JUDGMENT OF THE COURT OF FIRST INSTANCE (Second Chamber)

23 September 2009*

In Case T-183/07,

Republic of Poland, represented initially by E. Ośniecka-Tamecka, then by T. Nowakowski, then by T. Kozek, then by M. Dowgielewicz, and finally by M. Dowgielewicz, M. Jarosz and M. Nowacki, acting as Agents,

applicant,

supported by

Republic of Hungary, represented by J. Fazekas, R. Somssich and M. Fehér, acting as Agents,

and

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

* Language of the case: Polish.

and

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

interveners,

v

Commission of the European Communities, represented by U. Wölker and K. Herrmann, acting as Agents,

defendant,

supported by

United Kingdom of Great Britain and Northern Ireland, represented initially by Z. Bryanston-Cross and C. Gibbs, acting as Agents, assisted by H. Mercer, Barrister, and subsequently by I. Rao and S. Ossowski, acting as Agents, assisted by J. Maurici, Barrister,

intervener,

APPLICATION for the annulment, in whole or in part of Commission Decision C(2007) 1295 final of 26 March 2007 concerning the national allocation plan for the allocation of greenhouse gas emission allowances notified by Poland 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 (OJ 2003 L 275, p. 32),

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

composed of I. Pelikánová, President, K. Jürimäe (Rapporteur) and S. Soldevila Fragoso, Judges,

Registrar: K. Pocheć, Administrator,

having regard to the written procedure and further to the hearing on 10 February 2009,

gives the following

Judgment

Legal context

I — *International and Community 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 Poland, 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. The UNFCCC was ratified by the Republic of Poland on 28 July 1994 and entered into force there on 26 October 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.

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.

4 the Republic of Poland ratified the Kyoto Protocol on 13 December 2002. The Kyoto Protocol entered into force in the Community and the Republic of Poland on 16 February 2005.

II — *Legislation concerning the Community's greenhouse gas emission allowance trading system*

5 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) ('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.'

6 Article 9 of the Directive reads:

'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 the Directive].

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.'

7 According to Article 11(2) of the Directive:

'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.'

8 Annex III to the Directive sets out 12 criteria applicable to national allocation plans. Criteria Nos 1 to 3, 5 and 6, 10 and 12 of Annex III provide respectively as follows:

'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 [Council Decision 93/389/EEC of 24 June 1993 for a monitoring mechanism of Community CO_2 and other greenhouse gas emissions].

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 and 88 thereof.

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.

…

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

…

12. The plan shall specify the maximum amount of [certified emission reductions (CERs)] and [emission reduction units (ERUs)] which may be used by operators in the Community scheme as a percentage of the allocation of the allowances to each installation. The percentage shall be consistent with the Member State's supplementary obligations under the Kyoto Protocol and decisions adopted pursuant to the UNFCCC or the Kyoto Protocol.'

Background to the dispute

9 By letter of 30 June 2006, the Republic of Poland notified the Commission of the European Communities, in accordance with Article 9(1) of the Directive, of its national allocation plan for the period from 2008 to 2012 ('the NAP'). According to the NAP, the Republic of Poland intended to allocate to its national industry covered by the Directive an average annual total of 284.648332 million tonnes-equivalent of carbon dioxide ('CO_2').

10 The NAP was accompanied by a letter to the Commission dated 29 June 2006, from the Polish Environment Minister, indicating that 'the tables containing the earlier data and the emissions forecasts referred to in Annex 10 of the guidelines mentioned above, will be sent to the Commission as soon as the updated indispensable data are received' and that 'the definitive version of the list naming operators of installations and the figures for the allowances which will be allocated to them will be sent to the Commission after adoption by the Council of Ministers'.

11 By letter to the Republic of Poland of 30 August 2006, the Commission stated that, after a first examination of the NAP, the latter was incomplete, and that, at that stage, it was not compatible with criteria Nos 2 and 5 of Annex III to the Directive. It therefore invited the Republic of Poland to reply within 10 working days to a series of questions and requests for additional information. The Commission added that it would be able to take a position on the NAP not later than three months after receipt of full information.

12 By letter of 30 October 2006, the Deputy State Secretary at the Polish Environment Ministry asked the Commission to extend the time for replying to the letter of 30 August 2006 until the end of the third week of November 2006, stating, inter alia, that that additional time would enable him to prepare exact information and to explain essential aspects, thus enabling the Commission to make a correct and truly complete assessment of the document submitted.

13 the Republic of Poland replied to the letter of 30 August 2006 by a letter of 29 December 2006. By letter of 9 January 2007, it sent further information.

14 On 26 March 2007, pursuant to Article 9(3) of the Directive, the Commission adopted Decision C(2007) 1295 final concerning the NAP ('the contested decision'). In the contested decision, the Commission concluded, essentially, that several criteria in Annex III of the Directive had been infringed, and thus reduced the total annual quantity of emission allowances in the NAP by 76.132937 million tonnes of CO_2 equivalent, fixing the ceiling at 208.515395 million tonnes of CO_2 equivalent.

15 The operative part of the contested decision reads:

'*Article 1*

The following aspects of the [NAP] of Poland for the first five-year period mentioned in Article 11(2) of the Directive are incompatible respectively with:

1. criteria [Nos] 1, 2 and 3 of Annex III to the Directive: the part of the intended total quantity of allowances, amounting to the sum of 76.132937 million tonnes of CO_2 equivalent per year and the adjustment resulting from any lowering of the number of installations covered and one fifth of the total number of allowances [the Republic of] Poland decides to issue pursuant to Article 13(2) of the Directive, that is not consistent with assessments made pursuant to Decision 280/2004/EC 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 the Directive 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 6.2884 million tonnes of allowances in respect of additional emissions of combustion installations annually to the extent that this is not justified in accordance with the general methodologies stated in the [NAP] and on the basis of substantiated and verified emission figures and does not exclusively relate to the expansion element of the installations concerned;

2. criterion [No] 5 of Annex III to the Directive: the allocations to certain installations going beyond their expected needs as a result of the application of bonuses for early action, biomass or co-generation;

3. 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;

4. criterion [No] 10 of Annex III to the Directive: the intention of [the Republic of] Poland to transfer allowances from an installation in the coking industry to a power generator in the event of the sale of coke oven gas by the former to the latter;

5. criterion [No] 12 of Annex III to the Directive: the maximum overall amount of CERs and ERUs of 25% which may be used by operators in the Community scheme as a percentage of the allocation of the allowances to each installation that is inconsistent with [the Republic of] Poland's supplementary obligations under the Kyoto Protocol and decisions adopted pursuant to the UNFCCC or the Kyoto Protocol, to the extent that it exceeds 10%.

Article 2

No objections shall be raised to the [NAP], 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 the sum of 76.132937 million tonnes CO_2 equivalent of allowances per year and the adjustment resulting from any lowering of the number of installations covered and one fifth of the total number of allowances [the Republic of] Poland decides to issue pursuant to Article 13(2) of the Directive; and the quantities allocated to additional combustion installations are determined in accordance with the general methodologies stated in the [NAP] and on the basis of substantiated and verified emission figures and exclusively relate to the expansion element of the installations concerned, with the total quantity being further reduced by any difference between the allocations to these installations and the 6.2884 million tonnes set aside annually for these installations; 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 the Directive to the extent that the resulting emission reductions or limitations due to these project activities have been substantiated and verified;

2. the allocations to installations do not go beyond their expected needs as a result of the application of bonuses for early action, biomass or co-generation;

3. 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;

4. the quantity of allowances allocated to an installation that is listed in the [NAP] and operating in its territory is not subject to adjustments as a result of the closure of other installations within that territory;

5. the overall maximum amount of CERs and ERUs which may be used by operators in the Community scheme as a percentage of the allocation of the allowances to each installation is reduced to no more than 10%.

Article 3

1. The total average annual quantity of allowances of 208.515395 million tonnes, reduced by the sum of the adjustment resulting from any lowering of the number of installations covered and one fifth of the total number of allowances [the Republic of] Poland decides to issue pursuant to Article 13(2) of the Directive, and further reduced by any difference between the allocations to additional combustion installations and the 6.2884 million tonnes set aside annually for these installations, 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 the Directive to the extent that the resulting emission reductions or limitations due to these

project activities have been substantiated and verified and exclusively relate to the expansion element of the installations concerned, to be allocated by [the Republic of] Poland according to its [NAP] to installations listed therein 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 the Directive.

3. Any amendments of the [NAP] 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 [NAP], apart from those made to comply with Article 2 of this Decision, are inadmissible.

Article 4

This Decision is addressed to the Republic of Poland.'

Procedure and forms of order sought

16 By application lodged at the Registry of the Court of First Instance on 28 May 2007, the Republic of Poland brought the present action.

17 By separate document lodged at the Registry of the Court of First Instance the same day, the Republic of Poland requested that the expedited procedure under Article 76a of the Rules of Procedure be used. By decision of 10 July 2007, the Court of First Instance (Fifth Chamber) dismissed that request.

18 The composition of the chambers of the Court of First Instance having been modified, the Judge-Rapporteur was assigned to the Second Chamber, to which this case was therefore allocated.

19 By separate document lodged at the Registry of the Court of First Instance on 7 September 2007, the Republic of Poland made an application for interim relief, requesting the President of the Court of First Instance to suspend operation of the contested decision. By order of 9 November 2007, the President of the Court of First Instance dismissed that application.

20 By document lodged at the Registry of the Court of First Instance on 24 August 2007, the United Kingdom of Great Britain and Northern Ireland sought leave to intervene in the current proceedings in support of the Commission. By order of 5 October 2007, the President of the Court of First Instance granted that application. The United Kingdom of Great Britain and Northern Ireland lodged its statement in intervention on 19 December 2007. By documents lodged at the Registry of the Court of First Instance on 7 March 2008, the Republic of Poland and the Commission submitted their observations on the statement in intervention lodged by the United Kingdom of Great Britain and Northern Ireland.

21 By document lodged at the Registry of the Court of First Instance on 16 October 2007, the Republic of Lithuania sought leave to intervene in the proceedings in support of the Republic of Poland. By order of 19 November 2007, the President of the Second Chamber of the Court of First Instance 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 Second Chamber of the Court of First Instance allowed that application, while limiting the rights of the Republic of Lithuania to those provided by Article 116(6) of those rules.

22 By documents lodged at the Registry of the Court of First Instance on 7 and 20 February 2008 respectively, the Slovak Republic and the Republic of Hungary sought leave to intervene in support of the Republic of Poland. By order of 10 April 2008, the President of the Second Chamber of the Court of First Instance found that those applications 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 Second Chamber of the Court of First Instance allowed those applications, while limiting the rights of the Slovak Republic and the Republic of Hungary to those provided by Article 116(6) of those rules.

23 The Republic of Poland claims that the Court should:

— annul the contested decision in whole or in part;

— order the Commission to pay the costs.

24 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 Poland to pay the costs.

Law

25 In general, as appears from the summary of the pleas by the Republic of Poland, appearing in the second part of the application, headed 'Conclusions', those pleas seek to demonstrate that the contested decision 'was adopted by the Commission when it did not have the power to do so, in breach of essential formal requirements and provisions of the EC Treaty, and in excess of its powers'.

26 More precisely, in support of its action, the Republic of Poland makes nine pleas, essentially claiming, first, infringement of the provisions of the Directive, namely Article 9(1) and (3), criteria Nos 1 to 3 and 12 of Annex III, and Article 13(2); and, secondly, infringement of the right of the Republic of Poland to take cognisance, during the procedure, of the evidence on the basis of which the contested decision was adopted, and an attack on its energy security.

I — *The first plea, claiming illegal adoption of the contested decision after the expiry of the three-month period prescribed by Article 9(3) of the Directive*

A — *Arguments of the parties*

27 the Republic of Poland argues that the Commission infringed Article 9(3) of the Directive on the ground that, after the expiry of the three-month period which it had, under that article, to reject the NAP or any aspect of it ('the three-month period'), it was no longer entitled to adopt the contested decision. That time-limit started to run from the date of notification of the NAP, which in this case was 30 June 2006. The Commission's letter of 30 August 2006, in which it sought further information concerning the NAP, did not suspend that time-limit. In support of its argument, the Republic of Poland cites Case T-178/05 *United Kingdom* v *Commission* [2005] ECR II-4807, particularly paragraphs 55 and 73. It concludes that the contested decision should be annulled and the Commission deemed to have accepted the NAP.

28 More precisely, it argues, the judgment in *United Kingdom* v *Commission*, cited in paragraph 27 above, shows that, where the Commission considers an NAP to be incomplete, it cannot reject it and demand that a new NAP be notified until after the expiry of the three-month period. The Commission was therefore wrong, in paragraph 7 of its Communication on further guidance on allocation plans for the 2008 to 2012 trading period of the EU Emission Trading Scheme (COM(2005) 703 final), published on 22 December 2005, to state that the three-month period cannot start to run until a full NAP has been submitted. Similarly, in its letter of 30 August 2006, the Commission reiterated that erroneous interpretation of the rules for applying the three-month period by indicating that it would adopt a decision within a period of not more than three months as from receipt of the full information requested.

29 As regards the letter of 30 August 2006, the Republic of Poland is of the opinion that it cannot constitute a decision rejecting the NAP. Its request for extension of the period for replying to that letter concerned the 10-day period referred to therein and not the 3-month period. It observes that, whereas it did not supply any answer to that letter before

29 December 2006, the Commission did not adopt any rejection decision. The three-month period could not be interrupted by any measure of either of the parties to the procedure.

30 Finally, if the lack of the additional information requested in the letter of 30 August 2006 were sufficient to justify a decision rejecting the NAP, the Commission would then have been required to adopt such a decision before 30 September 2006 and request the Republic of Poland to submit a new complete NAP.

31 The Commission, supported by the United Kingdom of Great Britain and Northern Ireland, argues that, although not stated in the Directive, it is reasonable to consider that the three-month period can start to run only as from notification of the complete NAP. By virtue of the principle of sincere cooperation with Member States, it is under a duty to request them to complete incomplete NAPs, and to do so within three months from its notification. In any event, it argues that, according to consistent administrative practice, the starting point for the three-month period must be taken to be the date of registration of the amended NAP with the Secretariat-General of the Commission, namely, in this case, 6 July 2006.

B — *Findings of the Court*

32 As a preliminary observation, it should be noted that the following matters are not disputed between the parties. First, the Republic of Poland notified the NAP on 30 June 2006, and that notification was accompanied by a letter from the Polish Environment Ministry expressly stating that a number of matters were missing from the NAP, and that they would be communicated to the Commission subsequently. Secondly, the Commission received the NAP on 30 June 2006. In addition, in the letter of 30 August 2006, the Commission expressly indicated to the Republic of Poland that, as things stood, the NAP was incomplete and incompatible with certain criteria of Annex III of the Directive, and therefore invited that Member State to reply to a number of questions and requests for further information. Finally, on 30 October 2006, the Republic of

Poland formally requested an extension of the period for replying to the questions and requests for further information contained in the letter of 30 August 2006.

33 Primarily, the Court must assess whether the arguments by the Republic of Poland, seeking to demonstrate that, in this case, the three-month period laid down in Article 9(3) of the Directive, first, began to run as from 30 June 2006, even though the NAP was incomplete, and, secondly, that it expired on 30 September 2006.

34 Firstly, concerning the question whether the three-month period began to run on 30 June 2006 even though the NAP notified was incomplete, it should firstly be noted that, by virtue of the provisions of Article 9(3) of the Directive, in the three months which follow the notification of an NAP by a Member State, the Commission may reject that NAP or any aspect of it in the event of incompatibility with the criteria of Annex III or the provisions of Article 10 of the Directive.

35 Secondly, as the Court has already held, there is no reason to suppose that, where an incomplete NAP is notified, the three-month period which it has to reject an NAP cannot start to run. A Member State cannot, by notifying an incomplete NAP, indefinitely postpone the Commission's taking a decision pursuant to Article 9(3) of the Directive (*United Kingdom* v *Commission*, cited in paragraph 27 above, at paragraph 73).

36 Thirdly, the case-law shows that the Commission's power to consider and reject NAPs, in accordance with Article 9(3) of the Directive, is severely limited, both in substantive terms and in time. 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 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). Moreover, as regards the limits in time, it should

be noted that Article 9(3) of the Directive makes provision for only one three-month period during which the Commission must state its position on the NAP.

37 In the light of the above considerations, the Court considers that the Republic of Poland is right to maintain that the three-month period started to run as from the notification of the NAP by the Republic of Poland, namely on 30 June 2006.

38 That latter finding cannot be called into question by the Commission's argument that, in substance, the three-month period begins to run, by virtue of a consistent administrative practice, as from the date of registration of the letter giving notification of the NAP with the Secretariat-General of the Commission, namely in this case 6 July 2006.

39 In the first place, the Commission does not adduce any evidence in support of its argument that such a consistent administrative practice exists. Secondly, it is expressly stated in Article 9(3) of the Directive that the starting-point for the three-month period is the notification of the NAP. In this case, the Commission does not deny having received notification of the NAP on 30 June 2006.

40 Secondly, concerning the question whether the three-month period expired on 30 September 2006, it is necessary to assess the effects produced by the Commission's letter of 30 August 2006, in which, first, it found the NAP incomplete and incompatible, and, secondly, it invited the Republic of Poland to reply to a number of questions and requests for further information.

41 First, the case-law shows that a prior review under Article 9(3) of the Directive does not necessarily lead to an authorising decision. The Commission may not intervene except in so far as it considers it necessary to raise objections to certain aspects of the NAP as notified and, if the Member State refuses to amend its NAP, to adopt a decision rejecting the plan. Those objections and the rejection decision may occur during the three months following notification of the NAP. If that does not happen, the NAP as notified becomes definitive and enjoys a presumption of legality which permits the Member State to put it into effect (order in *ENBW Energie Baden-Württemberg*, cited in paragraph 36 above, at paragraph 115). Moreover, having regard to the Commission's severely limited power to examine an NAP, as referred to in paragraph 36 above, such objections and a rejection decision must necessarily be based on a finding of incompatibility of the NAP notified with the criteria for assessment set out in Annex III or with the provisions of Article 10 of the Directive.

42 Next, in the absence of a general power of authorisation stricto sensu on the part of the Commission in relation to the NAP notified, the absence of objections on its part at the expiry of the three-month period cannot form the basis of any presumption of authorisation of the NAP. Therefore, the sole consequence of the expiry of that period is that the NAP becomes definitive and may be implemented by the Member State (order in *EnBW Energie Baden-Württemberg*, cited in paragraph 36 above, at paragraph 120).

43 Therefore, the Court considers that the Commission may intervene before the expiry of the three-month period, not only, initially, by raising objections or putting questions with regard to certain aspects of the NAP notified, but also, subsequently, in the event of refusal by the Member State to amend its NAP, by adopting a decision to reject the NAP notified. Where the adoption of a rejection decision has the effect of interrupting the running of the three-month period, where the Commission raises objections or puts questions concerning certain aspects of the NAP notified, the three-month period is suspended.

44 In this case, it should be noted that, in its letter of 30 August 2006, namely two months after the notification of the NAP, firstly, the Commission formally drew the attention of the Republic of Poland to the fact that the NAP was not only incomplete but also incompatible, as it stood, having regard to the criteria for assessment applicable in the

context of its examination under Article 9(3) of the Directive. Secondly, it invited the Republic of Poland to reply to several questions and requests for further information in order to complete the NAP. Those latter requests particularly concerned a list naming the operators of installations and the quantity of allowances which the Republic of Poland envisaged allocating to them, such data being missing from the NAP. Those two types of data, which are required in accordance with criterion No 10 of Annex III to the Directive, were of fundamental importance in order to enable the Commission to examine the compatibility of the NAP. In the absence of such data, it has to be recognised that the Commission was not in a position to examine the NAP, in accordance with the provisions of Article 9(3) of the Directive. Finally, the Court finds that the documents before it show that, following the letter of 30 August 2006, the Republic of Poland did not refuse to modify its NAP and reply to the questions put by the Commission in that letter.

45 It follows from the above that the letter of 30 August 2006 contained objections, which had been thus raised by the Commission within the three-month period, for the purposes of the case-law cited in paragraphs 41 and 42 above. Therefore, having regard to the considerations set out in paragraph 43 above, the Republic of Poland is wrong to maintain that, in this case, the three-month period, which was suspended by the objections and the questions in the letter of 30 August 2006, expired on 30 September 2006.

46 That conclusion cannot be called into question on the ground that the Commission did not adopt the decision rejecting the NAP before the expiry of the three-month period. As recalled in paragraph 42 above, a decision to reject an NAP, which is capable of taking place at a subsequent time, can be adopted only in so far as the Member State concerned has rejected the Commission's objections or refused to modify its NAP. In this case, it is undisputed that the Polish Environment Minister, in his letter accompanying the NAP, notified on 30 June 2006, was already at that date drawing the attention of the Commission to the incompleteness of the NAP and the fact that the missing elements would be notified subsequently. It is, moreover, equally undisputed that, after the Commission's letter of 30 August 2006, the Republic of Poland, far from refusing to reply to the Commission's questions and requests contained in that letter, or to modify the NAP, on the contrary, on the occasion of discussions between Polish and Commission civil servants, and then formally by the letter of 30 October 2006, asked the Commission to extend the deadline which had been set in order to enable it to submit its answers to the questions and the requests for further information. Moreover, the letter of 30 October 2006 shows that it insisted that the Commission could thus

proceed to a correct and truly complete assessment of the NAP. In those circumstances, the Commission was right to hold that there was no need to reject the NAP at that state, before receiving the reply of the Republic of Poland to the questions and requests for further information contained in its letter of 30 August 2006.

47 It follows from the whole of the reasoning above that the first plea must be dismissed as unfounded.

II — *The second plea, claiming infringement of the duty to state reasons and of Article 9(1) and (3) of the Directive*

A — *Arguments of the parties*

48 the Republic of Poland maintains that the Commission infringed Article 9(1) of the Directive on the ground that it departed, without reason and 'without relevant reasoning' from the assessment of data contained in the NAP, and that it substituted for the analysis of those data the analysis of its own data obtained following the incoherent application of its own method of economic analysis.

49 First, the Republic of Poland maintains that, in the contested decision, the Commission left out of its analysis the data which it supplied in the NAP, and those which it sent to it in reply to its questions in the letter of 30 August 2006. In order to justify the rejection of those data, the Commission claimed that they were unreliable, without however giving a more precise ground. In that respect, the Republic of Poland states that the Commission merely indicated, in recital 5 of the contested decision, that 'the possibility could therefore not be excluded that the actual emissions were overestimated by reason of the emissions figures for earlier years communicated by the Republic of Poland'. The

Commission thus 'discredited' the data supplied by the Republic of Poland and all the efforts in preparing the NAP on the basis of and in accordance with its own instructions.

50 It further accuses the Commission of not having shown that the data entered in the NAP were inappropriate. Concerning, in particular, the emissions declared by the Republic of Poland before 2005, they were the subject of a report in the context of the UNFCCC and reviewed by the Commission without the least observation on its part.

51 the Republic of Poland adds that, in the light of the provisions of Article 9(3) of the Directive, the Commission is required to make an individual assessment, by economic sector covered by the Directive, of the data used by the Member State in preparing the NAP. In that regard, it recalls that criterion No 3 of Annex III to the Directive acknowledges that Member States are entitled to base the methods of allocating allowances on data used in relation to the activities of the various economic sectors covered by the Directive.

52 In its reply, the Republic of Poland argues that the position adopted by the Commission, and which caused it not to take account of the data appearing in the NAP, flows from an erroneous and unjustified interpretation by the Commission of its role in the process of assessing NAPs. It its submission, the Commission's task consisted of proving, by a complete argument, that the method applied in the NAP infringes the provisions of the Directive.

53 Also in the reply, the Republic of Poland insists that, in order to be able to set aside the method used to draw up the NAP, the Commission was under a duty, while respecting the 'predominant role' which Member States enjoy in this respect, to prove clearly and irrefutably that that method infringes the provisions of the Directive. Similarly, it considers that, both in the contested decision and in its defence, the Commission does not adduce evidence that the data used in the NAP are not objective and reliable. Moreover, in recital 5 of the contested decision, the Commission itself recognised that, at the time of its adoption, it did not have any proof that the data in the NAP were

erroneous or incorrect, and merely stated that it was not possible to exclude the possibility that the data in the NAP 'disproportionately inflated the actual levels of gas emissions'.

54 Secondly, the Republic of Poland maintains that the Commission is not entitled, without any justification or consultation of the Member State concerned, to replace the data in that Member State's NAP with its own data, obtained after application of its own method of economic analysis, likewise substituted for that used by the Member State. In assessing an NAP, it argues, the Commission has only the right to examine the data supplied by the Member State. Such a method of assessing those data is distinct from the introduction by the Commission of its own method of economic analysis, from the substitution in that model of its own data, from the discretionary correction of the latter by the Commission, and, finally, from an order given to the Republic of Poland to use the results thus obtained.

55 According to the Republic of Poland, the Commission did not indicate either in its additional guidelines of 2005 (see paragraph 28 above) or in its letter of 30 August 2006 that it intended to use the Primes model as a model for economic analysis for the purposes of assessing growth in gross domestic product (GDP) and the potential for reduction in emissions. It was only in its report of 27 October 2006 on progress made in achieving the objectives of the Kyoto Protocol (COM(2006) 658 final), published after the Republic of Poland had notified the NAP, that the Commission stated that, in order to assess the conformity of an NAP in the light of criteria Nos 2 and 3 of Annex III to the Directive, it would base its reasoning on the 'GDP method', as opposed to the 'sectoral method' used by the Republic of Poland in the NAP.

56 Moreover, concerning the reliability of the Primes model, the Republic of Poland argues that, before adopting the contested decision, the Commission held more precise and recent data concerning Polish GDP. That emerges from the footnote on page 24 of the contested decision, where the Commission states that it did not take account of the data in the interim forecasts of February 2007, published by its Directorate-General for 'Economic and Financial Affairs' on 16 February 2007, as they were available only for

seven Member States and, consequently, did not constitute a sufficiently coherent and equitable set of data for the whole of the Union.

57 Regarding the Commission's argument in its defence that, in accordance with the equal treatment principle, the method of assessing NAPs must be identical for all States, the Republic of Poland maintains that that is contrary both to its own guidelines concerning the drawing-up of an NAP and its decision-making practice in the matter in relation to other Member States. the Republic of Poland observes that use of the most precise and recent information does not constitute 'discrimination'.

58 It adds that, during the procedure for assessing the NAP, the Commission did not at any time allow it to submit observations concerning, first, the finding that the Republic of Poland's assessment method in drawing up the NAP infringed provisions of Community law, second, the choice by the Commission to assess the authorised emissions level according to the 'GDP method' instead of the 'sectoral method' and, finally, the functioning of the Primes model used by the Commission. Discussions within representative committees or bodies concerning the criteria to be used by the Commission do not absolve the latter from its obligation to present its conclusions to the Republic of Poland during the administrative procedure. Therefore, in the absence of such a prior consultation, the Commission infringed the principle of cooperation between the Community institutions and the Member States.

59 In its reply, the Republic of Poland argues, in support of its first plea, that, under the Directive, the Commission has a limited role consisting exclusively of assessing the NAPs which have been notified to it, in the light of the criteria laid down by the Directive. It further points out that, in accordance with Article 11(2) of the Directive, each Member State decides the total quantity of allowances to be allocated and puts in motion the process of allocating the allowances to the operators concerned. It maintains that the Commission is required, before rejecting an NAP, and before imposing greenhouse gas emission authorisations that are more restricted than those laid down in the NAP, to demonstrate in a certain and detailed manner that the latter does not comply with Community law. According to the Republic of Poland, the

objective of the assessment of an NAP by the Commission is not to substitute itself for the Member State in the drawing-up of its NAP.

60 The Commission argues that the second plea concerns the manner in which it used the data in an NAP at the stage of the assessment of the latter.

61 However, the Republic of Poland raised at the reply stage, in the part devoted to the first plea, a new plea alleging infringement of Article 9(3) of the Directive, in that the Commission exceeded the powers of review conferred upon it by that Directive. The Commission argues that the first plea raised in the application concerned only the fact that the contested decision was adopted after the expiry of the three-month period. Therefore, that plea should be declared inadmissible, in accordance with Article 44(1)(c) and Article 48(2) of the Rules of Procedure.

62 As its main argument, the Commission indicates that, in the contested decision, it took the view that certain aspects of the NAP did not comply with several criteria of Annex III to the Directive. It adds that it fixed the annual quantity of greenhouse gas emission allowances in question at 208.515395 million tonnes of CO_2 equivalent, thereby reducing the annual quantity of greenhouse gas emission allowances proposed by the Republic of Poland by 76.132937 million tonnes of CO_2 equivalent.

63 It argues that, in accordance with Article 9(3) of the Directive, in assessing the NAP in the light of criteria Nos 1 to 3 of Annex III to the Directive, it took account of three indicators, namely, first, verified data for actual greenhouse gas emissions in 2005 (in the context of criterion No 2); secondly, forecasts for GDP growth in 2010, and, finally, carbon intensity trends for the years 2005 to 2010 (those two latter indicators falling under criterion No 3). 'Verified data' should be taken to mean data sent by the installations, then surveyed, registered and verified by independent experts.

64 The Commission maintains that a correct assessment of an NAP on the basis of Article 9(3) of the Directive, must enable a situation to be avoided in which surpluses of allowances build up, thereby risking a 'collapse in the market' as happened during the trading period from 2005 to 2007. In its submission, only a 'sufficient rarity of allowances' can contribute to achieving the aim of the Directive, which is to reduce greenhouse gas emissions in economically efficient and cost-effective circumstances. In that respect, the United Kingdom of Great Britain and Northern Ireland argues that the Commission should take into account in its choice of data the fact that the granting of allocations claimed by the Republic of Poland would entail an immediate surplus of allocations and thus an excess of supply on the greenhouse gas emission trading market, which would have an effect on the price of those allowances.

65 The Commission, supported by the United Kingdom of Great Britain and Northern Ireland, considers that Article 9(3) of the Directive does not oblige it to use the method of analysis used by the Member State concerned and the data contained in the NAP which it examines. The Commission does not deny that Member States have a 'broad discretion' in the implementation of their NAP after assessment by the Commission. However, in order to assess an NAP in the light of the criteria in Annex III to and Article 10 of the Directive, it should use the most objective and reliable data and, by virtue of the principle of equal treatment between the Member States, use a single method of economic analysis for all, which might sometimes lead it, in relation to some of them, to use data that are not entirely up to date. The Commission adds that that obligation, particularly to use reliable data on emissions when assessing NAPs under Article 9(3) of the Directive, follows from Articles 14 and 15 of the latter and from Commission Decision 2004/156/EC of 29 January 2004 establishing guidelines for the monitoring and reporting of greenhouse gas emissions pursuant to the Directive (OJ 2004 L 59, p. 1). It maintains that, by reason of the wide discretion which it has when making complex economic and ecological assessments in the context of reviewing NAPs, it is not required to provide detailed explanations on the use of economic and environmental indicators. Finally, it argues that the assessment which it makes pursuant to Article 9(3) of the Directive in not intended to replace the NAP but merely to lay down a maximum level for the total quantity of allowances to be allocated.

66 In order to demonstrate that Member States may use their own method of calculation in determining the total quantity of allowances to be allocated, the Commission cites as examples the United Kingdom of Great Britain and Northern Ireland, the Republic of Slovenia, the French Republic and the Kingdom of Denmark, which have not exceeded the 'fixed limit' for the quantity of allowances possible for the second trading period, with the result that neither their NAPs nor the total quantities of allowances contained therein have been rejected.

67 According to the United Kingdom of Great Britain and Northern Ireland, the choice of policy made by the Commission regarding data, which by nature implies a complex economic decision and is subject to a restricted judicial review, is not limited to an assessment of the quality of the data concerned but also includes an assessment of the reaction which the market is likely to have in relation to the quality of those data. Moreover, an excessive allocation proposal, such as that at issue in this case, clearly risks having a major impact on the greenhouse gas emissions trading system in the Community. Therefore, that allocation proposal should be examined in relation to the additional allowances requested by other Member States in their respective NAPs.

68 According to the Commission, supported by the United Kingdom of Great Britain and Northern Ireland, it is for that reason that, first, it decided to use data concerning emissions in all the Member States during the year 2005, as published on 15 May 2006 in the *Community Independent Transaction Log* (CITL). It adds that, by press release the same day, it indicated that it regarded those data as the best and the most accurate, and that it would take account of them when assessing NAPs for the period from 2008 to 2012. Those data were also reproduced in the report of 2006 (see paragraph 55 above) and, concerning the Republic of Poland, were completed on the basis of its reply to the letter of 30 August 2006. The Commission states that, unlike the emissions data for 2005, those notified by the Republic of Poland in the NAP, which concerned years before 2005, had not been independently verified, so that it was not possible to exclude the possibility that they might 'disproportionately inflate the actual levels of gas emissions'. The fact that those data had been the subject-matter of a report in the context of the UNFCCC and had been surveyed in that regard by the Commission did not automatically entail their 'recognition' in the context of the system for trading allowances.

69 Secondly, the Commission argues, first, that it used the Primes model only to fix the indicator concerning carbon intensity for the period from 2005 to 2010 and, second, that that was a model incorporating the most reliable data as to the degree of reduction of greenhouse gas emissions. That data system was set up and administered, on behalf of the Commission, by independent experts of the University of Athens. Those data were collected during the same period for all Member States, thereby ensuring a comparable level of coherence and accuracy. Finally, the fact that examination of the NAP proved impossible in the second half of 2006, since information indispensable for that purpose had not been sent by the Republic of Poland to the Commission until 2007, cannot place the Republic of Poland in a different, or even more advantageous, position, in relation to the use of GDP forecasts, than that of other Member States which had notified a complete NAP.

B — *Findings of the Court*

70 The Court finds that the second plea is divided into two parts. In the first part, the Republic of Poland accuses the Commission, without reason and 'without a relevant statement of reasons', of setting aside the method of economic analysis which it had used and the data incorporated in the NAP. Having regard to the written pleadings of the parties, the Court considers that, in this part of the second plea, the Republic of Poland accuses the Commission of infringing the duty to state reasons under Article 253 EC. In the second part, it accuses the Commission of infringing the provisions of Article 9(1) and (3) of the Directive, first by replacing that method and those data with its own method of assessment and its own data obtained on the basis of the latter, and, secondly, by imposing on it, by way of review of the NAP, a ceiling for the total quantity of allowances to be allocated.

1. The alleged existence of a new plea, raised by the Kingdom of Poland at the reply stage, claiming that the Commission had exceeded its powers of review

71 It needs to be examined whether, as the Commission argues, the plea claiming infringement of Article 9(3) of the Directive, on the ground that the Commission exceeded the review powers conferred on it by that article, constitutes a new plea, which must therefore be dismissed.

72 It follows from Article 44(1)(c) in conjunction with Article 48(2) of the Rules of Procedure that the original application must contain the subject-matter of the proceedings and a summary of the pleas in law relied on, and that new pleas in law may not be introduced in the course of the proceedings unless they are based on matters of law or of fact which come to light in the course of the procedure.

73 In this case, as is clear from the pleas contained in the last part of the application (see paragraph 25 above), the Republic of Poland generally accuses the Commission of adopting the contested decision when it did not have the power to do so, and of doing so 'in breach of essential rules, of provisions of the EC Treaty and in excess of its powers'. It is clear from that summary of the pleas raised by the Republic of Poland that, from the application stage onwards, it accused the Commission of exceeding its powers under Article 9(3) of the Directive for assessing NAPs.

74 The Court further finds that, in paragraph 53 of its application, the Republic of Poland argues, in its second plea, that, in assessing an NAP, the Commission is entitled only to examine the compatibility of the data supplied by the Member State concerned in relation to the criteria for assessment set out in the Directive. By contrast, it argues, the Commission does not have the right, in that context, to introduce its own data in the place of those supplied by the Member State. The Court also notes that the Republic of Poland adds, in the same paragraph of the application, that the Commission's assessment of the data supplied by a Member State in its NAP must not be confused

with the introduction by the latter of its own method of economic analysis, with the substitution of its own data for those contained in an NAP, with the Commission's correction of the latter at its discretion, or with the order issued to it by the Commission to use the results thus obtained.

75 The Court then notes that, in paragraph 54 of the application, the Republic of Poland argues that each Member State is entitled, under Article 9(3) of the Directive, to expect the Commission to make an individual assessment of the data which it used in drawing up its NAP. Similarly, in paragraph 56 of the application, the Republic of Poland accuses the Commission of not demonstrating that the data contained in the NAP were inappropriate.

76 Moreover, it should be noted that the arguments of the Republic of Poland in paragraph 8 of the reply, under the heading of the first plea, are identical in substance to those which it has made at the same stage of the written procedure, but under the heading of the second plea (see paragraph 53 above). In both cases, it essentially argues that, in order to adopt a decision such as the contested decision, and in particular in order to set aside the method of assessment used by the Member State concerned, the Commission must, while respecting the 'predominant role' of the Member States in drawing up NAPs, prove clearly and irrefutably that that method infringes the provisions of the Directive. It must be noted that the Commission has not pleaded the inadmissibility of that line of argument set out in the reply in support of the second plea. Finally, it is apparent from the arguments presented in paragraph 52 above, which were also developed at the reply stage in support of the second plea, that the Republic of Poland expressly maintains that the position adopted by the Commission, which caused it not to take account of data appearing in the NAP, follows from an erroneous and unjustified interpretation by the latter of its role in the process of assessing NAPs.

77 In any event, the Court finds that, in its defence, the Commission has, first, itself found that the second plea concerned the manner in which it had used the data contained in an NAP at the stage of its assessment, and, secondly, clearly replied to that plea to the effect that it concerned the conditions for exercising its power to review the NAP, in accordance with Article 9(3) of the Directive.

78 It follows from the above findings that the Republic of Poland has, from the application stage onwards, not only accused the Commission of not complying with the conditions for exercising its power to review NAPs under Article 9(3) of the Directive, but also argues, in substance, that the Commission exceeded the scope of that power, and did so by substituting its method of analysis and its data for those used in the NAP, correcting those data at its discretion and obliging the Republic of Poland to use the results which it thus obtained.

79 Therefore, contrary to what the Commission argues, the plea of infringement of Article 9(3) of the Directive, on the ground that the Commission exceeded its powers of review under that article, does not constitute a new plea. It is therefore admissible.

2. The foundation for the second plea

(a) Preliminary observations

80 It is necessary at the outset to recall the aims pursued by the Directive, the allocation of powers between the Commission and the Member States by virtue of its provisions, and, finally, the extent of the judicial review exercised by the Community judicature over a decision such as the contested decision.

The aims of the Directive

81 As regards the aims pursued by the Directive, the Court of First Instance has already ruled that its principal declared objective is to reduce greenhouse gas emissions substantially in order to be able to fulfil the commitments of the Community 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 this purpose is constituted by the Community scheme for greenhouse gas emissions trading (Article 1 of Directive 2003/87 and recital 2 in its preamble), the functioning of which is determined by certain 'sub-objectives', namely the maintenance of cost-effective and economically efficient conditions, the safeguarding of economic development and employment, and the preservation of the integrity of the internal market and of conditions of competition (Article 1 and recitals 5 and 7) (*Germany* v *Commission*, paragraph 36 above, paragraph 124).

The allocation of powers between the Commission and the Member States

82 So far as concerns the allocation of tasks and powers between the Commission and the Member States when transposition of a directive in the environmental field is at issue, the wording of the third paragraph of Article 249 EC is to be remembered, according to which 'a directive shall be binding, as to the result to be achieved, upon each Member State to which it is addressed, but shall leave to the national authorities the choice of form and methods'. It follows that, when the directive in question does not prescribe the form and methods for achieving a particular result, the freedom of action of the Member States as to the choice of the appropriate forms and methods for obtaining that result remains, in principle, complete. Nevertheless, the Member States are required, within the bounds of the freedom left to them by the third paragraph of Article 249 EC, to choose the most appropriate forms and methods to ensure the effectiveness of directives. It also follows that, where there is no Community rule prescribing clearly and precisely the form and methods that must be employed by the Member State, the Commission has the task, when exercising its supervisory power, pursuant in particular to Articles 211 EC and 226 EC, of proving to the required legal standard that the instruments used by the Member State in that respect are contrary to Community law (*Germany* v *Commission*, cited in paragraph 36 above, paragraph 78 and case-law cited).

83 It should be added that it is only by applying those principles that compliance with the principle of subsidiarity enshrined in the second paragraph of Article 5 EC can be ensured, a principle which binds the Community institutions in the exercise of their legislative functions and which is deemed to have been complied with in respect of the adoption of the Directive (recital 30 in its preamble). According to that principle, in areas which do not fall within its exclusive competence the Community is to take action only if and in so far as the objectives of the proposed action cannot be sufficiently achieved by the Member States and can therefore, by reason of the scale or effects of the proposed action, be better achieved by the Community. Accordingly, in a field, such as that of the environment governed by Articles 174 EC to 176 EC, where the Community and the Member States share competence, the Community, that is to say the Commission in the present case, has the burden of proving the extent to which the powers of the Member State and, therefore, its freedom of action, are limited in light of the conditions set out in paragraph 82 above (see, to that effect, *Germany* v *Commission*, cited in paragraph 36 above, at paragraph 79).

84 As regards the Directive, it should be noted that, for the purposes of implementing the system of greenhouse gas emissions trading, it determines clearly and explicitly, in Article 9(1) and (3) and in Article 11(2), the allocation of powers between the Member States and the Commission for the drawing-up, review and implementation of NAPs. Therefore, having regard to the close link between them regarding the allocation of powers, those articles should be considered together, both as regards their interpretation and the assessment of any plea based on their infringement.

— The powers of the Member States

85 Regarding the powers of the Member States, it follows unequivocally from Articles 9(1) and 11(2) of the Directive, that only Member States have the power, at the initial stage, to draw up an NAP stating the total quantity of allowances which they propose to allocate for the period concerned and the manner in which they propose to allocate them, and, subsequently, to decide the total quantity of allowances which they will allocate for each five-year period and to launch the process for individually allocating those allowances.

86 It is true that, by virtue of the second sentence of Article 9(1) of the Directive, the exercise of those exclusive powers of the Member States must be based on objective and transparent criteria such as those listed in Annex III to the Directive. Similarly, in accordance with the second sentence of Article 9(3) of the Directive, where the Commission decides to reject an NAP in whole or in part, the Member State does not take a decision under Article 11(2) of the Directive unless the amendments which it proposes have been accepted by the Commission.

87 However, it should be noted that the Directive does not prescribe clearly and precisely the form and means for achieving the result which it fixes. Moreover, as has been recalled in paragraph 85 above, Member States alone have the power to draw up their NAPs and to decide the total quantity of allowances to be allocated. Therefore, they must be regarded as having a central role in the implementation of the greenhouse gas trading system.

88 In those circumstances, as the Court of First Instance has already ruled, they therefore have a certain margin for manoeuvre in transposing the Directive (see, to that effect, *Germany* v *Commission*, cited in paragraph 36 above, at paragraph 80) 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.

— The powers of the Commission

89 As regards the powers of the Commission, it follows unequivocally from Article 9(3) of the Directive that its power to review and reject NAPs is, as stated in paragraph 37 above, severely limited. As regards the substantive limits of that power, the Commission is empowered only 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. In addition, in accordance with Article 9(3) of the Directive, the Commission is required, if it decides to reject an NAP, to give reasons for its decision. However, the case-law shows that, where the exercise of that severely limited power to review NAPs involves complex

economic and ecological assessments having regard to the general objective to reduce greenhouse gas emissions by means of an economically efficient and cost-effective system of trading allowances (Article 1 and recital 5 of the Directive), the Commission then itself has a discretion (see, to that effect, *Germany* v *Commission*, cited in paragraph 36 above, at paragraph 80).

90 In addition, in order to allow Member States to take, in accordance with Article 11(2) of the Directive, a decision as to the total quantity of allowances to be allocated, and to do so in compliance with their obligation under the second sentence of Article 9(3) of the Directive, according to which that decision cannot be taken unless the Commission has accepted the proposed amendments, the Commission must be regarded as entitled, when assessing an NAP, to make specific criticisms as to incompatibilities found and, in appropriate cases, to formulate proposals or recommendations so that the Member State is able to amend its NAP in a manner which, according to the Commission, would make it compatible with the review criteria laid down by the Directive.

The extent of judicial review

91 In its review of legality in this regard, the Community judicature conducts a full review as to whether the Commission applied properly the relevant rules of law, whose meaning must be determined in accordance with the methods of interpretation recognised by the case-law. On the other hand, the Court of First Instance cannot take the place of the Commission where the latter must carry out complex economic and ecological assessments in this context. In this respect, the Court is obliged to confine itself to verifying that the measure in question is not vitiated by a manifest error or a misuse of powers, that the competent authority did not clearly exceed the bounds of its discretion and that the procedural guarantees, which are of particularly fundamental importance in this context, have been fully observed (see, to that effect, *Germany* v *Commission*, cited in paragraph 36 above, at paragraph 81, and case-law cited).

92 It is in the light of the whole of the principles recalled above that the Court must thus examine the foundation of the second plea raised by the Republic of Poland which essentially seeks an assessment by the Court as to whether, in adopting the contested decision, the Commission infringed Article 9(1) and (3) of the Directive by encroaching on the Member States' power to draw up and implement NAPs, in accordance with Articles 9(1) and 11(2) of the Directive, and thus exceeded the power to review NAPs conferred on it by Article 9(3) of the Directive.

(b) The contested decision

93 As a preliminary observation, it should be noted that, in Article 1(1) of the contested decision, the Commission finds in particular that part of the total quantity of allowances which the Republic of Poland proposes to allocate in the NAP, namely 76.132937 million tonnes of CO_2 equivalent per annum, is incompatible with criteria Nos 1 to 3 of Annex III to the Directive. At the same time, in Article 2(1) of the contested decision, the Commission states that no objections will be raised to the NAP, subject, however, to a number of amendments being made to it, in particular the reduction of the total quantity of allowances to be allocated for the purposes of the Community system by 76.132937 million tonnes of CO_2 equivalent per annum. Finally, in Article 3(1) of the contested decision, it indicates that the total annual average quantity of allowances to be allocated by the Republic of Poland, pursuant to the NAP, to installations mentioned therein and to new entrants is equal to 208.515395 million tonnes of CO_2 equivalent and must not be exceeded.

94 The Court notes that the provisions of the contested decision referred to in paragraph 93 above are all based on the Commission's conclusion in the final paragraph of recital 13 of the contested decision, whereby it finds, in particular, that the average annual excess of the Republic of Poland's allowances for the period 2008-2012, which amounts to 76.132937 million tonnes of CO_2 equivalent at the end of the first stage of calculation, is incompatible with criteria Nos 1 to 3 of Annex III to the Directive.

95 Articles 1(1) and 2(1) of the contested decision expressly refer to that annual excess. Similarly, as mentioned in paragraph 62 above, the Commission's written pleadings show that the ceiling of the annual quantity of greenhouse gas emissions allowances in question fixed in Article 3(1) of the contested decision, of 208.515395 million tonnes of CO_2 equivalent, was obtained by reducing the annual quantity of greenhouse gas emission allowances proposed by the Republic of Poland in the NAP, namely 284.648332 million tonnes of CO_2 equivalent, by the same amount of 76.132937 million tonnes of CO_2 equivalent.

96 Finally, it is in the context of recitals 4 to 13 of the contested decision that the Commission reviewed the compatibility of the NAP with criteria Nos 1 to 3 of Annex III to the Directive. It is therefore necessary to assess whether the second plea is well founded, having regard to the grounds set out in recitals 4 to 13 of the contested decision.

97 The Court must examine the two parts of the second plea in succession, starting with the second part, claiming infringement of Article 9(1) and (3) of the Directive.

98 Having regard to the case-law referred to in paragraph 91 above, since, in order to rule on whether the second plea is well founded, the Court must, at the initial stage, review whether, in the contested decision, the Commission properly applied the relevant rules of law as to the allocation of powers between the Member States and itself, the review by the Court on that question of law must be complete. It is only subsequently, if it has been established that the Commission properly applied those rules, that it is necessary to examine whether the review which it carried out of the compatibility of the NAP with the criteria set out in the Directive and, in particular, its choice of method for the economic and ecological analysis of the NAP are vitiated by an error of assessment.

The foundation of the second part of the second plea

99 In the second part of the second plea, the Republic of Poland accuses the Commission of infringing Article 9(1) and (3) of the Directive by, first, replacing the method of analysis which it had used and the data contained in the NAP by its own assessment method and the data obtained on the basis thereof, and, secondly, by imposing on it, by way of review of the NAP, a ceiling not to be exceeded for the total quantity of allowances to be allocated.

100 First, the Republic of Poland maintains that the Commission did not have the power, having regard to Article 9(3) of the Directive, to replace the assessment method which it had used and the data contained in the NAP by its own assessment method and its own data. In that regard, the Court notes that all the arguments in defence by the Commission on this subject tend to confirm that it misjudged the extent of its powers as defined in the Directive.

101 First, the Commission cannot argue, as appears from its written pleadings, that the Directive does not oblige it to use the data contained in the NAP which it examines, and that, in assessing it, it must use the same method for all the Member States. In accordance with Article 9(3) of the Directive, its power to review NAPs necessarily revolves around the data contained in the NAP in question, since, as has been recalled in paragraphs 82 to 90 above, the Commission must assess their compatibility with the criteria in Annex III and the provisions of Article 10 of the Directive. It is thus necessarily its task to review the choice of data of the Member State concerned for the purposes of drawing up its NAP.

102 It is true that, in the context of its power to review NAPs, the Commission cannot be blamed for drawing up its own method of assessing NAPs, based on the data which it considers the most appropriate, and to use it as a tool for comparison in assessing data contained in the NAPs of the Member States, the compatibility of which with the criteria of Annex III and the provisions of Article 10 of the Directive the Commission

must assess. In that respect, to the extent that the establishment and use of such a model require complex economic and ecological assessments, the Commission does, as recalled in paragraph 89 above, have a discretion, so that use of such an assessment model cannot be challenged unless it would lead to a manifest error of assessment.

103 However, where the Commission decides to adopt a decision on the basis of Article 9(3) of the Directive, it cannot claim, as it argues in its pleadings and as appears from the contested decision, to set aside the data in the NAP in question so as to replace them at the outset by data obtained from its own assessment method. Contrary to what the Commission argues, supported by the United Kingdom of Great Britain and Northern Ireland, it is not for the Commission, by virtue of the principle of equal treatment between Member States, to select and apply a single method for assessing the NAPs of all the Member States.

104 In that respect, it should first be noted that application of the principle of equal treatment between the Member States cannot have the effect of modifying the allocation of powers between the Member States and the Commission, as provided for by the Directive, in accordance with the principle of subsidiarity which is deemed to have been complied with for the adoption of the latter (recital 30 of the Directive). As has been recalled in paragraphs 82 to 90 above, the Member States alone have the power to draw up an NAP and to take a final decision on the total quantity of allowances to allocate.

105 Moreover, as has been recalled in paragraph 82 above, the use of different forms and means by the Member States to attain the objective pursued by a directive is inherent in the very nature of such an act. Therefore, since the Directive does not clearly and precisely prescribe the form and the means which must be used for the purposes of its transposition, it must be held that, in maintaining that, by virtue of the equal treatment principle, it was under a duty to select and apply a single method of assessing NAPs for all the Member States in order to attain the objective pursued by the Directive, the Commission exceeded the margin for manoeuvre conferred upon it by the Directive.

106 To allow the Commission to use a single method of assessing NAPs for all the Member States would amount to acknowledging it as having not only a veritable power of uniformisation in the context of implementing the allowance trading system, but also a central role in the drawing up of NAPs. Neither such a power of uniformisation nor such a central role were conferred on the Commission by the legislature in the Directive, in the context of its power of reviewing NAPs.

107 In this case, it is undisputed that, on the basis of the equal treatment principle, the Commission assessed the NAP having regard to its own data obtained on the basis of its own method of assessment.

108 By proceeding in that way, the Commission thus did not content itself, before the adoption of the contested decision, as it was entitled to do, with comparing the data in the NAP with those which it had obtained from its own assessment method, for the purpose of assessing the compatibility of the former with the criteria set out in the Directive. On the contrary, the review method which it used amounts, in practice, to allowing the Commission itself to draw up its own reference NAP in a totally autonomous manner, and to assess the compatibility of the notified NAPs not having regard to the criteria set out in the Directive but, first and foremost, having regard to the data and results obtained from its own method.

109 Moreover, the Court notes that, as emphasised in paragraph 66 above, the Commission observes in its pleadings that other Member States were able to use their own calculation method to determine the total quantity of allowances to be allocated, in so far as they 'had not exceeded the limit fixed on the quantity of allowances possible for the second trading period', with the result that neither their NAP nor the overall quantity of allowances which they proposed in their NAPs was rejected. Such a line of argument shows that, in a general way, the Commission took the view that its review of the NAPs must necessarily begin with a comparison between the quantity of allowances in the NAP and the quantity which it regarded as 'possible' having regard to the results obtained from its own method of assessment.

110 It follows that, in the final analysis, the Commission limited itself to substituting its own data for those contained in the NAP, without in any way reviewing the compatibility of the latter with the criteria set out in the Directive.

111 Moreover, and still concerning the compliance with the principle of equal treatment between Member States on which the Commission relies in argument, the Court finds that, in recital 3 of the contested decision, the Commission indicated that the NAP had been assessed in particular having regard to the Commission's communication of 7 January 2004 on guidance to assist Member States in the implementation of the criteria listed in Annex III to [the Directive] and on the circumstances under which force majeure is demonstrated (COM(2003) 830 final).

112 The Court notes that, in paragraph 10 of that communication, the Commission expressly indicated, concerning new Member States not referred to in Decision 2002/358, including the Republic of Poland, that their respective objective, pursuant to the Kyoto Protocol, constituted the reference point for criterion No 1 of Annex III to the Directive, that criterion forming the link between the total quantity of allowances and the objective fixed for the Member State pursuant either to Decision 2002/358 or to the Kyoto Protocol itself. It must therefore be concluded that, in its own guidelines, the Commission recognises that the new Member States, including the Republic of Poland, enjoy different treatment from other Member States as regards the drawing-up of their NAPs.

113 As regards the Commission's argument, supported by the United Kingdom of Great Britain and Northern Ireland, that, by virtue of the principle of equal treatment between Member States, it could not take account of certain updated data in the NAP, it must be noted that the purpose of the Directive is to establish an efficient European market in greenhouse gas emission allowances, with the least possible diminution of economic development and employment (see Article 1 of and the fifth recital in the preamble to the Directive). Therefore, even though the Directive aims to reduce greenhouse gas emissions in accordance with the commitments of the Community and its Member States under the Kyoto Protocol, that aim must be achieved, in so far as possible, while respecting the needs of the European economy. It follows that the NAPs developed under the Directive must take due account of accurate data and information relating to emission forecasts for the installations and sectors covered by the Directive. If an NAP was based in part on incorrect information or erroneous evaluations relating to the level

of emissions in certain sectors or certain installations, the Member State in question would have to be entitled to propose amendments to the NAP, including increases to the total quantity of allowances to be allocated, in order to address those problems before they produced market repercussions (*United Kingdom* v *Commission*, cited in paragraph 27 above, at paragraph 60).

114 Similarly, the case-law shows that there is nothing in the wording of the directive or in the nature or the objectives of the system which its establishes to exclude the possibility that a Member State may, following the Commission's decision adopted in accordance with Article 9(3) of the Directive, modify the data contained in its NAP in order, for example, to take account of new information received, in particular, at the time of the second public consultation provided for in Article 11 of the Directive (*United Kingdom* v *Commission*, cited in paragraph 27 above, at paragraph 58).

115 Moreover, as the Court of First Instance recognised in *Germany* v *Commission*, cited in paragraph 36 above, Member States even have the right to carry out subsequent adjustments, after adopting the individual allocation decision in accordance with Article 11(2) of the Directive.

116 Finally, it should be noted that public consultation, as provided for in Article 11(2) of the Directive, before the adoption of a final decision on the basis of that same provision, would be rendered devoid of purpose and the observations of the public would be purely theoretical if modifications of the NAP capable of being proposed after a decision by the Commission taken pursuant to Article 9(3) of the Directive, were limited to those envisaged by the Commission (see, by analogy, *United Kingdom* v *Commission*, cited in paragraph 27 above, at paragraph 57).

117 Having regard to the case-law referred to above, it should be noted that Member States may therefore, without necessarily being bound by the recommendations formulated

by the Commission in a decision taken in accordance with Article 9(3) of the Directive, not only correct and update their NAPs after such a decision, but also adjust them after the adoption of their individual allocation decision.

118 Therefore, in the light both of the wording of the Directive and the general system and objectives of the system which it establishes and of the case-law relating thereto, the Commission is required permanently to ensure that the NAPs take account of the most exact and thus the most up-to-date information possible in order to cause the least damage to economic development and employment, while at the same time maintaining an efficient system of greenhouse gas emission allowances.

119 It follows from the above considerations that the Commission's argument that, by virtue of the principle of equal treatment between Member States, it could not take account of certain updated data in the NAP must be dismissed as unfounded.

120 Having regard to the whole of the arguments above, and without there being any need to rule on whether the Commission was right to choose the Primes model as the model for assessing NAPs, it must be concluded that the Republic of Poland is right to argue that the Commission did not have the power to replace the data contained in the NAP with its own data, obtained on the basis of a single method of assessment applied to all the Member States.

121 Secondly, the Republic of Poland argues, essentially, that the Commission infringed the provisions of Article 9(3) of the Directive in that, having regard to the provisions of Article 11(2) of the Directive, it did not have the right, at the conclusion of the review of the NAP, to impose a ceiling upon it for the total quantity of allowances to be allocated.

122 As is apparent from the arguments presented in paragraph 65 above, the Commission argues that the assessment which it makes pursuant to Article 9(3) of the Directive is not designed to replace the NAP but merely to lay down a maximum level for the total quantity of allowances to be allocated.

123 In that regard, this Court considers that, by laying down in the contested decision such a ceiling for allowances above which the NAP would be regarded as incompatible with the Directive, the Commission exceeded the limits of its review power under Article 9(3) of the Directive.

124 It is true that, as noted above, the Commission alone has the power, in accordance with Article 9(3) of the Directive, to review or reject NAPs drawn up by Member States, having regard to the criteria set out in the Directive.

125 However, having regard to the principles recalled in paragraphs 82 to 90 above, the Commission cannot claim, as it argues in its pleadings, that by virtue of that latter power it may lay down a maximum level for the total quantity of allowances to be allocated.

126 On the contrary, as is expressly clear from the case-law, in accordance with Article 11(2) and (3) of the Directive, it is for each Member State, not the Commission, to decide on the total quantity of allowances it will allocate for the period in question, to initiate the process of allocation of those allowances and to rule on allocation of those allowances (Order in Case C-503/07 P *Saint-Gobain Glass Deutschland* v *Commission* [2008] ECR I-2217, paragraph 75).

127 In this case, by imposing in the operative part of the contested decision an allowances ceiling above which the NAP would be regarded as incompatible with the assessment criteria set out in the Directive, the Commission substituted itself, in practice, for the Republic of Poland for the purposes of fixing the total quantity of allowances, in accordance with Article 11(2) of the Directive. The effect of that operative part is that the Republic of Poland is obliged to modify the NAP in such a way as to make the total quantity of allowances in any event less than or equal to that ceiling, failing which it would find it impossible to adopt a decision in accordance with Article 11(2) of the Directive.

128 Therefore, such a decision has the effect not only of depriving the provisions of Article 11(2) of the Directive of their effect, but also, and in any event, of encroaching on the exclusive competence which that article confers on the Member States in deciding the total quantity of allowances which they will allocate in respect of each five-year period as from 1 January 2008.

129 Finally, this Court must dismiss the Commission's argument, supported by the United Kingdom of Great Britain and Northern Ireland, that annulment of the contested decision, on the ground that the Commission could not fix a ceiling for the total quantity of allowances to be allocated by reducing the amount proposed by the Republic of Poland in the NAP of the excess of allowances which it has identified, would risk a collapse of the greenhouse gas emissions trading market. Even if that argument were well founded, it cannot justify maintaining the contested decision in force in a community governed by the rule of law such as the Community, since that act was adopted in breach of the distribution of powers between the Member States and the Commission, as defined in the Directive.

130 Similarly, the Court must dismiss the argument by the United Kingdom of Great Britain and Northern Ireland that it is for the Commission to choose data, if only by reason of its choice of policies. On the contrary, this Court considers that it is for the Member States to choose the measures which, in their view, are the best suited to attaining the

objective set by the Directive in the specific context of the national energy market. The approach of the Commission, supported by the United Kingdom of Great Britain and Northern Ireland, consisting of the view that only the data which it has chosen may be used for the purposes of drawing up an NAP, clearly deprives Member States of their margin for manoeuvre, as stated in paragraph 88 above.

131 It follows from the above considerations that, in fixing a maximum level for the total quantity of allowances to be allocated in the operative part of the contested decision, the Commission exceeded the powers conferred upon it pursuant to Article 9(3) of the Directive.

132 It follows from the conclusions drawn in paragraphs 120 and 131 above that the Republic of Poland is right, in the second part of the second plea, to accuse the Commission of infringing Article 9(1) and (3) of the Directive on the ground that, first, by replacing the data contained in the NAP with its own data, obtained from its own method of assessing the NAPs of the Member States, and, secondly, by fixing the maximum level for the total quantity of allowances to be allocated by the Republic of Poland during the period from 2008 to 2012, it exceeded the powers conferred upon it by virtue of the provisions of Article 9(3) of the Directive.

133 Accordingly, without there being any need to rule on the other claims by the Republic of Poland in support of the second part of the second plea, the latter must be declared well founded.

134 In those circumstances, it is only for the sake of completeness that the Court will now examine whether the arguments in support of the first part of the second plea are well founded.

The first part of the second plea, claiming infringement of the duty to state reasons

135 In the first part of the second plea, the Republic of Poland argues that the Commission set aside without reason the method of economic analysis chosen for drawing up the NAP and also the data obtained on the basis of that method and entered in that NAP.

136 As a preliminary observation, it should be noted that the statement of reasons required by Article 253 EC must show clearly and unequivocally the reasoning of the Community authority which adopted the contested measure, so as to enable the persons concerned to ascertain the reasons for it in order to defend their rights and to enable the competent court to exercise its power of review (Case C-156/98 *Germany* v *Commission* [2000] ECR I-6857, paragraph 96; Case T-231/99 *Joynson* v *Commission* [2002] ECR II-2085, paragraph 164).

137 The requirement to state reasons must be assessed in the light of the circumstances of the case, in particular the content of the measure in question, the nature of the reasons given and the interest which the addressees of the measure, or other parties to whom it is of direct and individual concern, may have in obtaining explanations (Case T-198/98 *Micro Leader Business* v *Commission* [1999] ECR II-3989, paragraph 40). It is not necessary for the reasoning to go into all the relevant facts and points of law, since the question whether the statement of reasons meets the requirements of Article 253 EC must be assessed with regard not only to its wording but also to its context and to all the legal rules governing the matter in question (Case C-156/98 *Germany* v *Commission*, cited in paragraph 136 above, at paragraph 97; *Joynson* v *Commission*, cited in paragraph 136 above, at paragraph 165).

138 It should be observed that compliance with the obligation under Article 253 EC to state reasons, as reaffirmed in the final sentence of Article 9(3) of Directive 2003/87, which concerns decisions adopted by the Commission rejecting the whole or part of an NAP, is of particularly fundamental importance because here exercise of the Commission's power of review under Article 9(3) of the directive entails complex economic and ecological assessments and review by the Community judicature of the legality and merits of those assessments is restricted (see, to that effect, Case T-374/04 *Germany* v *Commission*, cited in paragraph 36 above, at paragraph 168, and the case-law there cited).

139 Principally, as the Court has already emphasised in paragraphs 87 and 88 above, in so far as the directive does not lay down, clearly and precisely, the form and the means which have to be used by the Member States in order to implement the aims fixed by the directive, the latter have a certain margin for manoeuvre. That is particularly so as regards the choice of method of economic analysis and calculation of data for the purposes of the drawing-up of NAPs by the Member States.

140 Moreover, as has been recalled in paragraph 89 above, it follows from Article 9(3) of the Directive that the Commission is empowered only to verify the conformity of the measures taken by the Member State with the criteria set out in Annex III to and the provisions of Article 10 of the Directive.

141 Moreover, the provisions of Article 14(1) of the Directive, providing that the Commission is to adopt guidelines for the surveillance and declaration of greenhouse gas emissions, based on the principles defined in Annex IV to the Directive, cannot be interpreted as meaning that the Community legislature recognised the Commission as

having a power to determine the method of economic analysis and calculation of data which have to be used by the Member States in order to draw up their NAP.

142 The provisions of Article 5, Article 14(2) and (3), and Article 15 of the Directive show that such guidelines determine the conditions for surveillance and declaration of greenhouse gas emissions by the installations whose activities are covered by Annex I to the Directive, and do so under the control of the Member States. Consequently, the guidelines adopted by the Commission on the basis of Article 14(1) of the Directive and applicable in this case, namely those adopted by Decision 2004/156, are designed only to allow the installations and the Member States to gather the most reliable data.

143 It was therefore the duty of the Commission, in the exercise of its review power under Article 9(3) of the Directive, to explain in what way the instruments used by the Republic of Poland in drawing up the NAP were incompatible with the criteria in Annex III and the provisions of Article 10 of the Directive. Moreover, as has been recalled in paragraph 90 above, it is explicit from the final sentence of Article 9(3), of the Directive that the legislature was concerned to insist on the duty to state reasons which binds the Commission when it adopts a decision rejecting an NAP.

144 In this case, it should be noted that, in recital 5 of the contested decision, concerning review of the compatibility of the NAP with criterion No 2 of Annex III to the Directive, the Commission rejected the data communicated by the Republic of Poland concerning the years before 2005 as 'less reliable', on the ground, according to the Commission, that, first, they had not been verified in an independent and coherent manner and,

secondly, it was not certain that they precisely corresponded to the number of installations included in the system by the Republic of Poland. It concluded in the same recital that 'it cannot be excluded that emissions figures reported by Poland in respect of earlier years overstate actual emissions' and that 'a starting point, which would be calculated as the average of independently verified emissions figures from 2005 and other figures proposed by Poland, would be likely not to truly represent actual emissions and would not ensure overall allocation not to be more than is needed'.

145 As regards the Commission's rejection of the method of economic analysis used by the Republic of Poland in drawing up the NAP, the Court notes that, concerning review of the compatibility of the NAP with criterion No 3 of Annex III to the Directive, the Commission merely stated, in recital 8 of the contested decision, that, of all the data at its disposal, it considered those obtained from the Primes model to be the most accurate and reliable estimates of GDP growth and carbon intensity improvement rates. However, the Commission did not set out any justification in the contested decision to explain in what way the method of economic analysis used by the Republic of Poland was not reliable.

146 As regards the rejection of the data contained in the NAP on the ground that they were not, in the Commission's view, the best available and that there was therefore a risk that emissions by the Republic of Poland might be overestimated, the Court finds, on a reading of the contested decision, that the Commission merely compared the total quantity of allowances proposed by the Republic of Poland in the NAP with the results of its own calculations. Thus, on the basis of that comparison, it took the view that an

overestimation of the said quantity could not be excluded, and therefore decided, on the strength of that mere hypothesis, to set aside the data entered by the Republic of Poland in the NAP.

147 Nor has the Commission in any way identified in the contested decision the data entered in the NAP which it regarded as 'less reliable'. At the very most, it limited itself, in recital 5 of the contested decision, to referring to data notified by the Republic of Poland in respect of earlier years.

148 Similarly, the Commission has not explained in what way the data entered in the NAP were not reliable. At the very most, it stated that they had not been verified in an independent and coherent manner.

149 On that latter point, the Court considers that, having regard to the burden of proof incumbent upon it, as recalled in paragraph 84 above, the Commission has not provided anything in the contested decision capable of sufficiently explaining in what way the choice of the method of economic analysis and the data used by the Republic of Poland were contrary to Community law.

150 Moreover, still on that latter point, it should be noted that the Republic of Poland states that the data entered in the NAP had been the subject of a report within the framework of the UNFCCC and had therefore been surveyed by the Commission. However, in reply to that argument, the Commission merely states that that does not automatically entail their 'recognition' in the context of the allowance trading system.

151 On that subject, the Court considers that, in so far as the Directive does not lay down a method of economic analysis which Member States have to use in order to draw up their NAPs and, in that respect, leaves the latter a certain margin for manoeuvre, such a reasoning does not explain the reasons why the Commission set aside the said data used by the Republic of Poland. Since the Commission does not challenge either the fact that the data entered in the NAP had formed the subject of a report to the UNFCCC or the fact that, as the Republic of Poland states, it reviewed those data itself, the Court considers that it cannot a priori be excluded that those data have a certain degree of reliability. Consequently, it was for the Commission, at the very least, to explain in what way those data entered in the NAP by the Republic of Poland were not reliable and, therefore, could be rejected in accordance with Article 9(3) of the Directive.

152 The mere claim by the Commission that, as recital 8 of the contested decision shows, its own calculations lead to the most reliable results is not sufficient, having regard to the allocation of powers between the Member States and the Commission referred to in paragraphs 82 to 90 above, to explain in what way the data used by the Republic of Poland in the NAP do not comply with the criteria in Annex III to the Directive.

153 It follows from the above arguments that, having regard to the margin for manoeuvre enjoyed by Member States in drawing up their NAPs, by setting aside in that way the method of economic analysis used by the Republic of Poland and the data entered in the NAP, the Commission infringed the obligation to state reasons for the contested decision. Consequently, the first part of the second plea must also be declared well founded.

154 It follows from the conclusions drawn in paragraphs 133 and 153 above, and from the considerations formulated by the Court in paragraphs 93 to 95 above, that both parts of the second plea must be upheld, and that Articles 1(1), 2(1) and 3(1) of the contested decision must therefore be annulled.

Consequences of the annulment of Articles 1(1), 2(1) and 3(1) of the contested decision on the other provisions in its operative part

155 At this stage of the examination of the present action, the Court must assess what consequences the annulment of the provisions of the contested decision referred to in paragraph 154 above may have for the legality of the other provisions in that measure.

156 First, it follows from settled case-law that partial annulment of a Community act is possible only if the elements the annulment of which is sought may be severed from the remainder of the act (Case C-29/99 *Commission* v *Council* [2002] ECR I-11221, paragraph 45; Case C-239/01 *Germany* v *Commission* [2003] ECR I-10333, paragraph 33; see also, to that effect, Case C-378/00 *Commission* v *Parliament and Council* [2003] ECR I-937, paragraph 30). Similarly, the Court has repeatedly ruled that that requirement of severability is not satisfied in the case where the partial annulment of an act would have the effect of altering its substance (Case C-244/03 *France* v *Parliament and Council* [2005] ECR I-4021, paragraph 13; see also, to that effect, Joined Cases C-68/94 and C-30/95 *France and Others* v *Commission* [1998] ECR I-1375, paragraph 257, and *Commission* v *Council*, at paragraph 46).

157 In this case, Article 1 of the contested decision begins as follows: 'The following aspects of the [NAP] of Poland for the first five-year period mentioned in Article 11(2) of the Directive are incompatible respectively with...'. Then, in paragraphs 1 to 5 of that article, the Commission enumerates various incompatibilities of the NAP with a number of the

criteria in Annex III to the Directive. Bearing in mind the structure of Article 1, any annulment of certain of its paragraphs would have the effect of reducing the number of incompatibilities with the Directive found in the contested decision.

158 Article 2 of the contested decision begins as follows: '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'. Then, in paragraphs 1 to 5 of that article, the Commission prescribes, in each paragraph, the modification of the NAP which it regards as necessary in order to remedy the incompatibility found in the corresponding paragraph of Article 1. Thus, any annulment of certain of its paragraphs only would have the effect of maintaining in force the Commission's undertaking not to raise objections to the NAP, while reducing the number of modifications subject to which that undertaking was initially given.

159 Similarly, it should be noted that, as is apparent from paragraphs 157 and 158 above, Articles 1 and 2 of the contested decision are closely interlinked. Each incompatibility referred to in the five paragraphs of Article 1 is the subject, in the five paragraphs of Article 2 of the same decision, of a proposal for modification in order to render the NAP compatible, in the Commission's view, with the Directive. Thus, if one of the incompatibilities found by the Commission were to be unjustified, and set aside for that reason, the paragraph of Article 2 proposing modifications in order to remove that incompatibility would automatically become devoid of purpose.

160 It follows from the structure of those two articles that their paragraphs 1 to 5 cannot be regarded as severable for the purposes of the case-law referred to in paragraph 156 above. Any annulment of one of the paragraphs of Article 1, like that of the corresponding paragraph of Article 2, would have the effect of altering the very substance of the contested decision.

161 Such an annulment would replace the contested decision, according to which the NAP could be adopted subject to five specific modifications enabling five incompatibilities with the criteria in Annex III to the Directive to be remedied, with a different decision according to which that plan could be adopted subject to a smaller number of modifications. The fact that the decision thus replacing the contested decision would be substantially different from it is made all the more true by the fact that the second plea raised by the Republic of Poland calls into question the incompatibility found and the corresponding modification demanded respectively in Articles 1(1) and 2(1) of the contested decision. It is precisely that incompatibility that is supposed to require the most significant modification of the NAP.

162 As for Article 3(2) and (3) of the contested decision, it is sufficient to point out that those provisions contain further details concerning the implementation of the other provisions of the contested decision.

163 It follows from the whole of the above considerations that since, as is apparent from paragraph 154 above, Articles 1(1), 2(1) and 3(1) of the contested decision must be annulled, it is necessary, without examining the other pleas raised in support of this action, to annul the latter in its entirety.

Costs

164 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 the Republic of Poland has pleaded.

165 Under the first paragraph of Article 87(4) of the Rules of Procedure, Member States intervening in the dispute are to bear their own costs. The Republic of Hungary, the Republic of Lithuania, the Slovak Republic and the United Kingdom of Great Britain and Northern Ireland must therefore bear their own costs.

On those grounds,

THE COURT OF FIRST INSTANCE (Second Chamber)

hereby:

1. Annuls Commission Decision C(2007) 1295 final of 26 March 2007 concerning the national allocation plan for the allocation of greenhouse gas emission allowances notified by Poland 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;

2. Orders the Commission to pay, in addition to its own costs, those incurred by the Republic of Poland;

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

Pelikánová Jürimäe Soldevila Fragoso

Delivered in open court in Luxembourg on 23 September 2009.

[Signatures]

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