JUDGMENT OF THE COURT OF FIRST INSTANCE
(Fifth Chamber, Extended Composition)

10 April 2008 *

In Case T-233/04,

Kingdom of the Netherlands, represented by H. Sevenster, J. van Bakel and M. de Grave, acting as Agents,

applicant,

supported by

Federal Republic of Germany, represented by W.-D. Plessing and M. Lumma, acting as Agents,

intervener,

v

Commission of the European Communities, represented by H. van Vliet and V. Di Bucci, acting as Agents,

defendant,

* Language of the case: Dutch.

ACTION for annulment of Commission decision C(2003) 1761 final of 24 June 2003 relating to State aid N 35/2003 concerning the emission trading scheme for nitrogen oxides notified by the Kingdom of the Netherlands,

THE COURT OF FIRST INSTANCE
OF THE EUROPEAN COMMUNITIES (Fifth Chamber, Extended Composition),

composed of M. Vilaras, President, E. Martins Ribeiro, F. Dehousse, D. Šváby and K. Jürimäe, Judges,

Registrar: J. Plingers, Administrator,

having regard to the written procedure and further to the hearing on 5 December 2006,

gives the following

Judgment

Legal framework

1 Article 6 EC provides:

'Environmental protection requirements must be integrated into the definition and implementation of the Community policies and activities referred to in Article 3, in particular with a view to promoting sustainable development.'

2 Article 87 EC provides:

‘1. Save as otherwise provided in this Treaty, any aid granted by a Member State or through State resources in any form whatsoever which distorts or threatens to distort competition by favouring certain undertakings or the production of certain goods shall, in so far as it affects trade between Member States, be incompatible with the common market.

…

3. The following may be considered to be compatible with the common market:

(a) aid to promote the economic development of areas where the standard of living is abnormally low or where there is serious underemployment;

(b) aid to promote the execution of an important project of common European interest or to remedy a serious disturbance in the economy of a Member State;

(c) aid to facilitate the development of certain economic activities or of certain economic areas, where such aid does not adversely affect trading conditions to an extent contrary to the common interest;

(d) aid to promote culture and heritage conservation where such aid does not affect trading conditions and competition in the Community to an extent that is contrary to the common interest;

(e) such other categories of aid as may be specified by decision of the Council acting by a qualified majority on a proposal from the Commission.'

3 According to the Community guidelines on State aid for environmental protection (OJ 2001 C 37, p. 3):

'69. Member States and the Community, as parties to the Protocol, will have to achieve the greenhouse gas reductions by means of common and coordinated policies and measures, including economic instruments, and also by means of the instruments established by the Kyoto Protocol itself, namely international emissions trading, joint implementation, and the clean development mechanism.

70. In the absence of any Community provisions in this area and without prejudice to the Commission's right of initiative in proposing such provisions, it is for each Member State to formulate the policies, measures and instruments it wishes to adopt in order to comply with the targets set under the Kyoto Protocol.

71. The Commission takes the view that some of the means adopted by Member States to comply with the objectives of the Protocol could constitute State aid but it is still too early to lay down the conditions for authorising any such aid.'

4 According to recital 11 in the preamble to Directive 2001/81/EC of the European Parliament and of the Council of 23 October 2001 on national emission ceilings for certain atmospheric pollutants (OJ 2001 L 309, p. 22):

'A set of national ceilings for each Member State for emissions of sulphur dioxide, nitrogen oxides, volatile organic compounds and ammonia is a cost-effective way of meeting interim environmental objectives. Such emission ceilings will allow the Community and the Member States flexibility in determining how to comply with them.'

5 Under the heading 'National emission ceilings', Article 4 of Directive 2001/81 provides:

'1. By the year 2010 at the latest, Member States shall limit their annual national emissions of the pollutants sulphur dioxide (SO2), nitrogen oxides (NOx), volatile organic compounds (VOC) and ammonia (NH3) to amounts not greater than the emission ceilings laid down in Annex I, taking into account any modifications made by Community measures adopted following the reports referred to in Article 9.'

6 For the Kingdom of the Netherlands, Annex I of Directive 2001/81 lays down 260 kilotonnes as the emission ceiling for nitrogen oxides (NOx) to be attained by 2010.

7 Member States were to bring into force the laws, regulations and administrative provisions necessary to comply with Directive 2001/81 before 27 November 2002 and to inform the Commission thereof forthwith.

Facts

8 By letter of 23 January 2003 the Netherlands authorities notified the Commission pursuant to Article 88(3) EC of a NOx emission trading scheme ('the measure in question'). They requested the Commission to take a decision finding that the measure in question did not constitute aid, in accordance with Article 4(2) of Council Regulation (EC) No 659/1999 of 22 March 1999 laying down detailed rules for the application of Article 93 of the EC Treaty (OJ 1999 L 83, p. 1).

9 On 24 June 2003, the Commission adopted Decision C(2003) 1761 final relating to State aid N 35/2003 concerning the measure in question ('the contested decision').

10 In paragraph 1 of the contested decision, the Commission first describes the measure in question. In the framework of the NOx national emission ceiling for the Netherlands established by Directive 2001/81, the Netherlands authorities set a target of 55 kilotonnes of NOx emissions for its large industrial facilities, that is approximately 250 undertakings, to be attained by 2010.

11 Regarding the working of the scheme, the Commission explains in paragraph 1.2 of the contested decision that Netherlands legislation will lay down a NOx emission standard for each industrial facility. The undertaking can comply with the emission standard thus laid down by taking steps to reduce NOx emissions in its own facility, by buying emission allowances from other undertakings, or by a combination of those options. Emission reductions, in the form of NOx credits, will be offered in the emission market by facilities whose emissions fall below the emission standard.

12 A facility's total annual NOx emission, adjusted for any NOx credits sold or bought, must comply with the authorised emission level for that facility. The authorised annual emission — as an absolute figure — is calculated on the basis of the emission standard concerned and the amount of energy used by that facility.

13 At the end of each year, the Netherlands authorities check whether the facilities have complied with the required emission standard. Each year, NOx credits can be bought, saved or lent for future periods. If a facility exceeds its emission standard, it must compensate for that surplus the following year. Moreover, that surplus will be increased by 25% in order to deter any overstepping of the mark. If a facility fails to comply with its emission standard, the Netherlands authorities will impose on it a fine which is effective, proportionate and dissuasive.

14 Finally, in the context of the measure in question, undertakings do not have to acquire emission allowances in order to engage in production. They are required only to comply with the emission standard.

15 In paragraph 1.3 of the contested decision, the Commission describes how the emission standard is calculated, then, in paragraph 1.4, the differences between the 'cap-and-trade' system and the 'dynamic cap' system, of which the measure in question is a type. It explains that, according to the Netherlands authorities, the measure in question differs from the other variant of tradable allowance schemes, the 'cap and trade' system, in which emission allowances are allocated to undertakings. New undertakings or those which wish to expand their activities must first acquire the required quantity of allowances. Under the measure in question, such undertakings are not subject to that obligation but must simply comply with their emission standard, which depends on and is adjusted on the basis of their energy consumption.

16 In paragraphs 1.5 and 1.6 of the contested decision, the Commission then points out that the measure in question will apply to all industrial facilities with installed total thermal capacity of more than 20 thermal megawatts (MWth), in parallel with Community legislation. The Netherlands authorities will continue to apply the emission limit values laid down by the various Community directives in force.

17 In its assessment of the measure in question (paragraph 3 of the contested decision), the Commission first refers to its previous decisions on emission trading schemes and distinguishes between two types of scheme, as follows:

> '(1) Systems where a tradable emission or pollution document is considered as [an] intangible asset representing a market value which the authorities could have sold or auctioned as well, leading to foregone revenues (or a loss of State resources), hence State aid within the meaning of Article 87(1) of the EC Treaty;
>
> (2) Systems where a tradable emission or pollution document is considered as authorised proof of a certain production that cannot be sold or auctioned to the recipient, hence no foregone revenues, therefore no State resources, hence no State aid within the meaning of Article 87(1) of the EC Treaty.'

18 The Commission then explains the reasons which led it to find that the measure in question constitutes State aid, that is, concretely, the grant by the State of NOx credits free of charge to a specific group of undertakings engaged in trade between Member States. According to the contested decision, the Netherlands authorities had the option of selling or auctioning the emission allowances. By offering NOx

credits free of charge as intangible assets, the Member State therefore suffers forgone revenue. The Commission therefore concludes that that scheme involves State resources within the meaning of Article 87(1) EC. The strengthening of the position of the undertakings concerned will affect trade between Member States.

19 Finally, in paragraph 3.3 of the contested decision, the Commission examines the compatibility of the measure in question with the common market.

20 In conclusion, in paragraph 4 of the contested decision, the Commission finds that the scheme in question constitutes State aid within the meaning of Article 87(1) EC, while adding that it is compatible with the common market in accordance with Article 87(3) of the EC Treaty and Article 61(3)(c) of the Agreement on the European Economic Area (EEA). The Commission requests the Netherlands authorities to provide it with an annual report concerning the implementation of the measure in question and to notify it in advance of any change in the conditions under which the aid is granted.

Procedure

21 By application lodged at the Registry of the Court of Justice on 5 September 2003, the Kingdom of the Netherlands brought an action against the contested decision (Case C-388/03).

22 By order of 17 February 2004, the President of the Court of Justice granted the Federal Republic of Germany leave to intervene in the present proceedings in support of the Kingdom of the Netherlands.

23 By order of 8 June 2004, the Court of Justice referred the case to the Court of First Instance pursuant to Council Decision 2004/407/EC, Euratom of 26 April 2004 amending Articles 51 and 54 of the Protocol on the Statute of the Court of Justice (OJ 2004 L 132, p. 5).

24 By letter of 13 December 2004, the Court of First Instance requested the Kingdom of the Netherlands and the Federal Republic of Germany to submit their observations on the conclusions to be drawn as regards the admissibility of the present action from the order of the Court of Justice in Case C-164/02 *Netherlands* v *Commission* [2004] ECR I-1177. They submitted their observations on 14 and 12 January 2005 respectively.

Forms of order sought by the parties

25 The Kingdom of the Netherlands, supported by the Federal Republic of Germany, claims that the Court should:

— annul the contested decision, in so far as the Commission takes the view therein that the measure in question constitutes State aid within the meaning of Article 87(1) EC;

— order the Commission to pay the costs.

26 The Commission contends that the Court should:

— declare the action inadmissible or, in the alternative, dismiss the action;

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

Admissibility

Arguments of the parties

27 Without raising a plea of inadmissibility, the Commission is uncertain whether the present action is admissible. It contends that the contested decision is a decision approving aid which has no legal effects capable of affecting the interests of the Kingdom of the Netherlands. The decision cannot therefore change its legal position or affect it adversely. According to the case-law, the contested decision is therefore not an actionable measure.

28 The Commission refers, in that regard, to the order of the Court of Justice in Case C-208/99 *Portugal* v *Commission* [2001] ECR I-9183 and to the judgments in Case C-242/00 *Germany* v *Commission* [2002] ECR I-5603 and Case T-212/00 *Nuove Industrie Molisane* v *Commission* [2002] ECR II-347. That case-law was recently confirmed by the order in *Netherlands* v *Commission*, cited at paragraph 24 above, a case similar to the present case.

29 The Commission considers that the Kingdom of the Netherlands has too broad a notion of admissibility. It is not sufficient to rely on the possibility that future interests may be affected. According to the Commission, an action for annulment is admissible only if the contested decision has a negative and clear impact on genuine and existing interests. That is not the case in the present proceedings. The fact that third parties could one day, in the context of national proceedings, rely on the contested decision in order to assert that schemes comparable to the measure in question constitute State aid does not mean that the contested decision changes the situation of the Kingdom of the Netherlands in a negative and detailed way.

30 The Commission also believes that Article 230 EC must be read in the light of Article 233 EC. The possibility of bringing an action on the basis of Article 230 EC should be limited to situations in which, were the contested measure to be annulled, the institution would be bound to take certain measures to comply with the judgment which would actually and specifically change the legal position of the Kingdom of the Netherlands. In the present case, however, in the case of annulment the Commission would not have to adopt any act that would change the legal position of the Kingdom of the Netherlands.

31 According to the Kingdom of the Netherlands, its action is admissible. It claims that it suffices that the contested measure has legal effects capable of affecting the interests of the Member States for actions brought by them to be admissible. It is therefore not necessary that the Netherlands' interests actually be affected at the time when the action is brought. An action can be brought in respect of future and potential legal effects.

32 The Kingdom of the Netherlands points out that classification as State aid triggers the application of Articles 17 to 19 of Regulation No 659/1999. The Commission could therefore, in the future, impose all appropriate measures, thereby posing a risk for the continuity and legal certainty of the measure in question. In addition, any amendments of the measure would have to be notified to the Commission, and the

Kingdom of the Netherlands would be bound to draw up an annual report on its implementation. The Federal Republic of Germany also submits that the contested decision has legal effects with regard to the Kingdom of the Netherlands in that it renders applicable to the measure in question the substantive and procedural provisions of Community law on State aid.

33 Moreover, the Kingdom of the Netherlands contends that the alleged aid granted under the measure in question could justify a decision of incompatibility of a new aid pursuant to the rules on overlapping aid contained in the guidelines adopted by the Commission. The contested decision thus establishes a precedent which will bind the Member States in future to notify similar schemes to the Commission. Third parties could furthermore rely on the contested decision before national courts.

34 Regarding the implications of the order in *Netherlands* v *Commission*, cited at paragraph 24 above, the Kingdom of the Netherlands, supported by the Federal Republic of Germany, claims in particular that its action in that case sought the annulment of an assertion contained in the grounds of the contested decision. Conversely, in the present case, the action is directed against the operative part and not against one of the grounds of the contested decision.

35 The Kingdom of the Netherlands, supported by the Federal Republic of Germany, observes that it asked the Commission to take a decision confirming that the measure in question did not constitute State aid. In finding on the contrary that there was State aid, the Commission rejected that request. According to the Federal Republic of Germany, that also distinguishes the present case from the one which led to the order in *Netherlands* v *Commission*, cited at paragraph 24 above.

36 Finally, according to the Kingdom of the Netherlands, the measures of compliance provided for in Article 233 EC do not figure among the conditions of admissibility for actions for annulment. Furthermore, the Commission could, following annulment of the contested decision, adopt a new decision finding that there was no State aid.

Findings of the Court

37 Article 230 EC draws a clear distinction between the right of Community institutions and Member States to bring an action for annulment and that of legal persons and individuals, in that the second paragraph of Article 230 EC gives all Member States the right to contest the legality of decisions of the Commission by means of an action for annulment, without having to establish any legal interest in bringing proceedings. A Member State need not therefore prove that an act of the Commission which it is contesting produces legal effects with regard to that Member State in order for its action to be admissible. However, in order for an act of the Commission to be the subject of an action for annulment, it must be intended to have legal effects (see order in *Portugal* v *Commission*, cited in paragraph 28 above, paragraphs 22 to 24, and the case-law referred to).

38 In the present case, following the notification by the Kingdom of the Netherlands of the measure in question and its request that the measure be found not to be State aid, in accordance with Article 4(2) of Regulation 659/1999, the Commission finds, in the contested decision, that the scheme constitutes State aid which is compatible with the common market.

39 First of all, it must be pointed out that, in similar circumstances, the Court has held an action brought by a Member State to be admissible (Case C-241/94 *France* v *Commission* [1996] ECR I-4551). In that regard, while it is true that, in that case, the Commission did not dispute the admissibility of the action, it should be made

clear that inadmissibility is an absolute bar to proceeding with an action which the Community judicature can raise at any time of its own motion. The lack of any challenge by the Commission to the admissibility of the action in that case did not therefore mean that the Court would refrain from considering that point.

40 Second, in contrast to the position in *Germany* v *Commission*, cited at paragraph 28 above, relied upon by the Commission, the Commission did not, when it classified the measure in question as State aid, comply with the request of the Kingdom of the Netherlands.

41 That finding enabled the Commission to examine, in the contested decision, the compatibility of the measure in question with the common market. It also triggers the application of the procedure for existing State aid schemes laid down by Regulation No 659/1999, and in particular the procedure laid down in Articles 17 to 19 and in Article 21 thereof, which requires the Member States to submit an annual report on all existing aid schemes. The classification as State aid can also have an impact on overlapping aid as a result of the rules on combination of aid laid down inter alia in point 74 of the Community guidelines on State aid for environmental protection.

42 It follows that the contested decision clearly gives rise to binding legal effects. The action of the Kingdom of the Netherlands is therefore admissible.

43 That finding is not invalidated by the case-law cited or by the arguments advanced by the Commission.

44 Contrary to the facts of Case T-138/89 *NBV and NVB* v *Commission* [2002] ECR II-2181, the contested decision has adverse legal effects for the Kingdom of the Netherlands (see paragraph 42 above). Its legal position with regard to Article 230 EC is furthermore not comparable (see paragraph 37 above) to that of the applicant in that case, which was an undertaking required to establish a legal interest in bringing proceedings (see paragraph 37 above).

45 Furthermore, while the Court, in its order in *Portugal* v *Commission*, cited at paragraph 28 above, declared the action inadmissible, it based its decision on the fact that the Portuguese Republic had requested the annulment of the contested decisions only in so far as it was designated in them as an addressee, a designation which the Court held to be superfluous and without independent legal effect (paragraphs 25 and 28). In the present case, however, the Kingdom of the Netherlands disputes the classification as State aid, which cannot be regarded as superfluous and without independent legal effect.

46 In *Nuove Industrie Molisane* v *Commission*, cited at paragraph 28 above, the Court dismissed the action as inadmissible in the absence of a legal interest in bringing proceedings, after pointing out that the applicant did not call into question the operative part of the decision and examining whether the contested finding had binding legal effects such as to affect its interests (paragraphs 34 and 38). In this case, the Kingdom of the Netherlands does not have to establish a legal interest in bringing proceedings (see paragraph 37 above), and it does call into question the operative part of the contested decision which contains the classification as State aid which it disputes.

47 On the latter point, the present case must also be distinguished from that which led to the order in *Netherlands* v *Commission*, cited in paragraph 24 above. In that case, the Kingdom of the Netherlands had requested in its application the annulment of the decision in question 'in so far as the Commission takes the view therein that the contributions paid to port authorities … constitute State aid for the purposes of Article 87(1) EC' (paragraph 9). That finding did not however appear in the operative part of that decision.

48 Finally, with regard to the Commission's argument that Article 230 EC and 233 EC, read in conjunction, permit an action on the basis of Article 230 EC only if the measures of compliance provided for in Article 233 EC must be taken, it must be held that that interpretation does not follow from the scheme of the Treaty. Article 233 EC requires the institution or institutions whose act has been declared void or whose failure to act has been declared contrary to the Treaty, to take the necessary measures to comply with the judgment of the Court of Justice. That article is therefore clearly aimed at ensuring that judgments annulling an act on the basis of Article 230 EC are complied with. On the other hand, Article 230 EC does not in any way link its application to that of Article 233 EC. It does not make it a condition for the bringing of an action that measures can be taken by the institution whose act is contested if that act is annulled.

49 In those circumstances, the action must be declared admissible.

Substance

50 The Kingdom of the Netherlands puts forward two pleas alleging the infringement, first, of Article 87 EC, and second, of the requirement to state reasons.

51 Regarding the first plea, the Kingdom of the Netherlands, supported by the Federal Republic of Germany, claims that the measure in question does not constitute an advantage financed through State resources and, in the alternative, that the condition of selectivity is not fulfilled.

Lack of an advantage financed through State resources

Arguments of the parties

52 The Kingdom of the Netherlands takes the view that the Commission's reasoning is incorrect because it is based on the grant of emission allowances whereas, in reality, the basis of the measure is the imposition of an environmental standard of statutory origin. That uniform standard applies to all industrial undertakings whose installed thermal capacity exceeds 20 MWth. It constitutes a burden and not an advantage for the undertakings. The characteristic of the scheme is that the undertakings can choose how to comply with the standard, by reducing their own emissions or by purchasing emission credits recorded by other undertakings. The Commission wrongly proceeds on the principle that the emission credits are created by the Netherlands authorities. Since, according to the Kingdom of the Netherlands, those authorities do not grant any emission allowances, they cannot therefore auction or sell such allowances.

53 The Kingdom of the Netherlands points out, in that respect, that one can speak of State aid only in the case of a transfer of State resources. It cites a number of cases in support of that assertion, including Case C-379/98 *PreussenElektra* [2001] ECR I-2099, in which the Court held that an obligation to purchase imposed by legislation, and the distribution of the resulting financial burdens between private undertakings, does not constitute a direct or indirect transfer of State resources. The Kingdom of the Netherlands considers the measure in question to be analogous to that examined in that case.

54 Moreover, the Kingdom of the Netherlands explains that the measure in question is not comparable to the Danish or British schemes, in which the allowances — the number of which is fixed in advance — are distributed free of charge by the authorities. In their case, auction or sale is unquestionably an option which can be considered. The measure in question is more similar to the Belgian system, under which the

tradable emission or pollution allowance is of no value to its recipient in terms of its relationship with the State and serves merely as proof of certain production or emission. In any case, the Kingdom of the Netherlands takes the view that the Commission's attempts to classify the measure in question under one of the two categories which it created itself only confuses the debate.

55 Finally, the Kingdom of the Netherlands disputes the Commission's interpretation of the Community guidelines on State aid for environmental protection, according to which the grant of an emission allowance is regarded in some cases as State aid. It also denies that Directive 2003/87/EC of the European Parliament and of the Council of 13 October 2003 establishing a scheme for greenhouse gas emission allowance trading within the Community and amending Council Directive 96/61/EC (OJ 2003 L 275, p. 32) points out in several places that Article 87 EC applies to the allocation of emission allowances.

56 The Federal Republic of Germany points to the lack of an advantage for the undertakings. Even if the view is taken that emission allowances have been allocated in the present case, they are no more than the specific expression of the obligation to comply with the emission ceiling laid down. The position of the undertakings has worsened as compared to the previous situation. Moreover, the undertakings can, in its opinion, obtain tradable allowances only thanks to their own efforts in reducing their emissions. The Member State is not responsible for that economic advantage. Furthermore, the Commission is mistaken in applying to the present case the criterion of the forgoing of State revenue, that criterion being inadequate to cover, in State aid law, the free allocation of emission allowances. Such allocation is derived from the right of the Member States freely to decide on the introduction of charges and cannot be equated, in State aid law, with the transfer of property by public authorities. The principle of the private investor under normal market conditions is not applicable, since the State provides the economic actors with a binding framework, without itself participating on the market.

57 The Commission takes the view that the measure in question constitutes State aid because, every year, emission allowances are made available by the Kingdom of the Netherlands free of charge to the undertakings concerned. The State therefore creates an intangible tradable asset which it offers free of charge to those undertakings, thereby mitigating the charges which are normally included in their budget.

58 The value of those emission allowances results in particular from the fact that an undertaking which believes it may exceed its emission standard may, by purchasing the necessary allowances, avoid the imposition of a fine by the Netherlands authorities. Those allowances may already be traded at the beginning of the year, enabling an undertaking with a cash-flow problem to sell them. According to the Commission, the Kingdom of the Netherlands does not dispute the economic value of those emission allowances.

59 The Commission contends that in the present case there is a transfer of State resources in the form of a loss of State resources. The Kingdom of the Netherlands takes into account only the second stage of the scheme in which the undertakings trade the emission allowances among each other. The State aid is however granted in the course of the first stage in which the Kingdom of the Netherlands allocates emission allowances free of charge to the undertakings concerned which they may then sell. The fact that the Netherlands authorities create tradable allowances which they then allocate free of charge, rather than sell, to those undertakings, gives rise to a loss of State revenue.

60 The Commission maintains that the Kingdom of the Netherlands could organise its scheme differently and sell emission allowances every year. Even under the scheme chosen by the Netherlands authorities, they could buy back unused emission allowances from undertakings whose emissions fall below the standard. The State could then sell those allowances at market value to the undertakings which need them. The result would be comparable in terms of the effects on the environment but it would be the Netherlands authorities who would receive almost the whole price of the unused credits. Under the measure in question, on the other hand, it is the undertakings holding and selling the NOx credits which receive the entire market price.

61 Regarding the comparison of the measure in question with the Danish and British systems, the Commission maintains that the fact that the measure in question does not fix in advance the exact quantity of emission allowances available to a particular undertaking does not mean that it differs from the other two systems in such a way that there is no longer a transfer of State resources within the meaning of Article 87(1) EC.

62 The Commission contends that the measure in question is not comparable to the Belgian system and that the *PreussenElektra* case-law (paragraph 53 above) does not apply to the present case.

Findings of the Court

63 According to settled case-law, classification as aid requires that all the conditions set out in Article 87(1) EC are fulfilled. That provision defines State aid which is in principle incompatible with the common market as aid granted by a Member State or through State resources in any form whatsoever which distorts or threatens to distort competition by favouring certain undertakings or the production of certain goods, in so far as it affects trade between Member States (see Case C-126/01 *GEMO* [2003] ECR I-13769, paragraphs 21 and 22, and the case-law cited).

64 For advantages to be capable of being classified as aid within the meaning of Article 87(1) EC, they must, first, be granted directly or indirectly through State resources and, second, be imputable to the State (*GEMO*, paragraph 24).

65 The notion of aid can encompass not only positive benefits such as subsidies, loans or direct investment in the capital of enterprises, but also interventions which, in

various forms, mitigate the charges which are normally included in the budget of an undertaking and which therefore, without being subsidies in the strict sense of the word, are of the same character and have the same effect (see *GEMO*, paragraph 28 and the case-law cited).

66 It therefore follows that a measure which grants certain undertakings an advantage entailing an additional burden for the public authorities in the form of a de facto waiver of public debts, exemption from the obligation to pay fines or other pecuniary penalties can constitute a State aid (see, to that effect, Case C-295/97 *Piaggio* [1999] ECR I-3735, paragraphs 42 and 43).

67 It is in the light of those principles that the court must examine whether the measure in question confers on its beneficiaries an advantage financed through State resources.

68 The Kingdom of the Netherlands submits that it does not grant emission allowances to the undertakings concerned.

69 In that regard, it must be pointed out that, unlike other schemes, the measure in question is not based on emission allowances allocated directly by the State. The Commission moreover itself concedes as much in the first subparagraph of paragraph 3.2 of the contested decision.

70 However, while it is true that the Kingdom of the Netherlands does not directly grant emission allowances to the undertakings concerned, nor does it limit itself to imposing on them a binding emission standard. It authorises the undertakings

subject to that standard to trade between themselves the emission allowances which indirectly result from that standard, up to the limit of the ceiling applicable to each of them. By making those allowances tradable, the Kingdom of the Netherlands confers on them a market value. Any undertaking coming within the scheme may sell them at any time.

71 In that regard, the Kingdom of the Netherlands pointed out, in its reply to the questions posed by the Court, that each holder of an emission authorisation had an account in the NOx emission registry and could sell all the allowances relating to the years in respect of which a standard was laid down, including future years. It therefore follows that all the allowances are tradable and not only the credits recorded at the end of the year by the undertakings which emitted less NOx than the standard laid down, those credits representing the positive balance after subtraction of the actual NOx emitted from the authorised amount.

72 It is true that, as argued by the Kingdom of the Netherlands, the emission credits which may be recorded by certain undertakings at the end of the year are the fruit and the proof of their efforts. However, in the absence of the possibility, provided for in the scheme, to trade those credits, they would be worthless on the market. The undertakings could not, by selling them, thus recover, even partially, the expenses incurred in order to reduce their NOx emissions.

73 With regard to those undertakings which emitted more NOx than laid down by the emission standard and whose balance at the end of the year is therefore negative, the measure in question enables them to avoid a fine by purchasing emission allowances from those who recorded a surplus.

74 It therefore follows that the tradability of the emission allowances provided for by the measure in question constitutes an advantage for the enterprises subject to the prescribed NOx emission standard.

75 Moreover, by setting up a scheme which provides for the possibility of trading NOx emission allowances on the market, the Kingdom of the Netherlands has conferred on them the character of intangible assets which the undertakings concerned are free to sell, even if they are linked to a maximum ceiling applicable to the undertaking concerned. Those assets are put at the disposal of the undertakings concerned free of charge, whereas they could have been sold or put up for auction. The Kingdom of the Netherlands has thus forgone State resources.

76 In that regard, the Kingdom of the Netherlands is wrong in its assertion that the measure in question is similar to the Belgian system. In its decision of 25 July 2001 relating to aid N 550/2000 — Belgium —'Green Electricity' Certificates (OJ 2001 C 330, p. 3), the Commission took the view that the green certificates provided only official proof of the production of the green electricity and that the State had therefore not agreed to forgo resources in providing them free of charge to the producers.

77 The Kingdom of the Netherlands is also wrong in claiming that the measure in question is similar to that referred to in *PreussenElektra*, cited in paragraph 53 above. That scheme imposed an obligation to purchase among the operators themselves. It was not however based on emission or pollution allowances.

78 Consequently, the measure in question constitutes, in accordance with the case-law cited in paragraphs 63 to 66 above, an advantage granted to the undertakings concerned through State resources.

Lack of selectivity

Arguments of the parties

79 The Kingdom of the Netherlands, supported by the Federal Republic of Germany, claims that the condition of selectivity is not fulfilled in the present case. The measure in question is binding on approximately 250 large industrial undertakings which do not belong to any particular sector of production. Since all large facilities must comply with the same standard, that group of undertakings is not favoured.

80 According to the Kingdom of the Netherlands, supported by the Federal Republic of Germany, it follows from the Court's judgment in Case C-143/99 *Adria-Wien Pipeline and Wietersdorfer & Peggauer Zementwerke* [2001] ECR I-8365, paragraph 41, that a comparison must be made with other undertakings which are in a legal and factual situation that is comparable in the light of the objective pursued by the measure in question.

81 The Kingdom of the Netherlands points out that the Commission does not state in comparison to which undertakings the large industrial facilities mentioned are favoured. In the opinion of the Federal Republic of Germany, those large facilities are not in a situation comparable to that of other undertakings, given that those other undertakings are not bound to comply with the respective emission ceilings.

82 The Commission asserts, for its part, that all undertakings whose company seat is situated in the Netherlands are subject to emission ceilings, whereas the measure in question concerns a very restricted group of Netherlands undertakings with an installed total thermal capacity of more than 20 MWth. Only those undertakings obtain emission allowances free of charge from the Netherlands authorities. Although those undertakings do not all manufacture the same product, the condition of selectivity required by Article 87(1) EC is fulfilled.

83 Relying on *Adria-Wien Pipeline and Wietersdorfer & Peggauer Zementwerke*, cited in paragraph 80 above, the Commission contends that the fact that the recipient undertakings belong to different sectors does not imply that the measure in question is a general measure of economic policy.

Findings of the Court

84 As is apparent from the terms of Article 87(1) EC, an economic benefit granted by a Member State constitutes State aid only if, by displaying a degree of selectivity, it is such as to favour certain undertakings or the production of certain goods (*Adria-Wien Pipeline and Wietersdorfer & Peggauer Zementwerke*, cited in paragraph 80 above, paragraph 34).

85 A State measure which benefits all undertakings in national territory, without distinction, cannot therefore constitute State aid (*Adria-Wien Pipeline and Wietersdorfer & Peggauer Zementwerke*, cited in paragraph 80 above, paragraph 35).

86 For the application of Article 87 EC, it is irrelevant that the situation of the presumed beneficiary of the measure is better or worse in comparison with the situation under the law as it previously stood, or has not altered over time. The only question to be determined is whether, under a particular statutory scheme, a State measure is such as to favour 'certain undertakings or the production of certain goods' within the meaning of Article 87(1) EC in comparison with other undertakings which are in a legal and factual situation that is comparable in the light of the objective pursued by the measure in question (see *Adria-Wien Pipeline and Wietersdorfer & Peggauer Zementwerke*, cited in paragraph 80 above, paragraph 41, and the case-law cited).

87 According to the first subparagraph of paragraph 1.5 of the contested decision, the measure in question applies to all industrial facilities with an installed total thermal capacity of more than 20 MWth. In paragraph 3.3 of the contested decision, it is stated in addition that the measure in question is aimed at a wide variety of large industrial undertakings and thus has a multisectoral approach.

88 Accordingly, it must first be pointed out that all large industrial facilities are subject to the NOx emission ceiling laid down by the measure in question and can benefit from the advantage offered by the tradability of emission allowances for which it provides. The criterion for application of the measure in question is therefore an objective one, without any geographic or sectoral connotation. To the extent that the measure in question is aimed at the undertakings which are the biggest polluters, that objective criterion is furthermore in conformity with the goal of the measure, that is the protection of the environment, and with the internal logic of the system.

89 Second, as stated in the contested decision, only those undertakings covered by the scheme must comply, on pain of fine, with an emission standard or strict 'Performance Standard Rate' (PSR) which will be gradually reduced up to the year 2010.

90 Therefore, both with regard to the objective pursued and the specific obligations imposed on large industrial facilities by the measure in question, it must be held that the legal and factual situation of the undertakings subject to that NOx emission ceiling cannot be regarded as comparable to that of undertakings to which that ceiling does not apply.

91 On that point, it is true that the Commission has cited the existence in the Netherlands of laws concerning, on the one hand, environmental management, and on the other hand, atmospheric pollution which do not provide for emission trading schemes, suggesting that all undertakings were subject to identical obligations

concerning reduction of NOx emissions. However, that contention contradicts the description of the measure in question given in paragraph 1 of the contested decision. According to that description, the calculation of the emission standard provided for by the measure in question and the fines which are imposed when it is exceeded concern only the facilities covered by the scheme (see paragraphs 10 to 16 above).

92 Furthermore, the Commission has failed to put forward any clear evidence establishing that undertakings subject to the laws cited were subject to obligations of the same kind as those of the undertakings concerned by the measure in question, or that a fine would be imposed on the first-mentioned undertakings for failure to comply with those obligations.

93 Similarly, there is no evidence to suggest that undertakings consuming less than 20 MWth are in a position comparable to that of the undertakings covered by the measure in question. The Commission has failed, in particular, to put forward evidence establishing that they are subject to the PSR.

94 The Commission has therefore not established the existence of a general scheme which would apply to undertakings in a legal and factual situation comparable to that of the facilities which are subject to the measure in question but which did not offer the advantage of the tradability of the NOx emission allowances. The measure in question therefore does not derogate from any general scheme.

95 The fact that the number of undertakings concerned can be restricted to around 250 is likewise not sufficient in itself to establish the selectivity of the measure. That group of undertakings, even if it is regarded as restricted, actually represents all of

the undertakings in a particular legal and factual situation that is not comparable, with regard to the objective pursued, to the situation of undertakings not belonging to that group.

96 The measure in question, taken as a whole, does not therefore favour certain undertakings or the production of certain goods in the sense of Article 87(1) EC.

97 In any case, even if the view were to be taken that the measure in question differentiates between undertakings and is, therefore, in principle selective, it would have to be held in the present case that that differentiation arose from the nature or overall structure of the scheme of which it is part (see, to that effect, Case C-88/03 *Portugal* v *Commission* [2006] ECR I-7115, paragraph 52, and the case-law cited).

98 According to the case-law of the Court, a measure which, although constituting an advantage for its beneficiary, is justified by the nature or general scheme of the system of which it is part does not fulfil that condition of selectivity (see *Adria-Wien Pipeline and Wietersdorfer & Peggauer Zementwerke*, cited in paragraph 80 above, paragraph 42).

99 In the present case, the beneficiary undertakings are determined in accordance with the nature and general scheme of the system, on the basis of their significant emissions of NOx and of the specific reduction standard to which they are subject. Ecological considerations justify distinguishing undertakings which emit large quantities of NOx from other undertakings (see, to that effect, *Adria-Wien Pipeline and*

Wietersdorfer & Peggauer Zementwerke, cited in paragraph 80 above, paragraphs 49 and 52). The implementation of those principles must take into account Article 6 EC in conjunction with Article 87 EC.

100 Having regard to the foregoing, the measure in question cannot therefore be classified as State aid.

101 In those circumstances, without it being necessary for the Court to rule on the second plea put forward by the Kingdom of the Netherlands, the contested decision must be annulled in so far as it finds that the measure in question constitutes State aid within the meaning of Article 87(1) EC.

Costs

102 Under the first subparagraph of Article 87(2) of the Rules of Procedure of the Court, the unsuccessful party is to be ordered to pay the costs if they have been applied for in the successful party's pleadings. Since the Commission has been unsuccessful, it must be ordered to pay the costs, as applied for by the Kingdom of the Netherlands.

103 Under the first subparagraph of Article 87(4) of the Rules of Procedure, Member States which intervened in the proceedings are to bear their own costs. The Federal Republic of Germany must therefore bear its own costs.

On those grounds,

THE COURT OF FIRST INSTANCE (Fifth Chamber, Extended Composition)

hereby:

1. **Annuls Commission Decision C(2003) 1761 final of 24 June 2003 relating to State aid N 35/2003 concerning the emission trading scheme for nitrogen oxides notified by the Kingdom of the Netherlands;**

2. **Orders the Commission to pay the costs;**

3. **Orders the Federal Republic of Germany to bear its own costs.**

Vilaras Martins Ribeiro Dehousse

Šváby Jürimäe

Delivered in open court in Luxembourg on 10 April 2008.

E. Coulon M. Vilaras

Registrar President