuch as in the conclusions it puts back the deadline for bringing the government deficit below the ceiling of 3 % of GDP and consequently alters the extent of the consolidation measures sought.

50 It follows from the foregoing that the Council's conclusions are intended to have legal effects, at the very least inasmuch as they hold the ongoing excessive deficit procedures in abeyance and in reality modify the recommendations previously adopted by the Council under Article 104(7) EC.

51 Accordingly, the action is admissible in so far as it is directed against those conclusions.

Substance

52 The Commission seeks the annulment of the Council's conclusions adopted in respect of each of the Member States concerned in so far as they involve holding the excessive deficit procedure in abeyance, recourse to an instrument not envisaged by the Treaty and modification of the recommendations decided on by the Council under Article 104(7) EC.

Arguments of the parties

53 The Commission submits that the Council, having recommendations for decisions under Article 104(8) and (9) EC before it, adopted 'conclusions', a measure not provided for by the Treaty and, in particular, Article 104 EC. The Council could not adopt instruments other than those provided for by Article 104 EC, namely decisions, which are binding measures. It was all the less able to do so because the conclusions include decisional elements such as the holding of the procedures in abeyance and recommendations to the Member States concerned.

54 In holding the excessive deficit procedure in abeyance, the Council's conclusions infringe the first indent of Article 9(1) of Regulation No 1467/97, under which that procedure is to be held in abeyance if the Member State concerned acts in compliance with recommendations adopted in accordance with Article 104(7) EC. The decisions to hold the procedure in abeyance do not show that this condition was met. Quite to the contrary, it is clear from the conclusions that the Council agreed with the Commission's analysis that led necessarily to the conclusion that this condition was not satisfied. Nor were the decisions to hold the procedure in abeyance adopted in compliance with the voting rules laid down in Article 104(13) EC, since they were adopted by the Member States in the euro area with the exception of the Member State concerned, and not by all the Member States other than the Member State concerned. Since it could only have been possible for the procedure to be legally held in abeyance at the stage of Article 104(7) EC, the voting rules should, by reason of parallelism of procedural requirements, have been those applicable at that stage.

55 The Commission does not contest the economic justification for the decisions to modify the recommendations decided upon by the Council under Article 104(7) EC, in particular so far as concerns the extension of the period within which the excessive deficits should be eliminated. However, it submits that the Council could not, without observing the procedures prescribed by the Treaty, adopt recommendations contrary to those adopted previously.

56 The Council recalls the observations made by it, in connection with its plea of inadmissibility, regarding the political, and not legal, nature of its conclusions and, in particular, its observation that the ongoing procedures were automatically held in abeyance when it did not adopt the measures recommended by the Commission.

57 In the Council's submission, annulment of its conclusions would not alter in fact or in law the state of the ongoing excessive deficit procedures. That is confirmed by the fact, acknowledged by the Commission, that those procedures have not been

brought to a close and that the Commission remains free at any time, in the exercise of its right of initiative, to submit to the Council recommendations pursuant to Article 104(7), (8) or (9) EC, depending on its analysis of the situation at the time.

- 58 The Council further submits that the recommendations previously adopted by it under Article 104(7) EC had become at least partially obsolete. They had been overtaken by changes in the economic situation. Various factors, in particular the less favourable development of the economic situation compared with the forecasts available when the recommendations were adopted, had made it impossible for the Member States concerned to correct their deficits in the periods laid down.
- 59 An alternative approach would have been for the Council to adopt fresh recommendations under Article 104(7) EC. However, such a solution was not possible since the Commission decided not to place before the Council fresh recommendations founded on that provision.
- 60 Accordingly, the Council considered it expedient to adopt the contested conclusions which, while recording the change in the economic situation and the measures taken and commitments made by each of the two Member States concerned, indicated to the latter what, in the Council's view, they had to do in order to remedy their excessive deficit situation.
- 61 This approach presented a number of advantages:
- making clear that the excessive deficit procedures had not been brought to a close, but were simply held in abeyance following the failure to adopt the decisions recommended by the Commission;

- noting the measures which the French Republic and the Federal Republic of Germany undertook to take and the objectives which they undertook to attain;
- reaffirming the preparedness of the Council to act, in the future, under Article 104(9) EC should the Member States concerned not comply with their commitments;
- making clear the Council's attachment to the principles and rules of the Stability and Growth Pact.

⁶² The approach adopted meant that, after the decisions recommended by the Commission pursuant to Article 104(8) and (9) EC had not been adopted, silence on the part of the Council did not undermine the credibility of the Stability and Growth Pact, and leave businesses and the foreign exchange markets in a state of uncertainty with disastrous consequences.

⁶³ The Council submits that the Treaty contains no provision that precludes proceeding in such a way.

⁶⁴ It adds that the recommendations under Article 104(7) EC, adopted on 21 January 2003 in respect of the Federal Republic of Germany and on 3 June 2003 in respect of the French Republic, remain in force.

Findings of the Court

65 In essence, notwithstanding the terms in which its application is couched, the Commission seeks annulment of the Council's conclusions only in so far as they contain a decision to hold the excessive deficit procedure in abeyance and a decision modifying the recommendations previously made to the Member State concerned.

66 Its formal claim that those conclusions be annulled in so far as they also involve recourse to an instrument not envisaged by the Treaty does not constitute, in reality, a self-standing claim, but rather an argument made in support of the claim for annulment noted in the preceding paragraph of this judgment.

67 The latter claim is to be examined after first identifying the broad logic of the excessive deficit procedure.

Broad logic of the excessive deficit procedure

68 According to Article 4(1) and (2) EC, the activities of the Member States and the Community are to include the adoption of an economic policy which is based on the close coordination of Member States' economic policies and, concurrently, the adoption of EMU. In accordance with Article 4(3) EC, these activities entail compliance with the following guiding principles: stable prices, sound public finances and monetary conditions and a sustainable balance of payments.

- 69 Article 104(1) EC lays down that Member States are to avoid excessive government deficits.
- 70 The objective of the excessive deficit procedure laid down in Article 104(2) to (13) EC is to encourage and, if necessary, compel the Member State concerned to reduce a deficit which might be identified.
- 71 The rules laid down in Article 104 EC are defined more precisely and strengthened by the Stability and Growth Pact, constituted, in particular, by the Resolution of the European Council of 17 June 1997 and Regulation No 1467/97.
- 72 The Resolution of the European Council of 17 June 1997 draws attention to the crucial importance of securing budgetary discipline in stage three of EMU. In the light of that observation, it solemnly invites the Council to be committed to a rigorous and timely implementation of all elements of the Stability and Growth Pact in its competence and to regard the deadlines for the application of the excessive deficit procedure as upper limits.
- 73 The eighth recital in the preamble to Regulation No 1467/97 states that budgetary discipline is necessary in stage three of EMU to safeguard price stability. It is observed in the 16th recital that the seriousness of an excessive deficit in stage three should call for urgent action from all those involved.
- 74 In this context, marked by the importance that the framers of the Treaty attach to observance of budgetary discipline and by the aim of the rules laid down for applying budgetary discipline, those rules are to be given an interpretation which ensures that they are fully effective.

- 75 It should be noted that, in accordance with Article 104(10) EC, the right of the Commission and the Member States to bring infringement proceedings against a Member State under Articles 226 EC and 227 EC may not be exercised within the framework of Article 104(1) to (9) EC.
- 76 As the Commission has pointed out, responsibility for making the Member States observe budgetary discipline lies essentially with the Council.
- 77 The excessive deficit procedure is a procedure in stages, which can result in the imposition of sanctions pursuant to Article 104(11) EC.
- 78 Article 104 EC specifies the manner in which each stage is carried out and the respective roles and powers of the institutions in question. Regulation No 1467/97, which was adopted unanimously on the basis of the second subparagraph of Article 104(14) EC, lays down a strict framework of deadlines to be met in the course of the excessive deficit procedure, in order, according to the 12th recital in its preamble, to ensure expeditious and effective implementation of the procedure. Article 9 of Regulation No 1467/97 provides that the excessive deficit procedure is to be held in abeyance where the Member State concerned acts in compliance with recommendations made or notice given pursuant to Article 104(7) and (9) EC respectively. Article 10 of the regulation provides for monitoring of the implementation of action taken by the Member State concerned.
- 79 For each of the stages of the procedure where the matter is placed before the Council there is a corresponding measure which the Commission recommends that the Council adopt. Each stage involves consideration by the Council as to whether the Member State has complied with its obligations under Article 104 EC and, in particular, those resulting from the recommendations and decisions previously adopted by the Council.

- 80 As the Commission acknowledges, the Council has a discretion. Commission recommendations, and not proposals within the meaning of Article 250 EC, are placed before it, and it may, in particular on the basis of a different assessment of the relevant economic data, of the measures to be taken and of the timetable to be met by the Member State concerned, modify the measure recommended by the Commission, by the majority required for adoption of that measure.
- 81 Nevertheless, it follows from the wording and the broad logic of the system established by the Treaty that the Council cannot break free from the rules laid down by Article 104 EC and those which it set for itself in Regulation No 1467/97. Thus, it cannot have recourse to an alternative procedure, for example in order to adopt a measure which would not be the very decision envisaged at a given stage or which would be adopted in conditions different from those required by the applicable provisions.
- 82 It is in the light of this finding that the issue of whether the Council's conclusions must be annulled in so far as they contain a decision to hold the excessive deficit procedure in abeyance and a decision modifying the recommendations previously adopted by the Council under Article 104(7) EC should be examined.

Holding the excessive deficit procedure in abeyance

- 83 The 17th recital in the preamble to Regulation No 1467/97 states that it is appropriate to hold the excessive deficit procedure in abeyance if the Member State concerned takes appropriate action in response to a recommendation under Article 104(7) EC or a notice issued under Article 104(9) EC in order to provide an incentive to Member States to act accordingly.

- 84 Article 9(1) of Regulation No 1467/97 provides that the excessive deficit procedure is to be held in abeyance where the Member State acts in compliance with a recommendation or notice of the Council.
- 85 Neither Article 104 EC nor Regulation No 1467/97 provides for the possibility of deciding to hold the procedure in abeyance in other situations.
- 86 As the Council maintains, the procedure may de facto be held in abeyance if a Commission recommendation is placed before the Council and the latter does not succeed in adopting a decision because the required majority is not achieved.
- 87 However, in the present case, the contested conclusions expressly state that the Council 'agrees to hold the Excessive Deficit Procedure for [the Member State concerned] in abeyance ...' and that it 'stands ready to take a decision under Article 104(9), on the basis of the Commission Recommendation, should [that Member State] fail to act in accordance with the commitments set out in these conclusions ...'.
- 88 By those statements, the Council does not simply record that the excessive deficit procedure is de facto held in abeyance because it has not been possible to adopt a decision recommended by the Commission, an inability which could be remedied at any time. In so far as the Council's conclusions make holding the procedure in abeyance conditional upon compliance by the Member State concerned with its commitments, they restrict the Council's power to give notice under Article 104(9) EC on the basis of the Commission's earlier recommendation, so long as the commitments are considered to be complied with. In so doing, the conclusions provide, in addition, that the Council's assessment for the purposes of a decision to give notice, that is to say for the purposes of pursuing the excessive deficit

procedure, will no longer have as its frame of reference the content of the recommendations already made under Article 104(7) EC to the Member State concerned, but unilateral commitments of that Member State.

- 89 Such a decision to hold the procedure in abeyance infringes Article 104 EC and Article 9 of Regulation No 1467/97.
- 90 It should be added that, in accepting that the procedure may de facto be held in abeyance simply because the Council does not succeed in adopting a decision recommended by the Commission, the Court does not express a view as to whether, pursuant to Article 104(9) EC, the Council could be required to adopt a decision where the Member State persists in failing to put into practice its recommendations under Article 104(7) EC, a question which the Court is not called upon to answer in the present proceedings.

Modification of the recommendations adopted by the Council under Article 104(7) EC

- 91 In accordance with Article 104(13) EC, recommendations under Article 104(7) EC may be adopted only on a recommendation from the Commission. As has been pointed out, the Council has the power to adopt a decision different from that recommended by the Commission.
- 92 However, where the Council has adopted recommendations under Article 104(7) EC, it cannot subsequently modify them without a fresh recommendation from the Commission since the latter has a right of initiative in the excessive deficit procedure, as the Council acknowledges.

- 93 In the present case, the Council adopted such recommendations for the Federal Republic of Germany on 21 January 2003 and for the French Republic on 3 June 2003.
- 94 The Council's conclusions were not preceded by Commission recommendations seeking the adoption, on the basis of Article 104(7) EC, of Council recommendations different from those adopted previously.
- 95 Furthermore, the recommendations contained in the Council's conclusions were adopted not in accordance with the voting rules prescribed for Council recommendations under Article 104(7) EC but in accordance with those prescribed for a decision under Article 104(9) EC, that is to say with only Member States in the euro area taking part in the vote.
- 96 The decision to adopt those Council recommendations, being contrary to Article 104(7) and (13) EC, is therefore unlawful.
- 97 The Council's conclusions adopted in respect of the French Republic and the Federal Republic of Germany respectively must consequently be annulled in so far as they contain a decision to hold the excessive deficit procedure in abeyance and a decision modifying the recommendations previously adopted by the Council under Article 104(7) EC.

Costs

- ⁹⁸ In accordance with Article 69(3) of the Rules of Procedure, where each party succeeds on some and fails on other heads, or where the circumstances are exceptional, the Court may order that the costs be shared or that the parties bear their own costs. Since each of the parties has failed in part, it is appropriate to order each of them to bear their own costs.

On those grounds,

THE COURT

hereby:

- 1. Declares the action of the Commission of the European Communities inadmissible in so far as it seeks annulment of the failure of the Council of the European Union to adopt the formal instruments contained in the Commission's recommendations pursuant to Article 104(8) and (9) EC;**

2. **Annuls the Council's conclusions of 25 November 2003 adopted in respect of the French Republic and the Federal Republic of Germany respectively, in so far as they contain a decision to hold the excessive deficit procedure in abeyance and a decision modifying the recommendations previously adopted by the Council under Article 104(7) EC;**
3. **Orders the parties to bear their own costs.**

Skouris

Jann

Timmermans

Rosas

Gulmann

Puissochet

Cunha Rodrigues

Schintgen

Macken

Colneric

von Bahr

Silva de Lapuerta

Lenaerts

Delivered in open court in Luxembourg on 13 July 2004.

R. Grass

V. Skouris

Registrar

President