JUDGMENT OF THE COURT OF FIRST INSTANCE (First Chamber)

23 November 2005 *

In Case T-178/05,

United Kingdom of Great Britain and Northern Ireland, represented initially by C. Jackson, acting as Agent, and M. Hoskins, Barrister, and, subsequently, by R. Caudwell, acting as Agent, and M. Hoskins,

applicant,

v

Commission of the European Communities, represented by U. Wölker and X. Lewis, acting as Agents, with an address for service in Luxembourg,

defendant,

APPLICATION for annulment of Commission Decision C(2005) 1081 final of 12 April 2005 concerning the proposed amendment to the national allocation plan for the allocation of greenhouse gas emission allowances notified by the United Kingdom in accordance with Directive 2003/87/EC of the European Parliament and of the Council,

* Language of the case: English.

THE COURT OF FIRST INSTANCE
OF THE EUROPEAN COMMUNITIES (First Chamber),

composed of J.D. Cooke, President, R. García-Valdecasas and I. Labucka, Judges,

Registrar: K. Andová, Administrator,

having regard to the written procedure and further to the hearing on 18 October 2005,

gives the following

Judgment

Legal framework

1 Article 1 of 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) (hereinafter 'the Directive') provides:

'This Directive establishes a scheme for greenhouse gas emission allowance trading within the Community ... in order to promote reductions of greenhouse gas emissions in a cost-effective and economically efficient manner.'

2 Article 9(1) of the Directive provides that each Member State is to develop, for each period referred to in Article 11 of the Directive, a national plan stating the total quantity of allowances that it intends to allocate for that period and how it proposes to allocate them. For the three-year period beginning on 1 January 2005, the national plan had to be published and notified to the Commission and to the other Member States by 31 March 2004 at the latest.

3 Article 9(3) of the Directive reads as follows:

'Within three months of notification of a national allocation plan by a Member State under paragraph 1, the Commission may reject that plan, or any aspect thereof, on the basis that it is incompatible with the criteria listed in Annex III or with Article 10. The Member State shall only take a decision under Article 11(1) or (2) if proposed amendments are accepted by the Commission. Reasons shall be given for any rejection decision by the Commission.'

4 According to Article 11(1) of the Directive:

'For the three-year period beginning 1 January 2005, each Member State shall decide upon the total quantity of allowances it will allocate for that period and the allocation of those allowances to the operator of each installation. This decision shall be taken at least three months before the beginning of the period and be based on its national allocation plan developed pursuant to Article 9 and in accordance with Article 10, taking due account of comments from the public.'

5 The criteria listed in paragraphs 9 and 10 of Annex III to the Directive read as follows:

'9. The plan shall include provisions for comments to be expressed by the public, and contain information on the arrangements by which due account will be taken of these comments before a decision on the allocation of allowances is taken.

10. The plan shall contain a list of the installations covered by this Directive with the quantities of allowances intended to be allocated to each.'

Facts

6 On 30 April 2004, following public consultation and the publication of a draft national allocation plan for the allocation of greenhouse gas emission allowances (hereinafter 'NAP'), the United Kingdom of Great Britain and Northern Ireland (hereinafter 'the United Kingdom') notified a NAP to the Commission, expressly stating it was provisional. According to paragraph 1.13 of that plan:

'the total quantity of allowances to be issued to EU ETS [European Union emissions trading scheme] installations for 2005 to 2007 will be 736 [million tonnes of carbon dioxide]. This figure is subject to further revision in the light of ongoing work.'

7 On 9 June 2004, the Commission sent a letter to the United Kingdom which was worded as follows:

'...

After an initial examination, the Commission has found the notification to be incomplete in that the information detailed in the Annex [to the letter] is missing.

This information is requested in order to facilitate the definition of the Commission's position on the proposed plan. The Commission reserves the right to define its position only after the additional information is received, and in any case no later than three months after the receipt of this information.

This should reach the Commission within 10 working days of the date of this letter.'

8 Annex I to the letter of 9 June 2004 identifies the missing information. Paragraph 1 of this annex reads as follows:

'The Commission notes that work on energy and emissions projections is continuing and could lead to further revision of projected emissions overall and of the contribution within that from sectors and installations covered by the EU ETS (paragraph 1.9 of the plan). The UK authorities are invited to notify the Commission of the revised projections and any consequential amendments made to the plan,

including as regards the issues listed in paragraphs 1.9(a)-(f), 1.10 (emission projections for non-CO_2 gases) and 1.13 (total quantity of allowances intended to be allocated) of the plan.'

9 By letter of 14 June 2004, the United Kingdom replied to the Commission's letter of 9 June 2004. The United Kingdom stated in paragraph 1 of its response:

'In relation to projections of CO_2 emissions, the UK published a working paper at the end of May setting out the background assumptions and ... the latest energy and emissions projections (copy attached). Stakeholders will have an opportunity to comment on the working paper until 17 June 2004. We will finalise the projections after taking into account any relevant comments and resolving the outstanding issues referred to in paragraph 1.9(a)-(f) of the plan. We will notify the Commission of the finalised projections and any consequential changes made to the plan as soon as possible.'

10 On 7 July 2004, the Commission adopted Decision C(2004) 2515/4 final concerning the national allocation plan for the allocation of greenhouse gas emission allowances notified by the United Kingdom in accordance with the Directive (hereinafter 'the Decision of 7 July 2004'). The operative part of that decision, which was adopted on the basis of Article 9(3) of the Directive, reads as follows:

'*Article 1*

The following aspects of the [NAP] of the United Kingdom are incompatible with criteria 6 and 10 of Annex III to Directive 2003/87/EC respectively:

(a) the information on the manner in which new entrants will be able to begin participating in the Community scheme;

(b) the list of the installations fails to specify installations situated within the territory of Gibraltar, and the quantities of allowances intended to be allocated to each such installation.

Article 2

Provided that the following amendments to the [NAP] are made and notified to the Commission by 30 September 2004 at the latest, no objections shall be raised to the national allocation plan:

(a) information is provided on the manner in which new entrants will be able to begin participating in the Community scheme, in a way that complies with the criteria of Annex III to Directive 2003/87/EC and Article 10 thereof;

(b) the list of installations is amended to include the installations situated within the territory of Gibraltar and the quantities of allowances intended to be allocated to them; those quantities being determined in accordance with the general methodologies stated in the [NAP].

Article 3

1. The total quantity of allowances to be allocated by the United Kingdom according to its [NAP] to installations listed therein and to new entrants, taking into account amendments referred to in Article 2, shall not be exceeded.

2. The [NAP] may be amended without prior acceptance by the Commission if the amendment consists in modifications of the allocation of allowances to individual installations within the total quantity resulting from improvements to data quality.

3. Any amendments to the [NAP] other than those referred to in paragraph 2 of this Article and in Article 2 shall be notified to the Commission and accepted in accordance with Article 9(3) of Directive 2003/87/EC.

...'

11 On 30 September 2004, the United Kingdom gave the Commission the reasons why it was not able to meet the deadline set in Article 2 of the Decision of 7 July 2004.

12 On 10 November 2004, the United Kingdom notified the Commission that it wished to amend its NAP to take account of the results of the work identified therein. The United Kingdom proposed, in particular, to increase the total quantity of allowances to 756.1 million tonnes of carbon dioxide (hereinafter 'Mt CO_2').

13 At a meeting held on 2 December 2004, the Commission indicated that it considered that the proposed amendments were inadmissible.

14 On 23 December 2004, the United Kingdom sent the Commission the information referred to in Article 2 of the Decision of 7 July 2004 and additional information on the proposed amendments to the NAP.

15 On the same day, the United Kingdom authorities sent the Commission a letter calling upon it to consider the amended NAP.

16 The Commission replied by a letter dated 1 February 2005 stating that it was of the opinion that the UK request to amend its [NAP] would not be admissible.

17 On 12 April 2005, the Commission adopted Decision C(2005) 1081 final concerning the proposed amendment to the NAP notified by the United Kingdom in accordance with the Directive (hereinafter 'the contested decision'). In that decision, the Commission concluded that the United Kingdom was not entitled to submit a provisional plan under Article 9(1) of the Directive (third recital in the preamble). The Commission added that, in accordance with Article 9(3) of the Directive, the United Kingdom is only entitled to amend its NAP in order to address the incompatibilities identified in the decision of 7 July 2004 and that Article 3(1) of that decision excludes any increases in the total quantity of allowances to be allocated (fourth to ninth recitals). Thus Article 1 of the contested decision reads as follows:

'The proposed amendment to the [NAP] notified by the United Kingdom to the Commission on 10 November 2004 and last updated on 18 February 2005 implying an increase of the emission allowance allocations by 19.8 [million tonnes of carbon dioxide equivalent] is inadmissible.'

Procedure and forms of order sought by the parties

18 The United Kingdom brought the present action by application lodged at the Registry of the Court of First Instance on 5 May 2005. By means of a separate document lodged on the same day, the United Kingdom requested that the action be decided under an expedited procedure in accordance with Article 76a of the Rules of Procedure of the Court of First Instance. On 27 May 2005, the Commission lodged its observations regarding that request.

19 By decision of 14 June 2005, the Court of First Instance (First Chamber) granted the request to expedite the proceedings.

20 Upon hearing the report of the Judge-Rapporteur, the Court decided to open the oral procedure.

21 The parties presented oral argument and answered questions put to them by the Court at the hearing on 18 October 2005.

22 The United Kingdom claims that the Court should:

— annul the contested decision;

— order the Commission to pay the costs.

23 The Commission claims that the Court should:

— dismiss the application as unfounded;

— order the applicant to pay the costs.

Law

24 The United Kingdom puts forward a single plea in law regarding infringement of the Directive and of the Decision of 7 July 2004.

Arguments of the parties

25 First, the United Kingdom submits that the position adopted by the Commission in the contested decision, according to which the provisional NAP which it submitted on 30 April 2004 has to be regarded as definitive since it is not permissible to submit a provisional NAP, is legally incorrect.

26 It states that the NAP in question was expressly provisional and that this was acknowledged by the Commission in its letter of 9 June 2004 in which it expressly envisaged the possibility of amending the total quantity of allowances the United Kingdom intended to allocate. In light of the fact that the Commission accepted the submission of a provisional plan, it was not entitled to adopt a different position in the contested decision.

27 The United Kingdom maintains that, under Article 9 of the Directive, the Commission does not have any power of its own motion to fix the total quantity of allowances that a Member State may allocate and that the Commission therefore cannot claim that the total quantity of allowances is fixed at the provisional level.

28 Furthermore, according to the United Kingdom, the Commission's decision to treat the provisional NAP as if it were definitive creates an inherent incompatibility between the total quantity of allowances and the allocation methodology stated in the provisional NAP, both of which are essential parts of a NAP (see Article 9(1) of the Directive). The provisional NAP was not intended to be definitive and cannot be treated as such.

29 Second, the contested decision is legally incorrect in that it suggests that a Member State may not make any amendments that are not permitted by a Commission decision adopted pursuant to Article 9(3) of the Directive (eighth recital in the preamble).

30 Under Article 9(1) of the Directive, the initial NAP submitted by a Member State to the Commission need only state the total quantity of allowances that it 'intends' to allocate. It is this 'intention' that the Commission considers under Article 9(3) of the Directive. However, it is only following the Commission decision and public consultation (see paragraph 9 of Annex III to the Directive) that the Member State is required to decide upon the total quantity of allowances that it 'will' allocate. Thus it is apparent from the Directive that a NAP, including the total quantity of allowances to be allocated, may be amended after the adoption of a decision by the Commission under Article 9(3).

31 The United Kingdom adds, firstly, that the public must be consulted on the NAP submitted to the Commission pursuant to Article 9(1) of the Directive and, secondly, that due account must be taken of the public's comments before a decision on the allocation of allowances is taken pursuant to Article 11(1) of the Directive (see paragraph 9 of Annex III to the Directive). The broad scope and importance of public consultation are confirmed by Section 2.1.9 (paragraphs 93 to 96) of the

communication from the Commission of 7 January 2004 on guidance to assist Member States in the implementation of the criteria listed in Annex III to the Directive and on the circumstances under which force majeure is demonstrated (COM(2003) 830 final) (hereinafter 'the communication of 7 January 2004').

32 The United Kingdom puts forward the view that it follows from the foregoing that a decision adopted by the Commission pursuant to Article 9(3) of the Directive cannot prevent or restrict the consideration of the comments of the public required by Article 11(1) of the Directive and paragraph 9 of Annex III thereto.

33 Furthermore, the statement in the contested decision that, when there has been a decision under Article 9(3) of the Directive, the Member States concerned can only repair deficiencies in their NAPs is inconsistent with the approach that the Commission has adopted in relation to other Member States (see the decisions of 7 July 2004 in relation to the Kingdom of Denmark, Ireland, the Kingdom of the Netherlands, the Republic of Slovenia and the Kingdom of Sweden). Although the Commission did not identify any deficiencies in the NAPs submitted by those Member States, each of the decisions which the Commission adopted expressly permitted them to notify subsequent amendments to it. The amendments envisaged cannot have related solely to deficiencies identified by the Commission because there were no such deficiencies.

34 Third, the United Kingdom claims that, in contrast to the suggestion in the contested decision (ninth recital in the preamble), Article 3(3) of the Decision of 7 July 2004 permits it to notify any amendment to the Commission, including those which would result in an increase to the total quantity of the allowances allocated. The United Kingdom states that the wording of Article 3 of the Decision of 7 July 2004 is consistent with its interpretation: Article 3(1) does not prevent any amendments being notified that might increase the total quantity of allowances. It indicates that, in the absence of any such other amendments, the United Kingdom may not exceed the total quantity of allowances set out in its NAP; Article 3(2)

indicates that certain amendments to the NAP which would not increase the total quantity of allowances may be made without requiring further acceptance by the Commission; and Article 3(3), which is drafted in general terms, provides that any amendments other than those referred to in Article 2 and Article 3(2) must be notified to the Commission and accepted in accordance with Article 9(3) of the Directive. This wording is sufficiently wide to include amendments that might increase the total quantity of allowances to be allocated.

35 The Commission admits, first of all, that the United Kingdom indicated that the NAP which it initially submitted was provisional. It puts forward the argument that, following its request of 9 June 2004, the United Kingdom did provide the further information sought in a letter dated 14 June 2004. It therefore concluded from this that the NAP, including the figures relating to the total quantity of allowances, was complete (see the first recital in the preamble to the Decision of 7 July 2004).

36 The Commission submits that, in contrast to the submission made by the United Kingdom (see paragraph 25 above), where a Member State submits a NAP in respect of which the Commission requests additional information, such a NAP is considered incomplete pending receipt of the information. It is only once the Member State has provided all information which the Commission deems necessary to regard the plan as complete that the three-month period commences.

37 According to the Commission, the United Kingdom was aware that, following the letter from the United Kingdom of 14 June 2004, the Commission considered its NAP to be complete and would take a final decision on 7 July 2004. The United Kingdom had expressed the wish to be part of the first wave of decisions on NAPs in order to indicate its commitment to greenhouse gas emission allowance trading, as well as combating climate change in general, and to act as an example for other Member States (see the letter of 14 June 2004 and certain web pages of the

Department for Environment, Food and Rural Affairs, hereinafter 'DEFRA'). Having regard to this wish, the United Kingdom cannot have formed a legitimate expectation that the Commission would take a further 'final' decision on its NAP to take into account any new information subsequently provided.

38 The Commission adds that the only acceptable amendments, following the adoption of the Decision of 7 July 2004, are those defined in Article 3 thereof. Any amendment exceeding the total quantity of allowances is expressly excluded as Commission decisions on NAPs must provide certainty, both for the coherence of the emissions trading system overall and in order for the allowance market to function properly, as market price building depends strongly on the utmost stability of the total quantity of allowances. The Commission observes that how central the stability of the total quantity of allowances obtained by the United Kingdom is to the proper functioning of the whole scheme can be inferred from its relative importance compared with other Member States.

39 Second, the Commission states that the purpose of the Directive is to establish a system for emission allowance trading which can function as from 1 January 2005 (see Articles 4, 9(1) and 11(1)). It is in the light of that objective that the term 'amendments' found in Article 9(3) of the Directive and in Articles 2 and 3(3) of the Decision of 7 July 2004 should be interpreted. According to the Commission, Member States cannot, as the deadline of 1 January 2005 draws near, present 'amendments' which are outside the scope of the decision addressed to them pursuant to Article 9(3) of the Directive. The term 'amendments' in Article 9(3) is restricted to those intended to correct incompatibilities identified by the Commission in its decision pursuant to Article 9(3), that is, in the present case, the Decision of 7 July 2004.

40 The Commission also observes that information obtained during a public consultation before the submission of the NAP is vital for determining the total quantity of allowances as well as the other elements in the NAP to be submitted. However, once the Commission has taken its decision, the second public consultation is intended to serve the purposes of data variation and possibly reallocation of allowances within that total quantity, not to serve as a means to increase the overall amount (see paragraph 9 of Annex III to the Directive and the communication of 7 January 2004, paragraphs 94 to 96). That second consultation is limited to how the Commission decision on the NAP should be implemented within the context of its scope and to aspects with regard to which the Member State may exercise its discretion.

41 If it were otherwise, the risk of having a series of consultations and new Commission decisions would arise. The market for allowances, being reliant on the stability of the total quantity of allowances, would be undermined and unable to function properly with such a degree of uncertainty.

42 The Commission observes that the United Kingdom is the only Member State that requested an increase in the total quantity of allowances as a result of the second consultation. Furthermore, the United Kingdom's line of argument in the present case is not consistent with the statement which appeared on DEFRA's website regarding the submission of the list of installations to the Commission on 14 June 2004 according to which the numbers in question may be subject to technical revision, and thus of a strictly limited nature, following the outcome of our final consultation exercises.

43 Moreover, the Commission maintains that a Member State cannot depart from its stated intention, even after the Commission has made its decision, just because it was only an 'intention'. According to the Commission, the Directive uses the words 'intends to allocate' because it is only following a decision by the Commission that the Member State is in a position to translate its intention into a final decision.

44 Third, the Commission observes that a strict interpretation of Article 3 of the Decision of 7 July 2004 is necessary in order to ensure that the Community emissions trading system contributes towards combating climate change.

45 Article 3(1) of the Decision of 7 July 2004 clearly states that the total quantity allocated may not be exceeded and Article 3(3) cannot be used as a basis for modifying this total quantity. The economic justification for this is that the stability of the total quantity of allowances is of crucial importance for the correct functioning of the emissions trading system. Article 3(3) grants the United Kingdom discretion in dealing with identified incompatibilities in ways other than those already conditionally approved by the Commission under Article 2 but only in order to make any necessary reallocation of allowances.

46 The Commission submits that Article 3(3) of the Decision of 7 July 2004 is to be read in the context of the overall figures fixed under Article 3(1). It is apparent from Article 3 of the Decision of 7 July 2004 that the United Kingdom had clearly defined leeway to reallocate its allowances to installations listed in the NAP and to new entrants. Therefore, according to the Commission, the United Kingdom was not required to seek an increase in the overall amount of allowances. Of those Member States to which a decision including the wording of Article 3(3) was addressed, the United Kingdom was the only one to conclude that that provision could be used to increase the total quantity of allowances.

47 The Commission adds that in the case of NAPs in which it has identified no incompatibilities in the final version of its decision, Article 3(3) (or its equivalent) is to be regarded as being effectively redundant. This provision was not removed from the text on account of the fact that a solution for eliminating all incompatibilities

was found only at a very late stage of the decision-making procedure. After this redundancy had been recognised, the provision was systematically deleted from later decisions that were adopted from December 2004 onwards.

48 Furthermore, the Commission claims that it did not raise objections to the creation in the United Kingdom NAP of a new entrants reserve pool which is considerably larger than for other Member States. The total quantity of allowances approved, comprising allocations for both existing installations and new entrants, gave the United Kingdom considerable flexibility in providing, pursuant to Article 3(2) of the Decision of 7 July 2004, allowances to existing installations from the new entrants pool should that have proved necessary as a result of improvements to data quality.

49 Finally, the Commission stresses the fact that the letter of 9 June 2004 cannot be used as a justification for increasing the total quantity of allowances. That letter predates the Decision of 7 July 2004 and therefore cannot be advanced as justifying the amendments which took place after that decision. The United Kingdom cannot therefore claim to have any sort of legitimate expectation with respect to a different interpretation of the Decision of 7 July 2004.

Findings of the Court

50 In the contested decision, the Commission rejected as inadmissible the amendments of the NAP proposed by the United Kingdom on 10 November 2004 because they would have resulted in the total quantity of allocated quotas exceeding the quantity authorised by the Commission in its Decision of 7 July 2004. Therefore, as the Commission confirmed during the hearing, it did not consider itself obliged to carry out any examination of the proposed amendments on their merits and particularly of their compatibility with the criteria set out in Annex III to or with Article 10 of the Directive.

51 In order to decide whether the Commission was entitled to reject those amendments as inadmissible, it is necessary to examine the roles and powers allocated to the Commission and the Member States respectively under the Directive, particularly those in Articles 9, 10 and 11.

52 The essential purpose of the Directive is to put in place, as from 1 January 2005, a scheme for greenhouse gas emission allowance trading within the Community. This system is based upon NAPs developed by the Member States in accordance with the criteria laid down by the Directive. Each Member State was required to develop a first NAP for the three-year period beginning 1 January 2005. This NAP was to be published and notified to the Commission and to the other Member States by 31 March 2004 at the latest in accordance with Article 9(1) of the Directive. The NAP was required to state the total quantity of allowances which the Member State 'intends to allocate for that period and how it proposes to allocate them' (see paragraph 2 above).

53 Each Member State was then obliged to make a definitive decision as to the total quantities of the allowances to be allocated and the allocation of those allowances to the installations in question under Article 11(1) of the Directive at least three months before the beginning of the period, that is to say, prior to 1 October 2004. According to that same provision, the Member States were required to base their definitive decisions on the NAPs which they had developed under Article 9 of the Directive (see paragraph 4 above).

54 Pursuant to Article 9(3) of the Directive, the Commission is empowered to reject a NAP, either in whole or in part, within three months of its notification (see paragraph 3 above). This provision stipulates that any such rejection is to be based on the NAP's incompatibility with the criteria of Annex III to or with Article 10 of the Directive. It is to be noted that no other ground for rejection of a NAP is provided for in the Directive.

55 Furthermore, as the Commission acknowledged at the hearing, Article 9(3) does not expressly require the adoption of a positive decision of approval of a NAP by the Commission in any case where it has no ground for rejecting that NAP either in whole or in part. If the Commission does not react to the NAP in the three months following notification, the plan must be considered as approved by the Commission and may not then be amended unless the proposed amendments are accepted by the Commission in accordance with Article 9(3) of the Directive.

56 Thus, the adoption by a Member State of its definitive decision concerning the total quantity of allowances that it will allocate and the allocation of those allowances to the installations in question, under Article 11(1) of the Directive, is subject to the condition contained in Article 9(3) of the Directive that any amendment proposed to the NAP must be accepted by the Commission. However, the second sentence of Article 9(3) of the Directive does not lay down any limit to the permissible amendments (see paragraph 3 above). Therefore, contrary to the Commission's submission, any amendments, whether proposed by the Member State of its own initiative or rendered necessary to overcome any incompatibility in the NAP raised by the Commission, must be notified to the latter and accepted by it before the NAP as amended can form a valid basis for the decision taken by the Member State under Article 11(1) of the Directive.

57 That the amendments of the NAP are not limited to those intended to address the incompatibilities raised by the Commission follows necessarily from the fact that the Member State is obliged, in accordance with Article 11(1) of and paragraph 9 of Annex III to the Directive, to take account of comments received from the public after the initial notification of the NAP and before the adoption of the definitive decision under Article 11(1) of the Directive. If permissible amendments to the NAPs, made after the expiry of the three-month period mentioned in Article 9(3) of the Directive or after a decision of the Commission under that provision, were

limited to those envisaged by the Commission, then that public consultation would be deprived of its effectiveness and the comments of the public would be rendered purely academic.

58 The Commission claims that comments obtained during the second round of public consultation are only intended to serve the purposes of data variation and possibly the reallocation of allowances within the total quantity, and not to serve as a means to increase the overall amount (see paragraph 40 above). That argument is supported neither by the wording of Article 11(1) of the Directive nor by paragraph 9 of Annex III. Furthermore, in its communication of 7 January 2004, the Commission did not lay down any limitation on the purpose of the second public consultation. In fact, according to paragraph 95 of that communication (repeated in paragraph 96), a 'Member State should inform the Commission of any intended modifications following public participation subsequent to the publication and notification of the [NAP] and before taking its final decision pursuant to Article 11'. The Court considers that such public consultation might well identify material errors in the calculations underlying the plan or disclose new information such that, as a result, it may be necessary to increase the total quantity of allowances to be allocated. There is nothing either in the wording of the Directive, nor in the general structure and objectives of the regime which it establishes, which requires the exclusion of such possible increases.

59 Even if the Commission was correct in arguing that the second public consultation concerned only the allocations to individual installations, the Court considers that the Commission has not shown why consequential amendments to the individual allocations might not necessitate making changes to the total quantity of allowances to be allocated. If, for example, there was an underestimation of the allowances to be allocated to an individual installation, while a competing installation of equivalent size received the correct allocation, it cannot be excluded that the allocation to the first installation, and consequentially, the total allocation of allowances, would have to be amended.

60 It must also be pointed out that the purpose of the Directive is to establish an efficient European market in greenhouse gas emission allowances, with the least possible diminution of economic development and employment (see Article 1 of and the fifth recital in the preamble to the Directive). Therefore, even though the Directive aims to reduce greenhouse gas emissions in accordance with the commitments of the Community and its Member States under the Kyoto Protocol, that aim must be achieved, in so far as possible, while respecting the needs of the European economy. It follows that the NAPs developed under the Directive must take due account of accurate data and information relating to emission forecasts for the installations and sectors covered by the Directive. If a NAP was based in part on incorrect information or erroneous evaluations relating to the level of emissions in certain sectors or certain installations, the Member State in question would have to be entitled to propose amendments to the NAP, including increases to the total quantity of allowances to be allocated, in order to address those problems before the market began functioning. That notwithstanding, in order to ensure that the environmental objectives of the Directive are respected, the Commission must still assess whether the amendments proposed by the Member State are compatible with the criteria listed in Annex III to or with Article 10 of the Directive.

61 The Court therefore considers that it follows both from the wording of the Directive, and from the general structure and objectives of the system which it establishes, that the Commission could not restrict a Member State's right to propose amendments, or categories of amendment. That question is different from the question whether the amendments in question were compatible with the criteria listed in Annex III to or with Article 10 of the Directive.

62 The Commission claims that its Decision of 7 July 2004 supports its argument that the scope of possible amendments was limited and, in particular, that it was not permissible to amend the total quantity of allowances which the Member State would decide to allocate. It adds that Article 3(1) of the Decision of 7 July 2004 clearly states that the total quantity to be allocated may not be exceeded.

63 That argument cannot be accepted. It follows from the express terms of the Directive, as well as from the general structure and objectives of the system which it establishes, that the United Kingdom was entitled to propose amendments to its NAP after it had been notified to the Commission and until its adoption of its decision under Article 11(1), and that the Commission is not entitled, when adopting a rejection decision in accordance with Article 9(3) of the Directive, to constrain the Member State in the exercise of its right (see paragraphs 54 to 61 above).

64 Furthermore, that argument of the Commission is inconsistent with the wording of its Decision of 7 July 2004. Firstly, it is clear from Article 2, subsection (b) of that decision that, as the Commission admitted during the hearing, amendments of the NAP made necessary in order to deal with the situation of installations in Gibraltar could lead to an increase in the total quantity of allowances to be allocated. In fact, Article 3(1) of that decision expressly contemplates the possibility that the total quantity of allowances to be allocated could be increased as a result of the amendments mentioned in Article 2, that is to say, without prior authorisation of the Commission (see paragraph 10 above). The Commission has thus recognised, at least implicitly, that such an amendment could be made without infringing the criteria laid down by Annex III to the Directive. It follows that there is a contradiction in principle in the position of the Commission in that, on the one hand, it permits increases in the total quantity of allowances to be allocated in order to address gaps which it has identified in the NAP while, on the other hand, it refuses to consider such amendments when proposed by the Member State in question.

65 Secondly, Article 3(3) of the Decision of 7 July 2004, which reflects Article 9(3) of the Directive, does not in fact limit the scope of permissible amendments before the adoption of a definitive decision under Article 11(1) of the Directive. While Article 2

and Article 3(2) of the Decision of 7 July 2004 deal with amendments which are permissible without requiring prior acceptance by the Commission, Article 3(3) of that decision deals with 'all' other amendments, including, conceivably, amendments to the total quantity of allowances to be allocated. Furthermore, contrary to the Commission's submission, Article 3(1) of the Decision of 7 July 2004 simply provides that, in the absence of such an amendment, the United Kingdom may not exceed the total quantity of allowances to be allocated as laid down by its NAP.

66 According to the Commission, Article 3(3) of the Decision of 7 July 2004 grants the United Kingdom the power to eliminate incompatibilities contained in its NAP in ways other than those envisaged by Article 2. However, as the United Kingdom submits, the Commission approved NAPs submitted by other Member States and, although it did not identify any deficiencies in those NAPs, its decisions included a provision similar to that of Article 3(3). It follows that, contrary to the Commission's submission, it was permissible, in accordance with that provision, to propose amendments other than those designed to address the incompatibilities identified by the Commission.

67 The Commission also maintains that any amendment increasing the total quantity of allowances must be excluded because it could have an adverse effect on the stability of the market (see paragraphs 38 and 45 above). The Court considers that this argument has not been substantiated by the Commission.

68 Indeed, the argument of the Commission that the proposed amendments would have serious repercussions on scarcity and would therefore be likely to have a significant impact on the market price is, at the very least, exaggerated. It is common

ground between the parties that the United Kingdom notified its NAP on 30 April 2004, expressly stating its provisional intention to allocate a total quantity of allowances of 736 Mt CO_2 for the period from 2005 to 2007 (see paragraph 6 above). Subsequently, on 10 November 2004, the United Kingdom informed the Commission of its proposal to increase the total quantity of allowances from 736 to 756.1 Mt CO_2 (see paragraph 12 above), that is to say, an increase of 2.7%. In light of the fact that this amendment was simultaneously published by the United Kingdom with a view to obtaining comments of the public, the Court considers that the operators concerned would have been aware of that increase seven weeks before the opening of the market.

69 Moreover, in its Decision of 7 July 2004, the Commission recognised that changes in the total quantity allocated might be necessary even after the market had commenced operation, independently of the possibility laid down by Article 29 of the Directive to amend the NAP in the case of force majeure. In particular, the Commission envisaged, in the eighth recital in the preamble to the Decision of 7 July 2004, that it might be necessary to adjust the total quantity of allowances to be allocated in respect of installations temporarily excluded from the Community scheme until 31 December 2006 under Article 27 of the Directive. Therefore, the argument of the Commission, based on the idea that the stability of the market amounts to an imperative rule, is exaggerated, especially with regard to amendments proposed before the opening of the market and thus it cannot be accepted.

70 In any case, in the context of a market where the Member States had, according to a press release of the Commission of 20 June 2005, allocated a total quantity of 6 572 Mt CO_2, the Commission has failed to explain how an increase of 20.1 Mt CO_2, announced seven weeks before the opening of the market, could 'destabilise' the market. The Court notes that on 10 November 2004, when the United Kingdom proposed the amendments in question, the Commission had still not taken a decision in accordance with Article 9(3) of the Directive on the NAPs of nine Member States.

71 The Commission implicitly relies on the fact that the United Kingdom should have taken its decision under Article 11(1) of the Directive by 30 September 2004 and that it was not entitled to propose any amendments after that date. It is worth mentioning in that regard that, even though this fact was referred to in the sixth recital in the preamble to the contested decision, it was not the basis for that decision. The amendments were rejected as inadmissible because they exceeded the total quantity fixed by the Decision of 7 July 2004.

72 Furthermore, it is not contested that the United Kingdom was acting in good faith in continuing its work on its NAP after notification and in continuing its efforts to obtain more exact data regarding emission forecasts by the sectors affected by the Directive. In a letter to the United Kingdom's Permanent Representation of 11 October 2004, the Commission, after noting that the United Kingdom had not respected the 30 September 2004 deadline, mentioned 'the progress that your authorities are making towards fulfilling the requirements of the decision' and urged those authorities to notify the necessary information to the Commission as soon as possible. In view of the approach of the Commission at that time, it is not now entitled to claim that the date of 30 September 2004 was of the essence with regard to the entitlement of the Member States to propose amendments to their NAPs under Article 9(3) of the Directive.

73 As regards the arguments of the United Kingdom to the effect that the NAP as notified was provisional, it is sufficient to point out that, once it is clear that the Member State in question was entitled to propose amendments to the Commission after the expiry of the three-month period laid down by Article 9(3) of the Directive or after a rejection decision in accordance with that article, it is immaterial that the NAP was characterised as 'provisional' when originally notified. As the Commission correctly submits, a Member State cannot, by submitting an incomplete NAP, postpone indefinitely the adoption of a decision by the Commission under Article 9 (3) of the Directive. However, if the NAP is incomplete or 'provisional', the

Commission is entitled to reject it either because it fails to comply with the criteria laid down by the Directive or because the Commission is unable to assess its conformity with those criteria. In that situation, the Commission is entitled, by rejecting the NAP, to oblige the Member State to notify a new and complete NAP before it takes its definitive decision under Article 11(1) of the Directive. Contrary to the Commission's submission, there is no need to suppose that the notification of an incomplete NAP has the effect of stopping the three-month period laid down by Article 9(3) of the Directive from running.

74 It follows from all of the foregoing that the Commission made an error of law in rejecting the amendments proposed by the United Kingdom as inadmissible. Therefore, the single plea raised by the United Kingdom must be declared to be well founded and the contested decision must be annulled.

Costs

75 Under Article 87(2) of the Rules of Procedure, the unsuccessful party is to be ordered to pay the costs if they have been applied for in the successful party's pleadings. Since the Commission has been unsuccessful, it must be ordered to pay the costs borne by the United Kingdom in accordance with the form of order sought by the latter.

On those grounds,

THE COURT OF FIRST INSTANCE (First Chamber)

hereby:

1. **Annuls Commission Decision C(2005) 1081 final of 12 April 2005 concerning the proposed amendment to the national allocation plan for the allocation of greenhouse gas emission allowances notified by the United Kingdom of Great Britain and Northern Ireland;**

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

Cooke García-Valdecasas Labucka

Delivered in open court in Luxembourg on 23 November 2005.

E. Coulon R. Garciá-Valdecasas

Registrar President