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Judgment of the Court of First Instance (Seventh Chamber) of 23 September 2009. Republic of Estonia v Commission of the European Communities. Environment - Directive 2003/87/EC - Emissions trading system for greenhouse gases - National plan allocating emissions allowances for Estonia for the period from 2008 to 2012 - Respective powers of the Member States and the Commission - Equal treatment - Article 9(1) and (3) and Article 11(2) of Directive 2003/87. Case T-263/07.

Court of First Instance of the European Communities

European Court reports 2009 Page 00000

2009 ECJ EUR-Lex LEXIS 803

July 16, 2007

September 23, 2009

TYPE: [*1] Judgment

SUBJECT: Environment

PROCEDURE: Action for annulment

DISPOSITION: On those grounds,

THE COURT OF FIRST INSTANCE (Seventh Chamber)

hereby:

1. Annuls the Commission Decision of 4 May 2007 concerning the national allocation plan for the allocation of greenhouse gas emission allowances notified by the Republic of Estonia for the period from 2008 to 2012, pursuant to Directive 2003/87/EC of the European Parliament and of the Council of 13 October 2003 establishing a scheme for greenhouse gas emission allowance trading within the Community and amending Council Directive 96/61/EC.

2. Orders the Commission to bear its own costs and to pay those incurred by the Republic of Estonia.

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

LANGUAGE: ET;

INTRODUCTION: In Case T-263/07,

Republic of Estonia, represented by L. Uibo, acting as Agent,

applicant,

supported by

Republic of Lithuania, represented by D. Kriau[#269]inas, acting as Agent,

and

Slovak Republic, represented initially by J. orba, and subsequently by B. Ricziov[#225], acting as Agents,

interveners,

v

Commission [*2] of the European Communities, represented by U. W[#246]lker, acting as Agent, assisted by T. Tamme, lawyer,

defendant,

supported by

United Kingdom of Great Britain and Northern Ireland, represented initially by Z. Bryanston-Cross, subsequently by L. Seeboruth, and finally by S. Ossowski, acting as Agents, assisted by J. Maurici, barrister,

intervener,

APPLICATION for the annulment of the Commission Decision of 4 May 2007 concerning the national allocation plan for the allocation of greenhouse gas emission allowances notified by the Republic of Estonia for the period from 2008 to 2012, pursuant to Directive 2003/87/EC of the European Parliament and of the Council of 13 October 2003 establishing a scheme for greenhouse gas emission allowance trading within the Community and amending Council Directive 96/61/EC (OJ 2003 L 275, p. 32),

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

composed of N.J. Forwood (Rapporteur), President, D. [#352]v[#225]by and E. Moavero Milanesi, Judges,

Registrar: K. Poche, Administrator,

having regard to the written procedure and further to the hearing on 11 February 2009,

gives the [*3] following

Judgment

JUDGMENT: Legal context

1. Article 1 of European Parliament and Council Directive 2003/87/EC of 13 October 2003 establishing a scheme for greenhouse gas emission allowance trading within the Community and amending Council Directive 96/61/EC (OJ 2003 L 275, p. 32; 'the Directive'), as amended by European Parliament and Council Directive 2004/101/EC of 27 October 2004 (OJ 2004 L 338, p. 18) provides:

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

2. Article 9(1) of the Directive provides:

'For each period referred to in Article 11(1) and (2), each Member State shall develop a national plan stating the total quantity of allowances that it intends to allocate for that period and how it proposes to allocate them. The plan shall be based on objective and transparent criteria, including those listed in Annex III, taking due account of comments from

the public. The Commission shall, without prejudice to the Treaty, by 31 December 2003 at the [*4] latest develop guidance on the implementation of the criteria listed in Annex III.

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

3. Article 9(3) of the Directive reads:

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

4. Article 11(2) of the Directive reads:

'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 [*5] and initiate the process for the allocation of those allowances to the operator of each installation. This decision shall be taken at least 12 months before the beginning of the relevant period and be based on the Member State's national allocation plan developed pursuant to Article 9 and in accordance with Article 10, taking due account of comments from the public.'

5. Annex III to the Directive ('Annex III') sets out 12 criteria applicable to national allocation plans. Criteria Nos 1 to 3, 5 and 6, 10 and 12 of Annex III provide:

'1. The total quantity of allowances to be allocated for the relevant period shall be consistent with the Member State's obligation to limit its emissions pursuant to [Council Decision 2002/358/EC of 25 April 2002 concerning the approval, on behalf of the European Community, of the Kyoto Protocol to the United Nations Framework Convention on Climate Change and the joint fulfilment of commitments thereunder (OJ 2002 L 130, p. 1)] and the Kyoto Protocol, taking into account, on the one hand, the proportion of overall emissions that these allowances represent in comparison with emissions from sources not covered by [*6] this Directive and, on the other hand, national energy policies, and should be consistent with the national climate change programme. The total quantity of allowances to be allocated shall not be more than is likely to be needed for the strict application of the criteria of this Annex. Prior to 2008, the quantity shall be consistent with a path towards achieving or over-achieving each Member State's target under Decision 2002/358 and the Kyoto Protocol.

2. The total quantity of allowances to be allocated shall be consistent with assessments of actual and projected progress towards fulfilling the Member States' contributions to the Community's commitments made pursuant to [Council Decision 93/389/EEC of 24 June 1993 for a monitoring mechanism of Community CO 2 and other greenhouse gas emissions].

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

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5. The [*7] plan shall not discriminate between companies or sectors in such a way as to unduly favour certain undertakings or activities in accordance with the requirements of the Treaty, in particular Articles 87 and 88 thereof.

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

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

to be allocated to each.

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

Facts and procedure

6. The Republic of Estonia has notified the Commission of the European Communities of its national greenhouse gas allocation plan, in accordance with the Directive. According to the Republic of Estonia, that notification [*8] was given on 30 June 2006, whereas the Commission maintains that it was given on 7 July 2006.

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

8. On 4 May 2007, the Commission adopted its decision on the national greenhouse gas allocation plan notified by the Republic of Estonia for the period from 2008 to 2012, in accordance with the Directive (the 'contested decision'). That decision calls for a reduction of 47.8% compared with the emission allowances which the Republic of Estonia was proposing to issue.

9. The operative part of the contested decision reads:

'Article 1

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

1. criteria 1, 2 and 3 of Annex III to the Directive: the part of the intended total quantity of allowances, amounting to 11.657987 million tonnes CO 2 equivalent per year, that is not consistent with assessments made pursuant to Decision 280/2004/EC and not consistent with [*9] the potential, including the technological potential, of activities to reduce emissions; this part being reduced in respect of emissions of project activities which were already operational in 2005 and resulted in 2005 in emission reductions or limitations in installations falling under the scope of the Directive to the extent that the resulting emission reductions or limitations due to these project activities have been substantiated and verified; in addition, the part of the total quantity potentially amounting to 0.313883 million tonnes of allowances annually in respect of additional emissions of one combustion installation not included in the first phase national allocation plan to the extent that this is not justified in accordance with the general methodologies stated in the national allocation plan and on the basis of substantiated and verified emission figures;

2. criterion 3 of Annex III to the Directive: the non-inclusion in the national allocation plan of a set-aside for allowances drawn up by Estonia pursuant to Article 3(1) and (2) of [Commission Decision 2006/780/EC of 13 November 2006 on avoiding double counting of greenhouse gas emission reductions under the [*10] Community emissions trading scheme for project activities under the Kyoto Protocol pursuant to European Parliament and Council Directive 2003/87/EC] in the total quantity of allowances and the absence of a correspondingly lower allocation to installations carrying out the relevant activities;

3. criterion 5 of Annex III to the Directive: the allocations to certain installations beyond their expected needs resulting from the cumulation of a bonus for early action with the allocations otherwise calculated;

4. criterion 6 of Annex III to the Directive: the information on the manner in which new entrants will be able to begin participating in the Community scheme.

Article 2

No objections shall be raised to the national allocation plan, provided that the following amendments to the national allocation plan are made in a non-discriminatory manner and notified to the Commission as soon as possible, taking into account the time-scale necessary to carry out the national procedures without undue delay:

1. the total quantity to be allocated for the Community scheme is reduced by 11.657987 million tonnes CO 2 equivalent of allowances per year; and the quantities allocated [*11] to one additional installation not included in the first phase plan are determined in accordance with the general methodologies stated in the national allocation plan and on the basis of substantiated and verified emission figures, with the total quantity being further reduced by any difference between the allocation to this installation and the 0.313883 million tonnes set aside annually for this installation; and the total quantity being increased in respect of emissions of project activities which were already operational in 2005 and resulted in 2005 in emission reductions or limitations in installations falling under the scope of the Directive to the extent that the resulting emission reductions or limitations due to these project activities have been substantiated and verified;

2. a set-aside for allowances drawn up pursuant to Article 3(1) and (2) of Decision 2006/780/EC is included by Estonia in the total quantity of allowances of 12.717058 million tonnes calculated in accordance with criteria 1, 2 and 3 of Annex III to the Directive before the final national allocation decision pursuant to Article 11(2) of the Directive is taken and a correspondingly lower allocation to [*12] installations carrying out the relevant activities takes place;

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

4. information is provided on the manner in which new entrants will be able to begin participating in the Community scheme, in a way that complies with the criteria of Annex III to the Directive and Article 10 thereof.

Article 3

1. The total average annual quantity of allowances of 12.717058 million tonnes, reduced by the size of a set-aside for allowances drawn up by Estonia pursuant to Article 3(1) and (2) of Decision 2006/780/EC, and further reduced by any difference between the allocation to one additional installation not included in the first phase plan and the 0.313883 million tonnes set aside annually for this installation, to the extent that this is not justified in accordance with the general methodologies stated in the national allocation plan and on the basis of substantiated and verified emissions of this installation, and increased in respect of emissions of project activities which were already operational in 2005 and resulted in 2005 in emission [*13] reductions or limitations in installations falling under the scope of the Directive to the extent that the resulting emission reductions or limitations due to these project activities have been substantiated and verified, to be allocated by Estonia according to its national allocation plan to installations listed therein and to new entrants shall not be exceeded.

2. The national allocation plan may be amended without prior acceptance by the Commission if the amendment consists in modifications of the allocation of allowances to individual installations within the total quantity to be allocated to installations listed therein resulting from improvements to data quality or to reduce the share of the allocation of allowances free of charge within the limits set in Article 10 of the Directive.

3. Any amendments of the national allocation plan made to correct the incompatibilities indicated in Article 1 of this Decision but deviating from those referred to in Article 2 must be notified as soon as possible, taking into account the time-scale necessary to carry out the national procedures without undue delay, and require prior acceptance by the Commission pursuant to Article 9(3) [*14] of the Directive. Any other amendments of the national allocation plan, apart from those made to comply with Article 2 of this Decision, are inadmissible.

Article 4

This decision is addressed to the Republic of Estonia.'

10. By document lodged at the Registry of the Court of First Instance on 16 July 2007, the Republic of Estonia brought the present action for the annulment of the contested decision.

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

12. By document lodged at the Registry of the Court of First Instance on 8 October 2007, the United Kingdom of Great Britain and Northern Ireland sought leave to intervene in support of the Commission.

13. By documents lodged at the Registry of the Court of First Instance on 16 October and 8 November 2007 respectively, the Republic of Lithuania and the Slovak Republic sought leave to intervene in support of the Republic of Estonia.

14. By order of 29 January 2008, the President of the Seventh Chamber of the Court of First Instance allowed the three interventions. [*15]

15. On hearing the report of the Judge-Rapporteur, the Court of First Instance (Seventh Chamber) decided to open the oral procedure and put questions to the parties by way of measures of organisation of procedure pursuant to Article 64 of the Rules of Procedure of the Court of First Instance. The parties replied to those questions.

16. The parties presented oral argument and replied to the questions put to them by the Court at the hearing on 11 February 2009.

Forms of order sought

17. The Republic of Estonia claims that the Court should:

- annul the contested decision;

- order the Commission to pay the costs.

18. The Republic of Lithuania claims that the Court should annul the contested decision.

19. The Slovak Republic did not lodge a statement in intervention and has made no claims.

20. The Commiss ion contends that the Court should:

- dismiss the action as inadmissible in relation to Article 1(3) and (4), Article 2(3) and (4), and Article 3(2) and (3) of the contested decision;

- dismiss the action as unfounded in relation to the other provisions of the contested decision;

- order the Republic of Estonia to pay the costs. [*16]

21. The United Kingdom of Great Britain and Northern Ireland contends that the Court should:

- dismiss the action;

- order the Republic of Estonia to pay the costs.

Admissibility

Arguments of the parties

22. In its defence, the Commission argues that the present action is inadmissible in relation to Article 1(3) and (4), Article 2(3) and (4), and Article 3(2) and (3) of the contested decision. It argues that the pleas raised essentially concern the legality of the ceiling fixed for the total quantity of allowances provided for in Articles 1(1), 2(1) and 3(1) of the contested decision, and, partially, the non-inclusion of the reserves of allowances referred to in Articles 1(2) and 2(2) of the latter. Thus, the Commission argues, even if the Court of First Instance were to find the pleas well founded, that

would not entail the annulment of the whole of the contested decision, whereas the Republic of Estonia did not submit any factual or legal plea concerning the other provisions of the contested decision.

23. The Commission recalls that, according to Article 21 of the Statute of the Court of Justice, all applications submitted to the Community courts [*17] must contain a brief statement of the pleas in law on which the application is based. It mentions that Article 44(1)(c) of the Rules of Procedure of the Court of First Instance also provides that the application must state the subject-matter of the proceedings and a summary of the pleas in law on which the application is based. In the light of the above, the Commission considers that, in this case, the application does not comply with those requirements as regards Article 1(3) and (4), Article 2(3) and (4) and Article 3(2) and (3) of the contested decision. Moreover, the provisions in question could subsist independently, even if the rest of the contested decision were annulled. Thus, in so far as the present action seeks the annulment of those provisions, it should be dismissed as inadmissible.

24. The Republic of Estonia maintains at the outset that, in its application, it has sought the annulment of the contested decision in its entirety.

25. It goes on to observe that, according to the case-law, the partial annulment of a Community measure is possible only in so far as the elements of which annulment is sought are severable from the rest of the measure.

26. In this [*18] case, the contested decision was an individual measure addressed to the Republic of Estonia with a coherent meaning and structure, its recitals and the articles in its operative part being all interlinked. The Republic of Estonia considers that it is not possible to sever certain elements without emptying the contested decision of its content or causing it to lose its coherence.

27. On those grounds, the Republic of Estonia considers that the Commission's defence plea based on partial inadmissibility of the present action is unfounded, and that the contested decision must be annulled in its entirety.

Findings of the Court

28. It should first be noted that, according to consistent case-law, partial annulment of a decision is possible only if the elements whose annulment is sought may be severed from the remainder of the decision (Case C-29/99 Commission v Council [2002] ECR I-11221, paragraph 45; Case C-239/01 Germany v Commission [2003] ECR I-10333, paragraph 33; Case C-378/00 Commission v Parliament and Council [2003] ECR I-937, paragraph 30). Similarly, the Court has repeatedly held that that requirement of severability is not met where partial annulment [*19] of a measure would have the effect of changing its substance (Case C-244/03 France v Parliament and Council [2005] ECR I-4021, paragraph 13; Joined Cases C-68/94 and C-30/95 France and Others v Commission [1998] ECR I-1375, paragraph 257; Commission v Council , cited above, paragraph 46).

29. In this case, Article 1 of the contested decision begins with the following words: 'The following aspects of the national allocation plan of Estonia for the first five-year period mentioned in Article 11(2) of the Directive are incompatible respectively with [...]'. Then, in paragraphs 1 to 4 of that article, the Commission enumerates various incompatibilities of the Republic of Estonia's national allocation plan for allowances with one or more of the criteria in Annex III. Given the structure of the Article 1, any annulment of some of its paragraphs would have the effect of reducing the number of incompatibilities with the Directive which were found in the contested decision.

30. It should then be noted that Article 2 of the contested decision begins with the following words: 'No objections shall be raised to the national allocation plan, provided that the [*20] following amendments to the national allocation plan are made in a non-discriminatory manner and notified to the Commission as soon as possible, taking into account the time-scale necessary to carry out the national procedures without undue delay'. In paragraphs 1 to 4 of that article, the Commission prescribes, in each paragraph, the amendment of the plan which is necessary in order to remedy the incompatibility found in the corresponding paragraph of Article 1. Thus, any annulment of some of its paragraphs only would have the effect of maintaining in force the Commission's undertaking not to raise objections to the national plan, while reducing the number of amendments subject to which that undertaking was initially given.

31. It follows from the structure of those two articles that paragraphs 1 to 4 of each of them cannot be regarded as severable for the purposes of the case-law referred to in paragraph 28 above. Any annulment of one of the paragraphs of

Article 1, and of the corresponding paragraph of Article 2, would have the effect of modifying the substance of the contested decision.

32. Such an annulment would replace the contested decision, according to [*21] which the Republic of Estonia's national allocation plan for allowances may be adopted subject to four specific amendments for remedying four incompatibilities with the criteria in Annex III, with a different decision according to which that plan may be adopted subject to a smaller number of amendments. The decision thus substituted for the contested decision would be all the more different from the latter in that the pleas put forward by the Republic of Estonia challenge the incompatibility found, and the corresponding amendment demanded, in paragraphs 1 and 2 of Articles 1 and 2 of the contested decision. It is precisely those two incompatibilities which would necessitate the most significant amendments to the Republic of Estonia's national allocation plan for allowances.

33. As for Article 3(2) and (3) of the contested decision, it is sufficient to note that those provisions contain explanations concerning the implementation of the other provisions in the contested decision. Thus, if Articles 1 and 2 of the contested decision, and Article 3(1), also called into question by the pleas raised by the Republic of Estonia, were to be annulled, Article 3(2) and (3) would [*22] become devoid of purpose.

34. It follows from the whole of the above that, if the pleas raised by the Republic of Estonia, are well founded, the contested decision will have to be annulled in its entirety, since the provisions which form the subject-matter of the pleas put forward are not severable from the rest of the measure. Therefore, the Commission's arguments concerning the alleged partial inadmissibility of this action must be dismissed.

Substance

35. The Republic of Estonia makes five pleas in law, claiming, first, an excess of authority arising from infringements of Article 9(1) and (3) and Article 11(2) of the Directive; secondly, manifest errors of assessment; thirdly, infringement of Article 175 EC; fourthly, infringement of the principle of sound administration; and, fifthly, inadequate statement of reasons.

The first plea, claiming an excess of authority arising from infringements of Article 9(1) and (3) and Article 11(2) of the Directive

Arguments of the parties

36. The Republic of Estonia, supported by the Republic of Lithuania and the Slovak Republic, considers that, in adopting the contested decision, the Commission has exceeded [*23] its authority under Article 9(1) and (3) and Article 11(2) of the Directive. In its submission, those provisions show that the drawing up of a national allocation plan for allowances falls within the competence of the Member States, and that the Commission must limit itself to reviewing whether that plan is compatible with the criteria set out in Annex III and in Article 10 of the Directive. Member States therefore have the right to decide which method they will adopt in setting up their plan for allocating allowances and which data and forecasts they will use in determining the emissions authorised for installations during the period fixed by that plan.

37. In this case, the Commission did not take account of the method whereby the Republic of Estonia drew up its plan for allocating allowances. Recitals 5 and 6 of the contested decision show that, in order to determine the total quantity of allowances admissible, the Commission used its own method and that it based its reasoning on basic data chosen by itself and on the Primes model, set up by a Greek expert, ignoring in substance the plan for the allocation of allowances of the Republic of Estonia. Thus, de facto , the Commission [*24] itself fixed the total quantity of allowances to be allocated under the Republic of Estonia's allocation plan.

38. The Republic of Estonia adds, in its reply, that the concept of a 'ceiling', which in the Commission's submission constitutes the outer limit applicable to the total quantity of allowances to be allocated by a Member State, has no basis in law and does not appear either in the Directive or in the contested decision.

39. Finally, in its response to the statement in intervention of the United Kingdom of Great Britain and Northern Ireland, the Republic of Estonia emphasises that, 'in a State governed by the rule of law', administrative measures must be

adopted in accordance with the law and thus in compliance with the competences attributed to the various administrative bodies. Even if annulment of the contested decision were to have a significant effect on the European Union's trading system, that cannot justify maintaining an illegal decision in force. In any event, the Republic of Estonia emphasises that the total quantity of emission allowances for allocation under its plan is marginal in the wider context of the Community [*25] system for trading greenhouse gas emission allowances.

40. The Republic of Lithuania emphasises that the Commission does not have a general power to authorise the national allocation plan, but merely a power of review limited to the question of the compatibility of the plan with the criteria in Annex III.

41. As a preliminary, the Commission describes the Community system for trading greenhouse gas emission allowances, and observes, in particular, that, during the first period of the system's application, from 2005 to 2007, there was, in significant measure, an excessive allocation of allowances in relation to the emissions verified in 2005 and 2006, so that the benefit of the trading system for the environment was very limited or non-existent. According to the Commission, that excess allocation of allowances was very significant in Estonia, since its verified emissions for 2005 reached 12.62 million tonnes-equivalent of carbon dioxide (CO 2), whereas its average annual quantity of allowances for the first period was 19 million tonnes-equivalent of CO 2 per annum.

42. The United Kingdom of Great Britain and Northern Ireland argues that, if the Commission were to [*26] be unsuccessful in one of the cases concerning national allocation plans, the price of allowances during the second period would risk falling significantly due to the resulting oversupply of allowances, thereby completely undermining the effects of the Directive as a tool to reduce emissions. In other words, the consequences would be dire. The United Kingdom of Great Britain and Northern Ireland urges the Court to adopt a teleological interpretation of the Directive so as to allow the Commission to review national allocation plans in an effective manner and thus prevent Member States from fixing ceilings which are not capable of entailing an increase in the price of carbon or, therefore, of encouraging reductions in emissions.

43. The Commission and the United Kingdom of Great Britain and Northern Ireland then argue that, in the contested decision, the Commission did not determine the total quantity of allowances to be allocated by the Republic of Estonia, but fixed a ceiling for that total quantity. The Commission argues that, for the purposes of fixing that ceiling, it necessarily had to use objective and reliable data, and apply common assessment standards based on the same [*27] premises for the whole of the Union, in order to minimise distortions in the internal market and avoid any inequality of treatment between the Member States.

44. The Commission also argues that, for the proper functioning of the greenhouse gas emissions trading system, it is essential that the total quantity of allowances be insufficient both at the Union level and at the level of the Member States. It was for those reasons that the Commission used a single model, namely the Primes model, and freely accessible data, in consultation meetings with national experts, in order to fix the ceiling for the total quantity of allowances to be allocated for each of the Member States. The Commission considers that only an independent and coherent review of the data used allows sufficient guarantees to be obtained that the data reflect the reality and that their use will not involve, in significant measure, an excessive allocation of quotas as happened during the first trading period from 2005 to 2007. According to the United Kingdom of Great Britain and Northern Ireland, Articles 87 EC and 88 EC require an independent and objective assessment of the national allocation plans of the Member [*28] States.

45. The Commission considers that, particularly in recitals 2, 5 and 6 of the contested decision and in the various notices which it published, it provided the Republic of Estonia with detailed explanations of its reasons for holding that the verified emissions data for 2005 were the best data available. The Commission states that the notice of 7 January 2004 [COM(2003) 830 final], invoked by the Republic of Estonia, was followed by two notices pursuing the same objective [COM(2005) 703 final and COM(2006) 725 final], which were not in any way in conflict with the approach which it followed.

46. On the other hand, the Commission acknowledges in its rejoinder that it received e-mailed observations by the Republic of Estonia on 1 July 2005, contained in a report appearing in Annex 4 to the application, in which the Estonian experts formulated some general observations on the manner in which the production of electricity was taken into consideration in the initial forecasts of 2005, but without stating what they wished to amend. The Commission observes that taking the report in question into account caused the modeller of the National Technical University of Athens [*29]

significantly to amend the initial data and forecasts used.

47. The Commission considers that it has not imposed its own method of calculation either on the Republic of Estonia or on any other Member State, and observes that several Member States have drawn up their national allocation plans in compliance with the ceiling fixed for the total quantity of allowances in the decisions which the Commission addressed to them. It is, the Commission claims, not accurate to state that the Commission deprived the Republic of Estonia of the discretion which it is deemed to have in establishing its national plan, including as regards the total quantity of allowances to be allocated. Similarly, public consultation, in the context of the drawing up of the national plan, was not deprived of all its useful purpose. The Commission argues, in that respect, that national allocation plans fix not only the total quantity of allowances to be allocated, but also the distribution of allowances between the various installations in their territory.

48. As for the Republic of Estonia's line of argument based on Article 30(2) of the Directive, the Commission emphasises that that provision refers [*30] not to the harmonisation of the method for determining the total quantity of allowances, but to the possibility of further harmonising that method. In any event, the Commission had no other choice than to apply the same method for calculating the ceiling of the total quantity of allowances applicable to each of the Member States, as otherwise the principle of equal treatment would be infringed.

Findings of the Court

- The allocation of competences between the Member States and the Commission

49. First, it is undisputed between the parties, and is moreover apparent from the recitals and the general scheme of the Directive, that the reduction of greenhouse gas emissions in general, and the system for trading allowances established by the Directive in particular, are of primary importance in the context of the fight against global warming, which represents one of the greatest social, economic and environmental threats which the world currently faces.

50. The Republic of Estonia is nevertheless right to point out, in reply to the arguments of the United Kingdom of Great Britain and Northern Ireland, that, in a community governed by the rule of law, administrative measures [*31] must be adopted in compliance with the competences attributed to various administrative bodies. Therefore, even if the United Kingdom of Great Britain and Northern Ireland were right in its argument that annulment of the contested decision would have a negative impact on the proper functioning of the Community's greenhouse gas emissions trading system, that finding would not be enough to justify maintaining the contested decision in force if that measure were adopted in breach of the competences allocated by the Directive to the Member States and the Commission respectively.

51. In that regard, where transposition or implementation of an environmental directive is at issue, it is necessary to recall the wording of the third paragraph of Article 249 EC, according to which 'a directive shall be binding, as to the result to be achieved, upon each Member State to which it is addressed, but shall leave to the national authorities the choice of form and methods'. It follows that, when the directive in question does not prescribe the form and methods for achieving a particular result, the freedom of action of the Member States as to the choice of the appropriate forms [*32] and methods for achieving that result remains, in principle, complete. It also follows that, where there is no Community rule prescribing clearly and precisely the form and methods that must be employed by the Member State, the Commission has the burden, when exercising its supervisory power, pursuant in particular to Articles 211 EC and 226 EC, of proving to the required legal standard that the instruments used by the Member State in that respect are contrary to Community law (see, to that effect, Case T-374/04 Germany v Commission [2007] ECR II-4431, paragraph 78, and case-law cited).

52. It should be added that it is only by applying those principles that compliance with the principle of subsidiarity enshrined in the second paragraph of Article 5 EC can be ensured, a principle which binds the Community institutions in the exercise of their legislative functions and which is deemed to have been complied with in respect of the adoption of the Directive (recital 30 of the Directive). According to that principle, in areas which do not fall within its exclusive competence the Community is to take action only if and in so far as the objectives of the proposed action cannot be sufficiently [*33] achieved by the Member States and can therefore, by reason of the scale or effects of the proposed action, be better achieved by the Community. Accordingly, in a field such as that of the environment, which is governed by Articles 174 EC to 176 EC, where the Community and the Member States share competence, the Community, that is to say the Commission in the present case, has the burden of proving to what extent the powers of the Member State

and, therefore, its freedom of action, are limited in light of Article 10 and the criteria set out in Annex III to the Directive (Germany v Commission , cited above, paragraph 79).

53. Concerning more particularly the implementation of the Directive, it is unequivocally clear from Article 9(1) and (3) and from Article 11(2) thereof that the Member State alone has the power, first, to draw up the national allocation plan whereby it proposes to achieve the aims of the Directive concerning greenhouse gas emissions, which it notifies to the Commission, and, secondly, to take final decisions fixing the total quantity of allowances which it will allocate for each five-year period and the distribution of that quantity amongst economic operators. [*34] In the exercise of those powers, the Member State thus has a certain room for manoeuvre in choosing the measures which it considers the most appropriate to attain, in the specific context of the national energy market, the result prescribed by the Directive (see, to that effect, Germany v Commission , cited above, paragraph 80).

54. On the other hand, the Commission has power to review the national allocation plan under Article 9(3) of the Directive. Thus the Commission is authorised to verify the conformity of the national allocation plan notified by the Member State with the criteria set out in Annex III and the provisions of Article 10 of the Directive and to reject that plan on the grounds of incompatibility with those criteria and those provisions, by reasoned decision. Article 9(3) of the Directive also shows that, where the national allocation plan is rejected, the Member State may not take a decision under Article 11(2) unless the amendments proposed by the Member State following the refusal have been accepted by the Commission (see, in that respect, paragraph 92 below).

55. In the exercise of its power to review the national allocation plan, the Commission has a [*35] discretion in so far as that review causes it to make its own complex economic and ecological assessments having regard to the general objective of reducing greenhouse gases by means of an economically efficient and effective system of trading allowances (Article 1 and recital 5 of the Directive). It follows that, in its review of legality in this regard, the Community judicature conducts a full review as to whether the Commission applied properly the relevant rules of law. On the other hand, the Court of First Instance cannot take the place of the Commission on issues where the latter must carry out complex economic and ecological assessments in this context. In this respect, the Court is obliged to confine itself to verifying that the measure in question is not vitiated by a manifest error or a misuse of powers, that the competent authority did not clearly exceed the bounds of its discretion and that the procedural guarantees, which are of particularly fundamental importance in this context, have been fully observed (see, to that effect, Germany v Commission , cited above, at paragraphs 80 and 81; Case T-13/99 Pfizer Animal Health v Council [2002] ECR II-3305, paragraphs 166 and [*36] 171; Case T-70/99 Alpharma v Council [2002] ECR II-3495, paragraphs 177 and 182; and Case T-392/02 Solvay Pharmaceuticals v Council [2003] ECR II-4555, paragraphs 126 and 188).

- The exercise by the Commission of its powers in this case

56. In this case, the Republic of Estonia accuses the Commission of exceeding its powers under Article 9(1) and (3), and under Article 11(2) of the Directive, by adopting the contested decision. In so far as that line of argument seeks to establish that the Commission misapplied the relevant provisions, the Court must exercise a full review as regards that question of law. It should be emphasised in this respect that the discretion which the Republic of Estonia has in implementing the directive and the discretion which the Commission has, in so far as its review of the legality of the national allocation plan implies that it must carry out its own complex economic and ecological assessments, are relevant only for the purposes of determining the scope of the Court's review of the manner in which each authority exercised its own competences, but cannot have the effect of modifying the distribution of competences between those authorities. [*37]

57. In that regard, it should be noted that, in recital 13 and Article 1(1) of the contested decision, the Commission finds that a part of the total quantity of allowances which the Republic of Estonia proposes to allocate, namely 11.657987 million tonnes-equivalent of CO 2 per annum, is incompatible with criteria 1 to 3 of Annex III. It also finds that the total quantity of allowances corresponding to the additional emissions of one combustion installation not included in the first phase national allocation plan, assessed at 0.313883 million tonnes-equivalent of CO 2 per annum, is also incompatible with those criteria.

58. At the same time, the Commission states, in Article 2(1) of the contested decision, that no objection will be raised to the national allocation plan provided the total quantity of allowances to be allocated for the purposes of the Community system is reduced by 11.657987 million tonnes-equivalent of CO 2 per annum. Under the same provision, the

Commission further requires the total quantity of allowances thus approved to be further reduced by any difference between the allocation to the installation referred to in the previous paragraph and the 0.313883 [*38] million tonnes-equivalent of CO 2 set aside annually for that installation. Finally, in Article 3(1) of the contested decision, the Commission prohibits the Republic of Estonia from exceeding the total average annual quantity of allowances of 12.717058 million tonnes-equivalent of CO 2 , reduced by the 'set aside' proposed to be drawn up by the Republic of Estonia, and further reduced by any difference between the allowances allocated to the installation referred to above and the 0.313883 million tonnes-equivalent of CO 2 set aside annually for that installation.

59. In its pleadings, the Commission argues before the Court that the exclusion of the quantities of allowances referred to above represents the imposition on the Republic of Estonia of an outer limit or 'ceiling' and not the fixing of the total quantity of allowances which the latter may allocate.

60. The Court finds, however, that, by specifying a specific quantity of allowances, any exceeding of which is regarded as incompatible with the criteria laid down by the Directive, and by rejecting the national plan of the Republic of Estonia in so far as the total quantity of allowances proposed therein [*39] exceeds that threshold, the Commission has exceeded the limits of its power of review under Article 9(1) and (3) and Article 11(2) of the Directive.

61. It is undisputed, in that respect, that the Commission has the power, in accordance with Article 9(3) of the Directive, to review the national plan drawn up by a Member State under Article 9(1) of the Directive, and to reject it if it reaches the conclusion that the latter is incompatible with the criteria set out in Annex III or with the provisions of Article 10 of the Directive.

62. In addition, in carrying out such a review, and stating reasons for such a rejection decision, the Commission is entitled to make specific criticisms concerning the incompatibilities found, and, if it considers it appropriate, to formulate proposals or recommendations, which are not binding, seeking to allow the Member State to modify its plan in a manner which, in the Commission's view, would make it compatible with those criteria and provisions.

63. In the context of its assessments of the question whether the national allocation plans of various Member States are compatible with the criteria of Annex III, it is permissible for [*40] the Commission to choose a common point of comparison. To that end, it may, in particular, draw up its own economic and ecological model. In drawing up and using such a model, the Commission has, in accordance with the case-law cited in paragraph 55 above, a discretion, with the result that use of such a common point of reference in a decision rejecting a national plan is open to challenge only on the ground that it is vitiated by an obvious error of assessment.

64. However, by imposing, in the operative part of a decision rejecting a national allocation plan, a specific limit, calculated on the basis of its own economic model and its own choice of data, for the total quantity of allowances which a Member State has the right to fix, the Commission effectively substitutes itself for the Member State for the purposes of fixing that total quantity. Indeed, such a provision is liable to oblige the Member State to modify its national allocation plan so that the total quantity of allowances corresponds exactly to the limit indicated by the Commission in the rejection decision. In such a case, the Member State is required to fix a total quantity equal to or less than the limit indicated [*41] by the Commission, failing which it will find it impossible to adopt a decision in accordance with Article 11(2) of the Directive.

65. Such a rejection decision renders Article 11(2) of the Directive devoid of purpose, inasmuch as that provision provides that it is for the Member State, and not the Commission, to decide the total quantity of allowances which it will allocate. That finding is particularly relevant in a case such as the present, where the specific limit thus imposed by the Commission, namely 12.717058 millions tonnes-equivalent of CO 2 per annum, represents only 52.2% of the total quantity of allowances which the Republic of Estonia was proposing to allocate under its national allocation plan.

66. It is true that the Republic of Estonia remains free, in the context of the decision which it adopts in accordance with Article 11(2) of the Directive, to fix the total quantity of allowances to be allocated at a level even lower that the total quantity of allowances which the Commission considers compatible with the Directive. However, given that the Commission has imposed a drastic reduction in the total quantity of allowances which the Republic of Estonia was [*42] proposing to allocate, it is inconceivable, in the circumstances of this case, that the latter would fix the total quantity of allowances to be allocated at a level different from the limit fixed by the Commission in the contested decision. Thus, in reality, the Commission has indirectly fixed the total quantity of allowances to be allocated in place of

the Republic of Estonia.

67. Moreover, the Court finds that the reasoning developed by the Commission in the contested decision to explain the basis on which the limit imposed had been calculated confirms that it did not confine itself to reviewing the legality of the national allocation plan notified by the Republic of Estonia, but that it effectively substituted its own analysis for that carried out by the latter.

68. In that regard, it should be noted that the drawing up of a national allocation plan, designed to attain the aims of the Directive and complying with the criteria set out in Annex III, particularly criteria Nos 1 to 3, requires the Member State to carry out several complex economic and ecological assessments, particularly as regards the policies and the specific measures to be adopted at the national level [*43] in order to attain the said objectives, but also as to the measures which should be applied by economic operators. In addition, those assessments are essentially prospective, in that the Member State must predict the evolution of emissions in its territory many years in advance, and do so on the basis of data available at the time when its national allocation plan is adopted.

69. It is in the very nature of such an exercise that the Member State is obliged to make choices, first, concerning the policies and measures to be adopted and, secondly, as to the method to be used and the data on the basis of which the analysis is carried out. Ex hypothesi , such choices are neither correct nor incorrect in absolute terms, a certain number of different methods and data being validly capable of being used. In reviewing those choices of the Member State, the Commission must therefore respect the margin for manoeuvre which the latter has, and, in so far as the latter bases its reasoning on credible and sufficient data and parameters for analysis, having regard to the criteria in Annex III, it cannot reject its national allocation plan. By contrast, it is for the Commission, in particular, [*44] to verify the reliability and coherence of all aspects of the plan drawn up by the Member State and to review whether those elements constitute all of the factors to be taken into consideration in order to assess a complex situation and whether they are capable of supporting the conclusions which are drawn from them.

70. It is in the light of those observations that the Court must examine the specific criteria formulated by the Commission in the contested decision against the national allocation plan of the Republic of Estonia.

- The choice of emissions figures serving as a starting-point for the purposes of the forecasts for the period from 2008 to 2012

71. As a preliminary, it should be noted that, in recital 4 of the contested decision, the Commission stated that criterion No 1 of Annex III was relevant in the present context in that it provides that the total quantity of allowances to be allocated is not to exceed what is likely to be needed for the strict application of the other criteria in that annex. It should be noted in that respect that the Commission has itself defined the concept of strict application of the criteria in Annex III, in point 18 of its notice [*45] of 7 January 2004 (see paragraph 45 above), by specifying that, in order to comply with that requirement, a Member State should not allocate more allowances than necessary having regard to the most strict of the mandatory criteria, namely criteria Nos 1 to 5 of Annexe III. It is therefore apparent from the contested decision that, as it moreover confirmed at the hearing, the Commission considered that the Estonian national allocation plan was incompatible with criterion No 1 of Annex III, not on the basis of that criterion alone, but by reason of the fact that the total quantity of allowances proposed was not limited to what is necessary having regard to criteria Nos 2 and 3 of Annex III.

72. Next, it is apparent from recitals 5 to 7 of the contested decision that the Commission applied criterion No 2 set out in Annex III by itself fixing as the starting-point, by way of existing greenhouse gas emissions, the figures relating to emissions in 2005, rather than taking as its starting point the figures used by the Republic of Estonia in its national allocation plan and reviewing its legality, verifying in particular whether the latter had exceeded its margin for manoeuvre in implementing [*46] the Directive.

73. It is true that a correct application of criterion No 2 of Annex III authorises the Commission to verify the compatibility of the total quantity of allowances to be allocated with 'assessments of actual and projected progress towards fulfilling the Member States' contributions to the Community's commitments made pursuant to Decision [280/2004/CE]'. However, the Commission states, in recital 5 of the contested decision, that the last assessment carried out before the adoption of the contested decision, pursuant to Decision No 280/2004/EC of the European Parliament and of the Council of 11 February 2004 concerning a mechanism for monitoring Community greenhouse gas emissions and

for implementing the Kyoto Protocol (OJ 2004 L 49, p. 1), was carried out on the basis of figures communicated by Estonian installations for the year 2005, on the ground that those data were the most reliable and the most exact which it could use. In addition, according to recital 6 of the contested decision, whilst several Member States, including the Republic of Estonia, chose to use as the starting-point of their forecasts the average of independently verified [*47] emissions data for 2005 and those Member States' estimates of emissions over other years, in order to smooth out singular events in one particular year, the Commission rejected that approach, arguing that the effects of particular factors, such as meteorological conditions, generally balance each other out over the whole of a year, and that the Commission had no evidence indicating that the verified emissions data for 2005 could not be regarded as representative.

74. However, the Commission's power to review the compatibility of the national allocation plan with the abovementioned assessments did not authorise it to hold that the use, for the purposes of the said plan, of figures different from those used in the context of those assessments rendered the plan incompatible with criterion No 2 of Annex III, unless the Member State could justify that use. In that regard, it should be noted that, in recitals 5 to 7 of the contested decision, the Commission rejected the arguments put forward by the Republic of Estonia at the stage of the administrative proceedings in support of the figures used in its national allocation plan on the ground that those figures were 'less [*48] reliable' than those used in the last assessment and that there were 'no sufficient reasons with respect to Estonia to adjust independently verified emissions figures for 2005'. It took the view that an over-assessment of emissions by the Republic of Estonia could not be ruled out, and raised the risk that the figures communicated by the latter 'might not be truly representative of actual emissions'.

75. By rejecting the national allocation plan notified by the Republic of Estonia on the basis of such reasoning, which essentially consists only in the raising of doubts as to the reliability of the data used by the Republic of Estonia, the Commission erred in law. As stated in paragraphs 53 to 55 above, the Commission's task was to verify the legality of the national allocation plan while respecting the margin for manoeuvre granted to the Member State in the implementation of the Directive in the context of the drawing up of that plan. By rejecting the Estonian plan on the grounds that the data used for that purpose were not, in its opinion, the best available, that there was therefore a risk of over-assessment of emissions by the Republic of Estonia, [*49] and that there was nothing to indicate that the data on which it based its reasoning could not be regarded as representative, the Commission disregarded that margin for manoeuvre. The existence of such a margin for manoeuvre necessarily implies that the Member State could validly choose different data as the starting-point for its forecasts. By contrast, the Commission's approach, amounting to taking the view that only the data chosen by itself could be used for the purposes of drawing up a national allocation plan, deprives the Member States of all margin of manoeuvre in that regard. By adopting such an approach, the Commission disregarded the fact that its task was to review the choices made by the Member State for the purposes of drawing up its national plan, rather than to make its own choice as to the data to be used, and to express an opinion only on any challenges to that choice by the Member States.

76. In any event, the documents on the Court's file show that the figures used by the Commission were not necessarily the most representative, or therefore the most reliable, as regards emissions by the Republic of Estonia. It should be noted in that respect that [*50] the justifications put forward by the Commission for rejecting the approach of certain Member States referred to in recital 6 of the contested decision, cannot be accepted, at least as regards the particular case of the Republic of Estonia. Firstly, it is clear from Annex 4 to the national allocation plan that the year 2005, selected by the Commission, was not a representative year as regards the Republic of Estonia. The emissions of that year are well below the reference value calculated, as regards power stations and industrial installations, on the basis of the three years when emissions were highest between 2000 and 2005 and, as regards heat producing installations, on the basis of the three years when emissions were highest between 1995 and 2005, and that notwithstanding a significant increase in Gross Domestic Product (GDP) from year to year between 2000 and 2005. Secondly, when questioned on the point by the Court at the hearing, the Commission did not adduce any evidence capable of justifying its own argument that the effects of the various factors taken into account, such as me teorological conditions, generally balance each other out in the course of a full year.

77. [*51] It follows that, contrary to what the Commission claims in the contested decision, not only were the figures it used not necessarily the most representative or reliable as regards emissions by the Republic of Estonia, but that it held a certain amount of evidence which implied, at least in the case of the Republic of Estonia, that the choice of the 2005 figures as the starting-point for its calculations risked distorting those calculations.

- The choice of methods used for the purposes of forecasting the evolution of emissions between the reference period and the period from 2008 to 2012

78. In recitals 8 et seq . of the contested decision, the Commission examined the compatibility of the national allocation plan with criterion No 3 of Annex III, according to which the quantities of allowances to be allocated must be 'consistent with the potential, including the technological potential, of activities covered by the scheme to reduce emissions'. To that end, the Commission decided to use the data arising from the Primes model, set up by an expert of the National Technical University of Athens, on the ground that they 'constituted the most accurate and reliable [*52] estimations of both GDP growth and carbon intensity improvement rates' in order to assess the evolution of emissions between the reference period and the period from 2008 to 2012, and during that latter period. In the contested decision, the Commission based its forecasts concerning that evolution on the verified emissions figures for 2005, as adapted by the application of two coefficients reflecting, respectively, its estimate of the GDP growth rate during the period from 2005 to 2010 and the probable rate of carbon intensity improvement per unit of GDP during the same period.

79. In that regard, it should be recalled, once again, that the Member States have a wide margin for manoeuvre in deciding the method which they adopt in order to draw up their national plan for allocating allowances. By deciding to use the data arising from the Primes model by reason of their alleged better reliability compared with other data, but without establishing the insufficiency of the method used by the Republic of Estonia in order to calculate the data used for the purposes of its national allocation plan, the Commission disregarded that margin for manoeuvre.

80. In particular, the [*53] Commission itself expressly acknowledged at the hearing that it is not entitled to substitute its own assessment of aspects concerning political choices for that made by a Member State for the purposes of working out its national allocation plan, nor even to exercise a marginal review with regard to such a choice. However, the Commission argued that such a policy choice can be taken into account in the context of its assessment of a national allocation plan only in so far as it was set out in legislative instruments before 2004 and notified to it so that it could take them into consideration in drawing up its own economic model.

81. The Court notes, however, that the Commission has not invoked any statutory text or rule of law capable of justifying such a limitation on the taking into account, by a Member State, of its national energy policy for the purposes of its national allocation plan. On the contrary, it is for the Member State to draw up a national allocation plan in accordance with Article 9(1) of the Directive, and thus to determine which aspects of its national energy policy are to be taken into account. In this case, it is clear from point 3 of the national allocation [*54] plan of the Republic of Estonia, annexed to the application, that that Member State has stressed the strategic nature of is reserves of oil shale and the difficulties in terms of security of supply that might result from a significant increase in the use of natural gas, pointing out in particular that its gas imports come from a single exporting country, namely Russia.

82. By applying the Primes model based essentially on economic and ecological parameters, the Commission thus disregarded, in this case, the possible relevance of that geostrategic consideration which the Republic of Estonia had nevertheless specifically integrated in its national allocation plan. In so doing, the Commission exceeded the limits of its own power of review.

83. In any event, as regards, first, the rate of change in GDP during the period from 2005 to 2010, the documents before the Court show that the figures for GDP growth used by the Commission in the contested decision in order to determine the emissions ceiling for Estonia for the period from 2008 to 2012 were not the best available at the time the contested decision was adopted. In its national allocation plan, the Republic of Estonia used [*55] a growth forecast of 9.6% for the year 2006, based on the latest data available to the Estonian finance ministry. It predicted a slightly lower growth rate, of 7.4 to 8.4%, for each of the four following years.

84. In the contested decision, the Commission states, in footnote No 24, that, according to figures published in 2005 in a document entitled 'European Energy and Transport Trends', an annual growth rate of 5.1839% was predicted for Estonia from 2005 to 2010. However, it is apparent from the documents before the Court, and particularly from a combined reading of the document entitled 'Primes table "Estonia: Low carbon constraint case without carbon capture and storage"', annexed to the application and footnote No 24 of the contested decision that that rate of 5.1839% results from a simple arithmetical calculation made on the basis of the figures relating to the GDP of the Republic of Estonia also used in the Primes model, namely EUR 8 billion in 2005 and EUR 10.3 billion in 2010. However, the Commission explains, in the same footnote, that, in order to take account of the most recent figures brought to its knowledge, it

decided to replace the figure for [*56] GDP growth in the document entitled 'European Energy and Transport Trends' by other economic forecasts, published in November 2006 in a document entitled 'Economic Forecasts Autumn 2006', but only in respect of the years for which those more recent forecasts were available. Thus, it used those latter figures for the years 2006 to 2008, but, for the years 2009 and 2010, continued to use a growth rate calculated from figures presented in the document entitled 'European Energy and Transport Trends' of 2005.

85. It has to be held that, in acting in that way, the Commission did not use the best data available as regards GDP growth forecasts for the Republic of Estonia for 2009 and 2010, and neither did it sufficiently justify the rejection of the forecasts put forward by the Republic of Estonia for those two years. The forecasts by the Republic of Estonia in its national allocation plan are, first, based on more recent data than those used in the document entitled 'European Energy and Transport Trends' and, secondly, closer to those in the document entitled 'Economic Forecasts Autumn 2006' which the Commission itself used for 2006 [*57] to 2008 on the ground that they were more reliable. In those circumstance, the Commission's position, to the effect that it used the best available data for 2009 and 2010 by rejecting the forecasts of the Republic of Estonia and using in their place those in the document entitled 'European Energy and Transport Trends', is not credible.

86. As regards, secondly, calculation of the rate of improvement of the intensity of carbon emission per unit of GDP, it is undisputed that the Commission based its reasoning directly on the data arising from the Primes model, namely 1 945.3 tonnes of CO 2 emissions per million euros of GDP in 2005 and 1 346.3 tonnes of CO 2 emissions per million euros of GDP in 2010. As the Commission acknowledged at the hearing, if one set of data taken into account in the calculations made in the context of setting up the Primes model turns out to be incorrect, as is the case here as regards the GDP growth rate of the Republic of Estonia (see paragraphs 84 and 85 above), the data which appear in the latest version of that model are necessarily distorted. Those data are based on a GDP growth forecast which was not the most accurate available at [*58] the time the model was set up. As the Commission also acknowledged at the hearing, in such circumstances, it is necessary to recalculate all the forecasts which arise from the model, using updated estimates of the GDP growth rate. As the Commission has not done that, the data which it used in the contested decision cannot be regarded as the best available.

- The other reasons put forward by the Commission to justify its rejection of the national allocation plan

87. The Court must next reply to the Commission's argument that the use of 2005 data and of the Primes model was justified by the need to assess each national allocation plan by reference to the same figures and analytical parameters, in order to comply with the requirements of the equal treatment principle.

88. That argument cannot succeed. Reliance on that principle cannot modify the distribution of competences laid down by the Directive between the Commission and the Member States, according to which the latter have the authority to draw up a national allocation plan and to take a final decision on the total quantity of allowances to be allocated.

89. Moreover, as the Republic of Estonia rightly [*59] points out, the Commission may sufficiently ensure equal treatment between the Member States by examining the plan submitted by each of them with the same degree of diligence. It is true, as has been noted in paragraph 63 above, that the Commission is entitled to draw up its own economic and ecological model based on the data which it chooses and to use it as a point for comparison in order to verify whether the national allocation plan of each Member State is compatible with the criteria in Annex III. For the purposes of drawing up such a model, the Commission does, in accordance with the case-law mentioned in paragraph 55 above, have a margin of discretion.

90. However, the Commission does not have the right either to substitute the analysis resulting from applying its own model for the assessment made by the Member State in its national allocation plan, or to reject that plan on the ground that there is a divergence between that assessment and its own analysis. If the Commission had the power to make its own analysis prevail, Articles 9(1) and 11(2) of the Directive, which grant Member States the powers to draw up a national allocation plan of allowances and then to decide [*60] on the total quantity of allowances to be allocated, would be emptied of meaning.

91. Lastly, the Court rejects the Commission's argument that Article 9(3) of the Directive, which gives it a power to review and reject national allocation plans, would become devoid of purpose if it were not able to adopt a decision fixing a ceiling for the total quantity of allowances which a Member State is entitled to allocate.

92. It follows from the above, and particular from paragraphs 62 and 63 above, that the Commission may usefully review a national allocation plan, and reject it if necessary, without having to fix such a ceiling. Moreover, the argument that the provisions of the Directive may lead to a stalemate, if the Member State and the Commission do not reach agreement on a total quantity of allowances to be allocated on the basis of successive modifications of the national plan submitted by a Member State cannot succeed. First, it is not for the Court of First Instance to resolve that potential problem in the context of the present dispute, in which it does not arise. Secondly, if that problem did have to be resolved in order to avoid a situation of permanent stalemate, [*61] it would be inconceivable to resolve it by giving precedence to the Commission's point of view over that of the Member State, given that, as is apparent from paragraph 54 above, the Commission has a power of review and rejection, whereas the Member State has the power both to submit a national plan and to make the final decision on the allocation of allowances.

93. Finally, Article 1(1) of the contested decision also contains the finding that the inclusion of additional emissions of one specific installation, amounting to 0.313883 million tonnes-equivalent of CO 2 per annum, is also incompatible with criteria Nos 1 to 3 of Annex III. On the basis of the considerations set out above, the contested decision must also be annulled in relation to that finding, since the Commission did not limit itself to explaining the reasons which led it to conclude that such incompatibility existed, but prescribed that the amount in question be excluded from the total quantity of allowances, particularly in Articles 2(1) and 3(1) of the contested decision.

94. It follows from the whole of the above that Article 1(1), Article 2(1) and Article 3(1) of the contested decision must be annulled. [*62] Therefore, there is no need to examine the second, third, and fourth pleas raised by the Republic of Estonia, as they are directed against those same provisions.

The fourth plea, claiming infringement of the principle of sound administration

Arguments of the parties

95. The Republic of Estonia argues that, in accordance with the principle of sound administration, Community institutions are required to fulfil their functions with care and impartiality. It argues that that principle should apply not only to their relations with individuals but also to their relations with Member States. In this case, the Commission did not take account of all the facts and information that were supplied to it, and thus did not show sufficient diligence in adopting the contested decision.

96. More particularly, the Republic of Estonia complains that the Commission held, in Article 1(2) of the contested decision, that its national plan for allocation of allowances was incompatible with criterion No 3 of Annex III for failure to include, in the total quantity of allowances to be allocated, a 'reserve' of allowances, established by it in accordance with Article 3(1) and (2) [*63] of Commission Decision 2006/780/EC of 13 November 2006 on avoiding double counting of greenhouse gas emission reductions under the Community emissions trading scheme for project activities under the Kyoto Protocol pursuant to the Directive (OJ 2006 L 316, p. 12). That finding by the Commission was inaccurate, since a careful examination of the plan for allocating allowances, and in particular of Annexes 1 and 3, shows that the Republic of Estonia did include in the total quantity of allowances a reserve of allowances fixed in accordance with Article 3(1) of Decision 2006/780.

97. The Commission argues that the information submitted by the Republic of Estonia in its national allocation plan, particularly in Annexes 1 and 3 thereof, concerning the inclusion of a 'reserve' in the total quantity of emission allowances, was not sufficiently clear, and was even contradictory. Moreover, the Commission added up all the emission quantities of the installations envisaged for the second trading period and referred to in Annex 1 of the Estonian allowance allocation plan. That calculation did not show that the 'reserve' was taken into account when determining the total [*64] quantity of allowances in accordance with Article 3(1) or (3) of Decision 2006/780.

98. As to the remainder, the Commission refers to the arguments it made in reply to the second plea raised by the Republic of Estonia.

Findings of the Court

99. It should be noted that the guarantees conferred by the Community legal order in administrative proceedings

include, in particular, the duty of the competent institution to examine carefully and impartially all the relevant aspects of the individual case (Case T-44/90 La Cinq v Commission [1992] ECR II-1, paragraph 86; Case T-7/92 Asia Motor France and Others v Commission [1993] ECR II-669, paragraph 34; Case T-31/99 ABB Asea Brown Boveri v Commission [2002] ECR II-1881, paragraph 99).

100. It should further be noted that, since, essentially, the Republic of Estonia is raising in this plea the same defects which it relied upon in its second plea, it is challenging the Commission's fixing, in Articles 1(1), 2(1) and 3(1) of the contested decision, of a ceiling on the total quantity of allowances to be allocated. As those three provisions have already been annulled on the strength of the first plea, there is no [*65] further need to adjudicate on that part of this plea.

101. However, in so far as the Republic of Estonia is complaining that the Commission held, in Article 1(2) of the contested decision, that its national plan for allocating allowances was incompatible with criterion No 3 of Annex III for failure to include in the total quantity of allowances to be allocated a 'reserve' of allowances established by it in accordance with Article 3(1) and (2) of Decision 2006/780, that part of the plea will be examined in the following paragraphs. Given that Article 3 of Decision 2006/780 provides, in reality, for the creation of two distinct reserves, in Article 3(1) and Article 3(2) respectively, the two parts of the reserve to which the Commission refers in the contested decision will be treated as two reserves in the remainder of this judgment.

102. At the hearing, the Commission qualified its position on the subject of that latter part of the present plea. In its written pleadings, it claims not only that the national allocation plan was vague as regards the reserves provided for in Article 3(1) and (2) of Decision 2006/780, but also that its own calculations based on the annexes [*66] to the national plan show that those reserves were not included in the total quantity of allowances envisaged in that plan. At the hearing, however, it stated that, at the time when the contested decision was drafted, it was not clear, from reading the national allocation plan of the Republic of Estonia, and in particular from its annexes, whether the abovementioned reserves had been taken into account for the purposes of calculating the total quantity of allowances.

103. Contrary to what the Commission argues, this Court finds that the figures submitted by the Republic of Estonia in the annexes to its national allocation plan appear coherent and comprehensible, and that the reserves of allowances constituted by the Republic of Estonia in accordance with Article 3(1) and (2) of Decision 2006/780 were included in the total quantity of allowances to be allocated pursuant to the national allocation plan. In particular, it is clear from a combined reading of Annex 1 of the national allocation plan and the table appearing on the first page of Annex 3 thereof that the amount of 948 531 tonnes-equivalent of CO 2 represents the whole of the allowances contained in the reserve relating [*67] to installations carrying out project activities for which a letter of authorisation had already been issued, in accordance with Article 3(1) of Decision 2006/780. It is also clear from those two annexes that the quantity of allowances of 795 026 tonnes-equivalent of CO 2 was to be compensated for by the withdrawal of allowances from certain specific installations, the emissions of which would be directly reduced owing to the projects in question. It follows from a simple arithmetical calculation, made on the basis of the information contained in those same annexes, that the balance of the reserve amounts to 153 505 tonnes-equivalent of CO 2 . It also follows from those annexes that those quantities of allowances were to be specifically compensated for by the withdrawal of allowances from installations which had not yet been identified but fell within the heat production sector, the emissions of which would be indirectly reduced owing to the projects in question.

104. Similarly, it is clear from a combined reading of Annex 1 of the national allocation plan and of the table appearing on the second page of Annex 3 thereof that the amount of 9 194 742 tonnes-equivalent of CO 2 represents [*68] the whole of the allowances contained in the reserve for installations carrying out project activities for which a letter of authorisation had not yet been issued, in accordance with Article 3(2) of Decision 2006/780. It is clear from the explanations supplied on that same page of Annex 3 to the national plan that the quantities of allowances contained in that reserve were also to be compensated for by reductions in emissions at certain installations not yet identified.

105. It should be emphasised that the quantities of allowances included in the two reserves referred to above are thus compensated for by reductions in emissions at certain installations the actual emissions of which are nevertheless taken into account in Annex 1 to the national allocation plan in calculating the total quantity of allowances. The effect of the allocation of those allowances to reserves is thus perfectly neutral as regards the total quantity of allowances to be allocated. That being the case, if the quantities of allowances comprised in those reserves are not deducted from the total quantity of allowances, it must be concluded that they are necessarily included therein.

106. In that regard, [*69] the sum of the values indicated in Annex 1 to the national allocation plan corresponding to the emissions of each listed installation is 112 820 158 tonnes-equivalent of CO 2 . That total precisely corresponds to that of 112 666 653 tonnes-equivalent of CO 2 used in the final calculation appearing on the final page of that annex and which represents the total of the allowances intended for the installations which would already be in operation during the period from 2008 to 2012, save in so far as a quantity of allowances of 153 505 tonnes- equivalent of CO 2 has been deducted therefrom. That latter amount precisely corresponds to the part of the reserve constituted in accordance with Article 3(1) of Decision 2006/780 which was to be indirectly compensated for at unidentified installations.

107. It is not apparent from the annexes to the national allocation plan why the Republic of Estonia considered it necessary to deduct that amount from the total quantity of allowances. To that extent, that part of the reserve in question does not appear to have been included in the total quantity of allowances calculated by the Republic of Estonia. At least, the national allocation plan appears [*70] ambiguous in that respect.

108. However, since the other part of the reserve constituted in accordance with Article 3(1) of Decision 2006/780, namely a quantity of allowances of 795 026 tonnes-equivalent of CO 2 , and the whole of the reserve constituted in accordance with Article 3(2) of that decision, were not deducted from the total quantity of allowances, it follows from the information on the Court's file that they were rightly included in the latter.

109. It is not for the Community judicature to determine precisely and finally, in the context of the present plea claiming infringement of the principle of sound administration, to what extent the reserves in question were actually included in the total quantity of allowances. In that context, the Community judicature must verify whether the Commission examined, with care and impartiality, all the relevant aspects of the individual case.

110. In that regard, it results from the above that the information contained on the Court's file does not appear to be compatible with the conclusion reached by the Commission in the contested decision, according to which the allowances contained in the reserves in question [*71] were not included in the total quantity of allowances to be allocated. Moreover, the Commission has not explained either in the contested decision or before the Court on what basis it arrived at that conclusion, merely stating in its pleadings that its own calculations indicated that that was not the case and, at the hearing, that it was not clear whether the reserves in question had been taken into account for the purposes of calculating the total quantity of allowances. At the hearing, the Commission, having originally sought authorisation to lodge a document before the Court, explaining that its own calculations were set out there, then went back on that request indicating that that aspect was no longer relevant.

111. In the absence of precise explanations concerning the alleged gaps in the Estonian national allocation plan or the errors allegedly committed by the Republic of Estonia in that plan, the Commission has not established that the calculations contained in the Estonian national allocation plan were vitiated by error.

112. In the light of the above, this Court must conclude that the Commission did not properly examine the national allocation plan submitted by [*72] the Republic of Estonia, and particularly Annexes 1 and 3 thereof, in the context of its assessment of the question whether the reserves provided for in Article 3(1) and (2) of Decision 2006/780 were included in the total quantity of allowances proposed. In consequence, it infringed the principle of sound administration and, in that respect, this plea is well founded.

113. Article 1(2) and Article 2(2) of the contested decision must therefore be annulled.

Conclusion

114. As is apparent from paragraphs 31 to 34 above, it follows from the annulment of Articles 1(1), 2(1) and 3(1) of the contested decision (see paragraph 94 above), and from the annulment of Articles 1(2) and 2(2) of that decision (see paragraph 113 above), that the contested decision must be annulled in its entirety. Those provisions are not severable from the remainder of the contested decision, since their annulment modifies the very substance of the latter.

Costs

115. Under Article 87(2) of the Rules of Procedure, the unsuccessful party is to be ordered to pay the costs if they have

been applied for in the successful party's pleadings. As the Commission has been unsuccessful, it must [*73] be ordered to pay the costs, as pleaded by the Republic of Estonia.

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

DOC-NUMBER: 62007A0263 607A0263

TREATY-CITED: European Economic Community

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