OPINION OF ADVOCATE GENERAL POIARES MADURO

delivered on 21 May 2008 [1]

1. The question which forms the subject of this reference for a preliminary ruling relates to the compatibility with the principle of equal treatment of the scheme for greenhouse gas emission allowance trading introduced by a Community directive and involves the performance of complex assessments of fact. It may seem paradoxical that such a technical question should arise from a judgment with a major bearing on the relationship between national constitutional law and Community law. Some 20 years after the same referring court gave judgment in *Nicolo*, [2] which settled the question of the primacy of Community law over national legislation, the judgment in *Arcelor* given by the Judicial Assembly of the Conseil d'État on 8 February 2007 sets out, in terms of principle, the relationship between the French Constitution and Community law and the procedures for cooperation between the Court of Justice and the French administrative courts where the latter are faced with a challenge to the constitutionality of a Community directive. The apparent paradox therefore lies in the fact that, as will be seen, the challenge to the validity of the directive in the light of the Community principle of equal treatment has arisen from a challenge to the constitutionality of the directive. This case therefore provides an opportunity for the Court itself to specify the nature of the relationship between national constitutions and Community law. It will thus be able to dispel certain fears of a possible conflict which, as will be seen, are wholly unjustified given the common constitutional foundations on which the national and Community legal orders are based.

2. The question referred is in itself not without significance either. It calls into question the legality of legislation which is one of the cornerstones of Community environmental protection policy. It asks the Court to give a ruling on the relationship, by nature dialectic, between the practice of experimental legislation and the legislative requirements of equal treatment.

I — Legal framework

3. The legislation called into question in this case was adopted with a view to the fulfilment by the Community and its Member States of the commitments entered into under the Kyoto Protocol to the United Nations Framework Convention on Climate Change ('the Kyoto Protocol'). That protocol, which was adopted on 11 December 1997, aims to reduce

1 — Original language: French.
2 — Conseil d'État, Ass., 20 October 1989, Lebon p. 190.

total greenhouse gas emissions by at least 5% compared with the 1990 level over the period from 2008 to 2012. It was approved by the Community by decision of 25 April 2002 and contains the commitments undertaken by the Community and its Member States to reduce their greenhouse gas emissions by 8% compared with the 1990 level over the period from 2008 to 2012, which commitments the Community and its Member States agreed to fulfil jointly.

4. Without waiting for the entry into force of the Kyoto Protocol, which took place on 16 February 2005, the Community and its Member States decided to comply in advance with the commitments entered into. To that end, on 13 October 2003, the European Parliament and the Council, on the basis of Article 175(1) EC, adopted Directive 2003/87/EC ('the Directive'). [3] It entered into force on 25 October 2003 and the deadline for its transposition was fixed at 1 January 2005.

5. In order to promote reductions of greenhouse gas emissions in a cost-effective and economically efficient manner, the Directive establishes a scheme for greenhouse gas emission allowance trading. During an initial phase from 2005 to 2007, the Directive, as stated in Article 4, covers only one of the greenhouse gases listed in Annex II, namely carbon dioxide (or CO_2), and only emissions resulting from the activities listed in Annex I. The allowance trading scheme which it introduces therefore applies, during that initial phase, only to activities carried on in the energy sector, in the production and processing of ferrous metals (pig iron, steel), in the minerals industry (cement, glass, ceramics) and in the manufacture of paper pulp, paper and board. None the less, Article 30 of the Directive provides for a review, the purpose of which will be to consider amending Annex I to include other activities and emissions of other greenhouse gases.

6. Under Article 4 of the Directive, any installation undertaking an activity thus listed in Annex I to the Directive and resulting in CO_2 emissions must hold a permit issued by the competent authority, which is issued only if the operator is capable of monitoring and reporting CO_2 emissions. The total quantity of allowances allocated by each Member State to operators of the installations referred to in Annex I is based on a national allocation plan for allowances. The plan specifies, for an initial period of three years and then for consecutive periods of five years, not only the total quantity of allowances which the Member State intends to allocate for the period in question but also the criteria on the basis of which it proposes to allocate them.

7. Article 10 of the Directive lays down the obligation for Member States to allocate at least 95% of allowances free of charge in the

3 — Directive 2003/87/EC of the European Parliament and of the Council of 13 October 2003 establishing a scheme for greenhouse gas emission allowance trading within the Community and amending Council Directive 96/61/EC (OJ 2003 L 275, p. 32).

initial period and at least 90% free of charge in the second period. Finally, under Article 12, allowances may be transferred between persons within the Community and between persons within the Community and persons in non-member countries.

8. The Directive was transposed into French law by a regulation of 15 April 2004 establishing a scheme for greenhouse gas emission allowance trading, the detailed rules for its application being reserved for a decree to be adopted after consultation of the Conseil d'État. On that basis, Decree No 2004-832 of 19 August 2004 ('the Decree') was adopted.

II — The main proceedings and the question referred

9. On 12 July 2005 Arcelor and other steel companies asked the President of the Republic, the Prime Minister, the Minister for Ecology and Sustainable Development and the Minister with responsibility for Industry to repeal Article 1 of the Decree in so far as it renders that decree applicable to installations in the steel sector. Having been unsuccessful in their request, on 15 November 2005 the applicants brought an application before the Conseil d'État for judicial review of the implicit refusals to effect the repeal and sought an order requiring the competent administrative authorities to proceed with the repeal requested. In support of their application, they claimed that a number of constitutional principles had been infringed, such as the right to property, the right to carry on a business and the principle of equal treatment.

10. In its order for reference, the Conseil d'État pointed out that, by making steel activities subject to the greenhouse gas emission allowance trading scheme, Article 1 of the Decree merely repeats word for word the content of the Directive. Annex I to the Directive, which lays down the list of activities to which it applies, refers in particular, under the heading of carbon dioxide emissions, to the activities of 'production and processing of ferrous metals', that is to say 'metal ore (including sulphide ore) roasting or sintering installations' and 'installations for the production of pig iron or steel (primary or secondary fusion) including continuous casting, with a capacity exceeding 2.5 tonnes per hour'. Similarly, Article 1 of the Decree provides that, '[t]his decree shall apply to installations listed for the purposes of environmental protection which produce or process ferrous metals, produce energy, mineral products, paper or pulp and meet the criteria laid down in the annex to this decree in respect of the carbon dioxide they emit into the atmosphere'; and point II-A of the annex to the Decree lists among the activities of production and processing of ferrous metals 'metal ore (including sulphide ore) roasting or sintering installations' and 'installations for the production of pig iron or steel (primary or secondary fusion) including continuous casting, with a capacity exceeding 2.5 tonnes per hour'. As the Conseil d'État rightly states, this reproduction of the content of the

Directive was dictated by the Directive itself, which precludes a Member State from excluding activities listed in Annex I from the scope of the greenhouse gas emission allowance trading scheme.

11. Consequently, challenging the constitutionality of the Decree was in effect an indirect challenge to the conformity with the French Constitution of the Directive itself. On that point, the Conseil d'État starts by referring to the supremacy of the Constitution in the domestic legal order. It points out, however, that the acceptance by the authors of the Constitution of the participation of the French Republic in the making of Europe, set out in Article 88-1 of the French Constitution of 4 October 1958, creates 'a constitutional obligation to transpose directives' which cannot therefore in principle be obstructed. It follows from this that the Conseil d'État may review the compliance of a directive with constitutional principles and rules only where there is no equivalent means of protection, that is to say where there is no general rule or principle of Community law which, in the light of its character and scope as interpreted in the current Community case-law, will, if applied, ensure the observance of the constitutional provision or principle relied on. If, conversely, an equivalent means of protection does exist, the national court 'translates' [4] the conflict between the Community provision and the provision of the national constitution to the Community sphere: the plea alleging infringement of constitutional rules or principles is reclassified so that the challenge to the constitutionality of the directive becomes a challenge to its validity in the light of Community law; and the assessment of whether that challenge is well founded is, in the event of serious difficulties, referred to the Court of Justice in accordance with the judgment in *Foto-Frost*. [5]

12. Applying the review mechanism thus described, the Conseil d'État finds first of all that the right to property and the right to carry on a business are also guaranteed to the same degree in the Community legal order and considers that the directive at issue cannot be regarded as infringing them. The complaint alleging infringement of the constitutional principle of equal treatment resulting from the uniform treatment of different situations is dismissed as irrelevant by the French administrative court because the constitutional principle of equal treatment, unlike the Community principle of equal treatment, does not entail an obligation to treat different situations differently. [6]

13. That leaves the plea alleging infringement of the constitutional principle of equal treatment resulting from the different treatment of comparable situations. The Conseil d'État

4 — To use the felicitous expression of Government Commissioner Matthias Guyomar in his opinion on the case, RFDA 2007, p. 384, in particular p. 394.

5 — Case 314/85 [1987] ECR 4199.

6 — See to this effect CE, Ass., 28 March 1997, Société Baxter, Leb. 114, and CE, Sect., 19 March 2007, Le Gac, application No 300467 et al.

notes that there is a general principle of Community law which, as a result of its extent as defined by the case-law of the Court, 'safeguards the observance of the constitutional principle'. And the validity of the Directive in the light of the Community principle of equal treatment raises a serious difficulty. The doubts harboured by the Conseil d'État as to the validity of the Directive are fostered by the following considerations: the plastic and aluminium industries are in a situation comparable to that of the steel sector industries because they emit greenhouse gases identical to those the emission of which the Directive sought to restrict and they are in competition with the steel industry in so far as they produce materials which may be substituted in part for those produced by the steel industry; yet they are subject to different treatment, because they are not, as such, covered by the scheme for greenhouse gas emission allowance trading; the existence of an objective justification for such different treatment should be viewed with caution, even though the decision not to include the plastic and aluminium industries, as such, in the scheme from the start was based on their relative contribution to overall emissions of greenhouse gases and the need for a comprehensive scheme to be introduced gradually.

14. That is why the Conseil d'État considers it necessary to refer to the Court the question whether the Directive is valid in the light of the principle of equal treatment in so far as it makes the scheme for greenhouse gas emission allowance trading applicable to installations in the steel sector without including in its scope the aluminium and plastic industries.

III — Assessment

15. It may appear that, in being asked to rule on the conformity of the Directive with the French Constitution, the Conseil d'État was faced with the impossible task of having to reconcile the irreconcilable: how to protect the Constitution within the domestic legal order without breaching the primordial requirement of the primacy of Community law? Those concurrent claims to legal sovereignty are the very manifestation of the legal pluralism that makes the European integration process unique. It is the referring court's response to those claims which has given rise to this reference for a preliminary ruling. Far from resulting in a breach of the uniform application of Community law, those claims have prompted the Conseil d'État to seek, through the preliminary ruling procedure, the assistance of the Court of Justice in guaranteeing the observance by Community acts of the values and principles also recognised by its national constitution. There should be nothing surprising about that request, the Union itself being built on the constitutional principles common to the Member States, as reiterated in Article 6(1) TEU. In reality, what the Conseil d'État is asking the Court to do is not to verify the conformity of a Community act with certain national constitutional values — which it could not do anyway — but to review its lawfulness in the light of analogous European constitutional values. It is through this process that what at first sight appeared to be irreconcilable has in fact been reconciled. The European Union and the national legal orders are founded on the same fundamental legal values. While it is the duty of the national courts to guarantee

the observance of those values within the scope of their constitutions, it is the responsibility of the Court to do likewise within the Community legal order.

16. Article 6 TEU expresses the respect due to national constitutional values. It also indicates how best to prevent any real conflict with them, in particular by anchoring the constitutional foundations of the European Union in the constitutional principles common to the Member States. Through this provision the Member States are reassured that the law of the European Union will not threaten the fundamental values of their constitutions. At the same time, however, they have transferred to the Court of Justice the task of protecting those values within the scope of Community law. In that connection, the Conseil d'État is correct in assuming that the fundamental values of its constitution and those of the Community legal order are identical. It must be pointed out, however, that that structural congruence can be guaranteed only organically and only at the Community level, through the mechanisms provided for by the Treaty. It is that organic identity which is referred to in Article 6 TEU and which ensures that national constitutions are not undermined, even though they can no longer be used as points of reference for the purpose of reviewing the lawfulness of Community acts. If they could, in so far as the content of the national constitutions and the instruments for protecting them vary considerably, the application of Community acts could the subject of derogations in one Member State but not in another. Such an outcome would be contrary to the principles set out in Article 6 TEU and, in particular, to the understanding of the Community as a community based on the rule of law. In other words, the effect of being able to rely on national constitutions to require the selective and discriminatory application of Community provisions in the territory of the Union would, paradoxically, be to distort the conformity of the Community legal order with the constitutional traditions common to the Member States. That is why, in *Internationale Handelsgesellschaft*, the Court held that 'the validity of a Community measure or its effect within a Member State cannot be affected by allegations that it runs counter to either fundamental rights as formulated by the constitution of that State or the principles of a national constitutional structure'. [7] The primacy of Community law is therefore indeed a primordial requirement of the legal order of a community based on the rule of law.

17. Article 6 TEU merely makes explicit what was already inherent in that primordial requirement, namely that an examination of the compatibility of Community acts with the constitutional values and principles of the Member States may be carried out only by way of Community law itself and is confined, essentially, to the fundamental values which form part of their common constitutional traditions. Community law having thus incorporated the constitutional values of the Member States, national constitutions must adjust their claims to supremacy in order to comply with the primordial requirement of the primacy of Community law within its field of application. This does not mean that the national courts have no role to play in the

7 — Case 11/70 [1970] ECR 1125, paragraph 3.

interpretation to be given to the general principles and fundamental rights of the Community. On the contrary, it is inherent in the very nature of the constitutional values of the Union as constitutional values common to the Member States that they must be refined and developed by the Court in a process of ongoing dialogue with the national courts, in particular those responsible for determining the authentic interpretation of the national constitutions. The appropriate instrument of that dialogue is the reference for a preliminary ruling and it is in that context that the question raised here must be understood.

18. The above preliminary observations make it clear that the present reference for a preliminary ruling asks the Court to answer two questions. The first relates to the points on which its review of the validity of the Directive may be exercised, that is to say the extent of the examination of validity. The second has to do with the actual subject-matter of the question referred, that is to say the conformity of the Directive with the principle of equal treatment.

A — *Extent of the examination of validity*

19. The question on validity referred by the national court relates only to the conformity of the Directive with the principle of equal treatment 'in so far as that directive makes the greenhouse gas emission allowance trading scheme applicable to installations in the steel sector without including in its scope the aluminium and plastics industries'. However, the applicants in the main proceedings have asked the Court to extend its examination of validity to other pleas concerning legality, most of which they had already raised in substance in the national judicial proceedings. Those pleas allege infringement of the principle of equal treatment inasmuch as the Directive also entails the uniform treatment of different situations, and infringement of the freedom of establishment, the right to property, the freedom to pursue an occupation and the principles of proportionality and legal certainty.

20. Are these pleas raised by the applicants in the main proceedings admissible? How far can the Court go in a review of lawfulness in the context of a reference for a preliminary ruling on validity?

21. It is a matter of principle that the limits of the examination carried out by the Court in the context of a reference for a preliminary ruling are defined by the question raised by

the court adjudicating on the substance of the case. The parties may not change the tenor of the question, [8] and the Court may not accede to a request from them to do so. [9] The reason for this is that Article 234 EC establishes direct cooperation between the Court of Justice and the national courts by way of a non-contentious procedure excluding any initiative of the parties, who are merely invited to be heard in the course of that procedure. [10] The judicial cooperation for which that article provides rests on a clear separation of functions between the national courts and the Court of Justice, with the result that it is solely for the national court before which the dispute has been brought, and which must assume responsibility for the subsequent judicial decision, to determine in the light of the particular circumstances of the case both the need for a preliminary ruling in order to enable it to deliver judgment and the relevance of the questions which it submits to the Court. [11] Alongside the foregoing substantive reasons, which go to the very essence of the preliminary ruling procedure, is another, procedural reason, to the effect that any alteration to the substance of questions referred for a preliminary ruling would be incompatible with the Court's duty to ensure that the governments of the Member States and the parties concerned are given the opportunity to submit observations under Article 23 of the EC Statute of the Court (formerly Article 20), bearing in mind that, under that provision, only the order of the referring court is notified to the interested parties. [12]

22. It is true that observance of the national court's jurisdiction to determine the bounds of the preliminary ruling does not rule out a degree of flexibility. Thus, if the question referred for a ruling on validity is formulated openly, that is to say if its wording does not specify the grounds for invalidity other than by way of example, the Court considers itself to have the authority to carry out the most extensive examination of validity. [13] Indeed it sometimes exercises considerable freedom with regard to the wording of questions and does not hesitate, if appropriate, to reformulate them. In some cases, it even converts a question on interpretation into a question on validity. [14] Moreover, the interpretation given to a Community measure may sometimes prompt the Court to examine its validity [15] or even to find that it is invalid. [16]

23. However, where the question referred indicates the grounds for invalidity, the Court, other than in cases where it examines of its own motion a plea relating to public policy, [17] confines its review to the examination of those grounds, to the exclusion of pleas raised by the

8 — See Case 44/65 *Singer* [1965] ECR 965, at 970, and Case C-412/96 *Kainuun Liikenne and Pohjolan Liikenne* [1998] ECR I-5141, paragraph 23.

9 — See Case C-236/02 *Slob* [2004] ECR I-1861, paragraph 29.

10 — See, for example, Case C-402/98 *ATB and Others* [2000] ECR I-5501, paragraph 29.

11 — See, more recently, Case C-305/05 *Ordre des barreaux francophones et germanophone and Others* [2007] ECR I-5305, paragraph 18, and Case C-390/06 *Nuova Agricast* [2008] ECR I-2577, paragraph 43.

12 — See in particular Case C-178/95 *Wiljo* [1997] ECR I-585, paragraph 30, and Case C-352/95 *Phytheron International* [1997] ECR I-1729, paragraph 14.

13 — See, for example, Case 87/78 *Welding* [1978] ECR 2457; Case 158/80 *Rewe-Handelsgesellschaft Nord and Rewe-Markt Steffen* [1981] ECR 1805; and Case C-183/95 Affish [1997] ECR I-4315.

14 — See, for example, Case 16/65 *Schwarze* [1965] ECR 877, at 886-7, and Case 145/79 *Roquette Frères* [1980] ECR 2917, paragraphs 6 and 7.

15 — See Case 313/86 *Lenoir* [1988] ECR 5391 and Case C-383/98 *Polo/Lauren* [2000] ECR I-2519.

16 — See Case C-37/89 *Weiser* [1990] ECR I-2395 and Case C-61/98 *De Haan* [1999] ECR I-5003.

17 — See, for example, Joined Cases 73/63 and 74/63 *Internationale Crediet- en Handelsvereniging* [1964] ECR 1, at 14.

parties to the main proceedings which have not been put forward by the referring court. [18] The reason for this lies in the trust owed to the national court as a Community court and in respect for the task which it carries out in that capacity, from which it follows that the Court cannot revisit the assessment undertaken by a national court in relation to the lawfulness of a Community act unless there is a risk that that assessment will call into question the uniform application of Community law. [19]

24. The Court should not therefore consider the grounds for invalidity of the Directive, as referred to by the applicants in the main proceedings in their observations, which are based on the infringement of principles other than the principle of equal treatment. The argument put forward by the applicants to the effect that the Court of First Instance has pending before it an action for annulment of the Directive, supported by pleas which are more extensive than the ground for invalidity raised by the Conseil d'État, cannot to lead a different conclusion. To align, as a consequence, the extent of the examination carried out by the Court of Justice with that undertaken by the Court of First Instance would be to disregard the autonomy of the two legal remedies of an action for annulment and a reference for a preliminary ruling, each being designed to operate in such a way as best to serve its own particular purpose.

25. Can the Court none the less also examine the allegation of infringement of the principle of equal treatment on the ground of similar treatment of different situations as raised by the applicants in the main proceedings both before it and before the referring court? It is true that, in keeping with the extent of that principle as defined by the Court in its case-law, the Community principle of equal treatment is intended to prohibit not only the different treatment of comparable situations but also the uniform treatment of different situations. [20] The difficulty arises from the fact that the provision on the basis of which the applicants had raised the complaint alleging uniform treatment of different situations in the main proceedings was not the Community principle of equal treatment. They had relied on the principle of equal treatment in French constitutional law, thus calling into question the internal constitutionality of the Directive. However, since the French principle does not preclude the identical treatment of different situations, the Conseil d'État dismissed the plea as irrelevant without examining its merits. In other words, because of the more restricted scope in domestic law of the principle of equal treatment, on which the applicants relied, their argument did not compel the referring court to adjudicate on a

18 — For examples of the point-blank refusal to examine grounds for invalidity raised by the parties to the main proceedings but not put forward by the referring court, see *Ordre des barreaux francophones et germanophone and Others*, paragraphs 17 to 19, and *Nuova Agricast*, paragraphs 42 to 44.

19 — It is all too often forgotten that *Foto-Frost* recognises the jurisdiction of a national court to examine the validity of Community acts, only findings of invalidity being reserved for the Court of Justice.

20 — For a recent reminder, see Case C-273/04 *Poland* v *Council* [2007] ECR I-8925, paragraph 86.

conflict between the Directive and national constitutional law. That court was not therefore required, in order to avoid carrying out a review of the conformity of the Directive with the French Constitution, which could have precluded the application of Community law, to transfer the conflict to the Community sphere by reclassifying the plea of unconstitutionality as a plea alleging infringement of the Community principle of equal treatment and referring its examination to the Court of Justice.

26. The fate of the plea based on the uniform treatment of different situations would no doubt have been different if the applicants had relied on the Community principle of equal treatment: the national court would have examined the merits of the plea and, if there had been any doubt as to the validity of the Directive in this regard, would have referred the question to the Court. By agreeing to examine that dimension of the principle of equal treatment notwithstanding the foregoing, the Court might therefore give the unfortunate impression of correcting a strategic error in the conduct of the case.

27. Conversely, not to rule on that plea would ultimately amount to recognition that the scope of the Community principle of equal treatment is the same as its less protective counterpart in French law. This would be at odds with the autonomy of Community law. It therefore seems to me that the Court should also examine the complaint alleging identical treatment of different situations. Moreover, in so far as, in so doing, the Court confines its review of validity to verifying compliance with the principle which gave rise to uncertainty and prompted the reference from the national court, its examination might be said, without excessive recourse to the precedents in this regard, to remain 'within the context of the preliminary question' submitted to it. [21]

B — *Validity of the Directive in the light of the principle of equal treatment*

28. The principle of equal treatment, as a general principle of Community law, requires that 'comparable situations must not be treated differently and different situations must not be treated in the same way unless such treatment is objectively justified'. [22]

21 — Joined Cases 50/82 to 58/82 *Dorca Marina and Others* [1982] ECR 3949, paragraph 13.

22 — Case 106/83 *Sermide* [1984] ECR 4209, paragraph 28; Case 203/86 *Spain* v *Council* [1988] ECR 4563, paragraph 25; Case C-311/90 *Hierl* [1992] ECR I-2061, paragraph 18; Joined Cases C-133/93, C-300/93 and C-362/93 *Crispoltoni and Others* [1994] ECR I-4863, paragraph 51; Case C-222/94 *Commission* v *United Kimgdom* [1996] ECR I-4025, paragraph 34; Case C-304/01 *Spain* v *Commission* [2004] ECR I-7655, paragraph 31; and *Poland* v *Council*, paragraph 86.

29. The examination of the validity of the Directive in the light of the Community principle of equal treatment must, as has been said, look at the two dimensions accorded to it by the case-law of the Court.

30. Before I do this, it is appropriate to reiterate the purpose and the extent of a review of compliance with the principle of equal treatment carried out by the Court.

31. The principle of equal treatment creates a presumption to the effect that any difference in treatment constitutes discrimination unless the legislature puts forward an acceptable justification, [23] that is to say one which is objective and reasonable. [24] In any legal system, the extent of the review of that justification and of the difference in treatment which follows from it varies according to the sphere concerned and the grounds for differentiation given by the legislature. [25]

32. If the legislature uses suspect classifications, that is to say based on race, sex, ethnic origin, political or religious opinion etc, the review will be very rigorous and may extend to a strict examination of proportionality. Similarly in Community law, the Treaty's marked dislike of certain differentiating criteria, such as nationality (Article 12 EC) or the criteria set out in Article 13 EC, creates a presumption of discrimination which, here too, leads to a judicial review that generally includes a strict examination of proportionality.

33. In certain spheres, on the other hand, particularly economic and social regulation, and in cases where the legislature does not itself apply such suspect classifications, that is

23 — See Benedettelli, M. V., *Il giudizio di eguaglianza nell'ordinamento giuridico delle comunità europee*, Dott. A. Milani, Padua, 1989, p. 20.

24 — See Hernu, R., *Principe d'égalité et principe de non-discrimination dans la jurisprudence de la Cour de justice des Communautés européennes*, LGDJ 2003, p. 427 et seq.

25 — For an overview of the case-law of the German Federal Constitutional Court in this regard, see Somek, A., 'The Deadweight of Formulae: What Might Have Been the Second Germanisation of American Equal Protection Review', *Journal of Constitutional Law*, 1998-1999, p. 284; Sachs, M., 'The Equality Rule Before the German Federal Constitutional Court', *Saint-Louis-Warsaw Transatlantic Law Journal*, 1998, p. 139; see also, for a reminder of recent case-law, BVerfGE, 13 March 2007, 1BvF 1/05, paragraphs 79 to 82. The case-law of the French Constitutional Council also exhibits varying degrees of judicial review depending on the spheres in which the principle of equal treatment is applied and the types of discrimination created by the legislature (see Mélin-Soucramanien, F., *Le principe d'égalité dans la jurisprudence du Conseil constitutionnel*, Economica 1997, p. 130 to 162).

to say where it is only equality before the law which is at issue, the review is less intensive. This is true of all the national legal systems, even though the markers of that restriction on review ('reasonableness','rational basis','manifest error','Willkürverbot', etc.) and the extent of the review may vary. Three justifications for that lesser degree of review may be put forward. First, as the principle of equal treatment can be relied on against any type of government measure, irrespective of the interests or activities affected, if the courts always carried out an in-depth review, they would often subject the economic and social choices of the legislature to a second assessment, which would call into question both their legitimacy and their capacity to perform their judicial role. Second, all legislative activity entails choices and involves the redistribution of interests: in principle, although such choices and redistribution inevitably favour certain social and economic categories over others, they do not constitute discrimination and it is for the political process to discuss, define and determine the configuration of such redistribution. Third, it is only where specific groups, often underrepresented in the political decision-making process, are identified and protected by law that the courts have standing to undertake a stricter review of the differences in treatment decided upon by policymakers.

34. In Community law, similar considerations likewise lead to the recognition of discretion on the part of the legislature and the consequent restriction of judicial review. Since making choices and arbitrating between divergent interests requires the performance of complex assessments, the Court has granted the Community legislature a wide measure of discretion in that regard, be it in agricultural, [26] social, [27] or commercial matters [28] or in the transport sector. [29] The same has also been true of environmental policy, 'in view of the need to strike a balance between certain of the objectives and principles mentioned in Article 130r of the EC Treaty (now, after amendment, Article 174 EC) ... and in view of the complexity of implementing the criteria which the Community legislature must observe in conducting environmental policy'. [30]

35. Consequently, out of respect for the discretion of the institutions and in order not to encroach, in breach of the separation of powers, on the political responsibilities that

26 — See Case C-280/93 *Germany* v *Council* [1994] ECR I-4973, paragraphs 89 and 90.

27 — See Case C-84/94 *United Kingdom* v *Council* [1996] ECR I-5755, paragraph 58.

28 — See Case C-150/94 *United Kingdom* v *Council* [1998] ECR I-7235, paragraph 53.

29 — See Joined Cases C-248/95 and C-249/95 *SAM Schiffahrt and Stapf* [1997] ECR I-4475.

30 — Case C-86/03 *Greece* v *Commission* [2005] ECR I-10979, paragraph 88. See also Case C-284/95 *Safety Hi-Tech* [1998] ECR I-4301, paragraph 37, and Case C-341/95 *Bettati* [1998] ECR I-4355, paragraph 35.

fall to them by substituting its assessment for that reserved for them, [31] the Court, in any case not involving suspect classifications, confines its review to ascertaining whether there has been a manifest error of assessment in the legislative choices made. That restriction on judicial review can be seen in the spheres mentioned even where the Court is asked to verify the compatibility of the measure adopted with the general principles of Community law and, in particular, the principle of equal treatment. [32]

36. That restriction on judicial review cannot be seen as no review at all. A restricted review relating to observance of the principle of equal treatment may be presented schematically as follows:

— the Court seeks first to establish whether the differentiation applied by the legislature serves objective criteria, that is to say relative to a legally permissible objective pursued by the legislation in question; [33]

— the Court also ensures, again in order to avoid any arbitrary conduct, that the internal cohesion of the legislation in question is maintained, that is to say that the objective criteria adopted by the legislature and the weighting it has decided to give them are observed;

— finally, the Court ascertains whether the different treatment introduced is appropriate in relation to the objective pursued and, in this regard, usually confines itself to verifying that the measure adopted is not manifestly inappropriate.

37. What, then, is a manifest error? Although this is a judicial standard the characteristics of which the Court defines in each case, it follows from the trend of its case-law that a manifest error is first and foremost an *evident* error. It

31 — It follows from settled case-law that the Court bases the discretion of the institutions, and the consequent restriction of its powers of review, on the need, dictated by the principle of the separation of powers, to respect the 'political responsibilities' which the Treaty confers on the Community legislature and, as a result, the need not to substitute itself for the legislature in the choices the latter has to make (see, for example, Case 265/87 *Schräder HS Kraftfutter* [1989] ECR 2237, paragraph 22, and Case C-331/88 *Fedesa and Others* [1990] ECR I-4023, paragraph 14).

32 — See in particular Joined Cases C-267/88 to C-285/88 *Wuidart and Others* [1990] ECR I-435, paragraphs 13 to 18. See also Case 58/86 *Coopérative agricole d'approvisionnement des Avirons* [1987] ECR 1525, paragraphs 14 to 17, and Case 167/88 *AGPB* [1989] ECR 1653, paragraphs 29 to 33.

33 — See point 42 of this Opinion.

is true that, in theory, evidence may be brought to light 'with the enthusiasm of a short-sighted detective' [34] or, on the contrary, tracked down 'in the manner of … the greatest heroes of crime fiction'. [35] However, here too, a careful reading of Community case-law shows that, in general, an error is not evident unless it is indisputable: if any doubt remains, if the applicant fails to establish that the authority against which an action has been brought before the Court is in the wrong; if, in other words, the Community authority was 'entitled' to adopt the measure in question, [36] that is to say if it may have been right, the application is dismissed. A manifest error is also a *serious* error, inasmuch as an error which reaches a certain degree of seriousness becomes evident thereby. [37] Understood in this way, the term manifest error of assessment is not far removed from the term '*reasonableness*' or '*unreasonableness*', which represents the threshold for examination by the British courts of discretionary acts of the administration. [38] Moreover, it is certainly no coincidence that, in certain judgments, after having restated that its powers of review in the subject area concerned are restricted to ascertaining whether there has been a manifest error of assessment, the Court has dismissed the plea because 'it was reasonable' for the Community authority to make the contested assessment [39] because the assessment was 'reasonably acceptable'. [40] It is also akin to the concept of arbitrariness, particularly common in German law. [41]

38. The review to determine whether there has been a manifest error of assessment, that is to say identifying any serious, evident defect, penalising any unreasonable assessment and censuring any arbitrary conduct, does not therefore seek to ensure that a measure where adoption required complex assessments was the best possible; the legislature has a certain margin for error, provided that the error in question is not manifest.

39. That, in my view, is the purpose and intensity of a review of observance of the principle of equal treatment carried out by the Court in economic matters, [42] and that is therefore the examination which I shall now

34 — As aptly described by Kornprobst, M., 'L'erreur manifeste', *Recueil Dalloz*, 1965, Chronique, p. 121, in particular p. 124.

35 — Bourgois, J.-P., *L'erreur manifeste d'appréciation, la décision administrative, le juge et la force de l'évidence*, publ. L'Espace juridique, 1988, in particular p. 231.

36 — See, for example, Case 78/74 *Deuka* [1975] ECR 421, paragraph 9, and Case C-306/93 *SMW Winzersekt* [1994] ECR I-5555, paragraphs 25 to 27.

37 — See the particularly enlightening wording of the Court in Case 32/64 *Italy* v *Commission* [1965] ECR 365, at 375-6.

38 — On the terms '*reasonableness*'/'*unreasonableness*', see MacCormick, N., 'On reasonableness', in Ch. Perelman and R. Van der Elst, *Les notions à contenu variable en droit*, publ. E. Bruylant, Bruxelles 1984, p. 131.

39 — *Wuidart and Others*, paragraphs 16 to 18.

40 — Case 12/78 *Italy* v *Commission* [1979] ECR 1731, paragraphs 30 and 31.

41 — There is no better illustration of the equivalence of these various markers of the limits of review of the principle of equal treatment than to quote the following extracts from the case-law of the Federal Constitutional Court in Karlsruhe: '[t]he principle of equality is infringed if a reasonable ground, following from the nature of the subject-matter or otherwise objectively manifest, cannot be found for the statutory different treatment or equal treatment, in short, if the provision must be considered to be arbitrary' (BVerfGE, 23 October 1951, 1, 14 (52)), arbitrary conduct being understood as 'the objective and manifest inappropriatness of the statutory measure to the situation it is intended to deal with' (BVerfGE, 7 May 1953, 2, 266 (281)).

42 — That was also the intensity of the review carried out by the German Federal Constitutional Court in respect of a law transposing the Directive in the light of the principle of equal treatment guaranteed by the Basic Law. Having established that the Directive had left to the Member States a wide margin of discretion in the performance of the obligation to transpose, it considered itself able to review the contested legislative provision without calling into question the constitutionality of the Directive itself. Then, with reference to the wide margin of discretion on the part of the German legislature in relation to legislative measures concerning environmental protection, and in reliance on settled case-law, it confined its review to determining whether the *Willkürverbot* had been observed (BVerfGE, 13 March 2007, 1BvF 1/05).

carry out in this case in order to answer the question referred for a preliminary ruling.

1. Different treatment of comparable situations

40. It should be recalled that the question raised by the French Conseil d'État relates to 'the validity of Directive 2003/87/EC in the light of the principle of equal treatment, in so far as it makes the greenhouse gas emission allowance trading scheme applicable to installations in the steel sector without including in its scope the aluminium and plastic industries'. It follows from the grounds of the order of the national court that the doubts underlying the reference for a preliminary ruling have to do with whether there is an objective justification for the difference in treatment introduced by the contested directive between the steel sector on the one hand and the plastic and aluminium sectors on the other, even though those sectors are in comparable situations.

41. Let us dismiss immediately the objection raised by the Commission and the Parliament to the effect that, assuming it exists, the different treatment of comparable situations does not constitute discrimination inasmuch as it does not, in itself, entail any disadvantage to the steel sector as compared with the aluminium and plastic sectors. The two institutions contend that the Member States retain freedom in relation to the total quantity of allowances they intend to allocate and their distribution among sectors, and that they may therefore grant the steel sector allowances covering all its requirements. They further submit that the Member States may make those sectors which are not included subject to national measures that are more restrictive than the allowance trading scheme in order to fulfil their commitments to reduce greenhouse gases entered into under the Kyoto Protocol. That objection is tantamount to saying that the discrimination imposed or authorised by the Directive can be corrected by the policy of the Member States. However, the existence of discrimination is assessed in the light of the text called into question and the scheme which it establishes. That objection is therefore untenable.

42. In order to pinpoint the purpose of the question raised, it should be stated at the outset that ascertaining whether the different treatment of comparable situations is objectively justified, that is to say whether it is founded on an objective criterion, is in reality the same as determining whether the different treatment is justified by different situations. [43] After all, situations are never identical in all respects; there can never be equality in every term of comparison. Consequently, the choice of the terms of comparison which will enable the Community legislature to isolate from the innumerable characteristics of the situations

43 — See, to that effect, Lenaerts, K., 'L'égalité de traitement en droit communautaire', *Cahiers de droit européen*, 1991, p. 3, in particular p. 11; Barents, R., 'The significance of the Non-Discrimination Principle for the Common Agricultural Policy: between Competition and Intervention', *Mélanges H. G. Schermers*, Vol. 2, Martinus Nijhoff Publishers 1994, p. 527, in particular p. 536.

to be compared those which will be relevant for the purposes of deciding whether they are similar becomes crucially important. The case-law requires that the criterion used should be 'objective', [44] that is to say should relate to the subject-matter and purpose of the rules to be applied. [45] In other words, the similarity between the situations concerned must be determined in the light of the aims of the measure in question. Consequently, in so far as the criterion for objective differentiation, like the criterion for the comparison of situations, must relate to the objective pursued, relying on the latter in order to justify the different treatment of similar situations amounts ultimately to taking the view that the similarity which the situations are said to share is irrelevant in relation to the objective pursued. In other words, the question of validity which forms the subject of this reference for a preliminary ruling asks the Court to verify whether the inclusion of the steel sector within the scope of the greenhouse gas emission allowance trading scheme and the exclusion from that scheme of the aluminium and plastic sectors are justified by objective considerations, that is to say considerations dictated by the subject-matter and purpose of the contested directive.

43. Article 1 of the Directive states that the Community greenhouse gas emission allowance trading scheme is intended to 'promote reductions of greenhouse gas emissions in a cost-effective and economically efficient manner'. In the light of that objective, even though the existence of a competitive relationship between the economic operators concerned may have a part to play, it cannot in itself be considered to be decisive. Even assuming, as the referring court and the applicants in the main proceedings submit, that the steel and aluminium industries are in competition with each other, this does not mean that they must be regarded as being in comparable situations irrespective of the objectives pursued [46] and as therefore having to be treated in the same way for the purposes of the Community greenhouse gas emission allowance trading scheme.

44. The fact remains, however, that the objective pursued, to reduce greenhouse gas emissions, would a priori dictate that all industrial sectors which emit greenhouse gases should be subject to the Directive, including, therefore, both the non-ferrous metals sector and the chemical industry. However, the establishment by the Community of a greenhouse gas emission allowance trading scheme forms part of a 'step-by-

44 — See, for example, Case 8/78 *Milac* [1978] ECR 1721, paragraph 18; Case 179/84 *Bozzetti* [1985] ECR 2301, paragraph 34; and Case C-56/94 *SCAC* [1995] ECR I-1769, paragraph 28.

45 — In agricultural matters, the Court has, since 1971, held that the question whether or not situations are comparable 'must be considered in the light of the aims of the Community agricultural system' (Case 6/71 *Rheinmühlen Düsseldorf* [1971] ECR 823, paragraph 14). See also the Opinion of Advocate General Capotorti in Joined Cases 117/76 and 16/77 *Ruckdeschel and Others* [1977] ECR 1753, at 1779.

46 — See, to that effect, Joined Cases 279/84, 280/84, 285/84 and 286/84 *Rau Lebensmittelwerke and Others* v *Commission* [1987] ECR 1069, paragraphs 27 to 34: the 'Christmas butter' scheme was held not to discriminate against margarine, a competing product, 'having regard to the objective differences which characterise the legal machinery employed and the economic conditions on the markets in question'. See also Case T-472/93 *Campo Ebro and Others* v *Council* [1995] ECR II-421, paragraphs 84 et seq.: rules providing for aid to be granted only to sugar producers, despite the existence of a competitive link between sugar and isoglucose, was not held to be contrary to the principle of equal treatment since the situation of those two products was not comparable in the light of the objective pursued by the rules at issue, which was to offset the additional costs of stockpiling the products concerned.

step' approach, also known as 'learning by doing'. As all the intervening institutions have pointed out, the scheme introduced by the Directive was the first of its kind in the world. It was intended to serve as an example not only to the relevant players in the Community but also to non-member countries and, to that end, it was imperative that it should demonstrate its effectiveness. The fact that the scheme was new and the complexity of the mechanism for monitoring, notifying and verifying emissions which it required called for a degree of caution. It was important not to introduce a scheme which covered most industrial sectors and most greenhouse gases from the start. Overambition could have led to failure, as popular wisdom reminds us in the saying 'don't bite off more than you can chew'.

45. In fact, particularly in spheres which entail new social risks and/or in which the legislature is initiating new policies, it is often wise, and now common, to act with caution by trying out a new mechanism in limited areas. Indeed, the laws of the Member States allow and even enshrine the use of legislative experimentation. [47] The case-law of the Court itself has recognised the legitimacy of introducing legislative harmonisation in stages, [48] taking into account, in particular, the 'complexity of the matter' [49] to be resolved. It has also accorded to the legislature a margin of discretion in deciding on the expediency and rate of progressive harmonisation. [50]

46. It is, then, in the very nature of legislative experimentation that tension with the principle of equal treatment should arise. The very idea of 'learning by doing' requires that the new policy be applied to only a limited number of its potential subjects to begin with. As a result, the scope of the policy is artificially circumscribed so that its consequences can be tested before its rules are extended, if appropriate, to all operators who might, in the light of its objectives, be subject to it. That said, recognition of the legitimacy of legislative experimentation cannot invalidate any criticism that might be levelled against it from the point of view of the principle of equal treatment. The discrimination which experimental legislation inevitably entails is compatible with the principle of equal treatment only if certain conditions are satisfied.

47 — Under Article 72 of the French Constitution of 4 October 1958, local authorities have had the right to use experimental legislation since the constitutional reform of 28 March 2003.

48 — See Case 37/83 *Rewe-Zentrale* [1984] ECR 1229, paragraph 20; Case C-166/98 *Socridis* [1999] ECR I-3791, paragraph 26; and Case C-221/05 *Sam McCauley Chemists and Sadja* [2006] ECR I-6869, paragraph 26.

49 — See Case C-193/94 *Skanavi and Chryssanthakopoulos* [1996] ECR I-929, paragraph 27, and Case C-233/94 *Germany* v *Parliament and Council* [1997] ECR I-2405, paragraph 43.

50 — See *Rewe-Zentrale*, paragraph 20, and Case C-63/89 *Assurances du crédit* v *Council and Commission* [1991] ECR I-1799, paragraph 11.

47. The experimental measures must first of all be transitory. That is indeed the case with the Directive. Article 30 provides for a review of the Directive on the basis of 'experience' and 'progress achieved in the monitoring of emissions of greenhouse gases' with a view to including other industrial sectors and emissions of other greenhouse gases in the greenhouse gas emission allowance trading scheme. In application of that provision, the Commission proposed the inclusion of aviation activities. [51] In particular, with a view to reducing greenhouse gas emissions by at least 20% as compared with their 1990 levels, it proposed that the Community greenhouse gas emission allowance trading scheme be extended, on the one hand, to CO_2 emissions from petrochemicals, ammonia and aluminium and, on the other hand, to N_2O emissions from nitric, adipic and glyoxalic acid production and PFC emissions from the aluminium sector. [52]

48. Second, the scope of the trial measure must be defined in accordance with certain objective criteria. In this case, exclusion from or inclusion in the greenhouse gas emission allowance trading scheme must therefore be based on considerations relating to the objectives pursued by the Directive. As I have already said, the Directive aims to reduce greenhouse gas emissions in a cost-effective manner, that is to say with the least possible diminution of economic development and employment. [53] To that end, the Community legislature decided to apply the greenhouse gas emission allowance trading scheme as a priority to carbon dioxide emissions since, in 1999, CO_2 accounted for over 80% of Community greenhouse gas emissions and carbon dioxide emissions were capable of generating good quality monitoring data on a consistent basis, whereas the monitoring of emissions of other greenhouse gases still posed too many problems. [54] In addition, it made only those industrial sectors with the highest CO_2 emissions subject to the Directive, on the ground that the higher the quantities of emissions from an industrial sector, the less the burden of the fixed costs (accounting for and declaring emissions, verification of emissions by an independent body, training and employment of the necessary personnel to manage emission trading) generated by applying the allowance trading scheme, which must be borne by all operators participating in the scheme, would make itself felt; in the case of small-scale emitters with only a limited volume of allowances capable of being traded, on the other hand, any benefits they might derive from an allowance trading scheme are necessarily less substantial than those potentially available to major emitters.

51 — Proposal for a Directive of 20 December 2006, COM(2006) 818 final.

52 — Proposal for a Directive of the European Parliament and of the Council amending Directive 2003/87 so as to improve and extend the greenhouse gas emission allowance trading system of the Community of 23 January 2008, COM(2008) 16 final.

53 — See recital 5 in the preamble to the Directive.

54 — See recital 10 in the preamble to the Proposal for a Directive of the European Parliament and of the Council establishing a scheme for greenhouse gas emission allowance trading within the Community and amending Council Directive 96/61/EC of 23 October 2001, COM(2001) 581 final.

49. Targeting the gas chiefly 'responsible' for the greenhouse effect and using the quantities of that gas emitted by each industrial sector as a benchmark are certainly objective criteria. The applicants in the main proceedings dispute, however, the assertion that the quantity of CO_2 emitted was the determining criterion. They cite a statistic from the European Pollutant Emission Register for 2001 according to which CO_2 emissions from the chemical sector as a whole accounted for 5.35%, and from the aluminium sector 2%, of total emissions from industrial activities in the European Union, while those from the steel sector amounted to 5.4%, those from the glass, ceramic and building materials sector 2.7% and those from the paper and printing sector 1%. However, those figures cannot be used because, as the intervening institutions have observed, they make no distinction between direct [55] and indirect [56] emissions from each of the sectors concerned. In so far as indirect emissions produced by combustion plants with a combustion power in excess of 20 MW are themselves covered under the energy sector, the legislature decided to take account only of direct CO_2 emissions from other sectors. The fact that account is taken of CO_2 emissions only at the time when and in the place where they are produced is, moreover, consistent with the polluter pays principle and the principle that environmental damage should be rectified at source, as set out in Article 174 EC. In that regard, according to a study cited by all the intervening institutions and on which the Community legislature relied, the steel sector is not, contrary to the submissions of the applicants in the main proceedings, in the same situation as the aluminium and plastic sectors: direct emissions of CO_2 from the steel sector (steel and pig iron) amounted to 174.8 million tonnes in 1990 compared with 16.2 million tonnes for non-ferrous metals and 26.2 million tonnes for the chemical sector.

50. In response to the foregoing, the applicants in the main proceedings contend that the paper and paper pulp sector was included even though it produced only 10.6 million tonnes of direct CO_2 emissions in 1990, far less than the chemical industry sector and less even than the non-ferrous metals sector. However, the Community legislature also took into account the administrative feasibility of including industrial sectors in the allowance trading scheme. Since the efficient operation of that scheme required the introduction of a complex monitoring mechanism at the level of each plant, there was a risk that including from the outset sectors with a large number of plants in relation to the total volume of emissions they generate might make the monitoring mechanism cumbersome and, therefore, jeopardise the quality of emission monitoring and the reliability of the data, without producing any appreciable environmental benefit. The number of chemical plants in the Community was

55 — That is to say emissions corresponding to gases emitted at the production location of the product, during its production cycle.

56 — That is to say emissions corresponding to gases emitted prior to the production cycle, for example by a power station which produces the energy that will subsequently be consumed during the production process of certain products.

particularly high, in the order of 34 000 plants. [57] The paper sector, on the other hand, was highly concentrated. Taking account of the administrative difficulties associated with managing the trading scheme in this way serves to meet the objective set out in Article 1 of the Directive, to promote reductions of greenhouse gas emissions 'in a cost-effective and economically efficient manner'. Moreover, the Court has accepted that a concern to avoid disproportionate administrative costs may objectively justify different treatment. [58]

51. At the hearing, however, the applicants in the main proceedings raised in response to the argument of administrative feasibility the objection that only a small number of plants were responsible for the vast majority of carbon dioxide emissions in the chemical sector and that decisions on inclusion in the allowance trading scheme should therefore have been made on a plant by plant basis, not in relation to the whole sector, with only chemical plants which exceed a certain emission threshold being included. Such an approach would none the less have led to unequal treatment of large and small plants within a single sector which are in full competition with each other.

52. The fact remains that the administrative efficiency argument is a weaker justification for excluding the aluminium sector, in so far as it is as concentrated as the paper sector. On the other hand, the latter is highly exposed to international competition. Consequently, being unable to absorb the costs of inclusion in the allowance trading scheme without risking the loss of market share, aluminium plants may be tempted to relocate to non-member countries which are not subject to the Kyoto objectives. The paper and paper pulp sector is in an entirely different situation in this regard: as the Commission submitted at the hearing, the risk of relocation is minimised by the fact that plants cannot easily move away from their raw materials supply sources and international competition is minimised by the fact that transporting products with such a low unit value over long distances is unprofitable.

57 — See recital 11 in the preamble to the Proposal for a Directive of 23 October 2001.

58 — See Case 8/82 *Wagner* [1983] ECR 371, paragraphs 19 to 21.

53. It is true that the steel sector also faces very brisk international competition and there is a risk of relocation to countries with no Kyoto objectives. However, CO_2 emissions from that sector are not on the same scale as those from the aluminium sector, being over 10 times higher, and therefore justified its inclusion in the allowance trading scheme from the start.

54. It therefore follows from the foregoing considerations that, even though some of the criticisms made by the applicants in the main proceedings in relation to the principle of equal treatment are not wholly without relevance, and even though they have, rightly, raised doubts in the mind of the national court as to the validity of the Directive which prompted the present reference, it does not appear, as has been demonstrated above, that, for the purposes of implementing the principle of equal treatment, the choice of criteria and the balance struck between them were unreasonable, particularly within the context of experimental legislation. The arguments put forward by the intervening institutions to defend the legislative measure adopted appear defensible. Other options could no doubt have been considered; there may even have been a better solution. This is not, however, for the court to say. Where a number of opinions may be equidistant from the absolute and objective truth, which court can take upon itself the task of eliminating one of them? If it were to go down that path, the Court would divest the review of lawfulness of its objectivity and would have to substitute its assessment of economic policy for that of the Community legislature,[59] thus usurping the political responsibilities of the latter in breach of the separation of powers. For all the above reasons, the Directive does not appear to be vitiated by an infringement of the principle of equal treatment.

55. Contrary to what the applicants in the main proceedings submit, the fact that the Proposal for a Directive of 23 January 2008 decides to include the aluminium and chemical sectors in a second phase, even though the quantity of CO_2 emissions from those sectors, the number of plants in them and the degree to which they are exposed to international competition have not changed, cannot invalidate the above conclusion and demonstrate that the initial exclusion of those sectors was vitiated by a manifest error of assessment in the application of the principle of equal treatment. As the Council and the Commission submitted at the hearing, criteria are bound to be assessed differently at the time when a scheme is set up and when it

59 — Whereas avoiding such a distortion of its review of lawfulness is in fact the very justification for restricting that review (see, for example, Case 57/72 *Westzucker* [1973] ECR 321, paragraph 14, and Case C-233/94 *Germany* v *Parliament and Council*, paragraph 56).

comes to deciding which sectors are to be subject to a scheme which has proved its worth. That is, to some extent, the very essence of the 'step-by-step' approach.

2. Uniform treatment of different situations

56. The applicants in the main proceedings submit that the steel sector is not in the same situation as the other industrial sectors which fall within the scope of the Directive. Unlike the latter, the steel sector is not technically able to reduce its CO_2 emissions in the near future. Steel plants are therefore obliged to obtain additional allowances while at the same time, and unlike undertakings in the other sectors subject to the allowance trading scheme, being exposed to strong international competition, which prevents them from passing on the cost of the allowances to their customers at the risk of losing market share. This substantially reduces their profit margins and, consequently, cuts their investment capacity.

57. The argument put forward by the applicants in the main proceedings is untenable. It should be pointed out first that, at the hearing, the French Government disputed the inability of the steel companies significantly to reduce their carbon dioxide emissions, and mentioned a number of possible ways of doing so. What is more, even assuming that that is not the case and that the steel industry is indeed in a different situation in that regard, the Community legislature took due account of that different situation. Annex III, point 3 of the Directive requires the Member States, when allocating allowances, to take account of the potential, including the technological potential, of activities covered by the scheme to reduce emissions. Moreover, it follows from the exchange of argument at the hearing that all the emissions of the Arcelor group were covered by allowances allocated free of charge and that the Arcelor balance sheet for 2006 even shows a profit from the sale of excess allowances. Consequently, taking into account the restriction on reviewing the discretion granted to the Community legislature in this field, the complaint alleging infringement of the principle of equal treatment based on the uniform treatment of different situations cannot be upheld.

IV — Conclusion

58. In the light of the foregoing considerations, I propose that the Court's answer to the question referred for a preliminary ruling by the Conseil d'État should be as follows:

'Consideration of the question raised has not revealed any factor capable of affecting the validity of Directive 2003/87/EC of the European Parliament and of the Council of 13 October 2003 establishing a scheme for greenhouse gas emission allowance trading within the Community and amending Council Directive 96/61/EC.'