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Order of the Court of First Instance (Third Chamber) of 30 April 2007. EnBW Energie Baden-W[#252]rttemberg AG v Commission of the European Communities. Action for annulment - Directive 2003/87/EC - Inadmissibility. Case T-387/04.

Court of First Instance of the European Communities

European Court reports 2007 Page II-01195

*2007 ECJ EUR-Lex LEXIS 2361;*2007 ECR II-01195

September 27, 2004

April 30, 2007

TYPE: [*1] Order

SUBJECT: Environment; Competition; State aids

PROCEDURE: Action for annulment - inadmissible

DISPOSITION: On those grounds,

THE COURT OF FIRST INSTANCE (Third Chamber)

hereby orders:

1. The application is dismissed as inadmissible.

2. The applicant shall bear its own costs and pay those of the defendant.

3. The intervener shall bear its own costs.

Luxembourg, 30 April 2007.

LANGUAGE: German;

INTRODUCTION: In Case T-387/04,

EnBW Energie Baden-W[#252]rttemberg AG, established in Karlsruhe (Germany), represented by C.-D. Ehlermann, M. Seyfarth, A. Gutermuth and M. Wissmann, lawyers,

applicant,

v

Commission of the European Communities, represented by U. W[#246]lker, M. Niejahr and T. Scharf, acting as Agents,

defendant,

supported by

Federal Republic of Germany, represented by W.-D. Plessing and U. Forsthoff, acting as Agents, assisted by D. Sellner and U. Karpenstein, lawyers,

intervener,

APPLICATION for the annulment of Commission Decision C (2004) 2515/2 final of 7 July 2004 concerning the national allocation plan for the allocation of greenhouse gas emission allowances notified by Germany in accordance with Directive 2003/87/EC of [*2] 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 (Third Chamber),

composed of M. Jaeger, President, J. Azizi and E. Cremona, Judges,

Registrar: E. Coulon,

makes the following

Order

JUDGMENT: Legal framework

1. 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) establishes, with effect from 1 January 2005, a scheme for greenhouse gas emission allowance trading within the Community ('the allowance trading scheme') in order to promote reductions of greenhouse gas emissions, in particular, carbon dioxide ('CO 2 ') in a cost-effective and economically efficient manner (Article 1 of Directive 2003/87). Directive 2003/87 is based on the United Nations Framework Convention on Climate Change and the Kyoto Protocol. The Kyoto Protocol was [*3] approved by Council Decision 2002/358/EC of 25 April 2002 concerning the approval, on behalf of the European Community, of the Kyoto Protocol to the United Nations Framework Convention on Climate Change and the joint fulfilment of commitments thereunder (OJ 2002 L 130, p. 1). It entered into force on 16 February 2005.

2. The Community and its Member States committed themselves to reducing their aggregate anthropogenic emissions of the greenhouse gases listed in Annex A to the Kyoto Protocol by 8% as compared with 1990 levels in the period 2008 to 2012 (fourth recital in the preamble to Directive 2003/87).

3. For that purpose, Directive 2003/87 provides, essentially, that emissions of greenhouse gases from the installations listed in Annex I thereto are subject to prior authorisation and to the allocation of allowances under the national allocation plans ('NAPs'). If an operator succeeds in reducing its emissions, it may sell its surplus allowances to other operators. Conversely, the operator of an installation whose emissions are excessive may buy the necessary allowances from an operator who has a surplus.

4. Under Annex I thereto, Directive 2003/87 applies, [*4] in particular, to certain installations in the energy sector, namely combustion installations with a rated thermal input exceeding 20 megawatts (MW), mineral oil refineries and coke ovens.

5. Directive 2003/87 provides for a first phase from 2005 to 2007 (inclusive) ('the first allocation period'), which precedes the first period of commitments under the Kyoto Protocol, followed by a second phase from 2008 to 2012 (inclusive) ('the second allocation period'), corresponding to that first period of commitments (Article 11 of Directive 2003/87).

6. More specifically, the allowance trading scheme is based, on the one hand, on the obligation to hold a permit, issued in advance, to emit greenhouse gases (Articles 4 to 8 of Directive 2003/87) and, on the other, on allowances permitting the operator to emit a certain quantity of greenhouse gas (Article 12(3) of Directive 2003/87).

7. The conditions and procedures in accordance with which the competent national authorities are to allocate allowances under a NAP to operators of installations are laid down in Articles 9 to 11 of Directive 2003/87.

8. Thus, the first subparagraph of Article 9(1) of Directive [*5] 2003/87 provides that:

'For each period referred to in Article 11(1) and (2), each Member State shall develop a [NAP] stating the total quantity of allowances that it intends to allocate for that period and how it proposes to allocate them. The [NAP] 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.'

9. The Commission provided that guidance in its Communication COM (2003) 830 final of 7 January 2004 on guidance to assist Member States in the implementation of the criteria listed in Annex III to Directive 2003/87 and on the circumstances under which force majeure is demonstrated ('the Commission guidance').

10. The second subparagraph of Article 9(1) of Directive 2003/87 provides that:

'For the period referred to in Article 11(1), the [NAP] 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 [NAP] [*6] 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.'

11. Article 9(3) of Directive 2003/87 provides that:

'Within three months of notification of a [NAP] by a Member State under paragraph 1, the Commission may reject that [NAP], or any aspect thereof, on the basis that it is incompatible with the criteria listed in Annex III or with 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.'

12. Article 10 of Directive 2003/87 provides that, for the first allocation period, Member States are to allocate at least 95% of the allowances free of charge.

13. Article 11 of Directive 2003/87, concerning the allocation and issue of allowances, provides as follows:

'1. For the three-year period beginning 1 January 2005, each Member State shall decide upon the total quantity of allowances it will allocate for that period and the allocation of those allowances to the operator of each installation. This decision [*7] shall be taken at least three months before the beginning of the period and be based on its [NAP] developed pursuant to Article 9 and in accordance with Article 10, taking due account of comments from the public.

2. 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 [NAP] developed pursuant to Article 9 and in accordance with Article 10, taking due account of comments from the public.

3. Decisions taken pursuant to paragraph 1 or 2 shall be in accordance with the requirements of the Treaty, in particular Articles 87 and 88 thereof. When deciding upon allocation, Member States shall take into account the need to provide access to allowances for new entrants.

[--]'

14. Annex III to Directive 2003/87 sets out 11 criteria applicable to [NAPs].

15. According to the first criterion [*8] in Annex III:

'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.'

16. According to the fifth criterion in Annex III:

'The [NAP] 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.'

17. With regard to [*9] the fifth criterion, point 47 of the Commission guidance provides that '[n]ormal state aid rules will apply'.

18. According to the 10th criterion in Annex III, '[t]he [NAP] shall contain a list of the installations covered by this Directive with the quantities of allowances intended to be allocated to each.'

19. Under Article 12(1) of Directive 2003/87, it is to be possible for allowances to be transferred between natural and legal persons within the Community or to persons in third countries. Under Article 12(3), the operator of each installation is to surrender to the competent authority, before 1 May each year, a number of allowances equal to the total emissions from that installation during the preceding calendar year, and those allowances are to be subsequently cancelled.

20. Under Article 13(1) of Directive 2003/87, allowances are to be valid only for emissions during the period for which they are issued.

The facts

I - The Commission's letter of 17 March 2004

21. In a joint letter from the Directors General of DG Environment and DG Competition to the Member States, dated 17 March 2004, on the subject of 'State [*10] Aid and [NAPs]', the Commission set out the procedures to be followed and the criteria of which it intended to take account in assessing possible State aid granted in the context of the implementation of NAPs in accordance with the criteria laid down in Annex III to Directive 2003/87.

22. In that letter, the Commission set out the way in which it intended to interpret the fifth criterion in Annex III to Directive 2003/87 in its assessment of NAPs. The Commission pointed out, first of all, that it had concluded - in its decisions of 29 March 2000, 28 November 2001 and 24 June 2003 concerning, respectively, cases N 653/99 (Denmark, CO 2 quotas) (OJ 2000 C 322, p. 9), N 416/01 (United Kingdom, emission allowance trading scheme) (OJ 2002 C 88, p. 16) and N 35/03 (Netherlands, NO x [mono-nitrogen oxides] emission allowance trading scheme) (OJ 2003 C 227, p. 8) - that the four criteria laid down in Article 87(1) EC had been fulfilled. In those decisions, the Commission had considered that an emission allowance was equivalent to an intangible asset the value of which was determined by the market and that, therefore, the fact that the State gave it to undertakings free of charge [*11] gave them an advantage; that by not selling the allowance, by auction for example, the State deprived itself of a resource, with the result that such an advantage implied a transfer of State resources; and that, finally, the advantage at issue was selective, affected trade between the Member States and distorted or could have distorted competition.

23. The Commission also stated in its letter that even though the Community trading system was different from the national schemes referred to in those decisions, it considered that the NAPs may contain elements which distort competition and constitute State aid. It indicated that such was the case, for example, where a Member State allocated more allowances to undertakings than were needed to cover their projected emissions during the allocation period, since

the undertakings could sell the surplus allowances and retain the proceeds of the sale. The Commission pointed out that such an advantage could seriously distort competition and since there would be no link to an environmental counterpart, the Commission would consider it State aid incompatible with the common market. The Commission therefore pointed out that if it discovered [*12] that a NAP favoured certain undertakings in that manner, it would initiate a State aid proceeding on its own initiative. Even if the NAP did not contain any 'over-allocation' in that sense, there would still be an element of State aid, having regard to Article 10 of Directive 2003/87, if a Member State allocated more than 95% of the allowances for the first allocation period free of charge, thereby foregoing public revenue.

24. Finally, the Commission indicated in its letter that, for the first allocation period, it would not require formal notification of NAPs under Article 88(3) EC but would carefully review NAPs notified to it under Directive 2003/87 and would in each case consider, in particular, whether any serious distortions of competition incompatible with the Treaty were likely to arise. It pointed out that, in such a case, it would not hesitate to take action to the furthest possible extent that State aid rules allowed.

II - The German NAP

25. On 31 March 2004, the Federal Republic of Germany notified the Commission of the German NAP for the first allocation period in accordance with Article 9(1) of Directive No 2003/87.

26. The German NAP consists [*13] of a 'macroplan' and a 'microplan'. The macroplan contains the national emissions budget and fixes the total allowances to be allocated in accordance with Germany's commitments to reduce emissions. The microplan regulates the allocation of allowances to the operators of the various installations and provides for the setting up of a reserve of allowances for new entrants.

27. In accordance with the rule limiting the quantity of allowances, which flows from the first criterion in Annex III to Directive 2003/87, the German NAP limits, in principle, the emission allowances allocated to operators to what is needed to cover previous emissions (existing installations) or foreseeable emissions (new installations). However, that principle is subject to special rules as set out below.

28. With regard to old installations, that is to say, those whose operation commenced before 31 December 2002, the quantity of allowances to be allocated free of charge is calculated on the basis of their annual average emissions of CO 2 in the past, in accordance with the method known as 'grandfathering'. The quantity of allowances to be allocated is determined by multiplying [*14] the data from past emissions by an 'implementation factor' (Erf[#252]llungsfaktor) determined in relation to the emissions reduction objective to be attained. Generally, the implementation factor is less than 1 so as to permit a reduction as compared with the previous level of emissions and, ultimately, to limit the total quantity of allowances to be allocated.

29. According to the so-called 'malus' rule, the applicable implementation factor will be reduced by 0.15 during the second allocation period for old combustion power stations operating in a particularly inefficient way, namely, lignite-fuelled combustion power stations and oil-fuelled combustion power stations whose net energy efficiency - which determines what part of the energy contained in the fuel is converted into electricity - is less than 31% or 36% respectively. However, the reduction will not be applied to lignite-fuelled combustion power stations if the operators of such stations replace them with other power stations in accordance with the 'transfer rule' (see paragraph 31). The malus rule is designed to constitute an incentive to replace old and inefficient installations rapidly. [*15]

30. In accordance with the so-called 'new entrants' rule, new installations, that is to say, those which came into service after 1 January 2005 or increased their production capacity after that date, are allocated, during their first 14 years of operation, a quantity of allowances corresponding to their foreseeable emissions, which are assessed by taking as a benchmark the 'best available techniques'. During that period, the implementation factor remains fixed at 1. For installations producing electricity, the upper limit of the allowances is fixed at 750g CO 2 /kWh. However, if emissio ns are lower, the allowances must not exceed the real needs of the installation, with a lower limit of 365g CO 2 /kWh.

31. According to the so-called 'transfer' rule, if an installation in Germany is closed and if it is so requested, the allowances allocated to that installation are not withdrawn if the operator puts a new installation into service, on German territory, within three months of the closure of the old installation. In that case, the allocation is made, for four years, on the basis of the past emissions of the installation which has been closed down [*16] and is then calculated, for

fourteen years, on the basis of an implementation factor of 1. Thus, the operator of an installation producing electricity is not subject to the 'best available techniques' criteria and the 750g CO 2 /kWh ceiling to which new installations are, in principle, subject (see paragraph 30). That rule is intended to encourage early replacement of old and inefficient installations by new installations with reduced emissions.

32. For nuclear power stations, the 'special allocation' rule (Sonderzuteilung) provides for a transitional and compensatory allowance by reason of the obligation on operators to close certain nuclear power stations between 2003 and 2007 under the Gesetz zur geordneten Beendigung der Kernenergienutzung zur gewerblichen Erzeugung von Elektrizit[#228]t (Law on the progressive ending of reliance on nuclear energy for the commercial production of electricity, BGBl. 2002 I, p. 1351). That special allocation concerns only the power stations in Stade (closed in 2003 and operated by E.ON AG) and Obrigheim (closed in 2005 and operated by the applicant), since the closure of other nuclear power stations will not take place until [*17] after 2007. The special allocation is limited to 1.5 million tonnes of CO 2 per year during the first allocation period and is intended to cover the extra emissions resulting from the increased use of conventional power stations by the operators concerned, made necessary by the need to compensate for the loss of electricity production from the nuclear power stations closed and replaced.

33. The German NAP is the basis of the Zuteilungsgesetz 2007 (Law of 26 August 2004 on the allocation of emission allowances during the first allocation period, BGBl. 2004 I, p. 2211; 'the Allocation Law'). In regard to the aspects which are relevant to the present dispute, the provisions of the Allocation Law do not differ substantially from the German NAP. In addition, the Federal Republic of Germany adopted, on 8 July 2004, the Gesetz zur Umsetzung der Richtlinie 2003/87/EG [#252]ber ein System f[#252]r den Handel mit Treibhausgasemissionszertifikaten in der Gemeinschaft (Law transposing Directive 2003/87 establishing a scheme for allowance trading, BGBl. 2004 I, p. 1578).

III - The German energy market

34. In Germany, four undertakings produce and supply 88% of the country' [*18] s electricity production capacity, namely RWE AG, E.ON AG, Vattenfall Europe AG and the applicant. The remaining 12% of the market is divided between a number of small and medium-sized undertakings, in particular, municipal power stations (Stadtwerke).

35. The applicant is the third largest energy undertaking in Germany, with 37% of its production, namely 14 gigawatts (GW), coming from nuclear power stations and 29% from lignite or oil-fired stations. For the other large German energy undertakings, the production shares of nuclear power stations and lignite or oil-fired stations as a proportion of total production are as follows:

- RWE (total production capacity: 34 GW): 16% of production from nuclear power stations and 58% from lignite or oil-fired power stations;

- E.ON (total production capacity: 25 GW): 34% of production from nuclear power stations and 35% from lignite or oil-fired power stations;

- Vattenfall Europe (total production capacity: 15 GW): 9% of production from nuclear power stations and 61% from lignite or oil-fired power stations.

IV - Administrative procedure

A - The applicant's complaint

36. By letter of 17 June 2004, the [*19] applicant complained to the Commission's DG Environment and DG Competition that the transfer rule, as laid down in the German NAP and Paragraph 10 of the Allocation Law, gave an unfair advantage, in particular, to its principal competitor, RWE. The applicant stated in its letter that as a result of replacing its old conventional combustion installations with new ones, RWE had obtained, free of charge, an excessive quantity of emission allowances, as compared, in particular, with what it would have obtained by virtue of the special allocation rule and Paragraph 15 of the Allocation Law if it had closed and replaced its nuclear power stations. In view of that distortion of competition, the applicant asked the Commission, in particular, to reject the German NAP under Article 9(3) of Directive 2003/87 and to initiate, in regard to the Federal Republic of Germany, a formal review procedure under Article 88(2) EC.

37. By letter of 22 June 2004, the applicant repeated its requests and specified the grounds of its complaint. It indicated that the German NAP - and the transfer rule, in particular - infringed the fifth criterion in Annex III to Directive 2003/87, Article 87 EC and [*20] freedom of establishment. In support of its complaint, the applicant claims, in substance, that the consequence of the application of the transfer rule, which benefits its principal competitors, in particular, RWE, is a significant 'over-allocation' of allowances to new installations replacing old combustion installations by reason of the allocation to the operators concerned for a period of four years of emission allowances based on the needs of the earlier installations which have been replaced. The operator concerned is thus able to sell the surplus allowances - those not needed to cover the significantly lower level of emissions of the, more efficient, new installation - on the market and thereby obtain an unjustified competitive advantage. On the other hand, where a nuclear power station is replaced - the only option open to the applicant by reason of its financial position - application of the special allocation rule does not yield an equivalent advantage and is also insufficient to compensate for the loss of production capacity linked to the closure of nuclear power stations. Thus, in order to compensate for the lost production capacity, the applicant must produce [*21] more electricity, and therefore more emissions, in conventional installations and is obliged to meet its need for additional allowances by buying them. The applicant also claims that such preferential treatment, in particular of RWE, was not justified either by Directive 2003/87 or by Article 87 EC.

B - The contested decision and the Commission communication of 7 July 2004

38. In Decision C (2004) 2515/2 final of 7 July 2004 concerning the national allocation plan for the allocation of greenhouse gas emission allowances notified by Germany in accordance with Directive 2003/87 ('the contested decision'), the Commission rejected the German NAP only to the extent that it provided for ex-post adjustments to the allocation of emission allowances, which the Commission declared were incompatible with the fifth and tenth criteria in Annex III to Directive 2003/87. The declaration of incompatibility did not concern the aspects of the German NAP which had been the subject of the applicant's complaint.

39. With regard to the application of the rules on State aid and the transfer rule, the contested decision states as follows, in the ninth and tenth recitals in the [*22] preamble thereto:

'On the basis of the information provided by the Member State, the Commission therefore considers that any potential aid is likely to be compatible with the common market should it be assessed in accordance with Article 88(3) EC.

The Commission considers that in the [allocation] period of the current [NAP], the information provided by the Member State on the transfer rule demonstrates that for this period no advantage going beyond what is justified by the environmental benefit of the measure is granted to replacement installations compared to similar investments by other new entrants. For the following [allocation] period, no difference exists between installations subject to the transfer rule and those to be covered by the reserve for new entrants.'

40. At point 3.3 of the Communication COM (2004) 500 final to the Council and to the European Parliament on Commission Decisions of 7 July 2004 concerning national allocation plans for the allocation of greenhouse gas emission allowances of Austria, Denmark, Germany, Ireland, the Netherlands, Slovenia, Sweden, and the United Kingdom in accordance with Directive 2003/87, dated 7 July 2004, the [*23] Commission stated the following concerning the transfer rules:

'[--] Furthermore, Member States have discretion on the treatment of closed installations.

If a Member State does not withhold the issuance of allowances to a closed installation for the remainder of a[n allocation] period, the transfer of allowances from a closed installation to a new installation, under the control of the same operator, is in place.

Where a Member State has chosen to withhold the issuance of further allowances to a closed installation for the remainder of a[n allocation] period and has established a new entrant reserve, it is necessary to examine the conditions under which this part of the scheme will operate in order to ensure that installations benefiting from a transfer rule are not unduly favoured vis-[#224]-vis those who do not. The application of a transfer rule may be limited in the sense that an operator is only eligible to benefit from it in case both the closed and the new installation are located on the territory of the Member State.

The Commission furthermore notes that retaining allowances following closures is expected to create incentives for investment in [*24] clean and efficient installations. The environmental impact of a transfer rule, however, is neutral, unless a Member States would cancel any allowances not issued following closure. Any surplus allowances are likely to be surrendered by another installation, in the same Member State or elsewhere, to cover emissions.'

C - The Commission's letter of 29 July 2004

41. By letter of 29 July 2004 from DG Competition ('the DG Competition letter of 29 July 2004'), the Commission set out, by reference, in particular, to the contested decision, the assessment made by that DG of the matters raised in the applicant's complaint. It pointed out that, in the contested decision, the Commission had 'also analysed the compatibility of the [German NAP] with criterion [no] 5 in Annex III to [Directive 2003/87] in considering the question whether the [NAP] involved discrimination between companies or sectors by favouring certain undertakings or sectors of activity contrary to the rules concerning State aids' and that analysis had also considered the application of the transfer rule. The Commission indicated that, in its view, neither the German NAP nor [*25] the application of the transfer rule gave rise, during the first allocation period, to such discrimination, since the transfer rule seemed to ensure that no advantage accorded to replacement installations, as compared with similar investments made by other new entrants, would go beyond what is justified by the environmental advantage derived from the measure at issue. The Commission considered, in particular, that the transfer rule was conceived as an incentive to modernisation accessible to all the participants in the allowances trading scheme and not limited to certain sectors or certain companies.

42. With regard to the effects of the transfer rule, particularly in the energy sector, the Commission pointed out in the DG competition letter that it had noted, in particular, that, according to the German authorities, a number of power stations were operating very profitably. Consequently, it had formed the view that only the incentive offered by the transfer rule was likely to lead to rapid replacement with more ecological technologies which generated less CO 2 and that the effect of that incentive had also to be assessed in the light of the 'malus' rule, according to [*26] which less efficient installations were likely to be penalised if modernisation efforts were put off. It therefore considered that the transfer rule would encourage the operators concerned to modernise their installations more rapidly than they would have done in the absence of such a rule.

43. As regards the question whether the profit accruing from the transfer rule gives an excessive advantage to certain undertakings, the Commission stated that it relied on the explanations of the German authorities, according to which application of that rule to the energy sector would, in the majority of cases, lead to old and inefficient lignite-fired installations being replaced with modern and more efficient installations of the same type during the first allocation period. It indicated that, in such a case, the profit calculated by the German authorities represented a very small part of the cost of the investment. Bearing in mind the positive impact of the transfer rule on the achievement of the environmental objectives of Directive 2003/87 during the first four years, it considered that such a limited advantage seemed proportional and, for that reason, compatible with the rules concerning [*27] State aid and that, at the end of that four-year period, a replacement installation would receive allowances on the basis of the 'best technique available', in the same way as any other new installation, which will make it possible to avoid any discrimination between investments in replacement and new installations.

44. With regard to the relative disadvantage for nuclear power stations which must be replaced with conventional ones emitting CO 2 , the Commission indicates that it considered that that effect seems to flow from the decision of the Federal Republic of Germany to abandon the production of nuclear energy in the medium term and must not be attributed to the implementation of the allowance trading scheme established by Directive 2003/87. The Commission pointed out that the directive was concerned with the allocation of emission allowances and therefore did not concern nuclear power stations, which do not emit CO 2 , but that Directive 2003/87 permitted the Member States to attenuate the effects of national political choices, such as the Federal Republic of Germany's decision to abandon nuclear power. It pointed out that that Member State had indicated [*28] that that special situation had been sufficiently taken into account in the German NAP, first of all, by the direct allocation of compensatory allowances and, secondly, by the freedom left to the installations concerned to choose the method of allocation of those quotas and that, in addition, the Federal Republic of Germany had decided to establish a reserve for new entrants. Thus, new installations, including those replacing nuclear installations, will be allocated, free of charge, sufficient allowances to cover their projected needs.

45. With regard to the compatibility of the transfer rule with freedom of establishment, the Commission states that, according to the explanations provided by the Federal Republic of Germany, the rule did not discriminate between German companies and foreign ones.

46. In conclusion, the Commission indicates that it considered, in the contested decision, that, in regard to the first allocation period, 'any possible aid would probably be compatible with the common market if it was assessed in accordance with Article 88(3) EC'. Finally, having taken into account the rules applicable to State aid when it considered the NAPs, the Commission [*29] was satisfied that the transposition of Directive 2003/87 was compatible with other provisions of the Treaty for the purposes of the fifth criterion.

D - The Commission's letters of 3 and 27August 2004

47. By letter of 3 August 2004, from DG Environment, the Commission informed the applicant that the transfer rule did not infringe Article 11 of Directive 2003/87 and that it would shortly receive a separate letter from DG Competition dealing with the other complaints.

48. By letter of 27 August 2004 from DG Environment, the Commission referred to its letter of 3 August 2004 and indicated that it would close the procedure in the present case at one of its meetings in the near future.

Procedure and form of order sought

49. By application lodged at the Registry of the Court of First Instance on 27 September 2004, the applicant brought the present action.

50. The applicant claims that the Court of First Instance should:

- annul the contested decision;

- order the defendant to pay the costs.

51. By a document lodged at the Registry of the Court of First Instance on 13 January 2005, the Commission raised a plea of inadmissibility in accordance [*30] with Article 114(1) of the Rules of Procedure of the Court of First Instance. The applicant submitted its observations on that plea on 14 March 2005.

52. By a document lodged at the Registry of the Court of First Instance on 17 February 2005, the Federal Republic of Germany sought leave to intervene in the present proceedings in support of the defendant.

53. By order of 4 April 2005, the President of the Third Chamber of the Court of First Instance granted the Federal Republic of Germany leave to intervene. The intervener lodged its statement in intervention, limited to the issue of admissibility, on 17 May 2005. By a document lodged at the Registry of the Court of First Instance on 31 August 2005, the applicant submitted its observations on the statement in intervention.

54. The Commission and the intervener contend that the Court of First Instance should:

- dismiss the action as inadmissible;;

- order the applicant to pay the costs.

55. The applicant claims, in its observations on the plea of inadmissibility, that the Court should:

- dismiss the plea of inadmissibility;

- in the alternative, join the plea of inadmissibility to the substance [*31] of the case.

Law

56. By virtue of Article 114(1) of the Rules of Procedure, the Court may, if a party so requests, rule on the question of admissibility without considering the merits of the case. Under Article 114(3) of those Rules, unless the Court otherwise decides, the remainder of the proceedings is to be oral. In the present case, the Court considers that the information in the documents before it is sufficient for there to be no need to proceed to the oral stage of the proceedings.

I - Arguments of the parties

A - Arguments of the defendant and the intervener

57. The defendant, supported by the intervener, contends that the application for annulment is inadmissible.

58. First of all, the contested decision is not covered by the rules on State aid, derived from Articles 87 EC and 88 EC, with the effect that the applicant cannot rely on the case-law concerning the admissibility of actions for annulment brought against decisions adopted on that subject. Secondly, even if those rules did apply, the conditions laid down in the fourth paragraph of Article 230 EC, as settled by the case-law on State aid, are not fulfilled. The applicant is neither [*32] directly nor individually concerned, within the meaning of that provision, by the contested decision, having regard to Directive 2003/87. Finally, the applicant has no legitimate interest in seeking the annulment of the contested decision.

B - The applicant's arguments

1. Preliminary observations

59. The applicant claims that the plea of inadmissibility should be dismissed. The contested decision has a dual legal nature and is of direct and individual concern to the applicant within the meaning of the fourth paragraph of Article 230 EC. Having regard to the very close overlap between questions concerning admissibility and the substantive law as to whether the present application is well-founded, the applicant also asks, in the alternative, that the plea of inadmissibility be joined to the substance of the case (Case C-57/95 France v Commission [1997] ECR I-1627, paragraph 6 et seq).

60. Concerning the dual legal nature of the contested decision, the applicant points out, on the one hand, that it is a measure expressing the Commission's approval, adopted in accordance with Article 9(3) of Directive 2003/87. On the other hand, it is a Commission decision [*33] under the second sentence of Article 88(3) EC, authorising definitively, at least by implication - and without having initiated the formal review procedure laid down in Article 88(2) EC - the aid scheme which the transfer rule constitutes, including the 'over-allocation' of emission allowances to some of the applicant's competitors, as a result of applying that aid scheme.

61. The applicant maintains that it has locus standi under both headings.

2. The applicant's locus standi under the aid rules

(a) The characterisation of the contested decision as a decision concerning State aid

62. The applicant claims, essentially, that, contrary to the argument put forward by the defendant and the intervener, the Commission did in fact review the transfer rule from the point of view of the rules on State aid and adopted a definitive position on that point in the contested decision.

63. Thus, on the one hand, the ninth and tenth recitals in the preamble to the contested decision show that the Commission considered that the potential aid contained in the NAP was probably compatible with the common market. On the other, it follows that the Commission [*34] considered, in particular, the question whether the transfer rule gave an advantage to certain undertakings as compared with some of their competitors who build new installations without the benefit of that rule. Finally, it concluded that, in any event, any such advantage did not go beyond what was justified by the environmental benefit of the rule at issue.

64. In the applicant's view, the DG Competition letter of 29 July 2004 also confirms that before it adopted the contested decision, the Commission had carried out a detailed review of the transfer rule from the point of view of the rules on State aid and that it had taken account, in that connection, of the information contained in the applicant's complaint. The

Commission set out in detail, in its letter, the reasons which led it to conclude that the aid granted to certain undertakings in the German energy sector, as contained in the transfer rule, was compatible with the common market.

65. The applicant adds that the fact that the Commission took account of factors related to State aid in the context of the procedure laid down in Article 9 of Directive 2003/87 is in accordance not only with its statements [*35] to the Member States in its letter of 17 March 2004 to the effect that it intended to apply the rules concerning aid when considering NAPs, but also with its obligations, as laid down in Article 9(3), read together with the fifth criterion in Annex III to that directive, and as interpreted by the Commission itself in point 2.1.5 of its guidance. According to that criterion, a NAP may not be contrary to 'the requirements of the Treaty, in particular Articles 87 and 88 thereof'.

66. The applicant also points out that, in its letter of 17 March 2004, the Commission had dispensed with the need for 'formal notification of the NAPs under Article 88(3) EC for the [first allocation] period' and announced that where certain provisions of NAPs were likely to favour certain undertakings, it would carry out a 'full' review on its own initiative, the commencement of which would entail the rejection of that aspect of the NAP, given the timescale for completion of such a review. The applicant concludes that the Commission had thereby expressed its intention to reject, in a decision adopted under Article 9(3) of Directive 2003/87, the provisions of NAPs which require [*36] further consideration under Article 88(2) EC. It follows, a contrario , that where such a decision raises no objection to a NAP, the Commission has impliedly decided not to initiate the procedure provided for in Article 88(2) EC.

67. It follows from the foregoing, first of all, that the Commission considers that rules in a NAP which lead to an 'over-allocation' of allowances to be, in principle, incompatible with the rules concerning State aid; secondly, that, in accordance with its own statements, the Commission is required to consider the NAPs from the point of view of the rules on State aid in the context of the procedure laid down in Article 9(3) of Directive 2003/87 and, if need be, to reject them if they require an in-depth review under Article 88(2) EC; and, thirdly, that, in this particular case, the Commission undertook such a review of the German NAP under Article 9(3) of Directive 2003/87 without, however, rejecting the transfer rule in the contested decision.

68. The applicant characterises as irrelevant the defendant's contentions that (i) the contested decision is not based on Article 88 EC and that (ii) the operative part of the decision does [*37] not decide anything in regard to State aid, with the effect that the contested decision did not rule in an express and definitive manner within the meaning of Article 88(3) EC on the aspects of the transfer rule in the German NAP which could constitute State aid. The applicant refers to settled case-law to the effect that the legal characterisation of a Community measure depends neither on its designation nor on its form but solely on its nature, as determined by an assessment based on objective criteria (Case 60/81 IBM v Commission [1981] ECR 2639, paragraph 9, and Case T-3/93 Air France v Commission [1994] ECR II-121, paragraphs 43 and 51).

69. Thus, in order to determine the nature of the contested decision, it must be determined whether it produces binding legal effects in regard to the aid aspects of the German NAP, including the transfer rule. However, in the light of the higher rules of Community law (Case 374/87 Orkem v Commission [1989] ECR 3283, paragraph 28), the contested decision must be understood as a decision concerning State aid, in the sense that it authorises the transfer rule without initiating the formal review procedure under Article 88(2) EC (Case [*38] C-259/87 Greece v Commission [1990] ECR I-2845, the latter part of paragraph 1 of the summary). Having regard to the matters referred to in paragraph 66 of the present order, and notwithstanding the wording of the ninth recital in the preamble to the contested decision, an objective assessment would lead to the conclusion that that decision had found, in a legally binding and definitive way, that the transfer rule is compatible with the fifth criterion in Annex III to Directive 2003/87 and therefore, with Article 87 EC. That outcome would also accord with the sense and purpose of the review procedure provided for in Article 9 of Directive 2003/87, which is intended to ensure the compatibility of the national allocation rules with Community law. Realisation of that objective would be seriously compromised if the Commission could limit itself, in the course of such a review procedure, merely to carrying out a summary and provisional check from the point of view of the aid rules without adopting a binding decision in that regard.

70. The applicant claims that the binding legal effect of the contested decision from the point of view of the rules on aid can also be seen from the [*39] fact that the Federal Republic of Germany has, in the meantime, transposed the transfer rule laid down in the NAP by adopting Paragraph 10 of the Allocation Law. If the contested decision had not lifted the prohibition laid down in the third sentence of Article 88(3) EC on putting the aid into effect (Air France v Commission , mentioned in paragraph 68, above, paragraph 47), both that transposition and the aid scheme thereby established would

be contrary to that provision (Case C-354/90 F[#233]d[#233]ration nationale du commerce ext[#233]rieur des produits alimentaires and Others [1991] ECR I-5505, paragraph 12). The defendant and the Federal Republic of Germany thus clearly considered that the prohibition on putting the aid into effect did not apply to an aid scheme such as the one established by the transfer rule and Paragraph 10 of the Allocation Law. That confirms, a contrario , that the contested decision necessarily produced binding legal effects in regard to the aspects of State aid at issue.

71. Consequently, the defendant's argument based on the lack of formal notification of the transfer rule under the rules concerning aid should not be accepted. On the one hand, [*40] that argument is contradictory, having regard to the fact that the Commission, in its letter of 17 March 2004, dispensed with formal notification and to its declared intention to consider the NAPs from the point of view of the aid rules. On the other hand, if the defendant's view that the Commission did not need to rule definitively on the NAPs from the angle of the aid rules was relevant, it would have been manifestly unlawful to dispense with notification under the aid rules. The Commission cannot derogate from the rule requiring notification laid down in Article 88(3) EC, which is intended to provide it with an opportunity to review, in sufficient time and in the interest of the Community, any new plan to grant aid (Joined Cases 91/83 and 127/83 Heineken Brouwerijen [1984] ECR 3435, paragraph 14). In the present case, the Federal Republic of Germany fulfilled the obligation imposed by that provision by causing the German NAP to be preceded by a summary of the Community requirements, setting out all the criteria in Annex III to Directive 2003/87, including the reference to Articles 87 EC and 88 EC. Consequently, having regard, in particular, to the letter of 17 March 2004, it [*41] is clear that the Federal Republic of Germany did not wish to obtain merely a provisional assessment when it submitted the NAP to the Commission, but was seeking a definitive assessment of its plan from the angle of the State aid rules. That is confirmed by the public statements made after the adoption of the contested decision by the Federal Minister for the Environment.

72. With regard to the DG Competition letter of 29 July 2004, the applicant considers that the defendant rightly contends that it is not a decision adopted under the aid rules which may be contested under Article 230 EC by the person to whom it is addressed (Case C-367/95 P Commission v Sytraval and Brink's France [1998] ECR I-1719, paragraph 45). In addition, the text of the letter, which refers to the contested decision, makes it clear that it was not intended to produce independent binding legal effects but sought merely to explain the assessments on which the contested decision was based. On the other hand, the applicant contests the intervener's argument that the applicant could have brought an action for failure to act against the defendant in order to obtain a decision under Article 88 EC. [*42] In the applicant's view, having regard to the fact that a decision had been adopted under the aid rules, an application for annulment under Article 230 EC was the only possible recourse in the case.

73. The applicant adds, in substance, that the Commission was required to initiate the formal review procedure under Article 88(2) EC, since the transfer rule possesses the characteristics of aid within the meaning of Article 87(1) EC. The emission allowances allocated pursuant to that rule constitute an advantage granted through State resources to certain undertakings or branches of activity under conditions which do not correspond to normal market conditions (Case C-39/94 SFEI and Others [1996] ECR I-3547, paragraph 60, and Case C-342/96 Spain v Commission [1999] ECR I-2459, paragraph 41). The intervener's claims to the contrary are erroneous and incompatible with the defendant's position that the allocation rules are, in principle, capable of constituting aid.

(b) The applicant's direct concern

74. As to whether the contested decision is of direct concern to it within the meaning of the fourth paragraph of Article 230 EC, having regard to the aid [*43] rules, the applicant claims that that decision triggers an automatic mechanism in regard to the allocation of emission allowances to undertakings subject to the allowance trading scheme (Case 11/82 Piraiki-Patraiki and Others v Commission [1985] ECR 207, paragraph 9, and Case T-223/01 Japan Tobacco and JT International v Parliament and Council [2002] ECR II-3259, paragraph 46). In accordance with the relevant provisions of Directive 2003/87, the Federal Republic of Germany was required, as a result of the approval of the German NAP by the contested decision, to allocate allowances on the basis of that plan. Any deviation from the NAP would have required it to be amended and, consequently, reviewed again by the Commission. In addition, the NAP and the Allocation Law did not give the German authorities any discretion in allocating emission allowances but provided that allowances were to be allocated to operators of installations in a precise quantity.

75. The applicant disagrees with the intervener's argument that the implementation of the transfer rule depends on a great many prior discretionary decisions and a general environment which cannot yet be foreseen. That argument [*44] is erroneous inasmuch as it clearly refers to the decision-making process of the undertakings potentially concerned by

the transfer rule. If that argument were to be accepted, an action for annulment in respect of an aid scheme would never be possible in practice, contrary to settled case-law (Case T-114/00 Aktionsgemeinschaft Recht und Eigentum v Commission [2002] ECR II-5121, paragraphs 72 to 74, and the Opinion of Advocate General Jacobs in Case C-78/03 P Commission v Aktionsgemeinschaft Recht und Eigentum [2005] ECR I-10737 at I-10741, point 62), since, at the time that the scheme is adopted, delays in decision-making by the undertakings likely to benefit cannot be excluded. The applicant points out that, according to case-law, the criterion of direct concern is fulfilled where there is no doubt that the person to whom the contested measure is addressed intends to act in conformity with it (Case T-9/98 Mitteldeutsche Erd[#246]l-Raffinerie v Commission [ECR] II-3367, paragraph 48). As it is, there is no doubt that the Federal Republic of Germany intends to implement the emission allowances trading scheme in conformity with the provisions of the German NAP and the Allocation [*45] Law. In addition, the Federal Republic of Germany itself admits that, during the first allocation period, the transfer rule can be implemented without any discretion as to the allocation of allowances under the Allocation Law. Consequently, the decision-making process of beneficiary undertakings cannot be the determining factor and the applicant is directly concerned by the contested decision.

(c) The applicant's individual concern

76. The applicant also maintains that it is individually concerned by the contested decision within the meaning of the fourth paragraph of Article 230 EC, having regard to the case-law on State aid. According to that case-law, individual concern arises can be asserted where, as in the present case, the contested decision declares the aid to be compatible with the common market without initiating the formal review procedure or where the applicant must be regarded as a party concerned within the meaning of Article 88(2) EC (Case C-198/91 Cook v Commission [1993] ECR I-2487, paragraph 37, and Case C-225/91 Matra v Commission [1993] ECR I-3203, paragraph 18). Those principles apply, in particular, to competing undertakings, in so far as their [*46] competitive position is affected by the aid in question, even if the aid has been authorised under an aid scheme, such as that constituted by the transfer rule (Case T-188/95 Waterleiding Maatschappij v Commission [1998] ECR II-3713, paragraphs 60 and 62; Case T-184/97 BP Chemicals v Commission [2000] ECR II-3145, paragraphs 29 and 40; Case T-69/96 Hamburger Hafen- und Lagerhaus and Others v Commission [2001] ECR II-1037, paragraph 41; and Aktionsgemeinschaft Recht und Eigentum v Commission , cited above at paragraph 75, paragraph 71). The applicant adds that the essential objective of the judgments in Cook v Commission and Matra v Commission , cited above - namely, to safeguard the useful effect of the procedural guarantees conferred on the parties concerned by Article 88(2) EC - applies both in the case of aid schemes and in the case of individual aid. Once an aid scheme has been authorised, there is, in principle, no other procedure before the Commission in which those procedural guarantees can be safeguarded. Consequently, the principles laid down in the judgments cited above are applicable to the present case.

77. In the applicant's view, although the transfer [*47] rule also applies in theory to coke ovens, paper mills and operators of other types of installations, it was intended to apply to a very specific purpose in the electricity production sector, namely, the replacement, as rapidly as possible - particularly by RWE - of inefficient and highly polluting lignite-fired power stations with new and more ecological power stations. The Commission recognised the importance of the transfer rule in that particular respect in the DG Competition letter of 29 July 2004. In that connection, the applicant disagrees with the argument that it is not certain that its three major competitors availed themselves of the transfer rule, bearing in mind that the real possibility of such a development already during the first allocation period.

78. The applicant is of opinion that the contested decision also affects its competitive position in regard to the beneficiaries of the transfer rule, in particular, RWE, inasmuch as it leads to a significant 'over-allocation' of allowances to the advantage of those undertakings, whereas, by reason of the different composition of its group of power stations, it received a lower allocation. Thus, RW E in particular [*48] could sell its excess allowances on the market and consequently, reduce its production costs and increase its market share, to the applicant's detriment. That impairment of the applicant's competitive position is sufficient to support the inference that it has locus standi , in the light of the fact that the transfer rule is characterised as aid (Waterleiding Maatschappij v Commission , cited above at paragraph 76, paragraph 62). It is highly improbable that the transfer rule would entail similar restrictions outside the electricity sector. In addition, once the aid scheme had been authorised in the present case, the effect on the competitive relationship between the applicant and the beneficiaries of the scheme in question could be determined with sufficient certainty. Contrary to the intervener's view, that does not amount to recognising an actio popularis , regard being had to the requirement that there must be a competitive relationship in the market at issue between the applicants and the beneficiary of the aid (Waterleiding Maatschappij v Commission , cited above at paragraph 73, paragraphs 62, 80 and 81, and Hamburger Hafen- und Lagerhaus and Others v Commission [*49] , cited above at paragraph 76, paragraphs 41

and 42). In the present case, there is intense competition between the applicant, on the one side, and, on the other, RWE and the other two electricity undertakings concerned (Case 169/84 Cofaz and Another v Commission [1986] ECR 391, paragraph 25).

79. The applicant also argues that it is in any event different from the other undertakings taking part in the allowance exchange scheme and coming within the scope of the transfer rule. That is due, in particular, to the tangible effects in practice of the application of that rule to RWE's competitive position, which were already present during the first allocation period. The Federal Republic of Germany's report on the allocation of allowances during that period shows that not merely were 79% of the allowances allocated to energy-producing installations but the beneficiary of the largest individual allocation was a lignite-fired power station in Nordrhein-Westfalen, which the applicant supposes to be RWE's Niederau[#223]em plant. The applicant adds that no other undertaking is affected by the transfer rule in a comparable way.

80. Finally, according to the applicant, [*50] the Commission should have initiated the formal review procedure laid down in Article 88(2) EC, having regard to the fact that at the time that the contested decision was adopted, there were serious doubts as to the compatibility of the transfer rule with the common market. In the course of that procedure, the applicant would have been heard as a party concerned within the meaning of Article 88(2) EC (Case 323/82 Intermills v Commission [1984] ECR 3809, paragraph 16; Cook v Commission , cited above at paragraph 76, paragraph 29; and Commission v Sytraval and Brink's France , cited above at paragraph 72, paragraph 41).

3. The applicant's locus standi under Directive 2003/87

(a) Preliminary remarks

81. The applicant maintains that it also has locus standi within the meaning of the fourth paragraph of Article 230 EC under the relevant provisions of Directive 2003/87, in particular Article 9(3) thereof, read together with the fifth criterion in Annex III to that directive.

(b) The applicant's direct concern

82. With regard to its direct concern, the applicant contests, first, the defendant's argument that by adopting the contested decision, [*51] the Commission did not approve the German NAP, including the transfer rule. In its own communications, the Commission states that it has approved certain NAPs, in whole or in part, and the decisions adopted in that regard have been understood in the same way at national level. That interpretation is confirmed by the wording of Article 3(3) of the contested decision, which provides that '[a]ny amendments to [NAPs] [--] shall be [--]accepted in accordance with Article 9(3) of Directive 2003/87'.

83. The applicant also contests the relevance of the comparison made by the defendant and the intervener with the action under Article 226 EC for failure to fulfil obligations. On the one hand, unlike the latter procedure, the notification and review procedure laid down in Article 9 of Directive 2003/87 serves a purpose all of its own, which is to detect in advance possible infringements of Community law in the NAPs. That is not the case in regard to proceedings brought in respect of national measures which have already been adopted and which have not been notified to the Commission in advance. On the other hand, a decision not to initiate proceedings under Article 226 [*52] EC for failure to fulfil obligations does not prevent the Member State from repealing or amending the measure in question. In the present case, by contrast, the Member States are required, under Article 9 and Article 11(1) and (4) of Directive 2003/87, to grant emission allowances in accordance with the rules (which the Commission does not contest) laid down in the NAP. The fact that a Member State which wishes to depart from the rules of the NAP must, in principle, re-submit the NAP to the Commission shows that the Member State is bound by the uncontested aspects of the NAP. Consequently, a decision not to raise objections under Article 9 of Directive 2003/87 must necessarily be regarded be regarded as an authorisation of the NAP which has been notified, all the more so where, as in the ninth and tenth recitals in the preamble to the contested decision, the Commission has explicitly reviewed, and not contested, an aspect of the NAP. Finally, the scope of Article 9(3) of Directive 2003/87 is much narrower than that of Article 226 EC inasmuch as its sole purpose is to ensure that the allowance trading scheme is in accordance with Community law. At the same time, Article 9(3), read together [*53] with the criteria laid down in Annex III to Directive 2003/87, is intended to ensure equal treatment of the participants in the allowance trading scheme and to avoid distortions of competition. Therefore, that provision does not apply solely to relations between the Commission and the Member State but also provides protection for individuals.

84. Any discretionary power conferred on the Commission under Article 9(3) of Directive 2003/87 is not of such a nature as to call into question the fact that a decision adopted under that provision constitutes an authorisation. In the context of its supervision of State aid, the Commission also has a discretion and the fact that a positive decision by the Commission constitutes authorisation of the State measures in question has never been in doubt (Opinion of Advocate General La Pergola in Case C-107/95 P Bundesverband der Bilanzbuchhalter v Commission [1997] ECR I-947 at I-949, paragraph 10).

85. The applicant also contests the argument that, on the expiry of the three-month time period laid down in Article 9(3) of Directive 2003/87, the NAP would, in the absence of objections, be deemed to be unauthorised and, as such, prohibited. [*54] On the contrary, as with, for example, the rule laid down in Article 4(6) of Council Regulation (EC) No 659/1999 of 22 March 1999 laying down detailed rules for the application of Article [88] of the EC Treaty (OJ 1999 L 83, p. 1) and in Article 10(6) of Council Regulation (EC) No 139/2004 of 20 January 2004 on the control of concentrations between undertakings (OJ 2004 L 24, p. 1), the consequence of the expiry of the time-limit is that the NAP is deemed to be authorised.

86. According to the applicant, the relevant provisions of Directive 2003/87 render automatic the provisions of the German NAP to which no objection was raised in the contested decision. When the German NAP was authorised, it was established, de facto , that the transfer rule and the rule providing for special allocations for nuclear power stations would be carried over verbatim into the Allocation Law without the competent authorities having any discretion as to the individual allocations of emission allowances. Thus, the conditions laid down in the case-law for the applicant's being directly concerned are fulfilled (Aktionsgemeinschaft Recht und Eigentum v Commission , cited above at paragraph 75, [*55] paragraph 73). That conclusion is not called into question either by the possibility of subsequent adjustments to the quantity of allowances allocated as a result of improvements in information or by the obligation to take due account, after the adoption of the decision under Article 9 of Directive 2003/87, of 'comments from the public', in accordance with Article 11(1) of that directive. The relevant rules in the German NAP are formulated in so precise a manner that divergences in their application should - where appropriate, after account has been taken of comments from the public - have been the subject of a further notification to the Commission.

(c) The applicant's individual concern

87. The applicant maintains that it is also individually concerned within the meaning of the fourth paragraph of Article 230 EC inasmuch as the contested decision affects it by reason of certain attributes which are peculiar to it and by reason of a situation of fact in which it is differentiated from all other operators concerned by the NAP, with the effect that it is concerned in the same way as a person to whom the decision is addressed. By declaring the German NAP compatible [*56] with the criteria in Annex III to Directive 2003/87, the Commission made it possible for the German legislature to adopt the Allocation Law. That law was very favourable to energy undertakings, RWE in particular, which produce electricity principally in conventional power stations, to the detriment other energy undertakings, such as the applicant, which operate a large number of nuclear power stations. On the one hand, the latter cannot take advantage of the transfer rule when replacing their nuclear power stations, as required under the Gesetz zur geordneten Beendigung der Kernenergienutzung zur gewerblichen Erzeugung von Elektrizit[#228]t, and, on the other, the Allocation Law does not provide them with sufficient and comparable compensation for those replacements.

88. In that connection, the applicant refers to the case-law to the effect that a measure of general application may be of individual concern to undertakings if they constitute a restricted group which is sufficiently well defined in relation to the group of undertakings abstractly defined by that measure and whose number cannot increase during the period of validity of the measure (Case C-152/88 Sofrimport v Commission [*57] [1990] ECR I-2477, paragraph 11, and Case C-309/89 Codorn[#237]u v Councill [1994] ECR I-1853, paragraphs 18 and 21). Contrary to the defendant's argument, that case-law applies to the present case. The provisions of the allowance trading scheme affect actual legal situations since they profoundly alter the content and the limits of the property rights of operators of installations emitting greenhouse gases inasmuch as they are deprived of a positive right which permitted them, up to that time, to emit CO 2 .

89. The applicant states that, contrary to what the defendant argues, the negative and unequal effects of the transfer rule occur only within a restricted group of undertakings active in the electricity production sector and directly affect the applicant, since it is one of the two operators of nuclear power stations which are to be shut down during the first allocation period. The applicant points out that, among the four major undertakings producing electricity in Germany,

RWE and Vattenfall produce about 60% of their electricity in oil-fired power stations and produce only about 16% (RWE) and 9% (Vattenfall) in nuclear power stations. On the other hand, nuclear [*58] power constitutes 34% and 37% of the output of E.ON and the applicant respectively. Whereas Vattenfall operates a relatively modern group of power stations, RWE has a gross output of approximately 7 100 MW, which, according to the applicant's information, must be replaced, at least in part, before 2007 by new installations, which can take advantage of the transfer rule. On the other hand, E.ON and the applicant are the only undertakings which, after the closure of the nuclear power stations in Obrigheim (belonging to the applicant) and Stade (belonging to E.ON) by reason of the abandonment of nuclear energy in Germany, are required to compensate for their loss of nuclear capacity by producing electricity conventionally and without being able to benefit from the transfer rule. The advantage which thereby accrues during the first allocation period for operators of conventional power stations, in particular for RWE, affects the applicant's economic position in a particularly significant manner (order in Case C-96/01 P Galileo and Galileo International v Council [2002] ECR I-4025, paragraph 53). In addition, the applicant is individually affected by reason of a series of factual [*59] circumstances which distinguish it from all other operators, namely and in particular, by the large part of its electricity production capacity which nuclear energy represents, the specific composition of the group of power stations it operates as compared with its competitors and the express mention in the recitals in the preamble to the draft Allocation Law, which refer to the special allocation rule, of the closure of the Obrigheim and Stade nuclear power stations. The applicant adds that it will continue to be individually concerned by the transfer rule beyond the first allocation period since, after 2008, it will no longer be able to benefit from the special allocation for nuclear power stations and it will not need to replace its conventional stations, which could have benefited from application of the transfer rule (Case C-358/89 Extramet Industrie v Council [1991] ECR I-2501, paragraph 17, and Air France v Commission , cited above at paragraph 68, paragraph 82).

90. The applicant claims that the special allocation rule does not compensate for the advantage accorded to operators of conventional power stations. On the one hand, that provision is part of a series of provisions [*60] which distort competition to the applicant's detriment and, on the other, the quantity of allowances allocated at the time that the nuclear power stations were shut down is insufficient and is, of itself, a distortion of competition.

91. In the light of all the foregoing considerations, the applicant concludes that in the light, also, of Directive 2003/87, it is directly and individually concerned by the contested decision.

4. The applicant's locus standi

92. The applicant contests the defendant's argument that it does not have locus standi . In particular, it contests the argument that if the contested decision were annulled, the German NAP would be applicable in its entirety by reason of the expiry of the three-month time-limit laid down in Article 9(3) of Directive 2003/87. The applicant considers, on the contrary, that in such a case, the parties would be back in the position they were in before the adoption of the contested decision (Case 22/70 Commission v Council [1971] ECR 263, paragraphs 59 and 60). In regard to State aid as well, where a decision authorising aid is annulled, both the case-law and the Commission's decision-making practice [*61] call for the re-opening of the procedure, notwithstanding the fact that the two-month time-limit for initiating the preliminary review provided for in Article 88(3) EC has expired (Case C-415/96 Spain v Commission [1998] ECR I-6993, paragraph 31). In the applicant's view, the same principles must apply in the present case, with the consequence that, if the contested decision is annulled, the Commission is required to initiate a fresh review procedure under Article 9 of Directive 2003/87.

II - Findings of the Court

93. The Court notes at the outset that the defendant and the intervener contest the admissibility of the present action on the ground, in particular, that the contested decision is not of direct concern to the applicant within the meaning of the fourth paragraph of Article 230 EC and that, in any event, the applicant does not have locus standi to bring an action against that decision.

94. The question whether the applicant has locus standi to bring an action against the contested decision must be considered first.

A - Conditions for locus standi

95. In the defendant's view, the applicant does not have locus standi to apply for the annulment [*62] of the contested decision because the sole consequence of such an annulment would be the cancellation of the Commission's rejection of the three aspects of the German NAP mentioned in Article 1 of that decision. Therefore, since the three-month time-limit laid down in Article 9(3) of Directive 2003/87 has expired, annulment could not affect the application of the NAP in its entirety, including the contested transfer rule, and would therefore confer no advantage on the applicant. The applicant replies, in essence, that the annulment of the contested decision - as with the annulment of a decision authorising State aid - would cancel the Commission's authorisation of the transfer rule and lead the Commission to re-open the review procedure under Article 9(3) of Directive 2003/87, placing the parties in the same position as they had been in before the adoption of the contested decision, notwithstanding the fact that the three-month time-limit has expired, and adopting a fresh decision.

96. With regard to locus standi , it should be borne in mind that, in accordance with settled case-law, an action for annulment brought by a natural or legal person is admissible only in so [*63] far as that person has an interest in the annulment of the contested measure (see Case T-310/00 MCI v Commission [2004] ECR II-3253, paragraph 44, and the case-law cited therein). Such an interest presupposes that the annulment of the measure must of itself be capable of having legal consequences (see Joined Cases T-480/93 and T-483/93 Antillean Rice Mills and Others v Commission [1995] ECR II-2305, paragraphs 59 and 60 and the case-law cited therein) and that the action must be likely, if successful, to procure an advantage for the party who brought it (Case C-50/00 P Uni[#243]n de Peque[#241]os Agricultores v Council [2002] ECR I-6677, paragraph 21).

97. It must therefore be determined in the present case whether annulment of the contested decision would be likely to procure an advantage for the applicant. That would be the case, in particular, if the consequence of the annulment were that the rules contained in the German NAP, including the transfer rule, no longer enjoyed the benefit of the authorisation granted to them, at least by implication, by the contested decision under Article 9(3) of Directive 2003/87 and the Commission were required to make a fresh determination [*64] under that provision as to whether the NAP was compatible with the relevant Community rules.

98. Thus, the answer to the question whether there is locus standi depends on the legal nature of the review procedure and the Commission's decision-making power under Article 9(3) of Directive 2003/87 and, in particular, on whether the contested decision contained an authorisation of the whole of the German NAP, including the transfer rule.

99. The legal nature of that procedure and the Commission's decision-making power must therefore be considered.

B - The legal nature of the review procedure and the Commission's decision-making power under Article 9 of Directive 2003/87

1. Preliminary remarks

100. It is common ground that from a purely formal point of view, and independently of its real substantive scope, the contested decision is based solely on Article 9(3) of Directive 2003/87 and not on the relevant rules concerning State aids, namely, Articles 87 EC and 88 EC and Regulation No 659/1999.

101. In r egard to the legal nature of the review procedure laid down in Article 9(3) of Directive 2003/87, the defendant, supported by the intervener, [*65] argues, in substance, that that provision does not give the Commission the power to authorise NAPs notified to it, but only the power to reject them, or certain aspects of them, on the basis of the criteria laid down in Annex III to the directive. The applicant replies, in essence, that if the contested decision is annulled, the review procedure will have to be reopened and, in any event, the expiry of the three-month time-limit is a legal fiction intended to deem the NAPs authorised.

102. In order to determine whether the parties' arguments in this connection are well-founded, the Court considers that it must carry out a literal, contextual and teleological interpretation of Article 9(3) of Directive 2003/87 (see, as to methodology, Case T-251/00 Lagard[#232]re and Canal+ v Commission [2002] ECR II-4825, paragraph 72 et seq, and Joined Cases T-22/02 and T-23/02 Sumitomo Chemical and Sumika Fine Chemicals v Commission [2005] ECR II-4065, paragraph 41 et seq).

2. The authorisation contained in the contested decision

(a) Literal interpretation of Article 9(3) of Directive 2003/87

103. With regard, first of all, to the question whether the contested decision [*66] contains an authorisation of the German NAP, consideration must be given to the terms of Article 9(3) of Directive 2003/87, which, the parties agree, is the formal legal basis for the contested decision.

104. The Court notes that the first sentence of Article 9(3), which provides that the Commission 'may reject that [NAP], or any aspect thereof', indicates that the Commission does not have a full power of authorisation, as the applicant argues. Although it is true that that provision permits the Commission to review in advance NAPs notified to it by the Member States, the Commission's power to consider and reject NAPs 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 Directive 2003/87 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.

105. Contrary to the applicant's view, the fact that the second sentence of Article 9(3) of Directive 2003/87 mentions 'proposed amendments' which must be ' [*67] accepted by the Commission' does not call that assessment into question. Those amendments are made during a later phase of the review procedure - that is to say, following Commission objections to the NAP as notified or to certain aspects of it - and the purpose of such amendments is precisely to overcome the objections initially expressed by the Commission regarding their compatibility with the criteria laid down in Annex III and the provisions of Article 10 of Directive 2003/87. Therefore, acceptance of such amendments by the Commission is merely the corollary of the objections initially raised in the context of the limited power of review and rejection conferred on it by Article 9(3) of Directive 2003/87 and not the expression of a general authorisation power. On the contrary, the fact that the latter provision provides only for acceptance of the proposed amendments to the NAP indicates that the Commission has no such general power of authorisation.

106. Moreover, the power to reject the NAP as notified or certain aspects thereof does not flow from an absolute obligation on the Commission to act. Certainly, following the notification of a NAP, it is required to verify, [*68] carefully and impartially, that the NAP is compatible with the criteria in Annex III and the provisions of Article 10 of Directive 2003/87 (see, by analogy, Case C-269/90 Technische Universit[#228]t M[#252]nchen [1991] ECR I-5469, paragraph 14; Case T-13/99 Pfizer Animal Health v Council [2002] ECR II-3305, paragraph 171; and Case T-70/99 Alpharma v Council [2002] ECR II-3495, paragraph 182). However, the words 'may reject' imply a certain discretion on the part of the Commission, comparable to that which it enjoys in regard to Article 226 EC, which it is not required to apply in all circumstances (see the order in Case T-202/02 Makedoniko Metro and Michaniki v Commission [2004] ECR II-181, paragraphs 43 and 46 and the case-law cited therein). It follows that if, during the three months following the notification of a NAP by a Member State, the Commission does not make use of its power, the Member State may, in principle, implement its NAP under the conditions laid down in Article 11 et seq. of Directive 2003/87 without need of the Commission's approval (see, to that effect, Case T-178/05 United Kingdom v Commission [2005] ECR II-4807, paragraph 55). It should [*69] be added that that in no way affects the Commission's general supervisory power under Articles 211 EC and 226 EC, which is not subject to any absolute time-limit.

107. Equally, it is clear from the terms of Article 9(3) of Directive 2003/87 that the procedure for review of NAPs need not necessarily be closed by a formal decision, particularly when, in the course of that procedure, the Member State makes all the amendments requested by the Commission. In addition, the second sentence of Article 9(3) of Directive 2003/87 mentions only a negative decision, rejecting the NAP, and not of a decision authorising it or a decision not to raise any objections. It follows that the Commission enjoys a degree of latitude in adopting such a decision, of which it will make use, in particular, when a Member State refrains from, or refuses to, amend its NAP within the three-month time-limit, notwithstanding the objections raised by the Commission.

108. Therefore, the applicant's argument is in contradiction with the terms of Article 9(3) of Directive 2003/87.

(b) The contextual interpretation of Article 9(3) of Directive 2003/87

109. From a contextual point of view, the [*70] Court notes the absence of relevant factors in Directive 2003/87 permitting it better to determine the legal nature of the review procedure and the Commission's power of decision under Article 9(3) of that directive. However, that procedure and power may be compared to other systems of administrative

review which also involve a decision-making power on the part of the Commission, including those relied on by the parties, so as to identify the legal basis and the purpose of the rules at issue.

110. The parties referred, in particular, to the procedure for reviewing State aid laid down in Article 88 EC and, in more detail, in Regulation No 659/1999 and the procedure under Article 226 EC for failure to fulfil obligations.

111. It should be made clear that, unlike the procedure under Article 226 EC for failure to fulfil obligations, both the procedure in regard to State aid - in so far as it concerns measures notified in advance under Article 88(3) EC - and the review procedure under Article 9(3) of Directive 2003/87 are examples of prior review of the compatibility of national measures with certain provisions of Community law. Just as, under the third sentence of Article [*71] 88(3) EC, a Member State may not, before the expiry of a specific time-limit, put into effect an aid measure which has been notified, it may not put its NAP into effect before the expiry of the three-month time-limit laid down for that prior review in the first sentence of Article 9(3) of Directive 2003/87 unless the Commission informs the Member State, before the expiry of that time-limit, that it does not intend to raise any objections. On the one hand, that temporary prohibition on putting the NAP into effect is intended to enable the Commission to reject, up to the end of the time-limit, all or part of the NAP in question because of some incompatibility with, in particular, the criteria in Annex III. On the other hand, that prohibition flows from the fact that, under the second sentence of Article 9(3) of Directive 2003/87, if the Commission raises objections to the NAP or certain aspects thereof, the Member State may adopt a decision allocating allowances within the meaning of Article 11(1) - which requires that the NAP be 'developed pursuant to Article 9' - only if the amendments which it has proposed with a view to overcoming those objections have been accepted by [*72] the Commission. However, unlike the third sentence of Article 88(3) EC, Article 9(3) of Directive 2003/87 does not make the lifting of the prohibition on putting the NAP into effect dependent on the adoption of a formal decision by the Commission. Consequently, in the absence of express objections from the Commission within the prescribed time-limit, the mere expiry of the three-month time-limit permits, in principle, the Member State to put the NAP into effect in the form notified (United Kingdom v Commission , cited above at paragraph 106, paragraph 55).

112. The Court also considers that the mere fact that the procedure for reviewing NAPs constitutes a prior review does not imply that the procedure must lead to a decision creating rights in regard to the lawfulness of the measures notified and the possibility of putting them into effect. Although the rules concerning aid are based on the principle of a general prohibition - linked to a presumption of unlawfulness - under which aid measures within the meaning of Article 87(1) EC are, in principle, incompatible with the common market, Article 9(3) of Directive 2003/87 is not based on any such principle and is not intended to [*73] derogate from any general prohibition. On the contrary, that provision is intended to ensure the proper functioning of the emissions allowance trading scheme through the allocation of emission allowances by the Member States on the basis of their NAP, compliance with whose rules by the Member State is subject only to very limited review, particularly as regards the criteria set out in Annex III to the directive. Equally, in Community environment law, there are no provisions of primary or secondary law prohibiting a Member State - even as a precautionary measure, as is the case with the general prohibition in Article 87 EC - from adopting certain measures in the context of the implementation of Directive 2003/87 and the emissions allowances trading scheme. On the contrary, under Article 176 EC, a Member State may maintain or introduce more stringent protective measures than are required by Community law as long as those measures are compatible with the Treaty in general (see, by analogy, Case C-6/03 Deponiezweckverband Eiterk[#246]pfe [2005] ECR I-2753, paragraphs 27 to 32).

113. The Court considers that the differences, referred to in paragraph 112 of the present order, between [*74] the procedure for reviewing State aid and the review of NAPs reveal a fundamental distinction between those two systems of prior review. It follows that the legal effects of the measures adopted by the Commission under the two systems, both in regard to the Member States and to the undertakings concerned, must be clearly distinguished.

114. Thus, a formal decision finding compatibility, within the meaning of Article 88(3) EC, adopted by the Commission in the context of the procedure for reviewing State aid is an authorising decision expressly recognising the lawfulness of the aid notified and, in the absence of such a decision, such aid is, in principle, unlawful and may not be granted (see Article 4(2) and (3) and Article 7(2) and (3) of Regulation No 659/1999). A decision under Article 88(3) EC finding incompatibility, on the other hand, merely confirms in a legally binding manner the general prohibition laid down in Article 87 EC and the prohibition on implementing the aid (see Article 7(5) of Regulation No 659/1999). Finally, the need for such an authorisation, which derogates from the general prohibition of State aid laid down in Article 87(1) EC is confirmed by the legal [*75] fiction flowing from the first sentence of Article 4(6) of Regulation No 659/1999, under which aid is to be 'deemed to have been authorised' where the Commission has not taken a decision within the deadline

(see also Case 120/73 Lorenz [1973] ECR 1471, paragraph 5).

115. On the other hand, a prior review under Article 9(3) of Directive 2003/87 does not necessarily lead to an authorising decision, since 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 (see paragraph 106 of the present order). In addition, 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 during the allocation period concerned. Therefore, that particular review is based on a presumption that the State measure, which is subject only to a temporary prohibition on its being put into effect, is lawful. It follows [*76] that any decision of the Commission rejecting a NAP or certain aspects thereof, even where other aspects of the plan have been expressly accepted or where reasons for not raising objections to them are stated and where amendments to the NAP are subsequently accepted, cannot be regarded as an authorisation, in the sense of a measure giving rise to rights, because, of their nature, measures notified in this context do not require any such authorisation.

(c) The teleological interpretation of Article 9(3) of Directive 2003/87

116. The considerations set out in paragraphs 103 to 115 of the present order are confirmed by a teleological interpretation of Article 9(3) of Directive 2003/87.

117. From a teleological point of view, the purpose of the procedure under this provision, apart from permitting the Commission to exercise a prior review, is to provide legal certainty for the Member States and, in particular, to permit them to be sure, within a short time, how they may allocate emission allowances and manage the allowance trading scheme on the basis of their NAP during the allocation period in question. Having regard to the limited duration of such a period, which is three [*77] or five years (Article 11 of Directive 2003/87), both the Commission and the Member States have a legitimate interest in resolving quickly any dispute concerning the contents of the NAP and in ensuring that, during the entire period of its validity, the NAP does not risk being contested by the Commission.

118. In addition, unlike the application of the State aid rules, which are intended to avoid from the outset the creation of a situation contrary to the provisions of the Treaty and to the objectives of the common market, implementation of the objectives of Directive 2003/87, in particular, the establishment of an allowance trading scheme designed to promote reductions of greenhouse gas emissions in a cost-effective and economically efficient manner (Article 1 of the directive), would be hindered by a prohibition on putting the NAPs into effect until the Commission had adopted a decision authorising them.

119. It follows from the foregoing that that the applicant's argument to the effect that the contested decision contains an implicit authorisation of the German NAP, including the contested transfer rule, cannot be accepted.

3. The effects of the expiry of the [*78] three-month time-limit referred to in the first sentence of Article 9(3) of Directive 2003/87

120. With regard to the applicant's argument that the NAP as notified is deemed to be authorised on the expiry of the three-month time-limit referred to in the first sentence of Article 9(3) of Directive 2003/87, it follows from the considerations set out in paragraphs 103 to 119 of the present order that, in the absence of a general power on the part of the Commission, to authorise, in the strict sense, NAPs which have been notified to it, the absence of objections on the Commission's part on the expiry of the time-limit cannot raise any presumption or legal fiction that the NAP has been authorised. The Court would point out that the Commission enjoys only a limited power of review and rejection, restricted to the criteria set out in Annex III to Directive 2003/87 and Article 10 thereof. Therefore, the only consequence of the expiry of the time-limit is that the NAP - which enjoys a presumption of legality in the absence of objections from the Commission - becomes definitive and may be put into effect by the Member State without the need for any general authorisation by the [*79] Commission.

121. That assessment is reinforced by the fact that Article 9(3) of Directive 2003/87 does not lay down an express rule establishing a presumption or legal fiction of the kind claimed by the applicant. Certainly, the Community legislature could lay down such rules if it considered it indispensable in the interests of legal certainty for the parties to the proceedings. As the applicant points out, the Community legislature made use of that power in Article 4(6) of

Regulation No 659/1999, in the interests of the Member State, so that it could put an aid measure into effect after the expiry of two months from the time of its notification without the risk of a subsequent intervention on the part of the Commission. Similarly, Article 10(6) of Regulation No 139/2004 provides, in the interests of undertakings notifying an intended concentration, that a concentration is to be deemed to have been declared compatible with the common market where the Commission has not taken a decision within the time-limits set in the regulation. It must be stated that the justification for those rules lies precisely in the fact that, unlike the system laid down in Article 9(3) of Directive [*80] 2003/87, the systems of review in question require an express authorisation which creates rights on the part of the administration, so that the proposed measures may be put into effect. Moreover, those rules constitute exceptions and must be expressly laid down in the legislation in question inasmuch as they involve a modification of the legal structure by the grant of an authorisation independently of any intervention on the part of the Commission.

122. Thus, the absence of objections from the Commission before the expiry of the three-month time-limit laid down in Article 9(3) of Directive 2003/87 does not imply, by way of a legal fiction, that the NAP as notified has been authorised. It should be added that the applicant's argument could undermine the Commission's power of review under Article 226 EC, which, having regard to the limited review provided for in Article 9(3) of Directive 2003/87, it must be able to exercise where there have been infringements of Community law other than of the criteria in Annex III to that directive or the provisions of Article 10 thereof.

4. The legal effects of the annulment of the contested decision

123. In the light of the [*81] foregoing, the Court considers that the annulment of the contested decision would procure no advantage for the applicant which could give it locus standi within the meaning of the case-law cited in paragraph 96 of the present order.

124. First of all, independently of the question whether an annulment would require the Commission to rule anew on the German NAP under Article 9(3) of Directive 2003/87, such an annulment could not be based on a factor which is foreign to the purpose and scope of the contested decision, as determined, in particular, by its provisions. However, in the first place, Article 1 of the contested decision rejected only certain ex-post adjustments to the German NAP and not the transfer rule, which is what the applicant is primarily contesting. Secondly, it follows from the considerations set out in paragraphs 103 to 119 of the present order that the contested decision also does not contain any kind of authorisation - whether express or implied - of the German NAP as a whole, including the contested transfer rule. Therefore, unlike the annulment of a decision on the compatibility of State aid and contrary to the objective which the applicant is seeking to [*82] achieve, annulment of the contested decision would not cancel that authorisation.

125. Consequently, as the defendant contends, annulment of the provisions of the contested decision would not achieve the principal purpose of the applicant's action. It also follows that the provisions of the contested decision as such do not adversely affect the applicant and that, consequently, its annulment would not procure any advantage for it. Thus, the applicant has not shown, in that regard, that it has locus standi , and the application must be declared inadmissible.

126. Secondly, the applicant's action is also inadmissible in so far as it relates to the ninth and tenth recitals in the preamble to the contested decision. It is true that those recitals refer, essentially, to an assessment made by the Commission on the basis of Article 88(3) EC and to the transfer rule, to which the Commission saw no objections. In addition, with regard to the lawfulness of the transfer rule, Communication COM (2004) 500 final, cited above, carries over and completes the reasons on which the contested decision, adopted on the same day, is based and the Community judicature is required, in [*83] principle, to take those additional reasons into account when exercising its judicial review (see, by analogy, Case T-374/00 Verband der freien Rohrwerke and Others v Commission [2003] ECR II-2275, paragraphs 122 to 124).

127. However, as may be seen from settled case-law, only the enacting terms of a decision are capable of producing legal effects and, consequently, of adversely affecting a person's legal interests, regardless of the grounds on which the decision is based. By contrast, the assessments made in the recitals in the preamble to a decision are not in themselves capable of forming the subject of an application for annulment and can be subject to review by the Community judicature only to the extent that, as grounds for an act adversely affecting a person's interests, they constitute the essential basis for the enacting terms of that act (see, to that effect, the order in Case C-164/02 Netherlands v Commission [2004] ECR I-1177, paragraph 21, and Case T-213/00 CMA CGM and Others v Commission [2003] ECR II-913, paragraph 186), or if, at very least, those recitals could change the substance of what was provided for in the

enacting terms of the act in question [*84] (see, to that effect, Lagard[#232]re and Canal+ v Commission , cited above at paragraph 102, paragraphs 67 and 68). It should also be pointed out that, in principle, the enacting terms of an act are inextricably linked to the statement of reasons for them in the recitals, so that, if that act has to be interpreted, account must be taken of the reasons which led to its adoption (see Joined Cases T-346/02 and T-347/02 Cableuropa and Others v Commission [2003] ECR II-4251, paragraph 211 and the case-law cited therein).

128. In the light of that case-law, the conclusion is confirmed, on the one hand, that the contested decision does not adversely affect the applicant's interests and, on the other, that its annulment would procure no advantage for it, having regard to the real purpose of its action, namely, the annulment of the alleged authorisation of the transfer rule by the contested decision. The reasons at issue, in particular those set out in the 10th recital in the preamble to the contested decision, concerning the transfer rule, have no connection with, nor are they in any way reflected in, the enacting terms of the decision and, in addition, they do not - for the reasons [*85] set out in paragraphs 103 to 122 of the present order - change the substantive content of those enacting terms. It is, in fact, legally impossible to create such a link, since the contested decision is a decision of rejection adopted under Article 9(3) of Directive 2003/87 which, of its nature, can set out in its enacting terms only aspects of the NAP which the Commission contests and rejects but not aspects in regard to which the Commission has raised no objections.

129. Although the Commission none the less comments, obiter , in the recitals in the preamble to the contested decision on aspects of the NAP to which it does not object, those recitals cannot produce binding legal effects or constitute the necessary basis for the enacting terms of the decision, given that Article 9(3) of Directive 2003/87 does not give the Commission the power to determine, in a legally binding manner, the lawfulness of a rule contained in a NAP. Moreover, in those circumstances, the recitals also cannot provide useful information for the interpretation of the enacting terms of the contested decision within the meaning of the case-law cited in paragraph 127 of the present order.

130. Consequently, [*86] in the absence of a legally binding position adopted in regard to the transfer rule in the enacting terms of the contested decision, the reasons stated in that decision concerning the transfer rule and its compatibility or otherwise with the rules on State aid are not subject to review by the Community judicature in this case and cannot form the basis for locus standi on the part of the applicant.

5. The absence of a decision adopted in regard to aid from a substantive point of view

131. Finally, it is necessary to reject the applicant's argument that the contested decision must be classified in accordance with its real nature, as determined by an assessment carried out on the basis of criteria which are objective and independent of its designation or its form (see IBM v Commission , cited above at paragraph 68, paragraph 9, and Air France v Commission , cited above at paragraph 68, paragraphs 43 and 51).

132. In the first place, although it is true that Directive 2003/87, in particular the fifth criterion in Annex III thereof, itself envisages the possibility of conflicts between the provisions of a NAP and the rules on State aid, and therefore requires the Commission [*87] to take account of those rules in the review procedure under Article 9(3) of the directive. In addition, it cannot be excluded that, under certain circumstances, notification of a NAP under the second subparagraph of Article 9(3) of Directive 2003/87 might also constitute notification for the purposes of Article 88(3) EC, or might even have to be regarded as such.

133. It follows that the Commission must carry out a preliminary review of those aspects of a NAP notified to it which might infringe Article 87 EC and that review might give rise to the initiation of a parallel procedure under Regulation No 659/1999. If the Commission considers, as a result of that preliminary review, that it is necessary to initiate such a procedure and that the contents of the notification are insufficient to constitute notice under Article 88(3) EC, it may, if appropriate, ask the Member State, pursuant to Regulation No 659/1999, to provide the information needed to carry out a more detailed review of aspects of the NAP in the light of Article 87 EC. It should be pointed out that, under Article 88(3) EC, the Member State is required, in principle - subject to certain exceptions such as those provided [*88] for in Council Regulation (EC) No 994/98 of 7 May 1998 on the application of Articles [87] and [88] of the Treaty establishing the European Community to certain categories of horizontal State aid (OJ 1998 L 142, p. 1) - to notify the Commission of any plans to grant aid. That obligation is distinct in law and, in principle, independent of the obligation to notify a NAP under Article 9(3) of Directive 2003/87. A decision based solely on Article 9(3) of Directive 2003/87 and not on Article 87 EC or Article 88 EC permits the Commission to carry out only a prima facie assessment, from the point of view of the rules on State aid, of the aid-related aspects of a NAP, which does not prevent the adoption of a

formal decision under the third sentence of Article 88(3) EC.

134. Secondly, neither Directive 2003/87, adopted solely on the basis of Article 175 EC and not Article 89 EC, nor the measures - not legally binding - adopted in this context, such as the Commission's letter of 17 March 2004 (see paragraphs 21 to 24 of the present order), can legitimately restrict the scope and useful effect of the rules concerning review of State aid (see, by analogy, Joined Cases C-134/91 and [*89] C-135/91 Kerafina and Vioktimatiki [1992] ECR I-5699, paragraph 20, and BP Chemicals v Commission , cited above at paragraph 76, paragraph 55). In the absence of a relevant legal basis and subject to the considerations set out in paragraph 132 of the present order, Directive 2003/87 cannot constitute a lex specialis permitting the review of State aid in the course of the review procedure laid down in Article 9(3) of Directive 2003/87. Similarly, if full notification under the State aid rules of some rules in a NAP is necessary, Directive 2003/87 does not permit an exception to be made to the prohibition, laid down in the third sentence of Article 88(3) EC, on putting aid into effect. It follows that, if the Member State does not comply with that prohibition, an individual may rely on the direct effect of the third sentence of Article 88(3) EC before the national courts (F[#233]d[#233]ration nationale du commerce ext[#233]rieur des produits alimentaires and Others , cited above at paragraph 70, paragraph 12, and Joined Cases C-266/04 to C-270/04, C-276/04 and C-321/04 to C-325/04 Casino France and Others [2005] ECR I-9481, paragraph 30). Finally, it follows that a rejection decision [*90] adopted solely on the basis of Article 9(3) of Directive 2003/87 cannot have all the legal consequences of a decision adopted under Article 88 EC, read in conjunction with Article 4 or Article 7 of Regulation No 659/1999. That finding is without prejudice to the fact that, where notification of a NAP under Article 9(1) of Directive 2003/87 also fulfils the requirements of notification under Article 88(3) EC (see paragraph 132 of the present order), the absence of a preliminary review and a statement of its position by the Commission under the State aid rules within the time-limits laid down in Article 4(5) of Regulation 659/1999 gives rise to an implied decision authorising the aid notified by virtue of Article 4(6) of that regulation, but that decision is distinct in law from the decision adopted under Article 9(3) of Directive 2003/87.

135. Thirdly, that assessment is not weakened by the fact that, in accordance with the fifth criterion in Annex III to Directive 2003/87, Articles 87 EC and 88 EC must also be complied with in connection with the implementation of the NAPs. That criterion is merely the expression of a principle well established in Community law whereby all measures [*91] of secondary legislation must be implemented is such a way as not to infringe the Treaty or any other rule of primary law, such as the general principles of law or fundamental rights. However, that general obligation to comply with Community law does not imply that an administrative procedure must be carried out in accordance with all the relevant procedural and substantive rules, such as those laid down in Regulation No 659/1999, but it does require the Commission to make a prima facie assessment when applying Directive 2003/87 (see paragraph 134 of the present order). Finally, the review procedure under Article 9(3) of Directive 2003/87 in no way permits the Commission to authorise Member States to derogate from provisions of Community law which are not contained in that directive (see, by analogy, Kerafina and Vioktimatiki , cited above at paragraph 134, paragraph 20, and BP Chemicals v Commission , cited above at paragraph 76, paragraph 55).

136. Fourthly, the Court notes that in its letter of 29 July 2004 (see paragraphs 41 to 46 of the present order), the Commission merely explains the reasons why, in the contested decision, it refrained from adopting a definitive position [*92] as to the compatibility of the German NAP and the transfer rule with the common market for the purposes of Article 87 EC. In particular, the Commission pointed out therein that 'any possible aid would probably be compatible with the common market if it were considered under Article 88(3) EC'. It follows that, according to its own statements, the Commission merely carried out a provisional assessment of the transfer rule in the light of the rules concerning State aid. However, having regard to the considerations set out in paragraphs 103 to 122 of the present order, such a provisional assessment cannot be interpreted as a definitive position in that regard.

137. Consequently, the applicant's action must be dismissed as inadmissible for want of locus standi . In those circumstances, there is no need to determine whether the applicant is directly and individually concerned by the contested decision within the meaning of the fourth paragraph of Article 230 EC.

138. In the light of all the foregoing, the present application must be dismissed as inadmissible.

Costs

139. Under Article 87(2) of the Rules of Procedure, the unsuccessful party is to be ordered [*93] to pay the costs if they

have been applied for in the successful party's pleadings. Since the applicant has been unsuccessful, it must be ordered to pay the costs of the proceedings in accordance with the defendant's pleadings.

140. The first subparagraph of Article 87(4) of those rules provides that the Member States which have intervened in the proceedings are to bear their own costs. Accordingly, the Federal Republic of Germany, as intervener, must bear its own costs.

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11997E088: N 100 110 133 - 135

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31999R0659: N 100 110 133 135

31999R0659-A04: N 134

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NOTES: Giolito, Christophe: Le Tribunal traite des [*97] probl[#232]mes d'aides d'[#201]tat pos[#233]s par un plan national d'attribution des quotas d'[#233]mission en Allemagne, Concurrences : revue des droits de la concurrence 2007 n[#186] 3 p.129-132; Vedder, H.: S.E.W. ; Sociaal-economische wetgeving 2008 p.77-78

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