Reports of Cases

JUDGMENT OF THE COURT (Second Chamber)

29 March 2012*

(Appeal — Environment — Directive 2003/87/EC — Greenhouse gas emission allowance trading scheme — National allocation plan for emission allowances for the Republic of Estonia for the period 2008 to 2012 — Respective competences of the Commission and the Member States — Article 9(1) and (3) and Article 11(2) of Directive 2003/87 — Equal treatment — Principle of sound administration)

In Case C-505/09 P,

APPEAL under Article 56 of the Statute of the Court of Justice of the European Union, brought on 3 December 2009,

European Commission, represented by E. Kružíková and E. Randvere and by E. White, acting as Agents, with an address for service in Luxembourg,

applicant,

supported by:

Kingdom of Denmark, represented by C. Vang, acting as Agent,

intervener in the appeal,

The other parties to the proceedings being:

Republic of Estonia, represented by L. Uibo and M. Linntam, acting as Agents,

applicant at first instance,

supported by:

Czech Republic, represented by M. Smolek, acting as Agent,

Republic of Latvia, represented by K. Drēviņa and I. Kalniņš, acting as Agents,

interveners in the appeal,

Republic of Lithuania,

Slovak Republic,

* Language of the case: Estonian.

United Kingdom of Great Britain and Northern Ireland,

interveners at first instance,

THE COURT (Second Chamber),

composed of J.N. Cunha Rodrigues, President of the Chamber, U. Lõhmus, A. Rosas (Rapporteur), A. Ó Caoimh and A. Arabadjiev, Judges,

Advocate General: V. Trstenjak,

Registrar: C. Strömholm, Administrator,

having regard to the written procedure and further to the hearing on 29 September 2011,

after hearing the Opinion of the Advocate General at the sitting on 17 November 2011,

gives the following

Judgment

1 By its appeal, the European Commission seeks to have set aside the judgment of the Court of First Instance of the European Communities (now 'the General Court') of 23 September 2009 in Case T-263/07 *Estonia* v *Commission* [2009] ECR II-3463 ('the judgment under appeal') annulling the Commission decision of 4 May 2007 concerning the national allocation plan for emission allowances notified by the Republic of Estonia for the period from 2008 to 2012, in accordance with 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 ('the contested decision').

Legal context

2 Article 1 of European Parliament and Council Directive 2003/87/EC 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 Directive'), as amended by European Parliament and Council Directive 2004/101/EC 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.'

3 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 [EC] 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).

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

4 Article 10 of Directive 2003/87 provides that, 'for the three-year period beginning 1 January 2005, Member States shall allocate at least 95% of the allowances free of charge. For the five-year period beginning 1 January 2008, Member States shall allocate at least 90% of the allowances free of charge'.

5 Under 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.'

6 Annex III to the Directive ('Annex III') sets out 12 criteria applicable to national allocation plans. Criteria Nos 1 to 3, 5 and 6 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 [Council] Decision 2002/358/EC [of 25 April 2002 concerning the approval, on behalf of the European Community, of the Kyoto Protocol to the United Nations Framework Convention on Climate Change and the joint fulfilment of commitments thereunder (OJ 2002 L 130, p. 1)] 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 [Council] Decision 93/389/EEC [of 24 June 1993 for a monitoring mechanism of Community CO_2 and other greenhouse gas emissions (OJ 1993 L 167, p. 31)].

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.

…

5. The plan shall not discriminate between companies or sectors in such a way as to unduly favour certain undertakings or activities in accordance with the requirements of the Treaty, in particular Articles 87 [EC] and 88 [EC].

6. The plan shall contain information on the manner in which new entrants will be able to begin participating in the Community scheme in the Member State concerned.'

7 Article 3(1) and (2) of Commission Decision 2006/780/EC of 13 November 2006 on avoiding double counting of greenhouse gas emission reductions under the Community emissions trading scheme for project activities under the Kyoto Protocol pursuant to Directive 2003/87/EC of the European Parliament and of the Council (OJ 2006 L 316, p. 12) provide:

'1. In its national allocation plan for the period 2008 to 2012, a Member State shall include in the total quantity of allowances a set-aside of allowances drawn up for each project activity in the format set out in the table in Annex I to this Decision if, prior to the deadline for the notification of its national allocation plan set out in Article 9(1) of Directive 2003/87/EC, the Member State has issued letters of approval as a host country, pledging to issue emission reduction units or certified emission reductions for project activities which result in emission reductions or limitations in installations falling under the scope of Directive 2003/87/EC.

2. In its national allocation plan for the period 2008 to 2012, a Member State may also include in the total quantity of allowances an additional set-aside of allowances drawn up in the format set out in the Annex II to this Decision if after the decision pursuant to Article 11(2) of Directive 2003/87/EC it intends to issue letters of approval as a host country that pledge to issue emission reduction units or certified emission reductions before 31 December 2012 for project activities which result in emission reductions or limitations in installations falling under the scope of Directive 2003/87/EC. Planned project activities using the same methodology to reduce emissions for which no letter of endorsement has been issued yet may be grouped together under one column in the set-aside table drawn up according to Annex II.'

Background to the dispute and the contested decision

8 The background facts of the dispute and the contested decision are set out as follows in paragraphs 6 to 12 of the judgment under appeal:

'6 The Republic of Estonia has notified the Commission … of its national greenhouse gas allocation plan, in accordance with Directive [2003/87]. According to the Republic of Estonia, that notification was given on 30 June 2006, whereas the Commission maintains that it was given on 7 July 2006.

7 Following an exchange of correspondence with the Commission, the Republic of Estonia submitted a new version of its national greenhouse gas allocation plan in February 2007.

8 On 4 May 2007, the Commission adopted [the contested decision]. That decision calls for a reduction of 47.8% compared with the emission allowances which the Republic of Estonia was proposing to issue.

9 The operative part of the [contested] decision reads:

"Article 1

The following aspects of the national allocation plan of Estonia for the first five-year period mentioned in Article 11(2) of the Directive are incompatible respectively with:

1. criteria [Nos] 1 [to] 3 of Annex III to Directive [2003/87]: the part of the intended total quantity of allowances, amounting to 11.657987 million tonnes CO_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 activities to reduce emissions; this part being reduced in respect of emissions of project activities which were already operational in 2005 and resulted in 2005 in emission reductions or limitations in installations falling under the scope of Directive [2003/87] to the extent that the resulting emission reductions or limitations due to these project activities have been substantiated and verified; in addition, the part of the total quantity potentially amounting to 0.313883 million tonnes of allowances annually in respect of additional emissions of one combustion installation not included in the first phase national allocation plan to the extent that this is not justified in accordance with the general methodologies stated in the national allocation plan and on the basis of substantiated and verified emission figures;

2. criterion [No] 3 of Annex III to Directive [2003/87]: the non-inclusion in the national allocation plan of a set-aside for allowances drawn up by Estonia pursuant to Article 3(1) and (2) of Decision 2006/780 … in the total quantity of allowances and the absence of a correspondingly lower allocation to installations carrying out the relevant activities;

3. criterion [No] 5 of Annex III to Directive [2003/87]: the allocations to certain installations beyond their expected needs resulting from the cumulation of a bonus for early action with the allocations otherwise calculated;

4. criterion [No] 6 of Annex III to the Directive: the information on the manner in which new entrants will be able to begin participating in the Community scheme.

Article 2

No objections shall be raised to the national allocation plan, provided that the following amendments to the national allocation plan 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:

1. the total quantity to be allocated for the Community scheme is reduced by 11.657987 million tonnes CO_2 equivalent of allowances per year; and the quantities allocated to one additional installation not included in the first phase plan are determined in accordance with the general methodologies stated in the national allocation plan and on the basis of substantiated and verified emission figures, with the total quantity being further reduced by any difference between the allocation to this installation and the 0.313883 million tonnes set aside annually for this installation; and the total quantity being increased in respect of emissions of project activities which were already operational in 2005 and resulted in 2005 in emission reductions or limitations in installations falling under the scope of Directive [2003/87] to the extent that the resulting emission reductions or limitations due to these project activities have been substantiated and verified;

2. a set-aside for allowances drawn up pursuant to Article 3(1) and (2) of Decision 2006/780/EC is included by Estonia in the total quantity of allowances of 12.717058 million tonnes calculated in accordance with criteria [Nos] 1 [to] 3 of Annex III to Directive [2003/87] before the final national allocation decision pursuant to Article 11(2) of Directive [2003/87] is taken and a correspondingly lower allocation to installations carrying out the relevant activities takes place;

3. the allocations to certain installations do not go beyond their expected needs as a result of the application of a bonus for early action;

4. 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 the Directive and Article 10 thereof.

Article 3

1. The total average annual quantity of allowances of 12.717058 million tonnes, reduced by the size of a set-aside for allowances drawn up by [the Republic of] Estonia pursuant to Article 3(1) and (2) of Decision 2006/780/EC, and further reduced by any difference between the allocation to one additional installation not included in the first phase plan and the 0.313883 million tonnes set aside annually for this installation, to the extent that this is not justified in accordance with the general methodologies stated in the national allocation plan and on the basis of substantiated and verified emissions of this installation, and increased in respect of emissions of project activities which were already operational in 2005 and resulted in 2005 in emission reductions or limitations in installations falling under the scope of Directive [2003/87] to the extent that the resulting emission reductions or limitations due to these project activities have been substantiated and verified, to be allocated by [the Republic of] Estonia according to its national allocation plan to installations listed therein and to new entrants shall not be exceeded.

2. The national allocation plan 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 reduce the share of the allocation of allowances free of charge within the limits set in Article 10 of Directive [2003/87].

3. Any amendments of the national allocation plan made to correct the incompatibilities indicated in Article 1 of this Decision but deviating from those referred to in Article 2 must be notified as soon as possible, taking into account the time-scale necessary to carry out the national procedures without undue delay, and require prior acceptance by the Commission pursuant to Article 9(3) of the Directive. Any other amendments of the national allocation plan, apart from those made to comply with Article 2 of this Decision, are inadmissible.

Article 4

This decision is addressed to the Republic of Estonia.'"

The procedure before the General Court and the judgment under appeal

9 By application lodged at the Registry of the General Court on 16 July 2007, the Republic of Estonia brought an action for annulment of the contested decision.

10 By orders of 29 January 2008, the President of the Seventh Chamber of the General Court granted the United Kingdom of Great Britain and Northern Ireland leave to intervene in support of the form of order sought by the Commission and the Republic of Lithuania and the Slovak Republic leave to intervene in support of the form of order sought by the Republic of Estonia.

11 In support of its action, the Republic of Estonia made five pleas in law. They alleged as follows: first, the exceeding of authority arising from infringements of Article 9(1) and (3) and Article 11(2) of Directive 2003/87; second, manifest errors of assessment; third, infringement of Article 175 EC; fourth, infringement of the principle of sound administration; and, fifth, inadequate statement of reasons.

12 The Commission asked the General Court to declare the action inadmissible in relation to Article 1(3) and (4), Article 2(3) and (4), and Article 3(2) and (3) of the contested decision, the Republic of Estonia not having submitted any factual or legal plea concerning those provisions, and to dismiss it as unfounded in relation to the other provisions of the decision.

13 By the judgment under appeal, the General Court annulled the contested decision in its entirety.

14 First, in paragraphs 28 to 34 of that judgment, the General Court rejected the plea of partial inadmissibility raised by the Commission. It considered that Article 1(1) and (2), Article 2(1) and (2) and Article 3(1) of the contested decision were not severable from the other provisions of that decision and that, on the assumption that the pleas submitted by the Republic of Estonia were well founded, the contested decision should be annulled in its entirety.

15 Second, in paragraphs 49 to 93 of the judgment under appeal, the Court examined the first plea in law, alleging the exceeding of authority arising from infringements of Article 9(1) and (3) and Article 11(2) of Directive 2003/87. In the first place, it held that the Commission had exceeded the limits of its power of review under Article 9(3) of that directive by, first, referring in the contested decision to a specific quantity of allowances to be allocated, any exceeding of which is regarded as incompatible with the criteria laid down by the Directive and, second, rejecting the national plan for allocation of greenhouse gas emission allowances notified by the Republic of Estonia for the period 2008-2012 ('the Estonian NAP'), in so far as the total quantity of allowances proposed therein exceeded that amount. In the second place, it held that the Commission had infringed Article 9(3) of Directive 2003/87 by substituting its own analysis for that carried out by the Republic of Estonia in that plan. In that context, the General Court also held that the data and the methods of assessment used by the Commission were not 'necessarily' the most representative.

16 The General Court concluded, in paragraph 94 of the judgment under appeal, that Article 1(1), Article 2(1) and Article 3(1) of the contested decision, concerning the fixing of the total quantity of greenhouse gas emission allowances to be allocated, must be annulled. With regard to the second, third and fifth pleas submitted by the Republic of Estonia, to the extent that they were directed at the same provisions, the General Court held that it was not necessary to examine them.

17 Finally, in paragraphs 99 to 112 of the judgment under appeal, the General Court examined the fourth plea in law of the action, alleging infringement of the principle of sound administration. That plea referred to the Commission's assessment of whether the Estonian NAP was in conformity with criterion No 3 of Annex III to Directive 2003/87 concerning the taking into account of reserves in the total quantity of greenhouse gas emission allowances to be allocated. According to the General Court, the Commission had not proved that the calculations contained in that plan were vitiated by error.

18 In those circumstances, the General Court held, in paragraph 113 of that judgment, that Article 1(2) and Article 2(2) of the contested decision, concerning the alleged non-inclusion of reserve allowances in that total quantity, must be annulled.

19 Having thus held that Article 1(1) and (2), Article 2(1) and 2(2) and Article 3(1) of the contested decision should be annulled and having declared that those provisions were not severable from the remainder of that decision, the General Court finally found, in paragraph 114 of the judgment under appeal, that the contested decision had to be annulled in its entirety.

Procedure before the Court of Justice and form of order sought by the parties

20 By order of the President of the Court of 1 June 2010, the Kingdom of Denmark was granted leave to intervene in support of the form of order sought by the Commission and the Czech Republic and the Republic of Latvia were granted leave to intervene in support of the form of order sought by the Republic of Estonia.

21 By its appeal, the Commission asks the Court to:

— set aside the judgment under appeal; and

— order the Republic of Estonia to pay the costs.

22 The Kingdom of Denmark requests the Court to set aside the judgment under appeal.

23 The Republic of Estonia requests the Court:

— first, to dismiss the appeal;

— in the alternative, to send the case back to the General Court so that it can rule on the pleas submitted by that Member State at first instance which were not examined in the judgment under appeal; and

— order the Commission to pay the costs.

24 The Czech Republic requests the Court to:

— dismiss the appeal; and

— order the Commission to pay the costs.

25 The Republic of Latvia requests the Court to dismiss the appeal.

Consideration of the appeal

26 In support of its appeal, the Commission puts forward four pleas in law. They allege, first, an error of law in the examination of the admissibility of the action for annulment and, second, an error of law in its interpretation of Article 9(1) and (3) and of Article 11(2) of Directive 2003/87. Third, the General Court is said to have misinterpreted the principle of sound administration and, fourth, it erred in its legal classification of Article 1(1) and (2), Article 2(1) and (2) and Article 3(1) of the contested decision, when it considered that those provisions were not severable from the other provisions of the Directive.

The first plea, alleging an error of law in the examination of the admissibility of the action for annulment

Arguments of the parties

27 The Commission alleges that, by accepting that the action for annulment was admissible in relation to Article 1(3) and (4), Article 2(3) and (4) and Article 3(2) and (3) of the contested decision, the General Court infringed Article 21 of the Statute of the Court of Justice of the European Union and Article 44(1)(c) of the Rules of Procedure of the General Court.

28 The Commission argues that the pleas raised by the Republic of Estonia essentially concern the legality of the ceiling fixed for the total quantity of greenhouse gas emission allowances provided for in Articles 1(1), 2(1) and 3(1) of the contested decision, and, partially, the non-inclusion of the reserves of allowances referred to in Articles 1(2) and 2(2) of the latter. The Republic of Estonia did not make any criticism regarding the other incompatibilities determined with regard to the Estonian NAP, that is to say favouritism in the allocation of greenhouse gas emission allowances or the lack of transparency in the treatment of new entrants. In order to bring an action against the contested decision as a whole, the Republic of Estonia would have had to submit pleas in respect of each of its provisions.

29 In addition, the General Court erred in law by finding that Article 1(3) and (4), Article 2(3) and (4) and Article 3(2) and (3) of the contested decision are not severable from its other provisions.

30 The Republic of Estonia submits that that plea be rejected. It notes that it sought annulment of the contested decision in its entirety. The application contained a summary of the pleas relied on, in conformity with the formal requirements laid down in Article 21 of the Statute of the Court of Justice and in Article 44(1)(c) of the Rules of Procedure of the General Court. With regard to the judgment under appeal, it is based on a correct understanding of the severability of the provisions of that decision.

Findings of the Court

31 The first plea in the appeal concerns paragraphs 28 to 34 of the judgment under appeal, concerning the plea of partial inadmissibility of the action for annulment.

32 The General Court examined, in paragraphs 28 to 33 of that judgment, the question whether Article 1(1) and (2), Article 2(1) and (2) and Article 3(1) of the contested decision were severable from the other provisions of that decision and held that that was not the case. In those circumstances, in paragraph 34 of that judgment, it rejected the Commission's arguments concerning the alleged partial inadmissibility of the action, while stating that, if the pleas raised by the Republic of Estonia were well founded, the contested decision would have to be annulled in its entirety.

33 In the present case, it is common ground that the Republic of Estonia, in its application initiating proceedings, sought the annulment of the contested decision in its entirety. The plea of inadmissibility raised by the Commission concerned allegedly inadequate reasoning of that application with regard to the extent of the requested annulment in so far as the pleas submitted by that Member State concerned only Article 1(1) and (2), 2(1) and (2), and Article 3(1) of that decision. According to the Commission, such an application was incompatible with the requirements of Article 21, first paragraph, of the Statute of the Court of Justice and Article 44(1)(c) of the Rules of Procedure of the General Court. Considering that the provisions which are the subject-matter of the pleas submitted by the Republic of Estonia were severable from the other provisions of that decision, the Commission requested the General Court to dismiss the action as inadmissible with regard to the last mentioned provisions.

34 In that regard, it should be recalled that, under the first paragraph of Article 21 of the Statute of the Court, which is applicable to proceedings before the General Court in accordance with the first paragraph of Article 53 of that Statute and Article 44(1)(c) and (d) of the Rules of Procedure of the General Court, all applications must state the subject-matter of the dispute, the form of order sought and a brief statement of the pleas in law on which the application is based. Those elements must be sufficiently clear and precise to enable the defendant to prepare its defence and for the General Court to rule on the application, if necessary, without any further information. In order to guarantee legal certainty and the sound administration of justice it is necessary, in order for an action to be admissible, that the essential matters of law and fact relied on should be stated, at least in summary form, coherently and intelligibly in the application itself (Case C-343/08 *Commission* v *Czech Republic* [2010] ECR I-275, paragraph 26 and the case-law cited).

35 As to the remainder, it must be held that the application initiating proceedings submitted by the Republic of Estonia complies with the formalities since it is agreed that it refers to the subject-matter of the dispute and contains a brief statement of the pleas in law raised by that Member State, concerning Article 1(1) and (2), 2(1) and (2) and Article 3(1) of the contested decision. It is also not in dispute that the essential matters of law and fact on which those pleas are based are stated coherently and intelligibly in that application.

36 Admittedly, the Republic of Estonia did not submit, in its application, pleas or complaints concerning Article 1(3) and (4), Article 2(3) and (4) or Article 3(2) and (3) of the contested decision. However, in order to bring an action for annulment against a European Union measure in its entirety, it is not necessary for an applicant to submit pleas or complaints in respect of each provision thereof.

37 With regard to the question whether the annulment of the provisions expressly referred to in the pleas in the application, that is to say Article 1(1) and (2), 2(1) and (2) and 3(1) of the contested decision would be capable of bringing about the annulment of the remainder of that decision, as sought by the Republic of Estonia in the operative part of its application initiating proceedings, and in particular whether the General Court had erred in law in considering that those provisions were not severable from the other provisions of that decision, that question should be assessed in the context of the examination of the fourth ground of the present appeal.

38 The General Court was therefore right to reject the inadmissibility plea raised by the Commission with regard to Article 1(3) and (4), Article 2(3) and (4) and Article 3(2) and (3) of the contested decision. The first ground of appeal must accordingly be rejected as unfounded.

The second ground of appeal, alleging an error of law in the interpretation of Article 9(1) and (3) and of Article 11(2) of Directive 2003/87

39 By its second ground of appeal, the Commission complains that the General Court made an error of law in the interpretation of Article 9(1) and (3) and Article 11(2) of Directive 2003/87. After having criticised the general observations made by the Court concerning the allocation of competences between the Member States and the Commission as provided for in that directive and the nature of the review exercised by the Commission under Article 9(3) of that directive, the Commission submits arguments which can be divided into two parts. The first concerns an alleged infringement of the principle of equal treatment and the second an alleged disregard of the objectives of that directive.

40 The Republic of Estonia contends that that ground of appeal should be rejected. The Commission had not submitted any argument capable of proving that the General Court made such an error when it held that, according to Articles 9 and 11 of Directive 2003/87, the Commission was bound to act in the context of a review of the legality of choices carried out by that Member State and to respect the margin of manoeuvre reserved to it.

Nature of the Commission review pursuant to Article 9(3) of Directive 2003/87

– Arguments of the parties

41 The Commission criticises the General Court for having disregarded the allocation of powers between the Commission and the Member States, as provided for in Articles 9 and 11 of Directive 2003/87 and, by classifying its review under Article 9(3) of that directive as review of legality, for having committed an error of law.

42 In paragraph 51 of the judgment under appeal the General Court wrongly extended the powers of the Member States by relying on the definition of the legal nature of a directive, as derived from Article 249 EC. Articles 9 and 11 of Directive 2003/87 were intended to apply only between the institutions and the Member States and did not first require to be transposed into national law. They have a legislative character and are directly binding, like the provisions of a regulation. With regard to the form and content of the national allocation plans, they are largely fixed and reviewed at European Union level taking into account, inter alia, the guidelines drafted by the Commission pursuant to Article 9(1) of that directive, for the implementation of the criteria stated in Annex III thereof.

43 Contrary to the approach recommended by the General Court, the application of the subsidiarity principle enshrined in the second paragraph of Article 5 EC cannot limit the review power conferred on the Commission by the European Union legislature. Once that legislature has decided that it is necessary to legislate at European Union level, that principle no longer applies.

44 In addition, according to the Commission the General Court relied, wrongly, on Articles 211 EC and 226 EC. The national allocation plans are not classical measures transposing a directive. Whereas a transposition measure can be the subject only of an ex post review by the Commission, under Article 226 EC, the national allocation plans are assessed by the Commission ex ante, in conformity with Article 9 of Directive 2003/87. In that context, the Climate Change Committee, referred to in Article 9(2) of the Directive, plays an important role. Thus, in substance, review by the Commission goes beyond a simple review of legality.

45 The Commission points out, in its reply to the statements in intervention of the Czech Republic, the Kingdom of Denmark and the Republic of Latvia, that the objective of this ground of appeal is not to seek a finding that it has power to fix in a binding manner the total quantity of greenhouse gas emission allowances to be allocated, but to establish that the reasoning employed by the General Court to limit its review power is wrong. In any event, even if it should be concluded, contrary to the Commission's position, that it was not allowed to state, in the contested decision, the total quantity of emission allowances it regarded as acceptable, that finding is not sufficient in order to annul that decision, in so far as the Commission explained, in a detailed manner, that the total quantity of allowances provided for by the Republic of Estonia was obviously too high.

46 The Republic of Estonia contends that the Commission's allegations are unfounded. The General Court did not restrict the Commission's powers by relying on Article 249 EC. It limited itself to finding that, where a directive does not prescribe the form and methods to be used in order to achieve the intended result, the freedom of the Member States with regard to the choice thereof is, in principle, absolute. The question whether Articles 9 and 11 of Directive 2003/87 have a regulatory character is of no relevance to the allocation of powers between the Member States and the Commission. It also cannot be argued that the General Court, by invoking the subsidiarity principle, limited the powers conferred on the Commission.

– Findings of the Court

47 The Commission's claims relate to paragraphs 49 to 56 of the judgment under appeal, concerning the allocation of powers between the Commission and the Member States as provided for in Articles 9 and 11 of Directive 2003/87.

48 In those paragraphs, the General Court ruled that only the Member States have the power, first, to draw up their national allocation plan and, second, to take final decisions regarding the total quantity of greenhouse gas emission allowances to be allocated. When exercising their competences, they have a certain margin for manoeuvre. The Commission is entitled, under Article 9(3) of Directive 2003/87, first, to verify the conformity of the measures taken by the Member State with the criteria set out in

Annex III and the provisions of Article 10 of the Directive and, second, to reject the plans if they are incompatible with those criteria and provisions. The Commission's review power is therefore limited to a review of legality.

49 In the present case, as the General Court correctly stated in paragraphs 53 and 54 of the judgment under appeal, it is clear from Article 11(2) of Directive 2003/87 'that the Member State alone has the power, first, to draw up the national allocation plan whereby it proposes to achieve the aims of [that] Directive concerning greenhouse gas emissions, [and which] it notifies to the Commission, and, second, to take final decisions fixing the total quantity of allowances which it will allocate for each five-year period and the distribution of that quantity amongst economic operators'. On the other hand, it is unequivocally clear from Article 9(3) of Directive 2003/87 that the Commission's role is limited to verifying the conformity of the national allocation plan notified by the Member State with the criteria set out in Annex III to the Directive and the provisions of Article 10 thereof. It is entitled to check that conformity and to reject that plan on the grounds of incompatibility with those criteria and those provisions, by reasoned decision. If its plan is rejected by the Commission, the Member State may not take a decision under Article 11(2) of the Directive unless the amendments proposed by it have been accepted by the Commission.

50 Contrary to what is argued by the Commission, the General Court cannot be criticised for having relied, in paragraph 51 of the judgment under appeal, on the third paragraph of Article 249 EC in order to assess the question of the allocation of powers between the Commission and the Member States, as provided for in Articles 9 and 11 of Directive 2003/87. The principle that a directive is binding as to the result to be achieved, upon each Member State to which it is addressed, but leaves to the national authorities the choice of form and methods applies, in principle in relation to the whole directive.

51 It is true that there may be great differences in the types of obligations which directives impose on the Member States and therefore in the results which they must achieve. It is also common ground that provisions of a directive which concern only the relations between the Member States and the Commission may not require to be transposed (see, to that effect, Case C-32/05 *Commission* v *Luxembourg* [2006] ECR I-11323, paragraphs 35 and 36). That is however irrelevant for the outcome of the present dispute. It cannot be denied that Articles 9 and 11 of Directive 2003/87 govern the respective roles of the Commission and the Member States in the context of the procedure for adoption of the national allocation plans, that is to say the allocation of powers between them. Those provisions make it possible to determine whether the Member States enjoy a margin for manoeuvre when drawing up their plan and, as the case may be, what is the scope thereof.

52 In the present case, it cannot be denied that Directive 2003/87 does not lay down a specific method for elaboration of a national allocation plan or for the fixing of the total quantity of greenhouse gas emission allowances to be granted. Indeed on the contrary, Annex III, point 1, of that directive expressly provides, as the General Court held, in substance, in paragraph 81 of the judgment under appeal, that the Member States must lay down the total quantity of allowances to be allocated taking into account, inter alia, the national energy policy and the national climate change programme.

53 Thus, as the General Court held in paragraph 53 of the judgment under appeal, the Member States have a certain margin for manoeuvre in transposing Directive 2003/87 and, therefore, in choosing the measures which they consider most appropriate to achieve, in the specific context of the national energy market, the objective laid down by that Directive.

54 With regard to the fact that, in accordance with Article 9 of Directive 2003/87, the national allocation plans are assessed by the Commission ex ante, such a review power differs, clearly, in many respects from the ex post review provided for under Article 226 EC. That fact cannot however result in the ex ante review having to go beyond a review of legality.

55 It follows from the foregoing that the criticisms levelled by the Commission against the general reasoning of the General Court concerning the allocation of competences between the Member States and the Commission as laid down in Directive 2003/87 must be rejected.

First part of the second plea in law, alleging infringement of the principle of equal treatment

– Arguments of the parties

56 The Commission argues that, in determining the nature and extent of its power of review, under Article 9(3) of Directive 2003/87, the General Court made an error in law which results, in essence, in infringement of the principle of equal treatment.

57 The conclusion that the Commission infringed Article 9(3) of Directive 2003/87 by substituting its own analysis for that carried out by the Republic of Estonia is wrong. The General Court interpreted that provision without taking into account that principle and, in addition, committed an error of law in assessing the question of the choice of emissions data which were to operate as the starting point for the forecasts for the period 2008-2012.

58 In the Commission's view, the General Court erroneously held that the Commission could not reject the data relating to CO_2 emissions before 2005 presented by Estonia in its national allocation plan and the Gross Domestic Product (GDP) forecasts used by that Member State instead of those published by all the Member States during 2005. Allowing each Member State to use its own data, developed in accordance with its own criteria, would be likely to create inequalities between those States.

59 The objective of Directive 2003/87, and the operation of the procedure for review of the national allocation plans, was 'to guarantee that the national allocation plans for all the Member States are in comparable situations'. Thus, the compatibility of the national allocation plans with the criteria set out in Annex III to that directive must be examined on the basis of a method of assessment drawn up by the Commission and the data obtained using that method. That examination requires the use, by the Commission, of the CO_2 emissions data for the same year for all the Member States and the GDP growth estimates for 2005-2010 available at the same time for each Member State.

60 The operation of the review procedure laid down in Article 9 of Directive 2003/87 shows that what is at issue is a simultaneous review exercise within a limited period of time, intended to allow a joint trading scheme for emission allowances in all the Member States before 1 January 2008. The national allocation plans are examined by the Climate Change Committee in parallel to their examination by the Commission, which confirms that it must use a homogeneous approach for all the plans.

61 The reasoning adopted by the General Court in paragraphs 84 to 86 of the judgment under appeal contradicts, in the Commission's opinion, that applied in its order of 20 October 2008 in Case T-208/07 *BOT Elektrownia Bełchatów and Others* v *Commission*. In that order, the General Court accepted the timescale for the introduction of amendments made to their national allocation plan by the Member States, holding that it follows both from the wording of the Directive and from the general structure and objectives of the scheme which it establishes that a Member State remains entitled to propose amendments to its national allocation plan after the plan has been notified to the Commission, until the adoption of the decision which that Member State must make pursuant to Article 11(2) of the Directive.

62 The Republic of Estonia contends that the first part of the second ground of appeal should be rejected. The Commission relies on the principle of equality as if it were an absolute principle. The possible occurrence of unequal treatment cannot justify a modification to the allocation of powers between the

Member States and the Commission as provided for under Directive 2003/87. Equal treatment of the Member States can be adequately ensured by the Commission examining each plan with the same degree of diligence.

– Findings of the Court

63 The first part of the second ground refers to paragraphs 56 to 93 of the judgment under appeal. In those paragraphs, the General Court found that the power of review enjoyed by the European Commission under Article 9(3) of Directive 2003/87 does not permit it to substitute its own data for the data included by the Member State in its plan. It noted that the principle of equality 'cannot modify the distribution of competences laid down by [that] Directive between the Commission and the Member States, according to which the latter have the authority to draw up a national allocation plan and to take a final decision on the total quantity of allowances to be allocated'.

64 At the outset, it should be recalled that, according to settled case-law, observance of the principle of equality requires that comparable situations must not be treated differently and that different situations must not be treated in the same way unless such treatment is objectively justified (see, in particular, Case C-127/07 *Arcelor Atlantique and Lorraine and Others* [2008] ECR I-9895, paragraph 23).

65 The requirement that that principle be observed cannot however modify the allocation of powers between the Member States and the Commission, as laid down in a European Union provision. Thus, as confirmed in paragraph 49 of the present judgment, Article 9(3) of Directive 2003/87 confers on the Commission the power only to verify the legality of the national allocation plan, permitting it to reject a plan which is not in conformity with the criteria set out in Annex III to Directive 2003/87 or the provisions of Article 10 thereof.

66 With regard to the extent of such review, the General Court held, in paragraphs 68, 69, 75, 79 and 80 of the judgment under appeal, that the Member States remain free to use the data and methods of assessment of their choice, so long as they do not lead to results which are not in conformity with those criteria or those provisions. In exercising its power of review under Article 9(3) of that directive, the Commission must respect the margin of manoeuvre enjoyed by the Member States. Thus, it may not reject a national allocation plan solely on the ground that the data contained in it are not in conformity with the data favoured by it.

67 In those circumstances, the General Court cannot be criticised for having considered that the Commission was under an obligation to examine the data included by the Republic of Estonia in its national allocation plan. If the Commission had doubts regarding those data, it was for it to seek clarification from the competent national authorities or even to prove that those data were not in conformity with the criteria set out in Annex III to Directive 2003/87.

68 The arguments submitted by the Commission concerning the simultaneous character of the review of the national allocation plans are not capable of affecting this finding. Those arguments are based on an erroneous conception of the Commission's power of review under Article 9(3) of Directive 2003/87. As the Advocate General stated in point 65 of her Opinion, any differences between the data and the evaluation methods applied by the Member States are an expression of their margin for manoeuvre, which the Commission must respect in the context of its conformity review.

69 In that context, it should be noted that, as held by the General Court in paragraph 89 of the judgment under appeal, the Commission may sufficiently ensure equal treatment between the Member States by examining the plan submitted by each of them with the same degree of diligence. It should also be recalled that the Commission is entitled to choose a point for comparison between the plans drawn up by each of those States. As the General Court states in paragraph 63 of the judgment under

appeal, the Commission may inter alia draw up 'its own economic and ecological model' based on the data chosen by it and use that model as a point for comparison in order to verify whether the national allocation plans are compatible with the criteria laid down in Annex III to Directive 2003/87 and the provisions of Article 10 thereof.

70 Therefore, the first part of the second ground of appeal must be rejected as unfounded.

The second part of the second ground of appeal, alleging disregard of the objective of Directive 2003/87

– Arguments of the parties

71 The Commission considers that, when interpreting Article 9(3) of Directive 2003/87, the General Court disregarded the objective pursued by it. It denies that is exceeded the limits of its review power, under that article, by examining the Estonian NAP on the basis of its own methodology and by stating a specific quantity of greenhouse gas emission allowances to be allocated, the exceeding of which was to be regarded as incompatible with the criteria established by the Directive and by, consequently, rejecting the Estonian NAP since the total quantity of allowances proposed therein exceeded that ceiling.

72 The powers of review enjoyed by the Commission under that provision must be read and interpreted in the light of the objectives of Directive 2003/87. That Directive establishes, pursuant to Article 1 thereof, a scheme for greenhouse gas emission allowance trading in order to promote reduction of greenhouse gas emissions in a cost-effective and economically efficient manner. The Court acknowledged, in its judgment in *Arcelor Atlantique and Lorraine and Others*, that the ultimate objective of that scheme is protection of the environment and that that scheme encourages and promotes the pursuit of the lowest cost of achieving a given amount of emissions reductions. It follows from that judgment that that objective can be achieved only if the demand for allowances outstrips supply on the Community allowance market. Moreover, pursuant to recital 7 in the preamble to Directive 2003/87, the implementation of that scheme must contribute to preserving the integrity of the internal market and to avoiding distortions of competition.

73 Contrary to what was held by the General Court in the judgment under appeal, the review carried out by the Commission under Article 9 of Directive 2003/87 cannot be 'severely limited', and reduced to a mere verification of the data used by the Member States in their national allocation plans. That review must be based on a homogeneous approach, requiring the use by the Commission of the CO_2 emissions data for the same year for all the Member States and the GDP growth estimates for 2005-2010 available at the same time for all Member States.

74 According to the Commission, the objectives of Directive 2003/87 cannot be achieved if it does not have the power to fix the total quantity of greenhouse gas emission allowances to be allocated. Its point of view is also justified for reasons of procedural economy.

75 The General Court held, wrongly in the Commission's view, that the Member States enjoy exclusive power to fix the total quantity of greenhouse gas emission allowances to be allocated. It would be possible to prove ex post that the unconditional recognition of the CO_2 emissions data stated in the Estonian NAP, relating to earlier years than 2005, and the proposed total quantity of allowances to be allocated would have led to a result contrary not only to criteria Nos 1 [to] 3 of Annex III to Directive 2003/87 but also to the objective of that directive of limiting CO_2 emissions.

76 In addition, the General Court did not correctly distinguish between the fixing by the Commission of a ceiling for the total quantity of allowances and the fixing of the total quantity of allowances to be granted by each Member State.

77 The Republic of Estonia considers that the second part of the second ground of appeal must be rejected. The Commission has completely failed to prove that it is impossible to comply with the objective of Directive 2003/87 having regard to the allocation of powers between the Member States and the Commission, as confirmed by the General Court in the judgment under appeal.

– Findings of the Court

78 The second part of the second ground of appeal refers to paragraphs 59 to 66 of the judgment under appeal. In those paragraphs, the General Court considered that the Commission, by fixing in the contested decision a specific total of allowances, any exceeding of which would be regarded as incompatible with the criteria established by Directive 2003/87, and by rejecting the Estonian NAP on the basis that total quantity of allowances proposed therein exceeded that threshold, exceeded the limits of its power of review under Articles 9(1) and (3) and Article 11(2) of that directive. That part also refers to the General Court's conclusion that the Commission had, when assessing the Estonian NAP, exceeded those limits by using its own data and its own method. In so doing, the General Court interpreted Article 9(3) of that directive in disregard of the objectives pursued by it.

79 In that regard, it must be noted that the declared principal objective of Directive 2003/87 is to reduce greenhouse gas emissions substantially in order to be able to fulfil the commitments of the European Union and its Member States under the Kyoto Protocol. That objective must be achieved in compliance with a series of sub-objectives and through recourse to certain instruments. The principal instrument for that purpose is constituted by the Community scheme for greenhouse gas emissions trading based on Article 1 of Directive 2003/87 and recital 2 in its preamble. Article 1 thus states that that scheme promotes emissions reductions in a cost-effective and economically efficient manner. The other sub-objectives to be fulfilled by that scheme are, inter alia, as set out in recitals 5 and 7 in the preamble to the Directive, the safeguarding of economic development and employment and the preservation of the integrity of the internal market and of conditions of competition.

80 In the present case, even supposing that the approach favoured by the Commission could improve the functioning of the European Union scheme for greenhouse gas emissions trading and thus make it possible to achieve more efficiently the objective of reducing greenhouse gas emissions substantially, that fact could not alter the allocation of powers between the Member States and the Commission as provided for in Articles 9 and 11 of Directive 2003/87.

81 In an area of shared competences, such as that of environmental protection, it is for the European Union legislature to determine the measures which it considers necessary to achieve the intended objectives, while observing the principles of subsidiarity and proportionality enshrined in Article 5 EC.

82 The European Union legislature's intention to confer on the Commission only a power to review the conformity of the national allocation plans with the criteria laid down in Annex III to Directive 2003/87 and the provisions of Article 10 thereof, and not a power to substitute or to harmonise which would include the power to fix a maximum quantity of greenhouse gas emission allowances to be allocated, is apparent both from Article 9(3) of Directive 2003/87 and the travaux préparatoires of that directive. Thus, to hold that the Commission may fix such a maximum quantity would go beyond the limits of teleological interpretation of that directive and be tantamount to conferring on that institution powers which lacked any legal basis.

83 As is already clear from paragraph 51 above, the General Court was therefore correct to hold, in paragraph 54 of the judgment under appeal, that it is unequivocally clear from Article 9(3) of that directive that the Commission's role is limited to verifying the conformity of a Member State's national allocation plan with the criteria set out in Annex III to the Directive and the provisions of Article 10 thereof. It correctly held that the Commission is entitled to verify that conformity and to

reject the national allocation plan on the grounds of incompatibility with those criteria and those provisions, that Member State only being allowed, in such a case, to take a decision under Article 11(2) if the amendments proposed by it have been accepted by that institution.

84 In that regard, it should be noted that the European Union legislature, which alone has power to amend Directive 2003/87, considered it necessary to amend Article 9 thereof by Directive 2009/29/EC of the European Parliament and of the Council of 23 April 2009 amending Directive 2003/87 so as to improve and extend the greenhouse gas emission allowance trading scheme of the Community (OJ 2009 L 140, p. 63). That amending directive provides for the introduction of a more harmonised scheme in order to better exploit the benefits of emission trading, to avoid distortions in the market and to facilitate the linking of emissions trading systems.

85 With regard to the Commission's argument that it would be possible to prove ex post that the unconditional recognition of the CO_2 emissions data and the total quantity of allowances, stated in the Estonian NAP, would have led to a result contrary to criteria Nos 1 to 3 of Annex III to Directive 2003/87, that allegation is based on an erroneous interpretation of the judgment under appeal. As the Advocate General states in paragraph 80 of her Opinion, the General Court acknowledged that the Commission may reject a national allocation plan which does not conform to the criteria listed in that annex or to the provisions of Article 10 thereof and did not therefore consider that the Commission was obliged unconditionally to accept the data included in the Estonian NAP.

86 With regard to the Commission's argument that, in the interests of procedural economy, it should be given the right to fix the maximum quantity of greenhouse gas emission allowances, it is certainly true that such an approach would reduce the risk of successive decisions being adopted which rejected national allocation plans on account of their incompatibility with the criteria listed in Annex III to Directive 2003/87 or the provisions of Article 10 thereof. In that context, it is however important to state that the Commission would not exceed its powers where it stated, in the operative part of a decision to reject a national allocation plan, without fixing in a binding manner the maximum quantity of such allowances, that it would not reject amendments to that plan where they were in conformity with the proposals and recommendations made in that rejection decision. Such a procedure would be in conformity with the principle of loyal cooperation between the Member States and the Commission and would also meet the objectives of procedural economy.

87 It follows that the Commission is not justified in claiming that the General Court, by its interpretation of Article 9(3) of Directive 2003/87, disregarded the objectives pursued by that directive. The second part of the second ground of appeal must therefore be rejected as unfounded.

88 Since the objections formulated by the Commission in respect of the general considerations of the General Court concerning the allocation of powers between the Member States and the Commission as provided for under Directive 2003/87 have been rejected, and since neither part of the second ground of appeal could be accepted, that ground of appeal must be rejected as unfounded.

The third ground of appeal, alleging an error of law in the interpretation of the principle of sound administration

Arguments of the parties

89 The Commission complains that the General Court erred in law in its interpretation of the principle of sound administration when assessing the fourth plea in law, alleging infringement of that principle.

90 In order to assess the question whether the Estonian NAP was compatible with criterion No 3 of Annex III to Directive 2003/87, that is whether a set-aside of allowances established in conformity with Article 3(1) and (2) of Decision 2006/780 was included in the total quantity of allowances to be

allocated, the Commission was entitled properly to rely on the data used for all the national allocation plans of the Member States. The reasoning of Article 1(2) of the contested decision was, in that regard, sufficient, relevant and adequate. The General Court incorrectly held that the Commission had based the reasoning of its decision on its own data to the detriment of those of the Republic of Estonia.

91 Owing to the Estonian NAP's ambiguity with regard to the inclusion of certain parts of reserves in the total quantity of greenhouse gas emission allowances to be allocated, the Commission was justified in considering that the total quantity proposed in that plan was incompatible with the three criteria in Annex III to Directive 2003/87. The General Court itself recognised that ambiguity in paragraph 107 of the judgment under appeal.

92 The Republic of Estonia contends that this ground of appeal should be rejected. The Commission's arguments proceed on an incorrect reading of the judgment under appeal. When examining the fourth plea of the action, the General Court did not rule on the question whether the Commission was entitled to use its own data to evaluate the taking into account of the reserves of quotas, but confined itself to verifying whether the Commission has examined, carefully and impartially, all the elements of the present case.

Findings of the Court

93 This ground of appeal, which concerns paragraphs 99 to 112 of the judgment under appeal, refers to the validity of the General Court's finding that, by not examining adequately the Estonian NAP and in particular its Annexes 1 and 3, in order to determine whether a set-aside of allowances established in accordance with Article 3(1) and (2) of Decision 2006/780 had been taken into consideration in the calculation of the total quantity of allowances to be allocated, the Commission infringed the principle of sound administration.

94 Contrary to what is argued by the Commission, the General Court did not assess, in those paragraphs of the judgment under appeal, the question whether it could use its own data to evaluate whether such a reserve had been taken into account. As the Republic of Estonia correctly states, that court confined itself to verifying whether the Commission had examined the data presented by that Member State in its national allocation plan in conformity with the principle of sound administration.

95 First, in paragraph 99 of that judgment, the General Court noted that the principle of sound administration is included among the guarantees conferred by the European Union legal order in administrative proceedings, that principle entailing the duty of the competent institution to examine carefully and impartially all the relevant aspects of the individual case (see, inter alia, Case C-269/90 *Technische Universität München* [1991] ECR I-5469, paragraph 14).

96 With regard to the figures submitted by the Republic of Estonia in its national allocation plan, the General Court held, second, in paragraphs 103 to 108 of the judgment under appeal, that they appeared to be coherent and comprehensible. Finally, in paragraphs 109 to 111 of that judgment, it considered whether, taking those figures into account, the Commission had examined, carefully and impartially, all the relevant aspects of the individual case. In the first place, it held that the Commission's conclusion according to which the allowances contained in the reserves in question were not included in the total quantity of greenhouse gas emission allowances to be allocated did not seem to be consistent with the information contained on the Court's file. Second, the General Court held that the Commission should have explained on what basis it arrived at the conclusion that the Estonian NAP was not in conformity with criterion No 3 of Annex III to Directive 2003/87. It concluded from this that the Commission had not established that the calculations contained in that plan were vitiated by error.

97 With regard to the Commission's allegation that the General Court itself acknowledged that the Estonian NAP was ambiguous, it is true that, in paragraph 107 of the judgment under appeal, the General Court held that the plan appeared ambiguous with regard to the failure to include part of the reserve in the total quantity of allowances, in so far as it was not apparent from the annexes to that plan why the Republic of Estonia considered it necessary to deduct that part from the total quantity of allowances.

98 That element alone cannot however result in it being possible to regard the Estonian NAP as incompatible with the criteria listed in Annex III to Directive 2003/87. The presence of an ambiguous element in a national allocation plan cannot, on its own, lead to rejection of that plan.

99 Under Article 9(3) of that directive, the principle of loyal cooperation between the Commission and the Member States and the principle of sound administration, it is for the Commission to take the measures necessary in order to determine whether that ambiguous element is contrary to or in conformity with the criteria listed in that annex. In that context, the Commission must assess all the information contained in the national allocation plan which it examines and, if appropriate, ask for clarification from the competent national authorities.

100 Therefore, that ground of appeal is based on an incorrect reading of the judgment under appeal and must, therefore, be rejected.

The fourth ground of appeal, alleging an error of law in the analysis of the non-severable character of Article 1(1) and (2) and Article 2(1) and (2) and Article 3(1) of the contested decision

Arguments of the parties

101 The Commission criticises the General Court for having considered that Article 1(1) and (2) and Article 2(1) and (2) and Article 3(1) of the contested decision are not severable from the other provisions of the contested decision and for having, consequently, annulled that decision in its entirety.

102 The judgment under appeal is based, according to the Commission, on an incorrect understanding of the severability of provisions of European Union measures, and of the case-law cited by the General Court in paragraph 28 of the judgment under appeal, and of the contested decision. According to the Commission, it is settled case-law that the requirement of severability is not satisfied where the partial annulment of an act would have the effect of altering its substance. However, that does not apply in the case of any alteration of the content of the measure. Altering the substance of a measure means turning it into an act which its author would not have had the intention of adopting or would not have adopted.

103 Article 1(1) and (2) and Article 2(1) and (2) and Article 3(1) of the contested decision concern the total quantity of greenhouse gas emission allowances to be allocated (criteria Nos 1 to 3 of Annex III to Directive 2003/87). Those articles are certainly interconnected but are severable from the other provisions of that decision. Articles 1(3) and 2(3) of that decision relate to the excessive allocation of such quotas to certain undertakings (criterion 5 of that annex) whereas Articles 1(4) and 2(4) of the decision concern the lack of sufficient information on new entrants (criterion 6 of that annex).

104 The reasoning of the General Court is based, first, on the finding that there is a parallelism between the paragraphs of 1 and 2 of the contested decision, a finding shared by the Commission, and second, on an erroneous interpretation of the meaning of Article 2 of the decision. The meaning of Article 2 must be examined in the light of Article 1 and not vice-versa.

105 Article 1 of the contested decision contains the list of elements of the Estonian NAP which the Commission considers as being contrary to the criteria listed in Annex III to Directive 2003/87. Article 2 thereof contains a series of suggestions in order to remedy each of the incompatibilities stated in Article 1. The incompatibilities described in paragraphs 1 and 2 of those two articles are different and independent of those stated in paragraphs 3 and 4 thereof. Those paragraphs, or at least those two groups of paragraphs, are therefore severable.

106 It was clear from the structure and the reasoning of the contested decision that each paragraph of Article 2 thereof is indissociably linked to the corresponding paragraph of Article 1 of the decision and not with the other provisions of Article 2 itself. That same conclusion could have been reached in relation to the provisions of Article 1.

107 Although the Commission undertook not to raise any objections when examining another national allocation plan which incorporates all of the suggestions contained in Article 2 of the contested decision, those suggestions do not for that reason form part of an unseverable whole. If it were held that one or more of the incompatibilities described in Article 1 of that decision were not to be regarded as such, the corresponding suggestions in Article 2 would lapse. However, the other provisions of that article would still apply.

108 In those circumstances, the annulment of Article 1(1) and (2), Article 2(1) and (2) and Article 3(1) of the contested decision could not, according to the Commission, alter the substance of that decision. The various provisions could equally be regarded as a number of decisions grouped together in a single normative act.

109 The Republic of Estonia requests the Court to reject this ground. There is a non-severable link between, on the one hand, criteria Nos 1 to 3 of Annex III to Directive 2003/87, which refer to the total quantity of greenhouse gas emission allowances and, second, criteria Nos 5 and 6 of that annex. That total quantity and the manner in which the NAP is altered relative to those last mentioned criteria are interlinked. The substantial reduction, by the Commission, of that quantity, pursuant to Articles 1 and 2(1) of the contested decision, has an influence both on the favourable treatment granted to certain undertakings in relation to the measures adopted at an early stage (criterion No 5 of Annex III to that directive) and on those allowances for new entrants (criterion No 6 of that annex).

Findings of the Court

110 The fourth ground of appeal concerns paragraphs 31 to 34 and 114 of the judgment under appeal which relate to the question whether Article 1(1) and (2), Article 2(1) and (2) and Article 3(1) of the contested decision are severable or not from the remainder of that decision and whether, therefore, the General Court was right to annul that decision in its entirety.

111 As the General Court noted in paragraph 28 of the judgment under appeal, partial annulment of a European Union act is possible only if the elements the annulment of which is sought may be severed from the remainder of the act (see, inter alia, Case C-29/99 *Commission* v *Council* [2002] ECR I-11221, paragraphs 45 and 46; Case C-378/00 *Commission* v *Parliament and Council* [2003] ECR I-937, paragraph 30; and Case C-244/03 *France* v *Parliament and Council* [2005] ECR I-4021, paragraph 12; see, to that effect, Case C-378/00 *Commission* v *Parliament and Council* [2003] ECR I-937, paragraph 30). The Court has also repeatedly held that the requirement of severability is not satisfied in the case where the partial annulment of an act would have the effect of altering its substance (Joined Cases C-68/94 and C-30/95 *France and Others* v *Commission* [1998] ECR I-1375, paragraph 257; Case C-29/99 *Commission* v *Council* cited above, paragraph 46; and Case C-244/03 *France* v *Parliament and Council*, cited above, point 13).

112 In the present case, review of whether Article 1(1) and (2), Article 2(1) and (2) and Article 3(1) of the contested decision are severable from the remainder of that decision requires consideration of the scope of those provisions, in order to be able to assess whether their annulment would alter the Directive's spirit and substance (see, to that effect, Case C-540/03 *Parliament* v *Council* [2006] ECR I-5769, paragraph 29).

113 It should be noted that the provisions of the contested decision stem from the Commission's negative assessment of the Estonian NAP, as notified by the Republic of Estonia. Article 1 of that decision lists various incompatibilities of that plan with one or more of the criteria laid down in Annex III to Directive 2003/87. In Article 2 of the decision, the Commission undertakes not to raise objections to the plan adopted after that rejection decision provided that the Member State concerned makes the amendments listed in Article 2(1) to (4). With regard to Article 3 of the contested decision, paragraph 1 thereof governs the fixing of a reserve of allowances and paragraphs 2 and 3 thereof contain details regarding the implementation of the other provisions of that decision.

114 With regard in particular to the relationship between, on the one hand, Article 1(1) and (2), Article 2(1) and Article 3(1) of the contested decision and, on the other hand, the remaining provisions of that decision, it must be concluded that, while referring to a number of different aspects of the Estonian NAP and to the various criteria listed in Annex III to Directive 2003/87, those provisions form a non-severable whole.

115 First, it cannot be denied that the fixing of the total quantity of greenhouse gas emission allowances to be allocated (criteria Nos 1 to 3 of Annex III to Directive 2003/87) referred to in Articles 1(1), 2(1) and 3(1) of the contested decision, is the principal element of the national allocation plans and is closely linked to the other elements of such plans.

116 Second, as the General Court correctly held in paragraphs 29 and 30 of the judgment under appeal, respectively, the annulment of only some of the paragraphs of Article 1 of the contested decision 'would have the effect of reducing the number of incompatibilities with … Directive [2003/87] which were found [by the Commission]'. With regard to the annulment of certain paragraphs of Article 2 of that decision, that 'would have the effect of maintaining in force the Commission's undertaking not to raise objections to the national plan, while reducing the number of amendments subject to which that undertaking was given'.

117 Nothing in that decision makes it possible to suppose that the Estonian NAP could have been considered to be compatible with Directive 2003/87 without the plan having been amended in accordance with all of the amendments listed in the last mentioned paragraph.

118 As the General Court stated in paragraph 32 of the judgment under appeal, an annulment of only some of the paragraphs of Article 2 'would replace the contested decision, according to which the [Estonian NAP] may be adopted subject to four specific amendments for remedying four incompatibilities with the criteria in Annex III [to Directive 2003/87], with a different decision according to which that plan may be adopted subject to a smaller number of amendments'.

119 In the light of those factors, it must be held that the General Court was right to state, in paragraph 31 of the judgment under appeal, that an annulment of one of the paragraphs of Article 1 of the contested decision and of the corresponding paragraph of Article 2 of that decision would have the effect of altering the substance of the decision.

120 With regard to Article 3(2) and (3) of the contested decision, it need only be pointed out that those provisions contain further details regarding the implementation of the other provisions of the contested decision. Thus, in so far as Article 1(1) and (2), Article 2(1) and (2) and Article 3(1) of the contested decision are annulled, Article 3(2) and (3) become devoid of purpose.

121 Those findings cannot be invalidated by the Commission's allegation that altering the substance of a European Union act means turning it into an act which its author would not have had the intention of adopting or would not have adopted. In that regard, it need only be stated that the question whether partial annulment would alter the substance of the contested measure is an objective criterion, and not a subjective criterion linked to the political intention of the authority which adopted the measure at issue (see Case C-239/01 *Germany* v *Commission* [2003] ECR I-10333, paragraph 37, and Case C-244/03 *France* v *Parliament and Council*, cited above, paragraph 14).

122 It follows from the foregoing that the General Court did not commit an error of law by holding that Article 1(1) and (2), Article 2(1) and (2) and Article 3(1) of the contested decision are not severable from the other provisions of that decision and by annulling, therefore, that decision in its entirety. The fourth ground of appeal is therefore unfounded.

123 Since none of the grounds of appeal submitted by the Commission has been accepted, the appeal must be dismissed.

Costs

124 Under Article 69(2) of the Rules of Procedure, which applies to appeal proceedings by virtue of Article 118 thereof, 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 and the Republic of Estonia has applied for an order for costs, the Commission must be ordered to pay the costs.

125 In accordance with the first subparagraph of Article 69(4) of the Rules of Procedure, the Czech Republic, the Kingdom of Denmark and the Republic of Latvia, which intervened in the proceedings, shall bear their own costs.

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

1. Dismisses the appeal;

2. Orders the European Commission to pay the costs;

3. Orders the Czech Republic, the Kingdom of Denmark and the Republic of Latvia to bear their own costs.

[Signatures]