# OPINION OF ADVOCATE GENERAL MENGOZZI
delivered on 22 December 2010 [1]

1. In the present proceedings, the Commission is appealing against the judgment in the case of *Netherlands* v *Commission* [2] ('the judgment under appeal'), by which the Court of First Instance of the European Communities annulled the Commission decision of 24 June 2003 [3] relating to State aid N 35/2003 concerning an emission trading scheme for nitrogen oxides notified by the Kingdom of the Netherlands ('the decision'). That judgment forms the subject-matter of two cross-appeals brought by the Kingdom of the Netherlands and the Federal Republic of Germany.

## I — Facts of the case and the decision

2. The emission trading scheme for nitrogen oxides ($NO_x$) communicated to the Commission by the Netherlands ('the measure in question') and the content of the decision are set out as follows at paragraphs 8 to 13 and 16 to 20 of the judgment under appeal:

'8 By letter of 23 January 2003 the Netherlands authorities notified the Commission pursuant to Article 88(3) EC of a $NO_x$ emission trading scheme …. They requested the Commission to take a decision finding that the measure in question did not constitute aid, in accordance with Article 4(2) of Council Regulation (EC) No 659/1999 of 22 March 1999 laying down detailed rules for the application of Article 93 of the EC Treaty (OJ 1999 L 83, p. 1).

9 On 24 June 2003, the Commission adopted [the] Decision ….

10 In paragraph 1 of the … decision, the Commission first describes the measure in question. In the framework of the $NO_x$ national emission ceiling for the Netherlands established by Directive 2001/81, the Netherlands authorities set a target of 55 kilotonnes of $NO_x$ emissions for its

1 — Original language: Italian.
2 — Case T-233/04 ECR II-591.
3 — C (2003) 1761 final.

large industrial facilities, that is approximately 250 undertakings, to be attained by 2010.

11 Regarding the working of the scheme, the Commission explains in paragraph 1.2 of the … decision that Netherlands legislation will lay down a $NO_x$ emission standard for each industrial facility. The undertaking can comply with the emission standard thus laid down by taking steps to reduce $NO_x$ emissions in its own facility, by buying emission allowances from other undertakings, or by a combination of those options. Emission reductions, in the form of $NO_x$ credits, will be offered in the emission market by facilities whose emissions fall below the emission standard.

12 A facility's total annual $NO_x$ emission, adjusted for any $NO_x$ credits sold or bought, must comply with the authorised emission level for that facility. The authorised annual emission – as an absolute figure – is calculated on the basis of the emission standard concerned and the amount of energy used by that facility.

13 At the end of each year, the Netherlands authorities check whether the facilities have complied with the required emission standard. Each year, $NO_x$ credits can be bought, saved or lent for future periods. If a facility exceeds its emission standard, it must compensate for that surplus the following year. Moreover, that surplus will be increased by 25% in order to deter any overstepping of the mark. If a facility fails to comply with its emission standard, the Netherlands authorities will impose on it a fine which is effective, proportionate and dissuasive.

…

16 In paragraphs 1.5 and 1.6 of the … decision, the Commission … points out that the measure in question will apply to all industrial facilities with installed total thermal capacity of more than 20 thermal megawatts (MWth), in parallel with Community legislation. The Netherlands authorities will continue to apply the emission limit values laid down by the various Community directives in force.

17 In its assessment of the measure in question (paragraph 3 of the … decision), the Commission first refers to its previous decisions on emission trading schemes

and distinguishes between two types of scheme, as follows:

"(1) Systems where a tradable emission or pollution document is considered as [an] intangible asset representing a market value which the authorities could have sold or auctioned as well, leading to forgone revenues (or a loss of State resources), hence State aid within the meaning of Article 87(1) of the EC Treaty;

(2) Systems where a tradable emission or pollution document is considered as authorised proof of a certain production that cannot be sold or auctioned to the recipient, hence no forgone revenues, therefore no State resources, hence no State aid within the meaning of Article 87(1) of the EC Treaty".

18 The Commission then explains the reasons which led it to find that the measure in question constitutes State aid, that is, concretely, the grant by the State of $NO_x$ credits free of charge to a specific group of undertakings engaged in trade between Member States. According to the … decision, the Netherlands authorities had the option of selling or auctioning the emission allowances. By offering $NO_x$ credits free of charge as intangible assets, the Member State therefore suffers forgone revenue. The Commission therefore concludes that that scheme involves State resources within the meaning of Article 87(1) EC. The strengthening of the position of the undertakings concerned will affect trade between Member States.

19 Finally, in paragraph 3.3 of the … decision, the Commission examines the compatibility of the measure in question with the common market.

20 In conclusion, in paragraph 4 of the … decision, the Commission finds that the scheme in question constitutes State aid within the meaning of Article 87(1) EC, while adding that it is compatible with the common market in accordance with Article 87(3) of the EC Treaty …. The Commission requests the Netherlands authorities to provide it with an annual report concerning the implementation of the measure in question and to notify it in advance of any change in the conditions under which the aid is granted'.

3. In its defence the Netherlands states that the measure in question entered into force on 1 June 2005.

## II — Forms of order sought before the Court of First Instance and the judgment under appeal

4. The Kingdom of the Netherlands, supported by the Federal Republic of Germany, claims that the Court should annul the decision, in so far as it finds that the measure in question constitutes State aid, and order the Commission to pay the costs. The Commission contends that the Court should declare the action inadmissible or, in the alternative, dismiss the action, and order the Kingdom of the Netherlands to pay the costs.

5. In the judgment under appeal, the Court of First Instance rejected the plea of inadmissibility raised by the Commission (paragraphs 37 to 49). As to the substance, it rejected the first submission in support of the first ground alleging infringement of Article 87 EC, by which the Netherlands claimed that there was no advantage financed through State resources (paragraphs 63 to 78), and accepted the second submission, by which the applicant State disputed the claim that the condition of selectivity had been fulfilled (paragraphs 84 to 101). Therefore, the Court of First Instance annulled the decision and ordered the Commission to pay the costs.

## III — Procedure before the Court of Justice and forms of order sought

6. By application lodged with the Registry of the Court of Justice on 23 June 2008, the Commission lodged the appeal forming the subject-matter of the present proceedings. In their respective replies, the Kingdom of the Netherlands and the Federal Republic of Germany lodged cross-appeals. By order of the President of the Court of 23 December 2008, the United Kingdom of Great Britain and Northern Ireland and the Republic of Slovenia were given leave to intervene in the present proceedings. By order of 8 May 2009, the French Republic was given leave to intervene subject to the conditions laid down in Article 93(7) of the Rules of Procedure of the Court of Justice. At the hearing of 14 October 2010 the agents of the Commission and of the Governments of the Netherlands, the Federal Republic of Germany and the French Republic presented oral argument.

7. In the appeal, the Commission asks the Court to set aside the judgment under appeal and declare the action at first instance inadmissible or, in the alternative, to set aside the judgment under appeal and dismiss the action at first instance. In both cases the Commission asks that the Netherlands be ordered to pay the costs of the proceedings at first instance and the appeal. In its reply to the cross-appeals lodged by the Netherlands and the Federal Republic of Germany, the Commission asks the Court to set aside the judgment under appeal and to declare the action at first instance inadmissible or, in the alternative, to dismiss the cross-appeals, set aside the judgment under appeal, and dismiss the action at first instance as unfounded.

8. The Kingdom of the Netherlands claims that the Court should dismiss the appeal or, in the alternative, should the Court grant the appeal, set aside the judgment under appeal, in so far as it rejects the plea alleging a lack of an advantage financed through State resources. In both cases, it asks that the Commission be ordered to pay the costs of the proceedings at first instance and the appeal.

9. The Federal Republic of Germany claims that the Court should dismiss the appeal and set aside the judgment under appeal or, in the alternative, should the Court consider the latter claim inadmissible, dismiss the appeal and, if it grants the appeal, set aside the judgment under appeal. In both cases it maintains the claims made at first instance and asks that the Commission be ordered to pay the costs.

10. The United Kingdom claims that the Court should dismiss the Commission's claim that the action at first instance should be declared inadmissible and supports the principal claims brought by the Netherlands. The Republic of Slovenia claims that the Court should dismiss the appeal brought by the Commission and order it to pay the costs. At the hearing, the French Republic claimed that the Court should dismiss the Commission's claims for the action at first instance to be declared inadmissible.

## IV — The main action

11. The Commission has raised two grounds in support of its appeal. The first ground alleges an infringement of Article 230 EC and is directed at the part of the judgment under appeal which declares the action brought by the Kingdom of the Netherlands to be admissible. By its second ground, raised in the alternative, the Commission claims that there has been an infringement of Article 87(1) EC.

### A — *First ground of appeal, alleging infringement of Article 230 EC*

12. The Commission considers that a Member State is not entitled to take action pursuant to Article 230 EC against a decision which approves unconditionally a measure notified under the scheme for controlling State aid. The ground is made up of two submissions.

#### 1. First submission

13. By the first submission in support of the first ground of appeal, the Commission claims

that the Court of First Instance wrongly drew a distinction between the case before it and the one which gave rise to the order in *Netherlands* v *Commission* [4] ('order in *Netherlands* v *Commission*'). In the view of the Commission, there is no legally relevant difference between the two cases. On the other hand, the Netherlands, supported by the United Kingdom, the Republic of Slovenia, the French Republic, and the Federal Republic of Germany, consider that the facts of the case which gave rise to that order differ significantly from those of the present case and that that case is not therefore relevant.

14. It is necessary to set out briefly the content of the order in *Netherlands* v *Commission* given during the period of the action which led to the judgment under appeal.

15. In that order, the Court declared inadmissible the action brought by the Netherlands against a decision by which the Commission had found that certain incentives to encourage the processing of dredging silt, notified by that Member State, were compatible with the common market. The action was limited to the part of the decision in which 'the Commission [took] the view therein that the contributions paid to port authorities pursuant to those rules constitute[d] State aid for the purposes of Article 87(1) EC' (paragraph 1).

16. The grounds for the order are particularly brief. After recalling the case-law according to which only a measure whose legal effects are binding on the applicant and are capable of affecting his interests by bringing about a distinct change in his legal position is an act or decision which may be the subject of an action for annulment under Article 230 EC, the Court ruled, at paragraph 20, that the contested decision, which found that the system of aid notified was compatible with the common market, could not bring about a relevant change in the legal position of the Kingdom of the Netherlands 'so far as in its notification of the system the Netherlands Government [had] requested the Commission to assess the legality of that measure in the light of Articles 87 EC and 88 EC.' [5] At paragraphs 21 and 22, the Court responded to the Netherlands' argument that that part of the statement of reasons for the contested decision (in which the Commission stated that certain port authorities fell within the definition of 'undertakings' under Article 87 EC) had had adverse legal consequences for that State. In this respect, it first observed that only the operative part of a decision is capable of producing legal effects and, as a consequence, of adversely affecting its interests and that the assessments made in the recitals can be subject to judicial review by the Community judicature 'only to the extent that, as grounds of an act adversely affecting a person's interests, they constitute the essential basis for the operative part of that act'. At paragraph 22, it found in that case that 'the statement of reasons in issue does not constitute the essential

4 — Case C-164/02 [2004] ECR I-1177.

5 — Incidentally, I must confess that I have difficulty understanding the connection that the Court appears to establish between the content of the notification and the assessment of the effects of the measure concerned. Determination of the impact of aid on the legal position of the recipient State seems to me to depend on the objective assessment of its effects and not the view that that State may have as to the exact classification or compatibility with the common market of the planned measures, at least where it decides to notify them.

basis for the operative part of a decision adversely affecting the Kingdom of the Netherlands', pointing out that '[s]ince the Commission found in the operative part of the contested decision that, regardless of the fact that some of the contributions concerned might constitute aid within the meaning of Article 87(1) EC, the scheme is, in any event, justified on the basis of the reasons set out in Article 87(3)(c) EC, that operative part *does not in the least constitute the adoption of a position as to whether all port authorities are undertakings or whether all of the activities of such authorities are economic in nature*'. [6] At paragraph 23, the Court added that 'the contested decision makes no finding on the particular circumstances of any of the port authorities concerned' and that 'that decision does not in the least prejudge the assessment under Article 87(1) EC of any other contributions paid to the port authorities'.

17. It is clear from the grounds of the order, outlined broadly in the preceding paragraph, that in that case two factors led the Court to declare the action brought by the Netherlands inadmissible. Firstly, the fact that when it effected notification the Netherlands merely asked the Commission to assess the legality of the measures to provide incentives to encourage the processing of dredging silt, without pointing out that it considered that those measures did not constitute aid when intended for port authorities, played a particularly important, if not decisive, role in the scheme of the Court's reasoning. [7] Secondly, the Court held that although the Commission considered that all the measures notified were in any event compatible with Article 87(3) EC, it failed to make a definitive finding on whether or not the incentives given to the port authorities constituted aid.

18. Both of those factors are absent from the present case.

19. On the one hand, when it notified the measure in question the Netherlands pointed

6 — Emphasis added.

7 — It is clear from a reading of the case-files that the Commission itself had emphasised the relevance of this fact, stressing that in any event the Netherlands had, in the course of the administrative proceedings, set out to the Commission its position on the classification of the incentives targeted at the port authorities.

out that, in its view, the measure did not constitute State aid and asked the Commission for a declaration to that effect. On the other, in the decision the Commission adopted a clear and unequivocal position as to whether or not that measure constituted aid. Contrary to what the applicant institution maintains, in the light of the grounds of the order in *Netherlands* v *Commission*, these differences are legally relevant and prevent the approach adopted by the Court in that case from being applied automatically to this case.

20. More generally, I do not consider that it is possible to see in the order in *Netherlands* v *Commission* the intention of the Court to exclude in principle the Member States' right to bring an action against decisions by which the Commission unconditionally authorises aid measures notified by them. On the contrary, the specific characteristics of the present case, and the way in which they are interpreted by the Court, militate more in favour of restricting the scope thereof.

21. In conclusion, I consider that the Court of First Instance did not err in drawing a distinction between the case before it and the one which gave rise to the order in *Netherlands* v *Commission*. This finding would not be called into question even if it were held that there had been a distortion of the facts which, in the view of the Commission, the Court of First Instance committed at paragraph 47 of the judgment under appeal. [8]

22. The first submission put forward by the Commission in support of its first ground of appeal must therefore be rejected.

2. Second submission

23. By its second submission, the Commission disputes the Court of First Instance's claim that the classification of the measure in question as aid had legal consequences. The submission is directed in particular against paragraph 41 of the judgment under appeal in which the Court held that that finding, which enabled the Commission to examine the compatibility of the measure in question with the common market, on the one hand, 'triggers the application of the procedure for existing State aid schemes laid down by Regulation No 659/1999, and in particular the procedure laid down in Articles 17 to 19 and in Article 21 thereof, which requires the Member States to submit an annual report on all existing aid schemes' and, on the other, 'can … have an impact on the grant of new

8 — In the view of the Commission, the Court of First Instance wrongly claimed that in the contested decision in the case, which gave rise to the order in *Netherlands* v *Commission*, the findings subject to criticism by the applicant Member State appeared only in the statement of reasons and not in the operative part.

aid as a result of the rules on overlapping aid from different sources laid down inter alia in point 74 of the Community guidelines on State aid for environmental protection'.

24. The applicant institution contends first that, given the objective nature of the concept of aid, the consequences mentioned by the Court of First Instance arise from the very nature of the measure in question and not the decision. I cannot agree. The Court has repeatedly held, albeit in the different context of the definition of the scope of judicial review as regards the application of the concept of aid by the Commission, that this concept is objective in nature, [9] supporting the conclusion, which the Commission appears to reach, that a decision adopted pursuant to Article 87(1) EC (now Article 107(1) TFEU) merely has value as a declaration of whether or not the measure notified constitutes aid. Nevertheless, it seems to me difficult to deny that, if the Commission wrongly declares that a particular State measure constitutes aid, it is that decision and not the measure in question, which does not in fact meet the conditions required to constitute aid, which gives rise to the legal consequences associated with such a classification that the Member State concerned would be unable to eliminate other than by obtaining annulment of the decision on that point. I would also note that a similar argument was put forward by the applicant institution also to have declared inadmissible an action for annulment against the Commission's decision to examine a State measure as 'new' and not 'existing' aid and that it was dismissed by the Court. [10]

25. The Commission further contends that the application of the limit, laid down by Community law, on overlapping State aid to protect the environment, and mentioned at paragraph 41 of the judgment under appeal, is a merely hypothetical consequence of the decision. I agree with that analysis. That limit is intended to produce effects only if the Netherlands decides to grant further aid to the undertakings concerned by the measure in question. The same could also be said about the obligation to notify and the standstill obligation laid down in Article 88(3) EC (now Article 108(3) TFEU), to which the German Government in particular refers, obligations which the Netherlands must fulfil only if it decides to adopt measures similar to the one in question or to change elements of that measure, under paragraph 4 of the decision.

9 — See, for example, Case C-83/98 P *France* v *Ladbroke Racing and Commission* [2000] ECR I-3271, paragraphs 24 and 25, cited by the Commission.

10 — See Case C-312/90 *Spain* v *Commission* [1992] ECR I-4117, paragraphs 6 and 13, and Case C-47/91 *Italy* v *Commission* [1994] ECR I-4145, paragraphs 14 and 26.

26. As regards the obligation on the Member State concerned to submit a report on implementation of the measure in question, also referred to at paragraph 41 of the judgment under appeal, the Commission confines itself, in effect, to observing that, according to the information available to it, no report was ever requested by the Netherlands authorities. In my view, this argument is irrelevant. The fact that the Netherlands has thus far failed to fulfil that obligation has no effect on its being taken into account as a legal consequence of the classification of the measure in question as aid.

27. More generally, I consider that precisely the application of the procedure for existing State aid schemes, to which the Court of First Instance refers at paragraph 41 of the judgment under appeal, constitutes the most relevant legal consequence which arises from the classification of a notified State measure as aid. Article 108(1) TFEU provides that the Commission is to keep under constant review all systems of aid existing in the Member States in accordance with the procedure laid down in paragraph 2 and defined in Articles 17 to 19 of Regulation 659/99. This means that a State measure classified as aid is subject to constant monitoring by the Commission and to periodical checks. It therefore follows that a decision on compatibility under Article 107(3) TFEU gives the Member State concerned less legal certainty and more restricted room for manoeuvre in implementing the notified measure than a decision finding that that measure does not constitute aid for the purposes of Article 107(1) TFEU. In the case of the Netherlands it was precisely the desire for legal certainty which induced the authorities of that Member State to notify the measure in question, even though they considered that it did not constitute aid within the meaning of Article 87 EC.

28. On the basis of the forgoing, I therefore consider that the second submission put forward by the Commission in support of its first ground of appeal must also be rejected.

3. Conclusions on the first ground of appeal

29. In the light of those considerations, taken as a whole, I propose that the Court should reject in its entirety the first ground of appeal raised by the Commission, alleging infringement of Article 230 EC.

B — *Second ground, alleging infringement of Article 87(1) EC*

30. The second ground of appeal, raised in the alternative, is also made up of two submissions.

1. First submission

31. By the first submission in support of the second ground of appeal, the Commission disputes the Court of First Instance's finding that the measure in question does not constitute State aid since it is not such as to favour certain undertakings or the production of certain goods. This submission concerns paragraphs 84 to 96 of the judgment under appeal and raises two separate arguments.

(a) First argument

32. The Commission first submits that the Court of First Instance gave particular prominence, in ruling that the measure in question is not selective, to the fact that all large industrial facilities in the Netherlands are subject to the measure in question and that the criterion for application of that measure is therefore an objective one, without any geographic or sectoral connotation.

33. According to settled case-law, the fact that the number of undertakings able to claim entitlement under the measure at issue is very large, or that they belong to different sectors of activity, is not sufficient to call into question its selective nature and, therefore, to rule out its classification as State aid. [11] According to the same case-law, the fact that a State measure is governed by objective criteria of horizontal application merely shows that the incentives provided for therein do not constitute individual aid but fall within an aid scheme. [12] Therefore, the Commission correctly claims, in support of its first argument, that this fact does not demonstrate per se that a State initiative must be regarded as a general measure of economic policy which is therefore devoid of selective character.

34. However, this argument is founded on an incorrect reading of the judgment under appeal and should therefore be disregarded. Contrary to the view that the Commission appears to hold, the finding set out at paragraph 96 of the judgment under appeal, according to which '[t]he measure in question, taken as a whole, does not … favour certain undertakings or the production of certain goods in the sense of Article 87(1) EC', is not based, or not based substantially, on the

11 — Case C-75/97 *Belgium* v *Commission* [1999] ECR I-3671, paragraph 32; Case C-143/99 *Adria-Wien Pipeline and Wietersdorfer & Peggauer Zementwerke* [2001] ECR I-8365, paragraph 48; and Case C-409/00 *Spain* v *Commission* [2003] ECR I-1487, paragraph 48.

12 — See, inter alia, Case C-409/00 *Spain* v *Commission*, cited above, paragraph 49.

preceding paragraphs 87 and 88, which are contested in particular by the applicant. On the one hand, at paragraph 87 of the judgment under appeal the Court does not make its own appraisal but merely sets out the factors characterising the measure in question, as described in the decision, whilst the first sentence of the following paragraph 88 contains only a finding of fact.

35. On the other, the finding in the second sentence of paragraph 88 that '[t]he criterion for application of the measure in question is … an objective one, without any geographic or sectoral connotation', is of limited importance in the scheme of the Court's reasoning and in any event less than that attached to it by the Commission. It follows from paragraph 89 et seq. of the judgment under appeal that the Court of First Instance instead considered decisive, for the purposes of excluding the selectivity of the measure in question, the finding in paragraph 90 of the grounds that the factual and legal situation of the undertakings subject to that $NO_x$ emission ceiling which applies to large industrial facilities 'cannot be regarded as comparable to that of undertakings to which that ceiling does not apply'. Equally prescriptive is the finding in paragraph 94 that the Commission 'has therefore not established the existence of a general scheme which would apply to undertakings in a legal and factual situation comparable to that of the facilities which are subject to the measure in question but which did not offer the advantage of the tradability of the $NO_x$ emission allowances'.

36. In accordance with the forgoing analysis, the first argument put forward by the Commission in connection with the first submission in support of the second ground of appeal, by which the applicant institution criticises the Court for basing its reasoning on the objective nature of the criterion for application of the measure in question, must be regarded as unfounded. In any event, it is irrelevant since even if it were well founded, it would not be sufficient per se to invalidate the Court of First Instance's finding that this measure is not selective in nature since, as we have seen, that finding is based predominantly on different considerations.

(b) Second argument

37. In connection with the first submission in support of the second ground of appeal, the Commission also criticises the burden of

proof which the Court places upon it. [13] This argument is directed against paragraphs 89 to 96 of the judgment under appeal which show that in order to demonstrate the selectiveness of the measure in question the Commission should have furnished proof that (a) the undertakings to which that measure does not apply and to which the advantage represented by the tradability of $NO_x$ emission allowances is therefore not offered, are subject to the *same obligations* (the PSR), or to '*obligations of the same kind*' as those imposed by that measure, and (b) those undertakings can be fined in the event of infringement. [14]

38. The Commission considers that the proof requested by the Court of First Instance is superfluous as it is clear from the decision and the judgment under appeal that all undertakings in the Netherlands are subject to restrictions relating to $NO_x$ emissions; that is sufficient to demonstrate the selective nature of the measure in question because in view of the limitations imposed on all undertakings established in the Netherlands only the category of undertakings to which that measure applies are authorised to trade emission allowances. Moreover, the proof requested by the Court is impossible to furnish since it is clear that the undertakings not subject to the measure in question are clearly not required to fulfil the obligations which it lays down. The Netherlands, on the other hand, contends that the Court correctly interpreted the extent of the burden of proof on the Commission since the selectivity criterion laid down in

13 — In connection with this argument, and purely incidentally, the Commission is uncertain as to the compatibility of the judgment under appeal, in so far as it analyses the selectivity of the measure in question, with the case-law according to which an action for annulment cannot be based on facts or grounds which were not put forward in either the procedure under Articles 107 and 108 TFEU or the original application. Given the vagueness of these contentions and the fact that the Commission does not appear to formulate a genuine and actual claim, I will confine myself in this respect to two brief observations. Firstly, the case-law to which the applicant institution appears to refer, according to which the legality of a decision concerning aid is to be assessed in the light of the information available to the Commission when the decision was adopted (inter alia, Case 234/84 *Belgium* v *Commission* [1986] ECR 2263, paragraph 16, and Case C-241/94 *France* v *Commission* [1996] ECR I-4551, paragraph 33), would appear to be irrelevant in the present case: the Court did not base its finding on factors unknown to the Commission but essentially criticised it for having concluded that the measure in question was selective without there being sufficient evidence to bear out that conclusion. Secondly, it is unclear whether, in claiming that the Netherlands did not raise the question of selectivity in the application, the Commission seeks to claim that the Court ruled *ultra petita* or in breach of Article 48(2) of its Rules of Procedure, under which no new plea in law may be introduced in the course of proceedings. From that point of view, any claim by the Commission is devoid of the clarity necessary to enable the Court to give a ruling.

14 — Paragraphs 89 to 96 of the judgment under appeal can be summarised as follows. The Court of First Instance points out first of all that with regard to the objective pursued by the measure in question and the fact that only undertakings must comply, on pain of fine, with an emission standard or a strict 'Performance Standard Rate' (PSR), the legal and factual situation of those undertakings cannot be regarded as comparable to that of undertakings to which that ceiling does not apply (paragraphs 89 and 90). It then rules that the Commission has failed to put forward any evidence to suggest that undertakings consuming less than 20 MWth are in a position comparable to that of the undertakings subject to the measure in question or that they are subject, on pain of fine, to 'obligations of the same kind': the applicant institution has failed, in particular, to put forward evidence establishing that those undertakings are subject to the PSR. The Court of First Instance therefore finds that the Commission has failed to establish the existence of a general scheme from which the measure in question derogates (paragraphs 92 to 94).

the *Adria-Wien Pipeline* judgment [15] is based precisely on the comparability of the undertakings covered by the measure at issue and those excluded from it. In the present case, the 250 undertakings to which the measure in question applies are not in a situation comparable to that of other undertakings since they are under additional obligations arising from the other target of reducing $NO_x$ emissions to 55 kilotonnes by 2010.

39. For my own part, I note that, in accordance with the condition of selectivity, 'general' measures – which are designed to support, not specific activities or undertakings, but all economic operators active in the State's territory – are excluded from the application of the provisions on State aid. In that connection, the case-law has made it clear that State action in favour of an indefinite number of beneficiaries, identified on the basis of a number of objective criteria, must be regarded as a system of aid constituting a selective measure if, owing to the criteria governing its application, it procures an advantage for certain undertakings or the production of certain goods, to the exclusion of others. [16] On the other hand, however, the case-law has also made it clear that even measures which seem to be general measures, in that they are not limited either to a particular sector or to a particular territory and are not applied to a restricted category of undertakings, may be caught by the prohibition laid down in Article 87(1) EC if their implementation is left to the discretion of the national authorities as regards, in particular, the choice of recipients, the amount and the conditions of the financial assistance. [17] The Court has also held that aid may be selective even where it concerns an entire economic sector. [18] More generally, it is clear from the case-law that the question whether the selectivity condition is satisfied must be assessed on a case-by-case basis, in order to ascertain whether or not, in the light of its nature, scope, method of implementation and effects, the measure in question involves *advantages accruing exclusively to certain undertakings or certain sectors*. [19] In *Adria-Wien Pipeline* the Court made it clear that such an assessment requires it to be determined whether, under a particular statutory scheme, a State measure is such as to favour 'certain undertakings or the production of certain goods' in comparison with others

15 — Cited above.

16 — See Case T-55/99 *CETM* v *Commission* [2000] ECR II-3207, paragraph 40.

17 — See Case C-241/94 *France* v *Commission*, cited above; Case C-256/97 *DM Transport* [1999] ECR I-3913, paragraphs 28 to 30; and Case C-295/97 *Piaggio* [1999] ECR I-3735, paragraph 39.

18 — See, in particular, Case C-75/97 *Belgium* v *Commission*, cited above, paragraph 33, and Case C-148/04 *Unicredito Italiano* [2005] ECR I-11137, paragraph 45.

19 — See Case C-241/94 *France* v *Commission*, cited above, paragraph 24; Case C-200/97 *Ecotrade* [1998] ECR I-7907, paragraphs 40 and 41; and Case C-75/97 *Belgium* v *Commission*, cited above.

which are in a legal and factual situation that is comparable in the light of the objective pursued by that scheme. [20]

40. The Commission's criticisms of the judgment under appeal must also be examined in the light of this case-law. Let me say straight away that I share those criticisms.

41. Let me make clear at the outset that the fact that a State measure favours certain undertakings, identified by factors characterising their situation in comparison with that of other economic operators – for example, because they belong to a certain sector or exercise a certain type of activity, [21] or even their size [22] – acts, in principle, as an acknowledgement of the selective nature of that measure. [23] Therefore, the fact that the measure in question applies *solely* to undertakings which have large industrial facilities tends to indicate that it is selective.

42. In the present case, since the advantages offered by the measure in question involve the imposition of burdens, the Court of First Instance considered that it was necessary to prove that those burdens, but not the relative advantages, were also imposed on the undertakings excluded from that measure and found that in the absence of such proof the situation of the two categories of undertakings was not comparable and that the advantages granted to the first category of undertakings could not be regarded as selective. This finding appears to me to be open to criticism in two respects.

43. Firstly, it seems to me that it proceeds from an incorrect assessment of the facts. The quantitative difference [24] in the obligations to reduce $NO_x$ emissions imposed on the various facilities established in the Netherlands in accordance with their potential for pollution (obligations which, for the 250

20 — See *Adria-Wien Pipeline and Wietersdorfer & Peggauer Zementwerke*, cited above, paragraph 41; see, to the same effect, *Ecotrade*, cited above, paragraph 41, and Case C-75/97 *Belgium* v *Commission*, cited above, paragraph 26.

21 — See Joined Cases C-393/04 and C-41/05 *Air Liquide Industries Belgium* [2006] ECR I-5293, paragraph 31, and Case C-501/00 *Spain* v *Commission* [2004] ECR I-6717, paragraph 120.

22 — See, for example, *Ecotrade*, paragraph 28.

23 — See, inter alia, *Unicredito*, cited above, paragraph 49.

24 — Although the judgment under appeal makes reference to the methods for calculating the emission standard (paragraph 91) and, more generally, to the 'nature' of the obligations imposed by the measure in question, the Court of First Instance refers essentially to the *quantitative level* of the emission reduction targets.

undertakings concerned by the measure in question, involve a total reduction of 55 kilotonnes of $NO_x$ by 2010) does not, in my view, preclude the possibility of comparing the situation of the undertakings operating those facilities from the point of view of the burden which fulfilment of those obligations entails for them. An undertaking which has one or more facilities with installed total thermal capacity of less than 20 MWth, which is therefore not covered by the measure in question, can encounter the same difficulties, in terms of investments to make and costs to bear, in complying with the emissions ceilings imposed on it as an undertaking which operates facilities with a total thermal capacity of more than 20 MWth, in respect of which the measure in question sets a quantitatively higher emissions reduction target. On the contrary, since theoretically the costs of abating emissions vary from undertaking to undertaking, the possibility cannot be excluded that such compliance will be more of a burden on the first undertaking, if it has higher abatement costs than the second. [25] It therefore follows that, in spite of the difference in the obligations imposed on them, the burden borne by those two undertakings is *proportionally comparable*.

44. Secondly, the finding reached by the Court of First Instance does not appear to me to be in line with the judgment in *Adria-Wien Pipeline* cited at paragraph 86 of the judgment under appeal and on which its entire reasoning is based. According to paragraph 41 of that judgment, in order to determine whether a State measure is selective in nature, it is necessary to assess whether it is such as to favour 'certain undertakings or the production of certain goods' in comparison with other undertakings which are in a legal and factual situation that is comparable *in the light of the objective pursued by the measure*. In the present case, the environmental objective of the measure in question is to reduce industrial emissions of $NO_x$, that is to say of polluting but non-toxic gases in respect of which the source of the emission which brings about the reduction is therefore irrelevant. Contrary to the Court of First Instance's findings, in respect of that objective *all undertakings whose industrial facilities installed in the Netherlands emit $NO_x$ are in a comparable situation*. [26] This comparability is not called into question merely by the fact that the State has decided, in respect of some of those undertakings, to pursue that objective by creating an emission trading scheme. If that scheme grants an advantage to the undertakings which participate therein, in spite of the burdens which it entails,

25 — However, according to what the Netherlands Government stated in reply to certain questions posed by the Court, for the first year in which the measure in question was applied the emission standard 'was set a level intentionally higher than the average emission' to enable most undertakings to comply with it and to purchase sufficient emission credits.

26 — To that end, the Commission also contended at first instance that it was not necessary to prove the existence of emission reduction or limitation obligations on the undertakings excluded from the emission trading scheme in order to establish the selective nature of the measure in question.

that advantage is selective in nature since it favours only a limited number, albeit substantial and determined on the basis of objective criteria, of undertakings which emit $NO_x$ in the Netherlands.

45. A large number of previous cases confirm the forgoing analysis. [27]

46. In conclusion, I consider that the Court of First Instance erred in law in demarcating the extent of the burden of proof on the Commission by concluding that it was required to demonstrate that undertakings not subject to the measure in question were under identical $NO_x$ emission reduction obligations as those imposed on undertakings subject to that measure.

47. The Court of First Instance also held that it was for the Commission to demonstrate that undertakings subject to emission ceilings other than those laid down by the measure in question could be fined if they failed to comply with those ceilings. In assessing whether, in the present case, the imposition of such a burden of proof is justified, it should be borne in mind that at paragraph 68 et seq. of the judgment under appeal the Court of First Instance found that the measure in question had *two distinct advantages* accruing to undertakings subject thereto. On the one hand, it enabled those undertakings to trade between themselves the emission allowances which indirectly resulted from the emission standard imposed on them, and, on the other, it allowed undertakings which emitted more $NO_x$ than laid down by the emission standard to avoid a fine by purchasing emission allowances from those who recorded a surplus. The proof that undertakings not subject to the measure in question can be fined if they exceed the emission ceilings may be necessary in order to regard the advantage of being able to avoid such a fine as selective, since in the absence of that proof the situation of those undertakings will not logically be comparable, in relation to that advantage, to that of the undertakings subject to that measure. However, such proof can be of no relevance in assessing the possibly selective nature of the advantage of being able to trade emission allowances.

48. In this respect too, it therefore follows that the Court of First Instance misinterpreted the extent of the burden of proof on the Commission.

27 — See, for example, *Ecotrade*, cited above, in which Court considered selective a law which established a special administration procedure solely for large companies in difficulties and not all insolvent undertakings; Case C-409/00 *Spain* v *Commission*, cited above, relates to an aid scheme for purchasing commercial vehicles intended solely for natural persons and SMEs (see, in particular, paragraph 50, in which the Court rejects the Kingdom of Spain's argument that the exclusion of large undertakings, 'which replace their vehicles more regularly and without any need for aid for that purpose', was required by the general scheme); Case C-75/97 *Belgium* v *Commission*, cited above, concerning increased reductions in social security contributions for manual workers accruing solely to undertakings in certain sectors of the processing industry and excluding others marked by the employment of manual labour (paragraphs 23 to 31); and *Adria-Wien Pipeline*, cited above, paragraphs 48 to 53.

49. On the basis of the foregoing considerations, I consider that the Commission's second argument in connection with the first submission in support of the second ground of appeal, alleging that the Court erred in law in demarcating the extent of the burden of proof on the Commission, is well founded.

2. Second submission

50. The Commission also puts forward two separate arguments in connection with this submission. On the one hand, the Court of First Instance wrongly found, in the final sentence of paragraph 88 and at paragraphs 97 to 100 of the judgment under appeal, that the measure in question does not constitute State aid since it is concerned with the protection of the environment. On the other, the Court misapplied the case-law according to which a measure does not constitute State aid if it is justified by the nature or overall structure of the scheme of which it forms part.

51. As regards the first argument, I shall merely point out that it is based on a misunderstanding of the judgment under appeal. Contrary to the assertions of the Commission, in the passages that it cites the Court essentially confines itself to stating that the criterion for determining the undertakings to which the measure in question applies is in conformity with the environmental goal pursued by it and justified by the nature and overall structure of the scheme created by it. It is also necessary to reject the Commission's claim – made primarily in connection with the second argument – that the Court had contradicted itself by finding, at paragraphs 97 to 100 of the judgment under appeal, that there exists in the Netherlands a broader $NO_x$ emission scheme, of which the measure in question forms part, but at paragraphs 91 to 94 of that judgment criticising the Commission precisely for not having proven the existence of such a general scheme. First, paragraphs 97 to 100 are based on a mere hypothesis, set out for the sake of completeness, and, secondly, in the passages in which it mentions the 'nature and overall structure of the scheme', the Court refers to the scheme created by the measure in question itself – in respect of which it considers it must verify the consistency of the differentiation between undertakings which it assumes, hypothetically, to exist [28] –, and not, as the Commission maintains, to a 'broader' general $NO_x$ scheme applied in the Netherlands.

52. In connection with its second argument, the Commission contends, in the alternative,

28 — See paragraph 97.

that contrary to the Court of First Instance's findings, the grant of tradable emission allowances to a limited number of undertakings determined in accordance with the thermal capacity of their industrial facilities is not justified by the environmental objectives of the measure in question or by the nature or structure of the scheme. In that regard, it refers to paragraphs 52 and 53 of the judgment in *Adria-Wien Pipeline*, cited at point 39 of this Opinion. More generally, it contends, on the one hand, that it is for the Member State concerned to demonstrate, in the course of the administrative proceedings, that the measure notified is justified by the nature and general structure of the scheme – proof which it claims the Netherlands failed to furnish in this case –, and, on the other, that such justification, as an exception to the principle that a measure which favours certain undertakings constitutes State aid, should be interpreted and applied strictly.

53. I would point out that according to the case-law cited at paragraph 97 of the judgment under appeal the Court has made it clear, with particular reference to State measures of a fiscal nature, that even measures which are selective, in that they differentiate between undertakings, may escape being classified as aid, if that differentiation is justified by the nature or structure of the tax regime of which they form part. [29] More generally, the Court applies the test established by that case-law to 'creating different treatment of undertakings in relation to charges'. [30]

54. In the present case, at paragraph 99 of the judgment under appeal the Court of First Instance found that 'the beneficiary undertakings are determined in accordance with the nature and general scheme of the system, on the basis of their significant emissions of $NO_x$ and of the specific reduction standard to which they are subject' and that '[e]cological considerations justify distinguishing undertakings which emit large quantities of $NO_x$ from other undertakings'. The Court also held that '[t]he implementation of those principles must take into account Article 6 EC in conjunction with Article 87 EC'.

55. I am not persuaded by the Court of First Instance's reasoning. Firstly, I do not consider that the distinction between more or less polluting facilities can be regarded as 'inherent' to a scheme intended to reduce industrial pollution and therefore necessarily justified by its environmental objective. As the Commission

29 — See, to that effect, Case 173/73 *Italy* v *Commission* [1974] ECR 709, paragraph 33; Case C-148/04 *Unicredito Italiano* [2005] ECR I-11137, paragraph 51; and Case C-88/03 *Portugal* v *Commission* [2006] ECR I-7115, paragraph 52.

30 — See, inter alia, Case C-351/98 *Spain* v *Commission* [2002] ECR I-8031, paragraph 42; Joined Cases C-128/03 and C-129/03 *AEM and AEM Torino* [2005] ECR I-2861; and Case C-431/07 P *Bouygues and Bouygues Télécom* v *Commission* [2009] ECR I-2665, which upheld the judgment of the Court of First Instance in Case T-475/04 ECR II-2097.

rightly observes, in terms of environmental impact any $NO_x$ emission is harmful, regardless of the size of the facility it comes from. [31] Contrary to the Court's findings, a differentiation between undertakings based solely on a qualitative criterion of the type applied by the measure in question cannot be considered per se justified by ecological considerations. I note that the Court's reference to Article 6 EC in conjunction with Article 87 EC, without any further clarification, brings to mind some of the grounds stated in the judgment in *British Aggregates*, given by the Court of First Instance on 13 September 2006, which were criticised by the Court of Justice several months after the judgment under appeal. [32]

56. Secondly, in the absence of proof – which it was for the Netherlands Government to furnish [33] concerning the inapplicability of the PSR to undertakings with facilities below the size established by the measure in question – it is not possible to find, as the Court of First Instance does, that this distinction between undertakings drawn by that measure arises from the nature and general scheme of the system on the basis of the specific reduction standard to which some, but not others, are subject.

57. On the basis of the forgoing, I consider that the second argument put forward by the Commission in connection with its second submission is also well founded and that the Court of First Instance erred in finding, at paragraphs 97 to 100 of the judgment under appeal, that the distinction which the measure in question draws between undertakings with a thermal capacity of more than 20 MWth and undertakings with a thermal capacity below that threshold is justified by the nature and general scheme of the system within the meaning of the case-law cited at paragraph 53 above.

## C — *Conclusions on the main action*

58. In the light of all the forgoing, I propose that the Court should uphold the second ground of appeal, which the Commission raised in the alternative, and set aside the judgment under appeal.

31 — See, to that effect, paragraphs 52 and 53 of the judgment in *Adria-Wien Pipeline*, cited by the Commission.

32 — See Case T-210/02 *British Aggregates* v *Commission* [2006] ECR II-2789, in particular paragraphs 115 and 117, and *British Aggregates*, cited above, paragraph 86 set seq., specifically 90 to 92.

33 — Case C-159/01 *Netherlands* v *Commission* [2004] ECR I-4461, paragraph 43.

## V — Cross-appeals

59. The Netherlands and Germany have brought a cross-appeal against the part of the judgment under appeal in which the Court of First Instance rejected the submission made by the Netherlands at first instance alleging incorrect application by the Commission of the concept of 'advantage financed through State resources' for the purposes of Article 87(1) EC (paragraphs 63 to 78 of the judgment under appeal).

60. The cross-appeal lodged by Germany was brought both independently and subject to the main action being upheld as far as its merits were concerned. In so far as it constitutes an independent claim, it must, in my view, be dismissed as inadmissible. It is settled case-law that only the wholly or partially unsuccessful parties at first instance may appeal against a judgment of the Court of First Instance. [34] In the present case, although in the part of the judgment to which the cross-appeal relates the Court rejected the ground put forward by the Netherlands, supported by Germany, it nevertheless upheld in full the forms of order sought by those Member States by annulling the contested decision in its entirety. Therefore, those Member States are not permitted to bring an appeal before the Court of Justice other than to the extent that the Court, by upholding the main action brought by the Commission, calls into question the Court of First Instance's classification of the measure at issue.

61. In support of their cross-appeals, the Netherlands and Germany raise just one ground alleging infringement of Article 87(1) EC, which is framed in two separate submissions. Firstly, they claim that the measure in question did not give *any advantage* to the undertakings subject thereto and, second, even if the existence of such an advantage were ascertained, it is not *financed through State resources*. Therefore, the Court of First Instance incorrectly interpreted and applied the concepts of 'advantage' and 'financed through State resources' set out in Article 87(1) EC.

34 — See Joined Cases C-199/01 P and C-200/01 P *IPK-München and Commission* [2004] ECR I-4627, paragraph 42, and the Opinion of Advocate General Mischo in that case, paragraphs 21 to 29. See also the order of the President of the Court in Case C-363/98 P(R) *Emesa Sugar* v *Commission* [1998] ECR I-8787. In *Procter & Gamble* v *OHIM*, the Court appears to have taken a different position; however, in that case the applicant before the Court had obtained at first instance annulment of the contested act on a procedural ground raised in connection with forms of order sought in the alternative, whilst the ground relating to the substance of the dispute, put forward in support of the forms of order sought primarily, was rejected (Case C-383/99 P [2001] ECR I-6251, paragraphs 18 to 26).

A — *First submission, alleging incorrect interpretation and application of the concept of advantage within the meaning of Article 87(1) EC*

62. By the first submission in support of the sole ground of appeal, the Netherlands and German Governments first dispute the Court of First Instance's finding that the tradability of emission allowances provided for in the measure in question constitutes an advantage for the undertakings concerned. The Netherlands also disputes the finding in paragraph 73 of the judgment under appeal that the measure in question enables undertakings which have emitted more $NO_x$ than laid down by the emission standard to avoid paying a fine by purchasing emission allowances on the market.

1. Tradability of emission allowances

63. As a preliminary observation, it should be noted that in line with the importance that the objective of introducing and maintaining a system of free competition [35] has from the point of view of European Union law, the Court has, since its earliest judgments, placed a broad interpretation on the concept of State aid. This concept embraces not only positive benefits, such as subsidies, but also 'measures which, in various forms, mitigate the charges which are normally borne by the budget of an undertaking and which, therefore, without being subsidies in the strict sense of the word, are similar in character and have the same effect'. [36] On the other hand, a measure aimed at preventing a budget from being burdened with a charge which, in a normal situation, would not have existed, does not constitute aid. [37] Furthermore, as I have already mentioned, it is settled case-law that Article 87(1) EC does not make a distinction between State measures according to their aim or the reasons for their introduction, but defines them solely in terms of their effects. [38] It therefore follows that the mere fact that a State measure pursues economic policy, structural, social [39] or environmental [40] objectives is not

35 — See, inter alia, Case C-308/04 P *SGL Carbon* v *Commission* [2006] ECR I-5977, paragraph 31, and Joined Cases C-75/05 P and C-80/05 P *Germany* v *Kronofrance* [2008] ECR I-6619, paragraph 66.

36 — See, in particular, Case 30/59 *De Gezamenlijke Steenkolenmijnen in Limburg* v *High Authority* [1961] ECR 1; Case C-256/97 *DM Transport* [1999] ECR I-3913, paragraph 19; and Case C-276/02 *Spain* v *Commission* [2004] ECR I-8091, paragraph 24.

37 — Case C-237/04 *Enirisorse* [2006] ECR I-2843, paragraphs 43 to 49.

38 — See Case 173/73 *Italy* v *Commission* [1974] ECR 709, paragraph 27; Case C-241/94 *France* v *Commission* [1996] ECR I-4551, paragraph 20; and Case C-382/99 *Netherlands* v *Commission* [2002] ECR I-5163, paragraph 61.

39 — See Case 61/79 *Denkavit italiana* [1980] ECR 1205, paragraph 31; Case 173/73 *Italy* v *Commission*, cited above, paragraph 13, relating to measures to sustain employment in the textile sector; and Case C-5/01 *Belgium* v *Commission* [2002] ECR I-11991, paragraph 46, concerning measures to finance the reduction of the working week of salaried employees.

40 — See, in particular, *British Aggregates* v *Commission*, cited above, paragraph 84.

per se sufficient to exclude them from classification as aid for the purposes of that provision. [41] More generally, as Advocate General Léger pointed out in *Altmark*, [42] the elements characterising the measure – such as the form in which the aid is granted, the legal status of the measure in national law, the fact that it is part of an aid scheme, its objectives and the intentions of the public authorities and the recipient undertaking – are not relevant at the stage of determining the existence of aid because they are not liable to affect competition. They may, on the other hand, become relevant at a later stage of the analysis, in order to assess the compatibility of the aid from the point of view of the derogating provisions of the Treaty.

64. It is on the basis of these principles, in particular, that the arguments put forward by the Netherlands and Germany must be examined. In support of the contention that the tradability of emission allowances does not entail any advantage for the undertakings subject to the measure in question, those Member States observe first of all that those undertakings can sell their emission allowances only if and in so far as they succeed, as a result of the investments they have made, in reducing their $NO_x$ emissions to below the standard laid down. Therefore, the quantity of emission allowance which they can trade is not predetermined but merely a product of that additional reduction. Moreover, the value of those allowances is determined by the operators concerned and depends entirely on the quantity of allowances available on the market. The German Government further observes that that value could also be zero if all the undertakings complied with the emission ceilings imposed on them. It considers that in any event a supply consisting of a quid pro quo at the market price does not confer any advantage and does not constitute State aid.

65. These arguments seek, on the one hand, to call into question the *imputability to the State* of the purported advantage of being able to trade emission allowances and, on the other, cast doubt on the *very existence of such advantage* by classifying it as purely theoretical. In my view, they should be rejected in both respects.

66. As to the first aspect, I would note that the form in which a State measure is implemented is irrelevant for the purpose of its classification as aid; even a measure which entails a *merely indirect advantage* for the beneficiary undertaking, by mitigating the charges which are normally borne by its budget, can constitute State aid for the purposes of Article 107(1) TFEU. Moreover, the

41 — See, in particular, Case C-241/94 *France* v *Commission*, cited above, paragraph 21; Case C-342/96 *Spain* v *Commission* [1999] ECR I-2459, paragraph 23; and Case C-75/97 *Belgium* v *Commission* [1999] ECR I-3671, paragraph 25.

42 — Opinion in Case C-280/00 *Altmark Trans and Regierungspräsidium Magdeburg* [2003] ECR I-7747, paragraph 81.

imputability to the State of the advantage which arises from a State measure is not called into question merely by the fact that in order to obtain that advantage the beneficiary undertaking is obliged to conduct itself in a particular way. [43] In the present case, it is clear, irrespective of any consideration concerning the action required of the undertakings subject to the measure in question, that if the tradability of $NO_x$ emission allowances confers on them an advantage it is because the State, on the one hand, authorises the sale of those allowances and, on the other, enables undertakings which have emitted excess $NO_x$ to acquire the missing emission allowances from other undertakings covered by the scheme, thus allowing the creation of a market in those allowances. Therefore, as stated correctly at paragraph 70 of the judgment under appeal, such advantage, if confirmed, is attributable to the State measure even though the State does not directly grant emission allowances to the undertakings concerned.

67. As to the second aspect, the fact that under certain circumstances the advantage associated with a specific State measure may not take the form of a real benefit for the undertaking concerned – as would be the case if all the undertakings participating in the scheme merely complied with the emission ceilings imposed on them – does not, in my view, make it possible to preclude it automatically from being taken into account for the purposes of classifying the measure as aid. Moreover, in this case, it should be pointed out, on the one hand, that the scheme created by the measure in question is intended to regulate the reduction of $NO_x$ emissions in the industrial sector for a number of years and, on the other, that, as is clear in particular from paragraph 71 of the judgment under appeal, the undertakings covered by the scheme have the possibility of trading all the emission allowances and not only the credits recorded at the end of the year as the positive balance after subtraction of the actual emissions from the authorised amount. In such circumstances, the situation envisaged by the German Government should in practice be treated as marginal.

68. The Netherlands and Germany also contend that the tradable allowance scheme seeks to *compensate for* the costs incurred by undertakings in reducing emissions or, alternatively, in acquiring the allowances necessary to comply with the standard laid down. This scheme does not result in the charges which are normally borne by the budget of the undertakings in question being mitigated or confer any advantage on them, but must instead be considered in relation to the most stringent emissions ceilings imposed by the measure in question. Finally, the German Government observes that, contrary to the Court of First Instance's findings, the credit function conferred on the emission

43 — The aim of granting incentives is often precisely to induce undertakings to conduct themselves in a particular way which is in line with specific objectives, such as economic policy, social or environmental objectives, pursued by the State.

allowances does not demonstrate the existence of an advantage in favour of the undertakings which form part of the scheme.

69. I consider that these arguments too should be rejected.

70. As a preliminary observation, I would note that the existence of aid is not, in principle, excluded where the measure in question is designed to compensate for disadvantages or additional costs which affect the undertaking concerned as a result of unfavourable economic conditions, legislative measures [44]

44 — See, for example, Case 173/73 *Commission* v *Italy*, cited above, in which the Court held that the reduction of social charges which the Italian Republic granted to the textile sector constituted aid despite the fact that it was intended to compensate for the disadvantage which the system for financing family allowances introduced previously presented for sectors employing a high proportion of female labour; Case 57/86 *Greece* v *Commission* [1988] ECR 2855, in which the Court rejected the Greek Government's argument that the interest repayment granted to exporters was designed to be neutral since it was confined to cancelling out the negative effects of the increase in rates for exporters, without affording them any additional advantage; and Case C-251/97 *France* v *Commission* [1999] ECR I-6639, in which the Court rejected the French Government's argument that the relief on social security contributions in question was only the quid pro quo of exceptional additional costs which the undertakings had agreed to assume as a result of the negotiation of collective agreements and that, in any event, taking account of those additional costs, the contested measures were revealed to be financially neutral.

or even amendments to the regulatory framework applicable to those undertakings. [45]

71. That said, I note that, according to the Netherlands, undertakings which have made investments to reduce $NO_x$ emissions to below the ceiling resulting from application of the PSR can, by selling their respective emission allowances on the market, recover the costs associated with that investment, even if only to a degree. On the other hand, the undertakings which have failed to comply with those ceilings will have the choice of either investing in measures to reduce the emissions from their facilities or of acquiring the necessary emission allowances on the market. As the agent for the Netherlands himself emphasised at the hearing, that choice will depend in particular on the difference between the costs of acquiring emission allowances, which will vary as the market evolves, and the costs necessary to fund the measures to reduce $NO_x$ emissions. Therefore, in both cases the undertakings covered by the scheme will be able, as a result of the tradability of the emission allowances authorised by the Netherlands, to reduce, to varying degrees, the costs associated with environmental investments or arising from fulfilment of environmental obligations,

45 — See, for example, as regards aid designed to compensate for stranded costs in the liberalised sectors, barring the possible application of the *Altmark* case-law, the judgment cited above. With regard to compensation in respect of costs incurred in the discharge of public service obligations, see, to that effect, Case C-206/06 *Essent Netwerk Noord and Others* [2008] ECR I-5497.

which are normally borne by their budget. [46] The possibility of such a reduction constitutes an advantage for those undertakings. More generally, as the Netherlands points out in its replies to the written questions posed by the Court of First Instance, within the emission trading scheme for $NO_x$ the undertakings 'themselves determine the way in which they will comply with the emission standard laid down'. Furthermore, this scheme allows them to share the aggregate costs of adapting to this standard among the group of 250 undertakings concerned, with an advantage both for the undertakings whose emission abatement costs are low, which will be able to profit from reductions to below this standard, and the undertakings for which those costs are higher, which will have an alternative to the structural measures necessary to comply with the standard.

72. In such circumstances, the contention by the Netherlands and Germany that the tradability of the emission allowances must be considered in relation to the most stringent targets imposed on the undertakings concerned in terms of $NO_x$ emission targets is irrelevant. In so far as this contention seeks to justify the advantages associated with the tradability of emission allowances illustrated above by referring to the environmental objectives pursued by the measure in question, it must be rejected by reason of the Court's settled case-law, referred to at point 63 above, according to which Article 87(1) EC does not make a distinction between State measures according to their aim or the reasons for their introduction, but defines them solely in terms of their effects.

73. The argument put forward by the German Government and reiterated at the hearing by the agent for the Netherlands, that the tradability for the emission allowances constitutes a quid pro quo, at the market price, of the efforts made by the undertakings to reduce the $NO_x$ emissions, must also be rejected. As has just been explained, the costs of abating emissions, even where they are aimed at reducing emissions below the threshold granted by law to a single undertaking, form part of the costs which are normally borne by the budget of the undertaking and such a reduction cannot be regarded as a 'service' for which the tradability constitutes a quid pro quo at the market price. Although the recompense mechanism within the emission trading scheme

46 — In that regard, I note that in accordance with the 'polluter pays' principle, which, under Article 191 TFEU, is a cornerstone of EU environmental policy, as interpreted by the Court, the costs of remedying environmental damage are imposed on operators because of their contribution to the creation of pollution or the risk of pollution (see, in particular, Case C-378/08 *ERG and Others* [2010] ECR I-1919, paragraph 56). Therefore, those costs must be regarded as costs which are *normally borne by the budget* of undertakings whose activity has an unfavourable environmental impact and do not constitute exceptional charges for them.

established by the measure in question can be taken into account in assessing its compatibility with the internal market, [47] it is nevertheless irrelevant in considering whether that measure confers on the undertakings subject thereto an advantage which could constitute aid within the meaning of Article 87(1) EC.

74. Finally, it should be added that, as has been explained above, the undertakings subject to the measure in question have the possibility, within certain limits, to trade all the emission allowances and not only the credits recorded at the end of the year as the positive balance after subtraction of the actual emissions from the authorised amount. This confers on them the further advantage of being able to hold liquid assets by selling the emission allowances before the conditions for their final allocation have been satisfied.

2. Possibility of evading the fine

75. The Netherlands considers that the Court erred in holding, at paragraph 73 of the judgment under appeal, that the measure in question conferred an advantage on the undertakings which emitted more $NO_x$ than laid down by the emission standard since it enables them to avoid imposition of a fine by purchasing emission allowances from those who recorded a surplus.

76. In support of their contention, they essentially argue that payment of the fine will not exempt the undertakings from acquiring the missing emission allowances and, consequently, does not constitute a real alternative for them. Let me say straight away that this argument, even if construed as claiming an error in law and not as casting doubt on the assessments of fact in the judgment under appeal, appears to me to be irrelevant since it does not negate the Court of First Instance's finding that, by acquiring the missing emission allowances by the end of the year, undertakings which have exceeded their emission standard can avoid paying a fine.

77. On the other hand, nor can it be claimed, as the Netherlands appears implicitly to do, that such a finding fails to take account of the fact that the unlawful conduct consisted in failure to satisfy two conditions to be regarded as cumulative: exceeding the emission standard and failing to acquire the emission allowances that are lacking. Such an argument is vitiated by excessive formalism. Unlike an undertaking excluded from the emission trading scheme established by the measure in question, which is required to comply with the

47 — See paragraph 3.3 of the decision.

emission ceiling imposed or pay a fine,[48] the undertakings covered by the scheme have an alternative to that penalty if they exceed the standard. Contrary to what the Netherlands appears to contend, this alternative is genuine. At the end of each year those undertakings can decide whether to acquire the missing allowances immediately or to pay the fine and acquire them at a later date.[49] They will choose the first option where, depending on the value of the emission allowances on the market, it is more advantageous for them to acquire the missing allowances than to pay the fine. On the other hand, they will choose the second option if they believe that the value of the allowances on the market will decrease so as to make it more advantageous to delay acquisition, even though to do so entails payment of a fine, or if they believe that they will have, on account of the investments they have made, or are to make, excess allowances for the following year so as to compensate for the missing allowances in the current year (including the further 25% reduction which will be imposed on them).

78. Therefore, I do not consider that the arguments put forward by the Netherlands show that paragraph 73 of the judgment under appeal is vitiated by an error in law.

3. Conclusions on the first submission

79. In the light of the forgoing, the first submission relating to the incorrect interpretation and application of the concept of advantage within the meaning of Article 87(1) EC must, in my view, be rejected.

B — *Second submission, alleging incorrect interpretation and application of the concept of 'advantage financed through State resources' within the meaning of Article 87(1) EC*

80. By the second submission, the Netherlands and Germany dispute the finding, at paragraphs 75 to 77 of the judgment under appeal, that the advantages conferred by the measure in question are financed through State resources.

81. In the judgment under appeal the Court essentially held that by making the $NO_x$ emission allowances available to the undertakings

48 — At the hearing the Netherlands confirmed that the undertakings subject to the measure in question are responsible for approximately 90% of industrial $NO_x$ emissions and the undertakings responsible for the remaining 10% are subject to emission ceilings which attract penalties where they are exceeded.

49 — See the Kingdom of the Netherlands' replies to the questions posed by the Court of First Instance.

concerned free of charge, rather than selling or auctioning them, and by allowing undertakings which have emitted excess $NO_x$ to avoid paying a fine by acquiring the missing emission allowances on the market, the Netherlands had forgone State resources. It relied on the settled case-law of the Court, according to which the forgoing of revenue by the State, although not involving a transfer of State resources, can constitute aid. [50] In accordance with that case-law, the Court has held that the following can satisfy the conditions relating to financing through State resources: an exemption or a tax concession, [51] a postponement of taxation and, subject to certain conditions, payment facilities in respect of social security contributions granted in a discretionary manner to an undertaking by the body responsible for collecting such contributions, [52] the supply of goods or services on preferential terms, [53] the de facto waiver of public debts or release from the obligation to pay fines or other pecuniary penalties. [54]

82. In support of its submission, the Netherlands first contends that it has merely 'created a legislative framework for reducing $NO_x$ emissions in a manner which is advantageous to undertakings with large industrial facilities'. It stresses that the emission allowances which can be traded are created directly by those undertakings and their value is determined by the market. Such a scheme allows undertakings to 'compensate for' their excess emissions above the standard. Since these arguments essentially seek to call into question the imputability to the State of the advantages arising from the tradability of the emission allowances, I would simply refer in that regard to points 66 et seq. above, in which this aspect has already been discussed. [55]

83. The Netherlands further observes that the alternative indicated in the judgment under appeal, that is to say the sale or auction of the $NO_x$ emissions allowances by the State, would have placed a further burden on the undertakings already subject to strict NOx reduction targets and in any event would be incompatible with the scheme set up. In my view, this argument cannot succeed. Whilst considerations relating to the need to preserve the cohesion of the scheme and its stimulus effect and, more generally, its environmental objective, may come into play in assessing the compatibility of the measure

50 — See, in particular, Case C-387/92 *Banco Exterior de España* [1994] ECR I-877, paragraph 14, and Case C-6/97 *Italy* v *Commission* [1999] ECR I-2981, paragraph 16.

51 — See Case C-156/98 *Germany* v *Commission* [2000] ECR I-6857, paragraphs 26 and 27; *Banco Exterior de España*, cited above, paragraph 14; and Case C-6/97 *Italy* v *Commission*, cited above, paragraph 16.

52 — *DM Transport*, cited above.

53 — Case C-39/94 *SFEI and Others* [1996] ECR I-3547, paragraph 59.

54 — *Piaggio*, cited above, paragraph 41.

55 — I would add that in Case C-156/98 *Germany* v *Commission*, cited above, paragraphs 26 to 27, the Court ruled out the possibility that the connection between a tax concession for the acquisition of holdings in certain undertakings and the indirect advantage given to those undertakings could be eliminated merely by the fact that attainment of that benefit depended on an independent decision on the part of investors.

in question with the internal market, they are irrelevant for the purposes of determining whether the advantages which it confers on the undertakings concerned are financed through State resources. Moreover, whilst it is true that the imposition on the undertakings concerned of particularly stringent emission reduction targets, on the one hand, and the grant of tradable emission allowances, on the other, constitute aspects of a single scheme, they can nevertheless be considered separately in assessing whether this scheme involves elements of aid. [56]

84. On the other hand, the argument put forward by the German Government, which observes that Community law does not require Member States to sell or auction allowances for emissions of atmospheric pollutants, but leaves them free to choose whether to grant them in return for payment or free of charge, appears to me to be more sound.

85. It is true, as the Commission itself acknowledged both at first instance and at the hearing before the Court, that Community law does not lay down any such obligation or require the Member States to set up a particular scheme to achieve the $NO_x$ emission reduction targets set by Directive 2001/81. The Member States are essentially free to adopt a traditional scheme, based on the imposition of technologies or the laying down of emission ceilings, which attract penalties where they are breached, or a regulatory instrument based on the market mechanism, by creating a tradable emission allowance scheme, or even, as in the case of the Netherlands, to combine both options. Where they opt for a tradable allowance scheme, they are free to choose between granting those allowances free of charge ('grandfathering') or selling/auctioning them.

86. It seems to me, however, that such freedom does not rule out the possibility that the measures to implement the chosen option involve elements of aid in the same way that the procedures by which a tax regime is implemented may involve the grant of aid. Nonetheless, in the absence of specific Community obligations, the Member States are in principle free to decide whether or not to use taxation and are not required to raise tax revenue to a particular extent.

87. In the present case, I am inclined to think that if a Member State authorises, and indeed incentivises, the creation of a market in emissions of atmospheric pollutants, essentially by conferring on those allowances the character of tradable intangible assets, the fact of

56 — As regards the separability of the various aspects of a State measure for the purposes of analysing its compatibility with the provisions of the Treaty on aid, see Case 74/76 *Iannelli & Volpi* [1977] ECR 557, paragraphs 14 to 17.

making them available to the undertakings operating on that market, directly or indirectly, free of charge, would appear to constitute 'forgoing of State resources' in accordance with the case-law cited at point 81 above.

88. The arguments to the contrary of the Netherlands and German Governments do not convince me.

89. First of all, those governments deny that there is, in the present case, a grant of emission allowances by the State since those allowances are the result of actions of the undertakings and the investments made by them to reduce their emissions. This argument does not stand up to an examination of the facts which reveals that although the State does not actually and specifically grant those allowances, it nonetheless makes them indirectly available to the undertakings covered by the scheme. In that connection, it is worth pointing out that, according to the findings of the Court of First Instance, [57] the emission allowances can be traded at any time, that is to say even before the conditions for their creation have been satisfied (reduction of emissions to below the ceiling laid down). It is also important to note that, as is clear from the Netherlands' replies to the questions posed by the Court, at the stage when the allowance trading scheme in question was initiated the State did not confine itself to authorising the trading of those allowances, leaving determination of the quantity and value of the allowances available for trading entirely to the market mechanism, but set the emission standard at an intentionally low level so as to enable most undertakings to have sufficient credits to trade and to fix the value of the allowances at a level advantageous to those undertakings.

90. The Netherlands and German Governments also observe that the emission allowances in question have no value at the time they are made available to the undertakings and therefore acquire an actual value only when they are placed on the market. That fact does not appear to me to be decisive. What is relevant for the purposes of determining whether the State forwent revenue by making those allowances available to the undertakings free of charge is the *capability* thereof to form the subject of commercial transactions and to acquire value on the market. Moreover, as the Commission correctly points out, since the emission allowances can be traded at any time it would be artificial to separate the stage at which the allowance is made available and the stage at which it is traded.

91. The possibility, provided by the scheme, to trade allowances which have not yet been obtained also shows that there is no basis in

57 — Paragraph 71 of the judgment under appeal states 'each holder of an emission authorisation had an account in the $NO_x$ emission registry and could sell all the allowances relating to the years in respect of which a standard was laid down, including future years'.

fact for the German Government's argument that undertakings which emit less $NO_x$ than the threshold applicable to them accrue a right, as against the State, to obtain the relevant certificate and that right removes from the State the ability to make a charge or to auction such a certificate.

92. Finally, the Netherlands and German Governments derive arguments in favour of their submission from the purported similarity between the present case and that which gave rise to the judgment in *PreussenElektra*.[58] It seems to me necessary also to reject these arguments as a whole. In *PreussenElektra* the Court did not categorise as State aid within the meaning of Article 87(1) EC national legislation which, on the one hand, imposed on private electricity supply undertakings the obligation to purchase electricity produced from renewable energy sources at minimum prices higher than the economic value of that type of energy and, on the other, allocated the financial burden arising from that obligation between the supply undertakings and the upstream private electricity net operators. According to the Court, in the absence of any direct or indirect transfer of State resources, the fact that the legislation conferred an undeniable economic advantage on undertakings producing electricity from renewable sources and that the advantage was the consequence of intervention by the public authorities was not sufficient to categorise the contested measure as aid.[59] In particular, the Court held at paragraph 62 that the fact that the financial burden arising from the obligation to purchase at minimum prices is likely to have negative repercussions on the economic results of the undertakings subject to that obligation and therefore entail a diminution in tax receipts for the State is an 'inherent feature of such a legislative provision and [not] a means of granting to producers of electricity from renewable energy sources a particular advantage at the expense of the State'. In the present case, the provision free of charge of tradable emission allowances to the undertakings concerned and the consequent forgoing by the State of the relevant consideration cannot be regarded as comparable with the diminution in receipts caused by the (merely potential) impact of an obligation to purchase at fixed prices imposed by the State. In particular, that forgoing cannot be regarded as 'inherent' in any instrument designed to regulate emissions of atmospheric pollutants through an emission allowance trading scheme. As we have seen, where such instruments are used the State has, in principle, a choice between granting those allowances free of charge and selling or auctioning them. Furthermore, in the present case there is a sufficiently direct connection between the measure at issue and the loss

58 — Cited above.

59 — See, inter alia, paragraphs 59 and 61.

of revenue by the State which, however, did not exist between the imposition of the obligation to purchase and the possible diminution in tax receipts in *PreussenElektra*. Consequently, the facts in that case and the facts in this case are not the same and the solution adopted by the Court in that case cannot be transposed to this. [60]

93. In conclusion, it appears to me that the evidence provided by the Netherlands and German Governments is not such as to demonstrate an infringement of Article 87(1) EC by the Court of First Instance in so far as it rules, at paragraph 75 to 78 of the judgment under appeal, that in circumstances such as those in the case in point, by making the emission allowances in question available to the undertakings concerned free of charge, the Netherlands grants those undertakings an asset by forgoing the revenue equivalent to the price of its sale or arising from its auction. On the contrary, this finding is supported by the broad interpretation which the Court has placed on the concept of aid since its earliest judgments, in view of the importance of the objective of creating an internal market in which competition is not distorted by unilateral measures of the Member States. [61] This approach is also reflected in the case-law on the conditions relating to financing through State resources. In that regard, I note, in addition to the case-law referred to at point 81 above, which includes full and varied examples of 'financing through the forgoing of State revenues', that the Court has pointed out on a number of occasions that Article 87(1) EC covers all the financial means by which the public authorities may actually support undertakings, irrespective of whether or not those means *are permanent assets of the public sector*, provided that they constantly remain under public control. [62] It is also worth pointing out that the cases in which the Court has ruled that there is no financing through State resources related to situations in which to have ruled otherwise would have clearly meant regarding the concept of aid as also covering advantages which, although attributable to a State measure, involved no direct or indirect transfer of State resources [63] and *de facto* removing one of the

60 — I note, incidentally, that in my Opinion in *Essent* I proposed, albeit in a different context, that the Court should not extend the solution adopted in *PreussenElektra* beyond the specific circumstances of fact which justified its adoption. See the Opinion in *Essent*, cited above, paragraphs 97 and 98.

61 — See, inter alia, Case C-308/04 P *SGL Carbon* v *Commission* [2006] ECR I-5977, paragraph 31, and Joined Cases C-75/05 P and C-80/05 P *Germany* v *Kronofrance* [2008] ECR I-6619, paragraph 66.

62 — See Case C-83/98 P *France* v *Ladbroke Racing and Commission* [2000] ECR I-3271, paragraph 50, and Case C-482/99, paragraph 37.

63 — See, for example, Joined Cases C-72/91 and C-73/91 *Sloman Neptun* [1993] ECR I-887; Joined Cases C-52/97 to C-54/97 *Viscido and Others* [1998] ECR I-2629; and Case C-379/98 *PreussenElektra* [2001] ECR I-2099.

constituent elements of the concept of aid within the meaning of Article 87(1) EC. [64]

C — *Conclusions on the cross-appeals*

95. In the light of the forgoing, I propose that the Court should dismiss the cross-appeals brought by the Netherlands and Germany.

**VI — The action at first instance**

94. The Netherlands also disputes the Court of First Instance's finding that it forgoes State revenue by allowing undertakings which have emitted excessive $NO_x$ to avoid paying a fine by acquiring the missing emission allowances on the market. In that regard, it reiterates that the fine in question constitutes an additional penalty in relation to the provision of the missing emission allowances. This argument has already been discussed and rejected at points 76 and 78 above, to which I refer. Therefore, the argument put forward by the Netherlands cannot be accepted.

96. In accordance with the first paragraph of Article 61 of the Statute of the Court of Justice, the latter may, after quashing the decision of the Court of First Instance, itself give final judgment in the matter, where the state of the proceedings so permits, or refer the case back to the Court of First Instance for judgment.

97. In the present case, it is not necessary to refer the case back to the Court of First Instance. As both the Commission and the defendant governments contend, the state of the proceedings permits the Court to give judgment in the matter. To that end, it is necessary to examine the second ground of appeal raised by the Netherlands in support of its appeal alleging failure to state adequate reasons for the decision, on which the Court of First Instance has not given judgment.

64 — In that regard, I note that certain earlier judgments of the Court and Opinions of certain Advocates General have fed discussion about the necessity of public financing for the purposes of classifying a State measure as aid: see Case *Commission* v *France* [1985] ECR 439, paragraphs 13 and 14; Joined Cases 67/85, 68/85 and 70/*85 Kwekerij van der Kooy and Others* v *Commission* [1988] ECR 219, paragraphs 32 to 38; Case 57/86, *Greece* v *Commission* [1988] ECR 2855, paragraph 12, and the Opinion of Advocate General VerLoren van Themaat in Joined Cases 213/81 to 215/81 *Norddeutsches Vieh- und Fleischkontor Will and Others* [1982] ECR 3583; Advocate General Slynn in *Commission v Greece*, cited above; and Advocate General Darmon in *Sloman Neptun*, cited above. Since the *Sloman Neptun* judgment, cited above, the Court has however, repeatedly and without hesitation, upheld the principle that aid must be financed directly or indirectly through State resources. In *PreussenElektra*, cited above, the Court was requested directly by the Commission to reconsider its case-law, particularly in the light of recent developments in the Community legal order. The Court did not, however, accede to that request.

A — *Second ground, alleging infringement of the duty to state reasons*

98. The Netherlands claims that the decision does not contain a proper statement of reasons in so far as it finds that there is State aid.

99. It contends, firstly, that the Commission wrongly claimed in the decision that an undertaking which fails to comply with the emission threshold imposed, and is therefore fined, still receives emission credits. This argument must be rejected in so far as it claims that there has been a factual error rather than a failure to state reasons. The similar argument which the Netherlands put forward at paragraph 65 of the appeal should also be rejected.

100. Secondly, the Netherlands points to certain ambiguities and contradictions in the reasons stated for the decision. First of all, the Commission contradicted itself in claiming, on the one hand, that the emission allowances are distributed *free of charge* to the undertakings and, on the other, that the reductions of $NO_x$ emissions to below the threshold by the undertakings constitutes a *quid pro quo*. In that regard, it is sufficient to note that the two statements are contained respectively in the part of the decision examining the existence of aid and that assessing the compatibility of the aid with the internal market. In that assessment the Commission considered that the fact that the undertakings were given incentives to encourage them to reduce their emissions above the threshold constituted a quid pro quo 'in line with Community guidelines on State aid and the environment' for the advantage granted to those undertakings by the measure in question (paragraph 3.3 of the decision). This finding in no way contradicts the statement that the $NO_x$ emission allowances are granted free of charge to the undertakings subject to that measure.

101. In the view of the Netherlands, the Commission's reasoning is also imprecise in so far as it is claims, in the conclusions (paragraph 4 of the decision), that a 'dynamic-cap' scheme, such as that adopted in the Netherlands, has an uncertain environmental outcome and entails substantial administrative costs and for those reasons does not find favour with the Commission. In that regard, I merely note that it is clear from the considerations set out in the decision, taken as a whole, that this claim, which must be regarded as a sort of *obiter dictum* in the grounds of that act, had no relevance in the classification of the measure in question as aid and no effect on the examination of its compatibility with the internal market. The argument of the Netherlands should therefore be disregarded.

102. Thirdly, the Netherlands claims that the Commission failed to provide adequate

reasons for its finding that the measure in question affects trade between Member States and distorts competition. It appears to me that that argument should also be rejected. The penultimate subparagraph of paragraph 3.2 of the decision does provide sufficient, but concise, reasons as to why the Commission considers that the measure in question confers a competitive advantage on the undertakings subject thereto which is likely to affect trade between the Member States.

103. In the light of the forgoing, the second ground is, in my view, unfounded. It therefore follows that the action at first instance must be dismissed in its entirety.

## VII — Conclusion

104. In the light of the forgoing, I propose that the Court should:

— uphold the main appeal and set aside the judgment of the Court of First Instance in Case T-233/04 *Netherlands* v *Commission*;

— dismiss the cross-appeals;

— give judgment in the matter by dismissing the action at first instance.

105. Furthermore, since, in accordance with the first sentence of Article 122 of the Rules of Procedure, where the appeal is unfounded or where the appeal is well founded and the Court itself gives final judgment in the case, the Court is to make a decision as to costs and since the Commission has requested that the Kingdom of the Netherlands be ordered to pay the costs of the main action and the proceedings before the Court of First Instance, I propose that the Court should order the Kingdom of the Netherlands to pay those costs and declare that the Federal Republic of Germany, the French Republic, the Republic of Slovenia and the United Kingdom of Great Britain and Northern Ireland are to bear their own costs.