JUDGMENT OF THE GENERAL COURT (Third Chamber)

22 March 2011 *

In Case T-369/07,

Republic of Latvia, represented initially by E. Balode-Buraka and K. Bārdiņa, and subsequently by L. Ostrovska and lastly by L. Ostrovska and K. Drēviņa, acting as Agents,

applicant,

supported by

Republic of Lithuania, represented by D. Kriaučiūnas, acting as Agent,

and by

Slovak Republic, represented initially by J. Čorba, and subsequently by B. Ricziová, acting as Agents,

interveners,

* Language of the case: Latvian.

v

European Commission, represented by U. Wölker, E. Kalnins and I. Rubene, acting as Agents,

defendant,

supported by

United Kingdom of Great Britain and Northern Ireland, represented initially by Z. Bryanston-Cross, and subsequently by S. Behzadi-Spencer, I. Rao and F. Penlington, acting as Agents, assisted by J. Maurici, Barrister,

intervener,

APPLICATION for annulment of Commission Decision C(2007) 3409, of 13 July 2007, on the amendment of the national plan for the allocation of greenhouse gas emission allowances notified by the Republic of Latvia for the period from 2008 to 2012, under 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),

THE GENERAL COURT (Third Chamber),

composed of J. Azizi (Rapporteur), President, E. Cremona and S. Frimodt Nielsen, Judges,

Registrar: K. Pocheć, Administrator,

having regard to the written procedure and further to the hearing on 21 September 2010,

gives the following

Judgment

Legal context

International and European Union rules concerning the United Nations Framework Convention on Climate Change and the Kyoto Protocol

1 The United Nations Framework Convention on Climate Change, adopted at New York on 9 May 1992 ('the UNFCCC'), approved in the name of the European Community by Council Decision 94/69/EC of 15 December 1993 concerning the conclusion of the

UNFCCC (OJ 1994 L 33, p. 11), is ultimately designed to stabilise concentrations of greenhouse gases in the atmosphere at a level preventing any dangerous man-made disruption of the climate system. Annex I to the UNFCCC contains a list of State parties, including the Republic of Latvia, which is also classified there as a country in transition towards a market economy. The UNFCCC entered into force in the Community on 21 March 1994.

2 In order to attain the ultimate objective of the UNFCCC, the Kyoto Protocol to the UNFCCC was adopted on 11 December 1997 (Decision 1/CP.3 'Adoption of the Kyoto Protocol [to the UNFCCC]'). Annex A to the Kyoto Protocol contains the list of greenhouse gases and the list of sectors/categories of sources covered by the Kyoto Protocol. Annex B to the Kyoto Protocol contains the list of parties to the Kyoto Protocol with their commitments, with figures, to limit or reduce emissions, including those for the Republic of Latvia, whose reduction objective is fixed at 8 %.

3 On 25 April 2002, the Council of the European Union adopted Decision 2002/358/EC concerning the approval, on behalf of the European Community, of the Kyoto Protocol to the [UNFCCC] and the joint fulfilment of commitments thereunder (OJ 2002 L 130, p. 1). The Kyoto Protocol, and Annexes A and B thereto, are reproduced in Annex I to Decision 2002/358. The table of commitments, with figures, for limiting or reducing emissions, intended to establish the respective quantities of emissions attributed to the Community and its Member States in accordance with Article 4 of the Kyoto Protocol, appears in Annex II to Decision 2002/358.

Rules concerning the Community scheme for greenhouse gas emission allowance trading

4 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), as amended by Directive 2004/101/CE of the European Parliament and of the Council of 27 October 2004 (OJ 2004 L 338, p. 18), 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.'

5 Article 9 of Directive 2003/87 reads as follows:

'1. For each period referred to in Article 11(1) and (2), each Member State shall develop a national plan stating the total quantity of allowances that it intends to allocate for that period and how it proposes to allocate them. The plan shall be based on objective and transparent criteria, including those listed in Annex III, taking due account of comments from the public. The Commission shall, without prejudice to the Treaty, by 31 December 2003 at the latest develop guidance on the implementation of the criteria listed in Annex III.

For the period referred to in Article 11(1), the plan shall be published and notified to the Commission and to the other Member States by 31 March 2004 at the latest. For subsequent periods, the plan shall be published and notified to the Commission and to the other Member States at least 18 months before the beginning of the relevant period.

2. National allocation plans shall be considered within the committee referred to in Article 23(1) [of Directive 2003/87].

3. 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 [the] proposed amendments are accepted by the Commission. Reasons shall be given for any rejection decision by the Commission.'

6 According to Article 11(2) of Directive 2003/87:

'For the five-year period beginning 1 January 2008, and for each subsequent five-year period, each Member State shall decide upon the total quantity of allowances it will allocate for that period and initiate the process for the allocation of those allowances to the operator of each installation. This decision shall be taken at least 12 months before the beginning of the relevant period and be based on the Member State's national allocation plan developed pursuant to Article 9 and in accordance with Article 10, taking due account of comments from the public.'

7 Annex III to Directive 2003/87 sets out 12 criteria applicable to national allocation plans. Criteria Nos 1 to 3 of Annex III provide:

'1. The total quantity of allowances to be allocated for the relevant period shall be consistent with the Member State's obligation to limit its emissions pursuant to [Decision 2002/358] and the Kyoto Protocol, taking into account, on the one hand, the proportion of overall emissions that these allowances represent in comparison with emissions from sources not covered by this Directive and, on the

other hand, national energy policies, and should be consistent with the national climate change programme. The total quantity of allowances to be allocated shall not be more than is likely to be needed for the strict application of the criteria of this Annex. Prior to 2008, the quantity shall be consistent with a path towards achieving or over-achieving each Member State's target under Decision 2002/358 and the Kyoto Protocol.

2. The total quantity of allowances to be allocated shall be consistent with assessments of actual and projected progress towards fulfilling the Member States' contributions to the Community's commitments made pursuant to Decision 93/389/EEC.

3. Quantities of allowances to be allocated shall be consistent with the potential, including the technological potential, of activities covered by this scheme to reduce emissions. Member States may base their distribution of allowances on average emissions of greenhouse gases by product in each activity and achievable progress in each activity.

…'

Background to the dispute

8 By letter of 16 August 2006, the Republic of Latvia notified the Commission of the European Communities, in accordance with Article 9(1) of Directive 2003/87, of its

national allocation plan for the period from 2008 to 2012 ('the NAP'). According to the NAP, the Republic of Latvia intended to allocate to its national industry covered by the Directive an average annual total of 7.763883 million tonnes-equivalent of carbon dioxide ('MteCO$_2$').

9 On 29 November 2006, the Commission adopted a first rejection decision, which reads as follows:

'*Article 1*

The following aspect of the [NAP] for the first five-year period mentioned in Article 11(2) of the Directive is incompatible respectively with: criteria [Nos] 1 [to] 3 of Annex III to [Directive 2003/87]: the part of the intended total quantity of allowances, amounting to 4.480580 [MteCO$_2$] equivalent per year, that is not consistent with assessments made pursuant to Decision 280/2004/EC [of the European Parliament and of the Council of 11 February 2004 concerning a mechanism for monitoring Community greenhouse gas emissions and for implementing the Kyoto Protocol (OJ 2004 L 49, p. 1)] and not consistent with the potential, including the technological potential, of [the relevant] activities to reduce emissions.

Article 2

No objections shall be raised to the [NAP], provided that the following amendments to the [NAP] are made in a non-discriminatory manner and notified to the Commission as soon as possible, taking into account the time-scale necessary to carry out the national procedures without undue delay: the total quantity of allowances to be allocated for the purposes of the Community scheme shall be reduced by 4.480580 [MteCO$_2$].

Article 3

1. The total annual average quantity of allowances of 3.283303 MteCO_2 to be allocated by the [Republic of] Latvia, pursuant to its [NAP], to installations mentioned in that plan and to new entrants 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 to be allocated to installations listed therein resulting from improvements to data quality or to change the share of the allocation of allowances free of charge in a non-discriminatory manner within the limits set in Article 10 of [Directive 2003/87].

3. Any amendments to the [NAP] other than those intended to implement Article 2 must be notified before 31 December 2006, the time-limit laid down in Article 11(2) of Directive [2003/87], and shall require prior agreement from the Commission pursuant to Article 9(3) of Directive [2003/87].

Article 4

This Decision is addressed to the Republic of Latvia.'

10 By letter of 29 December 2006, the Republic of Latvia notified the Commission of a revised NAP to providing for a total annual average of 6.253146 MteCO_2.

11 By letter of 30 March 2007, written in English, the Commission found that some of the information in the revised NAP was incomplete and requested the Republic of Latvia to answer certain questions and to provide it with additional information.

12 By letter of 25 April 2007, the Republic of Latvia responded to that request for request for information.

13 On 13 July 2007, the Commission adopted Decision C(2007) 3409 on the amendment of the national plan for the allocation of greenhouse gas emission allowances notified by the Republic of Latvia for the period from 2008 to 2012, under Directive 2003/87 ('the contested decision'), the operative part of which reads as follows:

'*Article 1*

The following aspects of the proposed amendment to Latvia's [NAP] for the five-year period mentioned in Article 11(2) of [Directive 2003/87] are compatible with the criteria below and are accordingly approved:

1. Criteria [Nos] 1 [to] 3 of Annex III to [Directive 2003/87]: increase in the total annual quantity of allowances of 0.144813 [MteCO_2] which is consistent with assessments made pursuant to Decision 280/2004/EC and with the potential, including the technological potential, of [the relevant] activities to reduce emissions.

…

Article 2

The following aspect of the proposed amendment to Latvia's [NAP] for the five-year period mentioned in Article 11(2) of [Directive 2003/87] is incompatible with the criteria below and is accordingly rejected: criteria [Nos] 1 [to] 3 of Annex III to [Directive 2003/87]: increase in the total annual quantity of allowances of 2.825030 [MteCO_2] which is incompatible with assessments made pursuant to Decision [280/2004] and with the potential, including the technological potential, of [the relevant] activities to reduce emissions.

Article 3

This Decision is addressed to the Republic of Latvia.'

14 In point 1 of the reasons for the contested decision, the Commission refers to Article 3(3) of the first rejection decision authorising the Republic of Latvia to notify amendments to its NAP for the period from 2008 to 2012 before 31 December 2006, the time-limit referred to in Article 11(2) of Directive 2003/87.

15 In point 3 of the reasons for the contested decision, the Commission finds, inter alia, that, since the information submitted by the Republic of Latvia contains a substantive amendment to the NAP, it requires prior acceptance by the Commission under Article 9(3) of Directive 2003/87. The contested decision is limited to those aspects of the information submitted. Other aspects of that information, in particular that referring to the implementation of the first rejection decision or expressing a point of

view diverging from the assessment made by the Commission in that decision, was not taken into consideration for the purposes of the present decision.

16 In point 6 of the reasons for the contested decision, it is found that the Republic of Latvia did not submit information liable to justify a change to the method for calculating the maximum quantity of allowances, as defined in the first rejection decision.

17 Lastly, in point 8 of the reasons for the contested decision, regarding the more specific information provided by the Republic of Latvia relating to particularly high levels of investment in the cement sector, the Commission accepts, on the basis of that method of calculation, an upwards adjustment of the maximum allowance quotas available as identified in Article 1 of the contested decision.

Procedure and forms of order sought

18 By application lodged at the Registry of the Court of First Instance (now 'the General Court') on 26 September 2007, the Republic of Latvia brought the present action.

19 By separate document lodged at the Court Registry the same day, the Republic of Latvia requested that the expedited procedure under Article 76a of the Rules of Procedure be used. By decision of 13 November 2007, the Court of First Instance (Third Chamber) dismissed that request.

20 By document lodged at the Court Registry on 27 November 2007, the United Kingdom of Great Britain and Northern Ireland requested leave to intervene in the present proceedings in support of the Commission. By order of 12 June 2008, the President of the Third Chamber of the Court granted leave to intervene. The United Kingdom of Great Britain and Northern Ireland lodged its statement in intervention on 28 August 2008.

21 By separate document lodged at the Court Registry on 14 December 2007, confirmed by letter of 26 May 2008, the Republic of Latvia requested, in accordance with Article 116(2) of the Rules of Procedure, that Annex 7 to the application be accorded confidential treatment vis-à-vis the United Kingdom of Great Britain and Northern Ireland.

22 By document lodged at the Court Registry on 27 December 2007, the Republic of Lithuania sought leave to intervene in the proceedings in support of the Republic of Latvia. By order of 12 June 2008, the President of the Third Chamber of the Court granted leave to intervene. The Republic of Lithuania lodged its statement in intervention on 29 August 2008.

23 By document lodged at the Court Registry on 6 January 2009, the Commission submitted its observations on the statements in intervention of the United Kingdom of Great Britain and Northern Ireland and the Republic of Lithuania. The Republic of Latvia did not submit observations on those statements within the time-limit granted.

24 By document lodged at the Court Registry on 7 February 2008, the Slovak Republic sought leave to intervene in the proceedings in support of the forms of order sought by the Republic of Latvia. By order of 12 June 2008, the President of the Third Chamber of the Court found that that application had been lodged in accordance with Article 115 of the Rules of Procedure, but after the expiry of the six-week time-limit laid down by Article 115(1) of those rules. Therefore, the President of the Third Chamber

of the Court allowed that application, while limiting the rights of the Slovak Republic to those provided by Article 116(6) of those rules.

25 The Republic of Latvia, supported by the Republic of Lithuania, claims that the General Court should:

— annul the contested decision;

— order the Commission to pay the costs.

26 The Commission, supported by the United Kingdom of Great Britain and Northern Ireland, contends that the Court should:

— dismiss the application;

— order the Republic of Latvia to pay the costs.

27 Upon hearing the report of the Judge-Rapporteur, the Court (Third Chamber) decided to open the oral procedure.

28 By letter of 12 July 2010, by way of measure of organisation of the procedure provided for in Article 64 of the Rules of Procedure, the Court requested the Commission to lodge certain documents. The Commission complied with that request within the time-limit granted.

29 At the hearing held on 21 September 2010, the parties presented their oral arguments and answered the oral questions asked by the Court.

Law

30 The Republic of Latvia puts forward four pleas in law in support of its action: first, infringement of the spheres of competence laid down by the EC Treaty in regard to energy policy; second, infringement of the principle of non-discrimination; third, disregard of the obligations under the Kyoto Protocol; and, fourth, non-compliance with the three-month time-limit provided for in Article 9(3) of Directive 2003/87.

The objection of inadmissibility of the application for annulment of Article 1 of the contested decision

Arguments of the parties

31 The Commission, supported by the United Kingdom of Great Britain and Northern Ireland, submits that whilst the Republic of Latvia seeks annulment of the contested decision in its entirety, that application in reality seeks annulment of only Article 2 thereof and not Article 1, in which it is found that certain of the amendments

proposed for the revised NAP are compatible with the criteria of Annex III to Directive 2003/87. However, such a measure may be the subject of an action for annulment only where it produces mandatory legal effects such as to affect the applicant's interests. Since Article 1 of the contested decision does not affect the interests of the Republic of Latvia, it has no interest in annulment of that article and the action should be declared inadmissible in that regard.

32 The Republic of Latvia disputes that line of argument.

Findings of the Court

33 Regarding the concept of legal interest in bringing proceedings relied in by the Commission, it should be borne in mind that the Treaty 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. All Member States have 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 (order in Case C-208/99 *Portugal* v *Commission* [2001] ECR I-9183, paragraphs 22 and 23, and judgment in Joined Cases T-309/04, T-317/04, T-329/04 and T-336/04 *TV 2/Danmark and Others* v *Commission* [2008] ECR II-2935, paragraph 63). This also follows from the definition of legal interest in bringing proceedings as developed by the case-law, to the effect that it covers only actions brought by legal persons and individuals and not those brought by institutions of the European Union or the Member States (Joined Cases T-425/04, T-444/04, T-450/04 and T-456/04 *France and Others* v *Commission* [2010] ECR I-2099, paragraph 118 and the case-law cited).

34 Moreover, the concept of legal interest in bringing proceedings must not be confused with the concept of challengeable measure, under which a measure must be intended to produce legal effects which may be adverse in order to be capable of being challenged through an action for annulment, which issue must be determined by looking to its substance (see, to that effect, Case C-147/96 *Netherlands* v *Commission* [2000] ECR I-4723, paragraphs 25 and 27; orders in *Portugal* v *Commission*, paragraph 33 above, paragraph 24; Case C-164/02 *Netherlands* v *Commission* [2004] ECR I-1177, paragraphs 18 and 19; and *France and Others* v *Commission*, paragraph 33 above, paragraph 119). It is undeniable that the contested decision, owing to its substance, does produce such legal effects.

35 Consequently, the objection of inadmissibility of the form of order seeking annulment of Article 1 of the contested decision must be dismissed.

36 The Court considers it appropriate to begin by considering the merits of the fourth plea in law.

The fourth plea in law: non-compliance with the three-month time-limit provided for in Article 9(3) of Directive 2003/87

Preliminary observation

37 It should be observed, as a preliminary point, that although the Commission and the United Kingdom of Great Britain and Northern Ireland submit that, in the present action, the Republic of Latvia cannot call in question the first rejection decision of

29 November 2006, as it did not challenge it within the time-limits, that fact, even if it were established, is irrelevant to the admissibility of the fourth plea in law alleging a defect in the contested decision.

Arguments of the parties

38 The Republic of Latvia, supported by the Republic of Lithuania, submits that the contested decision must be considered as 'non-existent' because it was adopted in disregard of Article 9(3) of Directive 2003/87. According to that provision, the Commission may reject an NAP within three months of the notification thereof by a Member State. The revised NAP was notified on 29 December 2006. Therefore, the time-limit within which the Commission was to react, if it wished to reject that NAP in whole or in part, expired on 29 March 2007. Yet it was only on 30 March 2007 that the Commission sent a letter to the Republic of Latvia — in English, contrary to Article 3 of Council Regulation No 1 of 15 April 1958 determining the languages to be used by the European Atomic Energy Community (OJ 1958, 17, p. 385) — in which it, first, stated that the revised NAP was incomplete and, second, requested additional explanations. Lastly, the Republic of Latvia states that the three-month period provided for in Article 9(3) of Directive 2003/87 began to run from the day when its letter of 29 December 2006 giving notification of the revised NAP was actually received by the Commission, and not from the Commission's registration of that notification on 5 January 2007.

39 The Commission, supported by the United Kingdom of Great Britain and Northern Ireland, considers that it did comply with Article 9(3) of Directive 2003/87, since the

three-month time-limit provided for therein applies only to the notified NAP and not to amendments thereto. A clear distinction must be drawn between, on the one hand, the notification of the NAP, as from when that period begins to run and, on the other, the proposed amendments, for which no time-limit is laid down. The Commission recognises that, when it does not state its position before the expiry of the three-month time-limit, the NAP is deemed to have been accepted. However, the situation is different when a Member State proposes amendments to that NAP. In such a case, the second sentence of Article 9(3) of Directive 2003/87 allows a Member State to take an allocation decision pursuant to Article 11 of that directive only if the amendments proposed by it have been accepted by the Commission, which is tantamount to requiring express approval from the Commission.

40 According to the Commission, although the second sentence of Article 9(3) of Directive 2003/87 does not fix any time-limit for the Commission to approve amendments to the NAP which are proposed by the Member State, that does not mean it has an unlimited period of time in which to review those amendments. It should state its position on the matter as soon as possible and, in any event, before the beginning of the relevant exchange period. The Commission did, moreover, comply with paragraph 55 of Case T-178/05 *United Kingdom* v *Commission* [2005] ECR II-4807, by notifying the Latvian authorities, in its letter of 30 March 2007, of its criticisms of the proposed amendments. Similarly, contrary to the Republic of Lithuania's submissions, the Commission submits that the statement in paragraph 73 of that judgment, to the effect that there is no need to suppose that where an incomplete NAP has been notified, the three-month period which the Commission has to reject the plan, as provided for by Article 9(3) of the directive, cannot begin to run, is merely *obiter dictum*. First of all, that passage of the judgment should be construed in the light of the specific circumstances of that case. Secondly, in the same paragraph of that judgment, the Court stated that, even though the NAP may be incomplete or 'provisional', the Commission may reject it either because it does not comply with the criteria laid down by the directive, or because it prevents it from assessing whether it complies with those criteria. In those cases, the Court considers that the Commission may, in rejecting the NAP, require the Member State to notify a new, complete NAP before taking its decision pursuant to Article 11(1) of Directive 2003/87.

41 The United Kingdom of Great Britain and Northern Ireland argues that the Commission must have a real possibility of assessing the NAP, which is possible only when it has complete information. Therefore, the three-month period laid down in Article 9(3) of Directive 2003/87 should start to run only as from the time when that information is available; otherwise the review procedure is of no real effect. If this were not the case, the Commission would have to reject the NAP on the sole ground that the information was incomplete, with the result that the Member State would have to notify a new NAP and a new three-month period would start to run.

42 The Commission, supported by the United Kingdom of Great Britain and Northern Ireland, states that the principle of good faith provided for in Article 10 EC prohibits it, when it has not received all the information required to assess the amendments to an NAP in the light of the criteria in Annex III to Directive 2003/87, from rejecting those amendments automatically without allowing the Member State concerned to provide the missing elements within a given time period. If that were not so, the Commission would have to reject the amendments to the NAP, in order to comply with the three-month time-limit, even though the Member State, on its own initiative or when requested to do so, made efforts to gather and communicate the missing information. According to the United Kingdom of Great Britain and Northern Ireland, the Republic of Latvia's conduct is contrary to the principle of good faith since, although it acknowledged that the NAP was incomplete and provided the additional information requested by the Commission, it then put forward the plea of non-compliance with the three-month time-limit.

43 At the hearing, in response to a question from the Court, the Commission withdrew its argument, put forward in the alternative, to the effect that, in any case, that three-month period began to run only as from the date when the Commission's Secretariat-General registered the revised NAP, that is, 5 January 2007, which was noted in the minutes of the hearing.

44 The Commission submits, lastly, that although its letter of 30 March 2007 was written in English and not in Latvian, that does not affect the validity of the contested decision. It states that it had to assess the 27 NAPs within a very short period and that most of the Member States, including the Republic of Latvia, did it the courtesy of sending in their NAPs translated into English. The subsequent exchange of letters also took place mainly in English. The Commission therefore considered that, for the purposes of assessing the NAP, the Republic of Latvia had accepted English as the language of correspondence since, in its letter of 25 April 2007, it had responded to the letter of 30 March 2007 without objecting to the use of English. In any event, the infringement of Regulation No 1 is a procedural irregularity which can result in the annulment of the measure which was ultimately adopted only if, had it not been for the irregularity, the outcome of the procedure might have been different. In the present case, the provision of a translation into Lithuanian of all the correspondence between the Commission and the Republic of Latvia certainly would have lengthened the procedure, but would not have led to a different outcome.

Findings of the Court

— The Commission's power of review under Article 9(3) of Directive 2003/87

45 Under the first sentence of Article 9(3) of Directive 2003/87, within three months of notification of an NAP by a Member State, the Commission may reject that NAP, or any aspect thereof, on the basis that it is incompatible with the criteria listed in Annex III or with the provisions of Article 10 thereof. Under the second sentence of the same provision, the Member State is to take a decision under Article 11(1) or (2)

of that directive only if the proposed amendments are accepted by the Commission. Lastly, the third sentence of that provision states that reasons are to be given for any rejection decision by the Commission.

46 The case-law shows that the Commission's power to consider and reject NAPs under Article 9(3) of the directive is severely limited, both in substantive and temporal terms. On the one hand, its review is limited to considering whether the NAP is compatible with the criteria laid down in Annex III to the directive and the with provisions of Article 10 thereof and, on the other, the review must be carried out within three months of the date on which the Member State notified the NAP (order in Case T-387/04 *EnBW Energie Baden-Württemberg* v *Commission* [2007] ECR II-1195, paragraph 104; see also, to that effect, Case T-374/04 *Germany* v *Commission* [2007] ECR II-4431, paragraph 116).

47 Moreover, the prior review carried out pursuant to Article 9(3) of Directive 2003/87 does not necessarily lead to a decision by the Commission. It is of course required, following notification of an NAP, to check, in a careful and impartial manner, the compatibility of that NAP with the criteria of Annex III and the provisions of Article 10 of Directive 2003/87. However, the wording 'may reject' indicates that the Commission has a certain margin of discretion in that regard. It also follows that, if within three months following the Member State's notification of its NAP, the Commission opts not to exercise that power, the Member State may, in principle, implement the NAP under the terms laid down in Article 11 et seq. of Directive 2003/87, without any requirement of approval by the Commission. Thus, the procedure for reviewing NAPs need not necessarily culminate in a formal decision, particularly when the Member State makes all the amendments requested in the course of that procedure. By contrast, the Commission may decide to use its decision-making power under the second sentence of Article 9(3) of Directive 2003/87 where the Member State refrains from amending its NAP or refuses to do so before the expiry of the three-month time-limit, despite the objections raised. If the Commission does not take such a rejection decision, the notified NAP becomes definitive and there is a presumption of legality allowing the Member State to implement it (see, to that effect, order in *EnBW Energie*

Baden-Württemberg v *Commission*, paragraph 46 above, paragraphs 106, 107, 111, 115 and 120).

48 In that regard, the Commission may not legitimately argue that the second sentence of Article 9(3) of Directive 2003/87, which refers to 'proposed amendments' which must be accepted 'by the Commission', requires it to adopt a formal decision accepting those amendments. As this Court has held, the amendments in question are to be introduced during a subsequent phase of the review procedure, namely after the Commission has expressed its objections to the notified NAP or certain aspects thereof, and they are aimed specifically at addressing the objections initially expressed by the Commission about the compatibility of those aspects with the criteria laid down in Annex III and the provisions of Article 10 of Directive 2003/87. Accordingly, the acceptance of those amendments by the Commission is merely the corollary of the objections initially expressed by it as part of its power to review and reject NAPs under Article 9(3) of Directive 2003/87, and not the expression of a general power of authorisation (order in *EnBW Energie Baden-Württemberg* v *Commission*, paragraph 46 above, paragraph 104). Moreover, that case-law does not indicate that the Commission must accept the amendments made to the NAP by way of formal decision. On the contrary, such an interpretation, first, runs counter to the principle that the Commission does not have a general power to authorise NAPs. Second, it is inconsistent with the overall wording of the third sentence of Article 9(3) of Directive 2003/87, which contemplates only a rejection decision and not an authorisation decision.

49 It is in the light of those principles that it must be ascertained whether the Commission complied with the requirements of Article 9(3) of Directive 2003/87.

— Consideration of the concept of notification within the meaning of Article 9(3) of Directive 2003/87

50 It should be borne in mind that the Republic of Latvia argues, essentially, that, in the procedure for reviewing the revised NAP, the Commission disregarded the three-month time-limit provided for in Article 9(3) of Directive 2003/87. Given that the revised NAP was notified on 29 December 2006, that time-limit expired on 29 March 2007. Yet it was only on 30 March 2007 that the Commission made a request for information — in English, contrary to Article 3 of Regulation No 1 — indicating that the NAP was incomplete.

51 In the present case, it is common ground that the contested decision was not delivered within three months from the notification of the revised NAP, on 29 December 2006, but only on 13 July 2007. In those circumstances, it must be ascertained whether a new three-month period started to run following the notification of the revised NAP after the review procedure was provisionally brought to an end by the first rejection decision. In other words, it must be determined whether the concept of notification of an NAP within the meaning of Article 9(3) of Directive 2003/87 covers both the initial notification of the NAP and that of the revised NAP, particularly following a rejection decision by the Commission.

52 The wording of Article 9(3) of Directive 2003/87 does not draw a distinction between 'notification of [an NAP]' which triggers the start of the three-month period, depending on whether it is an initial notification of the NAP or a subsequent notification of the revised NAP, particularly where the Commission has adopted a rejection decision. Moreover, the stipulation that that notification must take place 'under paragraph 1', under which 'each Member State shall develop [an NAP] stating the total quantity of allowances that it intends to allocate for that [exchange] period and how it proposes to allocate them' does not provide any further elucidation on the point, since the purpose of both the initial notification of the NAP and the subsequent notification

of the revised NAP is to obtain the figures on the allowances that the Member State plans to allocate.

53 Moreover, the wording 'proposed amendments' does not rule out the possibility, or even the obligation, for the Member State to propose such amendments in the form of a formal 'notification' of the revised NAP, especially when the amendments are substantial in scope. In that regard, the Court has held previously, first, that the second sentence of Article 9(3) of Directive 2003/87 does not lay down any limit to the permissible amendments and, second, that any amendments must be notified to the Commission 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 of Directive 2003/87 (*United Kingdom* v *Commission*, paragraph 40 above, paragraph 56). In the same vein, the Court has held that the Commission could, in rejecting the NAP, require the Member State to notify a new, complete NAP, before it could take its decision (*United Kingdom* v *Commission*, paragraph 40 above, paragraph 73). In keeping with those principles, moreover, the operative part of the first rejection decision (Article 2 and Article 3(3)) indicates that the Commission itself took the view that, in the present case, it was to be 'notified' of all amendments to the NAP and that those amendments were therefore subject to prior review by it under Article 9(3) of Directive 2003/87.

54 From a teleological point of view, moreover, the purpose of the procedure under Article 9(3) of Directive 2003/87, apart from permitting the Commission to exercise a prior review, is to provide legal certainty for the Member States and, in particular, to permit them to be sure, within a short time, how they may allocate emission allowances and manage the allowance trading scheme on the basis of their NAP during the allocation period in question. Having regard to the limited duration of such a period, which is three or five years (Article 11 of Directive 2003/87), both the Commission and the Member States have a legitimate interest in resolving quickly any dispute concerning the contents of the NAP and in ensuring that, during the entire period of

its validity, the NAP does not risk being contested by the Commission (order in *EnBW Energie Baden-Württemberg* v *Commission*, paragraph 46 above, paragraph 117).

55 Those considerations apply to any NAP, irrespective of whether it is the version as initially notified or as revised and subsequently notified. Moreover, the requirement for the Commission to carry out a prompt and effective review following notification of a revised NAP is all the more important where that review has already been preceded by a first review stage of the initial NAP which led to a rejection decision and, subsequently, to amendments to that NAP. The Commission's submission that it is allowed to review proposed amendments to an NAP, or a revised NAP, without having to comply with the three-month time-limit provided for in Article 9(3) of Directive 2003/87 is liable to undermine the objective of a prompt and effective review as well as the legal certainty to which a notifying Member State is entitled in order to be able to allocate emission allowances for installations located in its territory before the beginning of the exchange period pursuant to Article 11 of that directive.

56 Lastly, the Commission may not maintain that, at the end of the second phase of the review procedure concerning the review of the proposed amendments to the NAP, it must adopt a formal decision approving those amendments, which distinguishes that phase from the one covering the NAP initially notified, since such a decision is neither provided for by Article 9(3) of Directive 2003/87 nor necessary (see paragraph 48 above).

57 Consequently, the concept of notification within the meaning of Article 9(3) of Directive 2003/87 encompasses both initial notifications and subsequent notifications of different versions of an NAP, with the result that each of those notifications triggers a new three-month time-limit.

— Expiry of the three-month time-limit under Article 9(3) of Directive 2003/87

58 It follows from the foregoing considerations that, in the present case, the notification of the revised NAP, on 29 December 2006, triggered a new three-month time-limit within the meaning of Article 9(3) of Directive 2003/87.

59 Given that the three-month time-limit within the meaning of Article 9(3) of Directive 2003/87 expired on 29 March 2007, the Commission's request for information, addressed to the Republic of Latvia on 30 March 2007, was out of time. It is therefore unnecessary to determine whether such a request, had it been made within the time-limit, would have been liable to interrupt or suspend that period and, even less so, whether it would have had such an interruptive or suspensory effect even though that letter was written in English and not in Latvian.

60 It follows that the revised NAP became definitive on 30 March 2007.

61 However, contrary to the Republic of Latvia's submission, the procedural defect consisting in non-compliance with the three-month time-limit within the meaning of Article 9(3) of Directive 2003/87 is not so serious and manifest as to justify categorising the contested decision as a non-existent measure (see Case C-196/07 *Commission* v *Spain*, judgment of 6 March 2008, not published in the ECR, paragraph 35 and the case-law cited). Measures of the Community institutions, even though irregular, are in principle presumed to be lawful and accordingly produce legal effects until such time as they are withdrawn, declared void in an action for annulment or declared invalid following a reference for a preliminary ruling or a plea of illegality (Case T-256/07 *People's Mojahedin Organization of Iran* v *Council* [2008] ECR II-3019, paragraph 55 and the case-law cited). As held in paragraph 47 above, given the particularities of the review procedure under Article 9(3) of Directive 2003/87, if, at the end of that

procedure, there is no decision by the Commission by the three-month time-limit, the NAP becomes definitive and is presumed to be lawful. The illegality in the present case, however, consisting in the lateness of the contested decision, cannot be deemed to be so serious and manifest as to lead to its being a non-existent measure. The principle of legal certainty is so fundamental that a finding that a measure is non-existent must be limited to the most extreme cases (see, to that effect, Case C-137/92 P *Commission* v *BASF and Others* [1994] ECR I-2555, paragraphs 48 and 55; Case C-245/92 P *Chemie Linz* v *Commission* [1999] ECR I-4643, paragraphs 93 and 95; and Case C-475/01 *Commission* v *Greece* [2004] ECR I-8923, paragraphs 18 and 20).

62 Accordingly, the contested decision must be annulled on the ground of infringement of Article 9(3) of Directive 2003/87, without its being necessary to rule on the admissibility and merits of the other pleas put forward by the Republic of Latvia.

Costs

63 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, as applied for by the Republic of Latvia.

64 Under the first subparagraph of Article 87(4) of the Rules of Procedure, Member States which intervene in the proceedings are to bear their own costs. In the present case, the Republic of Lithuania, the United Kingdom of Great Britain and Northern Ireland and the Slovak Republic must bear their own costs.

On those grounds,

THE GENERAL COURT (Third Chamber)

hereby:

1. **Annuls Commission Decision C(2007) 3409, of 13 July 2007, on the amendment of the national plan for the allocation of greenhouse gas emission allowances notified by the Republic of Latvia for the period from 2008 to 2012, under 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;**

2. **Orders the European Commission to bear its own costs and to pay those incurred by the Republic of Latvia;**

3. **Orders the Republic of Lithuania, the Slovak Republic and the United Kingdom of Great Britain and Northern Ireland to bear their own costs.**

Azizi Cremona Frimodt Nielsen

Delivered in open court in Luxembourg on 22 March 2011.

[Signatures]