JUDGMENT OF THE COURT (Third Chamber)

8 September 2011 *

In Case C-279/08 P,

APPEAL under Article 56 of the Statute of the Court of Justice, brought on 23 June 2008,

European Commission, represented by C. Urraca Caviedes, K. Gross and H. van Vliet, acting as Agents, with an address for service in Luxembourg,

appellant,

the other parties to the proceedings being:

Kingdom of the Netherlands, represented by C.M. Wissels and D.J.M. de Grave, acting as Agents,

applicant at first instance,

supported by:

French Republic, represented by G. de Bergues, A.-L. Vendrolini, J. Gstalter and B. Cabouat, acting as Agents,

* Language of the case: Dutch.

Republic of Slovenia, represented by V. Klemenc, acting as Agent,

United Kingdom of Great Britain and Northern Ireland, represented by E. Jenkinson, S. Behzadi-Spencer, S. Ossowski, and H. Walker, acting as Agents, and by K. Bacon, Barrister,

interveners in the appeal,

Federal Republic of Germany, represented by M. Lumma, B. Klein and T. Henze, acting as Agents,

intervener at first instance,

THE COURT (Third Chamber),

composed of K. Lenaerts, President of the Chamber, R. Silva de Lapuerta, E. Juhász, G. Arestis (Rapporteur) and J. Malenovský, Judges,

Advocate General: P. Mengozzi,
Registrar: C. Strömholm, Administrator,

having regard to the written procedure and further to the hearing on 14 October 2010,

after hearing the Opinion of the Advocate General at the sitting on 22 December 2010,

gives the following

Judgment

1 By its appeal, the Commission of the European Communities requests the Court to set aside the judgment of the Court of First Instance of the European Communities (now 'the General Court') of 10 April 2008 in Case T-233/04 *Netherlands* v *Commission* [2008] ECR II-591 ('the judgment under appeal') by which the General Court annulled Commission Decision C(2003) 1761 final of 24 June 2003 on State aid N 35/2003 concerning the emission trading scheme for nitrogen oxides notified by the Kingdom of the Netherlands ('the contested decision').

2 By its cross-appeal, the Kingdom of the Netherlands requests the Court to set aside the judgment under appeal to the extent that the first plea in law submitted by that State, concerning the absence of an advantage financed by State resources, is rejected.

3 By its cross-appeal, the Federal Republic of Germany requests the Court to set aside the judgment under appeal.

Legal context

4 Directive 2001/81/EC of the European Parliament and of the Council of 23 October 2001 lays down national emission ceilings for certain atmospheric pollutants (OJ 2001 L 309, p. 22). Member States were to bring into force the laws, regulations and administrative provisions necessary to comply with that directive before 27 November 2002 and to inform the Commission thereof forthwith.

5 Pursuant to Article 4 of that directive, Member States are, by the end of the year 2010 at the latest, to limit their national emissions of nitrogen oxides ('NO_x') to amounts not greater than the annual emission ceiling laid down in Annex I to that directive. That ceiling is fixed, for the Kingdom of the Netherlands, at 260 kilotonnes.

Background to the case

6 Paragraphs 8 to 20 of the judgment under appeal, reproduced below, set out the facts underlying the action:

'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 ("the measure in question"). 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 contested decision].

10 In paragraph 1 of [the contested 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 large industrial facilities, that is approximately 250 undertakings, to be attained by 2010.

11 Regarding the working of that scheme, the Commission explains in paragraph 1.2 of [the contested 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.

14 Finally, in the context of the measure in question, undertakings do not have to acquire emission allowances in order to engage in production. They are required only to comply with the emission standard.

15 In paragraph 1.3 of [the contested decision], the Commission describes how the emission standard is calculated, then, in paragraph 1.4, the differences between the "cap-and-trade" system and the "dynamic cap" system, of which the measure in question is a type. It explains that, according to the Netherlands authorities, the measure in question differs from the other variant of tradable allowance schemes, the "cap-and-trade" system, in which emission allowances are allocated

to undertakings. New undertakings or those which wish to expand their activities must first acquire the required quantity of allowances. Under the measure in question, such undertakings are not subject to that obligation but must simply comply with their emission standard, which depends on and is adjusted on the basis of their energy consumption.

16 In paragraphs 1.5 and 1.6 of [the contested decision], the Commission then 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 contested 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 foregone revenues (or a loss of State resources), hence State aid within the meaning of Article 87(1) [EC].

(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 foregone revenues, therefore no State resources, hence no State aid within the meaning of Article 87(1) [EC].

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 contested 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 foregone revenue. The Commission thus 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 contested decision], the Commission examines the compatibility of the measure in question with the common market.

20 In conclusion, in paragraph 4 of the contested 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 and Article 61(3)(c) of the Agreement on the European Economic Area (EEA). 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.'

The procedure before the General Court and the judgment under appeal

7 By application lodged at the Registry of the Court of Justice on 5 September 2003, the Kingdom of the Netherlands brought an action against the contested decision (Case C-388/03).

8 By order of 17 February 2004, the President of the Court granted the Federal Republic of Germany leave to intervene in the present proceedings in support of the Kingdom of the Netherlands.

9 By order of 8 June 2004, the Court referred the case to the General Court pursuant to Council Decision 2004/407/EC, Euratom of 26 April 2004 amending Articles 51 and 54 of the Protocol on the Statute of the Court of Justice (OJ 2004 L 132, p. 5).

10 By letter of 13 December 2004, the General Court requested the Kingdom of the Netherlands and the Federal Republic of Germany to submit their observations on the conclusions to be drawn as regards the admissibility of the present action from the order of the Court in Case C-164/02 *Netherlands* v *Commission* [2004] ECR I-1177. They submitted their observations on 14 and 12 January 2005 respectively.

11 The Kingdom of the Netherlands, supported by the Federal Republic of Germany, claims that the General Court should:

— annul the contested decision, in so far as the Commission takes the view that the measure in question constitutes State aid within the meaning of Article 87(1) EC, and

— order the Commission to pay the costs.

12 The Commission contends that the General Court should:

— declare the action inadmissible or, in the alternative, dismiss the action, and

— order the Kingdom of the Netherlands to pay the costs.

13 The Commission submitted that the action brought against the contested decision was inadmissible. That decision, classifying the measure in question as State aid which was compatible with the common market, could not be challenged because it did not affect the interests of the Kingdom of the Netherlands.

14 The General Court declared the action admissible, holding in paragraph 42 of the judgment under appeal that the contested decision clearly gave rise to binding legal effects. First, classification as State aid enabled the Commission to examine the compatibility of that measure with the common market. Second, that classification triggered 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 Article 21 thereof, which requires the Member States to submit an annual report on all existing aid schemes. Third, that classification could also have an impact on the grant of new aid on account 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 (OJ 2001 C 37, p. 3).

15 In support of its claims, the Kingdom of the Netherlands relied on two pleas in law, the first of which alleged infringement of Article 87 EC and the second infringement of the obligation to state the reasons for a decision.

16 With regard to the first plea, which is subdivided into two branches, the Kingdom of the Netherlands, supported by the Federal Republic of Germany, claims that the measure in question does not constitute an advantage financed through State resources and that the condition of selectivity laid down in Article 87 EC is not fulfilled with regard to the undertakings which benefit from that measure.

17 With regard to the first branch of the first plea, alleging the lack of an advantage financed through State resources, the General Court holds that the measure in question is not based on emission allowances allocated directly by the State. However, the

possibility of trading those allowances confers on them a value on the market which can be sold by the undertakings at any time. In addition, by purchasing emission allowances, the undertakings avoid a fine. The emission allowances, which are assimilated to intangible assets, were put at the disposal of the undertakings concerned free of charge, whereas they could have been sold or put up for auction. The Kingdom of the Netherlands has thus foregone the collection of State resources. Consequently, the measure in question constituted an advantage granted to the undertakings concerned through State resources.

18 With regard to the second branch of the first plea, alleging the lack of selectivity, the General Court held that, taken as a whole, the measure in question did not favour certain undertakings or the production of certain goods within the meaning of Article 87(1) EC.

19 First, the criterion for the application of the measure, which is the total thermal capacity of the industrial installations, was an objective criterion. According to the General Court, since the measure is aimed at the undertakings which are the biggest polluters, that objective criterion is furthermore in conformity with the goal of the measure, that is, the protection of the environment, and with the internal logic of the system.

20 Second, it is held that the factual and legal situation of the undertakings subject to that specific NO_x emission ceiling cannot be regarded as comparable to that of the undertakings to which that ceiling does not apply. The large industrial installations covered by that specific scheme must comply, on pain of fine, with an emission standard or strict performance standard which was to be gradually reduced up to the year 2010. The Commission had therefore not established the existence of a general scheme which would apply to undertakings in a factual and legal situation comparable to that of the facilities subject to the measure in question but which did not offer the advantage of the tradability of the NO_x emission allowances. Thus, the measure in question did not derogate from any general scheme. In those circumstances, the measure in question did not favour certain undertakings or the production of certain

goods within the meaning of Article 87(1) EC. Since the selectivity criterion was therefore not fulfilled, that measure could not be classified as State aid.

21 The General Court did not need to rule on the second plea in law because it annulled the contested measure following examination of the first plea.

Procedure before the Court of Justice

22 By order of the President of the Court of Justice of 23 December 2008, the Republic of Slovenia and the United Kingdom of Great Britain and Northern Ireland were granted leave to intervene in support of the forms of order sought by the Kingdom of the Netherlands.

23 By order of the President of the Court of 8 May 2009, the French Republic was granted leave to intervene in support of the forms of order sought by the Kingdom of the Netherlands, in the oral hearing, should it take place.

Forms of order sought by the parties

24 By its appeal, the Commission claims that the Court should:

— set aside the judgment under appeal;

— declare the action for annulment inadmissible;

— in the alternative, dismiss the action for annulment, and

— order the Kingdom of the Netherlands to pay the costs of the proceedings before the General Court and the Court.

25 In its response and by way of cross-appeal, the Kingdom of the Netherlands contends that the Court should:

— dismiss the appeal;

— set aside the judgment under appeal to the extent that the first plea in law submitted by it, concerning the absence of an advantage financed by State resources, is rejected, and

— order the Commission to pay the costs of the proceedings at first instance and of the present appeal.

26 In its response and by way of cross-appeal, the Federal Republic of Germany contends that the Court should:

— first:

— dismiss the appeal;

— set aside the judgment under appeal, and

— order the Commission to pay the costs;

— in the alternative, should the Court consider the cross-appeal to be admissible:

— dismiss the appeal;

— should the Court uphold the Commission's appeal, set aside the judgment under appeal in its entirety, and

— order the Commission to pay the costs.

27 In its statement in intervention, the Republic of Slovenia contends that the Court should:

— dismiss the appeal, and

— order the Commission to pay the costs.

28 In its statement in intervention, the United Kingdom contends that the Court should:

— dismiss the appeal, and

— order the Commission to pay the costs of the proceedings at first instance and of the present appeal.

The appeal

29 The Commission has submitted two grounds of appeal. The first ground alleges infringement of Article 230 EC with regard to the capacity of a Member State whose aid measure is approved to bring proceedings. By the second ground, submitted in the alternative, the Commission claims that Article 87(1) EC has been infringed with regard to the concepts of 'certain undertakings' or the 'production of certain goods' referred to in that provision.

The first ground of appeal

Arguments of the parties

30 The first ground of appeal is divided into two branches. By the first branch, the Commission claims that the precise wording of the operative part of the Commission's decision the annulment of which is sought is not decisive. In addition, in paragraph 47 of the judgment under appeal, the General Court mistakenly referred to the operative part of the Commission decision adopted in the case which led to the order in *Netherlands* v *Commission*. Consequently, paragraph 47 of the judgment under appeal contains a distortion of the facts and is therefore based on an incorrect admissibility criterion. In any case, the distinction made by the General Court, in paragraph 47 of the judgment under appeal, between the decision in question in the abovementioned order in *Netherlands* v *Commission* and the contested decision is irrelevant.

31 By the second branch of the first ground of appeal, the Commission submits that the conclusion according to which the classification of the measure in question as State

aid entailed certain legal consequences is wrong. It is settled case-law that the concept of State aid is an objective concept. The State measure at issue either falls within the scope of Article 87(1) EC or does not. It is not relevant to consider that the consequences of the contested decision for the Member State concerned, described by the General Court in paragraph 41 of the judgment under appeal (submission of reports, no overlapping aid), result from the position adopted by the Commission; they depend only on the question whether the measure at issue falls within Article 87(1) EC. Concerning the limitations on overlapping aid, referred to by the General Court, the Commission states that they apply if the measure at issue constitutes aid, irrespective of whether the Commission stated that to be the case in the contested decision or not.

32 The Kingdom of the Netherlands submits, in response to the first branch of the first ground, that the contested decision diverges considerably from that which led to the abovementioned order in *Netherlands* v *Commission*. In the present case, the Kingdom of the Netherlands did not request the lawfulness of the measure at issue to be reviewed in the light of Articles 87 and 88 EC. On the contrary, that Member State expressly requested the Commission not to classify that measure as State aid. The present action refers expressly to the operative part of the contested decision, in contrast to that which led to the abovementioned order in *Netherlands* v *Commission*.

33 With regard to the arguments concerning the second branch of the first ground of appeal, the Kingdom of the Netherlands states that it is only classification of a national measure as State aid which will allow the Commission to examine the compatibility of the measure with the common market. The Commission enjoys, in that regard, exclusive competence. That classification obliges a Member State to comply with the obligations flowing from Regulation No 659/1999. In addition, the classification by the Commission of a national measure as State aid also has consequences for proceedings before national courts concerning comparable national measures.

34 In addition, the Federal Republic of Germany, the French Republic, the Republic of Slovenia and the United Kingdom also submit that the contested decision is a challengeable act for the purposes of Article 230 EC.

Findings of the Court

35 With regard to the first ground, the Commission contests, first, the conclusion reached by the General Court in paragraph 47 of the judgment under appeal, according to which the present case must be distinguished from the case which led to the abovementioned order in *Netherlands* v *Commission*. In the latter case, the Kingdom of the Netherlands had requested in its application the annulment of the decision in question 'in so far as the Commission t[ook] the view therein that the contributions paid to port authorities … constitute[d] State aid for the purposes of Article 87(1) EC', whereas that finding did not appear in the operative part of that decision.

36 In that regard, it is apparent from paragraph 20 of that order that, in its notification of the aid scheme at issue, the Member State had requested the Commission to assess the legality of the measure in the light of Articles 87 EC and 88 EC, with the result that that decision, adopted, first, under Article 87(1) EC and, second, under Article 87(3)(c) EC, cannot bring about a distinct change in the legal position of the Kingdom of the Netherlands. The Court also held, in paragraphs 21 to 24 of that order, that the operative part of the decision in question did not in the least constitute the adoption of a position as to whether port authorities were undertakings or whether all of the activities of such authorities were economic in nature, that the operative part of the decision did not in the least prejudge the assessment under Article 87(1) EC of any other contributions paid to the port authorities, and that the disputed part of the statement of reasons for that decision had not given rise to a binding legal effect such as to affect the interests of the Kingdom of the Netherlands.

37 In the present case, by contrast, it is apparent from paragraph 8 of the judgment under appeal that the Netherlands authorities, in application of Article 88(3) EC, notified the Commission of the measure in question while requesting it to find that there was no aid, in accordance with Article 4(2) of Regulation No 659/1999. In its action before the General Court, the Kingdom of the Netherlands expressly contests, first, the rejection of its application not to classify the measure at issue as State aid and, second, the statement of reasons for the contested decision which rejected that request. In addition, it is apparent from the contested decision, and from the judgment under appeal, that the Commission classified the measure in question as State aid before declaring it compatible with the common market.

38 In those circumstances, the General Court did not err in law when distinguishing the present case, which concerns the express request by the Member State concerned that the Commission find a measure is adopted in conformity with Article 4(2) of Regulation No 659/1999 from that which was the subject of the case which led to the abovementioned order in *Netherlands* v *Commission*.

39 Second, the Commission contests paragraph 41 of the judgment under appeal according to which the classification of the measure in question as State aid entailed certain legal consequences for the Member State concerned. It submits that the concept of State aid is an objective concept and that the consequences described by the General Court do not follow from that classification but depend on whether the measure at issue falls within Article 87(1) EC.

40 In that regard, it should be recalled that if the Commission finds, following the preliminary examination, that the measure notified, in so far as it falls within the scope of Article 87(1) EC, does not raise any doubts as to its compatibility with the common market, it is to adopt a decision not to raise objections under Article 4(3) of Regulation No 659/1999 (Case C-83/09 P *Commission* v *Kronoply and Kronotex* [2011] ECR I-4441, paragraph 44). The General Court was correct to state, in paragraph 41 of the

judgment under appeal, that such a decision triggers, in particular, the application of the procedure laid down in Articles 17 to 19 and Article 21 thereof, which requires the Member States to submit an annual report on all existing aid schemes.

41 As noted by the Advocate General in points 24 and 27 of his Opinion, a mistaken classification of a measure as State aid does therefore have legal consequences for the notifying Member State, since such a measure is subject to constant monitoring by the Commission and to periodic checks by it, meaning that that Member State enjoys restricted room for manoeuvre in implementing the notified measure.

42 It necessarily follows from this that a decision based on Article 87(1) and (3) EC which, while classifying the measure in question as State aid, declares it compatible with the common market, must be regarded as a challengeable act under Article 230 EC. Such a decision of compatibility within the meaning of Article 87(1) and (3) EC also has a final character and does not constitute a preparatory measure.

43 In the light of those considerations, the first ground of appeal must be rejected.

The second ground of appeal

44 The Commission submits, in essence, that the General Court erred in law in its assessment of the selectivity of the contested decision. By its second ground of appeal, the Commission contests, first, the reasoning of the judgment under appeal leading to the conclusion that the measure in question does not favour certain undertakings or

the production of certain goods within the meaning of Article 87(1) EC and, second, the conclusion reached by the General Court that, even if the measure in question favoured certain undertakings or the production of certain goods, it did not constitute State aid because it was beneficial to the environment and was justified by the nature or overall structure of the scheme of which it is part.

The first branch of the second ground of appeal

— Arguments of the parties

45 By the first branch of the second ground of appeal, the Commission submits that the fact that the criterion of application of the measure in question is, according to the General Court, an objective criterion and not a geographic or sectoral one, is irrelevant. In that regard, the Commission states, in its first argument, that the fact that all the large installations are subject to the emission ceiling is of no consequence, that ceiling being only such as to establish that the contested aid falls within an aid scheme, and is not individual aid. According to the Commission, the measure at issue, which concerns a restricted group of undertakings, that is around 250, constitutes a selective measure.

46 In a second argument, the Commission submits that the General Court applied the wrong criterion in order to determine the selectivity of the measure in question and imposed, wrongly, on the Commission an incorrect and impossible burden of proof. It would thus have had to prove that all the other Netherlands undertakings were subject to the same obligations as those to which the 250 undertakings referred to were subject. The Commission states in that regard that, even if no other Netherlands undertaking were subject to the slightest restriction with regard to NO_x emissions,

the measure in question would still constitute State aid. The Kingdom of the Netherlands could have imposed on those 250 undertakings a 'traditional' measure of a binding nature, without giving them the possibility of trading NO_x emission allowances. By contrast, the number of undertakings to which that Member State offers such an advantage is limited, in the present case only 250 undertakings which have an installed capacity greater than 20 MWth being concerned. The measure is, therefore, selective.

47 The Kingdom of the Netherlands replies that the grounds on which the General Court found the measure in question to be objective, and lacking geographic or sectoral scope, cannot be called into question at the appeal stage in order to negate the General Court's finding that the measure in question is not selective. The General Court mentioned that point only as a factual finding and not as an essential basis of its assessment of the selectivity of that measure. With regard to the comparison between Netherlands undertakings which are not covered by the scheme in question and the 250 undertakings which may trade NO_x emission allowances, the Kingdom of the Netherlands, first, states that the latter undertakings, which have large industrial facilities, are subject to additional obligations. The effect of those additional obligations is to create a major difference, concerning NO_x emission allowances, between those undertakings and the others.

48 According to the Federal Republic of Germany, it is clear that, for the General Court, the objectivity criterion is a necessary but not sufficient condition for finding that a measure is not selective. The decisive assessment criterion is the effect of the measure. The Court would consider a measure as selective only if it was factually selective even if it had been implemented according to objective criteria. That finding also follows from the judgments cited by the Commission. The General Court held, in the present case, that the 250 undertakings participating in the emission allowance trading scheme were not in a situation comparable in law or in fact to that of other undertakings. The Federal Republic of Germany maintains that it is for the Commission to prove that other undertakings, in a situation comparable to that of the undertakings

concerned by the measure in question, are subject to the same rules regarding NO_x emissions, but are excluded from the emission allowance trading scheme. Decisive alone is the question whether the measure at issue constitutes an exception to a more general rule.

49 According to the Republic of Slovenia, the criterion which must be taken into account in order to assess the selectivity of a measure is to determine whether that measure applies to all undertakings which are in a comparable situation. That Member State considers that the objective of the scheme in question is to protect the environment and takes into account the specific characteristics of the major polluters in order to attain it. The polluting undertakings are subject to greater financial restrictions than the others and their legal situation is dealt with differently.

— Findings of the Court

50 It is settled case-law that the fact that the number of undertakings able to claim entitlement under a measure is very large, or that they belong to different sectors of activity, is not sufficient to call into question the selective nature of that measure and, therefore, to rule out its classification as State aid (Case C-75/97 *Belgium* v *Commission* [1999] ECR I-3671, paragraph 32; Case C-143/99 *Adria-Wien Pipeline and Wietersdorfer & Peggauer Zementwerke* [2011] ECR I-8365, paragraph 48; and Case C-409/00 *Spain* v *Commission* [2003] ECR I-1487, paragraph 48). Where the measure in question is governed by objective criteria of horizontal application, that fact too does not call into question its selective character, since it can serve only to show that the aid at issue falls within an aid scheme and is not individual aid (see, to that effect, *Spain* v *Commission*, paragraph 49).

51 Article 87(1) EC defines State interventions on the basis of their effects, and thus independently of the techniques used by the Member States to implement their interventions (see Case C-487/06 P *British Aggregates* v *Commission* [2008] ECR I-10505, paragraph 89).

52 Moreover, in paragraphs 84 and 86 of the judgment under appeal, the General Court, relying on paragraphs 34 and 41 of *Adria-Wien Pipeline and Wietersdorfer & Peggauer Zementwerke*, confirms, correctly, that a State measure constitutes aid if 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 question.

53 In paragraph 88 of the judgment under appeal, the General Court states that '[t]he criterion for application of the measure in question is therefore an objective one, without any geographic or sectoral connotation. To the extent that the measure in question is aimed at the undertakings which are the biggest polluters, that objective criterion is furthermore in conformity with the goal of the measure, that is, the protection of the environment and with the internal logic of the system.'

54 However, the General Court also noted, in paragraph 89 of the judgment under appeal, that 'only those undertakings covered by the scheme must comply, on pain of fine, with an emission standard or strict "Performance Standard Rate" (PSR) which will be gradually reduced up to the year 2010'. It then pursued its analysis, in paragraph 91 et seq., explaining, in essence, that the Commission did not establish, in the contested decision, that undertakings other then those concerned by the measure in question are subject to obligations equivalent to those stemming from that decision, with the result that those other undertakings could be considered as being in a situation comparable to that of the undertakings concerned by the measure in question. On the basis of those considerations, the General Court held, in paragraph 96 of the judgment under appeal, that the measure in question does not favour certain undertakings.

55 Thus, it is apparent from reading paragraphs 84 to 96 of the judgment under appeal as a whole that the General Court did not hold, as the Commission argues, that the application of the objective criterion of total installed thermal capacity greater than 20 MWth of the undertakings concerned is sufficient to disregard the Commission's argument regarding the selective character of the measure at issue. The General Court holds that that measure applies to the large undertakings without any other geographic or sectoral connotation. Those factual findings of the General Court, regarding the objective character of the measure, reinforce its reasoning according to which the measure in question is not selective, since a measure applied on the basis of subjective criteria would by definition be selective. It should be noted that the General Court does not rely exclusively on those findings in order to hold that the measure is not selective.

56 Consequently, the General Court did not hold, contrary to what the Commission argues, that the measure was not selective for the purposes of Article 87(1) EC on the ground only that the measure was governed by an objective criterion.

57 Accordingly, the Commission's first argument of the first branch of the second ground of appeal should be dismissed.

58 In the context of the second argument of the first branch of the second ground of appeal, the Commission calls into question the findings of the General Court in paragraphs 89 to 96 of the judgment under appeal and submits, in essence, that the General Court applied the wrong criterion according to which the Commission should have proved that all other undertakings in the Member State concerned were subject to the same obligations as those arising from the measure in question. According to the Commission, the burden of proof imposed on it by the General Court was excessive and superfluous because it is clear from the contested decision and the judgment under appeal that all the Netherlands undertakings are subject to NO_x emission restrictions. According to the Commission, the Kingdom of the Netherlands never argued that the measure in question lacked selectivity on the ground that the other undertakings were not subject to identical or comparable obligations.

59 As a preliminary point, it should be recalled that, according to settled case-law, it is clear from Article 225 EC and the first paragraph of Article 58 of the Statute of the Court of Justice that the Court has no jurisdiction to establish the facts or, in principle, to examine the evidence which the General Court accepted in support of those facts. Provided that the evidence has been properly obtained and the general principles of law and the rules of procedure in relation to the burden of proof and the taking of evidence have been observed, it is for the General Court alone to assess the value which should be attached to the evidence produced to it. Save where the clear sense of the evidence has been distorted, that appraisal does not therefore constitute a point of law which is subject, as such, to review by the Court of Justice (see Case C-419/08 P *Trubowest Handel and Makarov* v *Council and Commission* [2010] ECR I-2259, paragraphs 30 and 31, and Case C-399/08 P *Commission* v *Deutsche Post* [2010] ECR I-7831, paragraph 63).

60 However, regarding the rules of procedure in relation to the burden of proof and the taking of evidence, the Court has jurisdiction to examine, in the appeal, according to the abovementioned case-law, whether it is for the Commission to prove the selective character of the measure in question.

61 According to settled case-law, categorisation as aid requires that all the conditions set out in Article 87(1) EC be fulfilled (see Case C-345/02 *Pearle and Others* [2004] ECR I-7139, paragraph 32 and the case-law cited). As was stated in paragraph 52 above, the General Court, correctly, considered that an economic advantage granted by a Member State constitutes an aid only if it is such as to favour certain undertakings or the production of certain goods.

62 Thus, in order to prove that the measure in question applies selectively to certain undertakings or to the production of certain goods, it is for the Commission to prove that it creates differences between undertakings which, with regard to the objective of the measure in question, are in a comparable factual and legal situation. However, it must be added that the concept of aid does not encompass measures creating different

treatment of undertakings in relation to charges where that difference is attributable to the nature and general scheme of the system of charges in question (Case C-159/01 *Netherlands* v *Commission* [2004] ECR I-4461, paragraph 42 and case-law cited). It is for the Member State which has introduced such a differentiation between undertakings in relation to charges to show that it is actually justified by the nature and general scheme of the system in question (*Netherlands* v *Commission*, paragraph 43).

63 In that regard, it must be held, as the Commission observes in point 3.1 of the contested decision, that the undertakings participating in the 'dynamic cap' systems fall within a specific group of large industrial undertakings engaged in trade between the Member States and enjoy an advantage which is not available to other undertakings. Those undertakings enjoy the advantage of being able to monetise the economic value of the emission reductions they achieve, by converting them into tradable emission allowances or, as the case may be, avoiding the risk of having to pay fines when they exceed the NO_x emission limit per unit of energy laid down by the national authorities by buying such emission allowance from other undertakings falling within the measure in question (see, in that regard, paragraphs 92 to 96 below), whereas the other undertakings do not have those opportunities, that being sufficient, in principle, to establish that the Kingdom of the Netherlands has created a differentiation between undertakings in relation to charges within the meaning of the case-law cited in paragraph 61 above.

64 It is agreed between the parties, as they confirmed at the hearing, that every undertaking the operations of which produce NO_x emissions must comply with obligations regarding the limitation or reduction of those emissions, whether or not it falls within the measure in question. In order to fulfil the obligations to which they are thus subject, under national law, only those undertakings covered by the measure in question have the opportunities described in the preceding paragraph, which constitutes an advantage in their favour not enjoyed by other undertakings in a comparable situation.

65 In that regard, the Commission was not required to go into any more detail in its decision. In the case of an aid programme, it may confine itself to examining the characteristics of the programme in question in order to determine, in the grounds of its decision, whether, by reason of the terms of the programme, it gives an appreciable advantage to recipients in relation to their competitors and is likely to benefit in particular undertakings engaged in trade between Member States (Case C-310/99 *Italy* v *Commission* [2002] ECR I-2289, paragraph 89).

66 It follows that by holding, in paragraphs 92 and 93 of the judgment under appeal, that the Commission has failed to put forward any clear evidence establishing that the two categories of undertakings mentioned in paragraph 64 above were subject to the same kind of obligations and that they were therefore in comparable situations, the General Court erred in law concerning the burden of proof on the Commission.

67 In this case, it is therefore sufficient to observe that the contested decision sets out clearly, and applies to the situation in this case, the selectivity criterion which must be satisfied in order for a measure to constitute State aid. The Commission has referred to the existence, in the Member State concerned, of laws concerning environmental management and atmospheric pollution which do not contain the measure in question. In addition, it has taken into account the fact that Netherlands undertakings, other than the 250 large facilities which are covered by the measure in question, are also subject to certain NO_x emission requirements.

68 It follows from the foregoing that the first part of the second ground of appeal must be upheld.

Second branch of the second ground of appeal

— Arguments of the parties

69 In relation to the second branch of the second ground of appeal, the Commission submits that the measure in question is not deprived of its character as State aid by its objective of environmental protection or the nature or overall structure of the scheme of which it is part.

70 First, the Commission refers to the case-law of the Court according to which, in order to determine whether the State measure constitutes State aid, Article 87(1) EC does not distinguish between measures of State intervention by reference to their causes or their aims but defines them in relation to their effects. The Commission states that, were it possible to rely on the objective of environmental protection, that would adversely affect the Commission's task of examining whether the aid does not adversely affect trading conditions to an extent contrary to the common interest.

71 Second, the Commission criticises the General Court for having found the measure in question to be justified because of the nature or overall structure of the scheme of which it is part. According to the Commission, that interpretation is mistaken because the General Court previously found that the Commission did not establish the existence of a general scheme proving that the measure in question favoured certain undertakings within the meaning of Article 87(1) EC. In addition, the Commission adds that it is for the Member State to show that such a measure is justified by the nature or overall structure of the scheme of which it is part. In the present case, the Kingdom of the Netherlands failed to bring forward such proof.

72 By invoking the judgment in Case C-88/03 *Portugal* v *Commission* [2006] ECR I-7115, the Commission argues that it does not follow from the nature or overall structure

of a broader scheme containing NO_x emission restrictions that the tradability of NO_x emission allowances must be granted to the undertakings covered by the measure in question. Following the judgment of the Court in *Adria-Wien Pipeline and Wietersdorfer & Peggauer Zementwerke*, the Commission considers that all the NO_x emission reductions are beneficial for the environment without distinction between the origin of those reductions, that is to say thermal capacity of the installations lower or higher than 20 MWth.

73 The Kingdom of the Netherlands replies that that ground of appeal is based on a misinterpretation of the judgment under appeal. According to it, the General Court does not consider that the goal of environmental protection deprives the measure in question of its character as State aid. It states that those findings were made in the alternative. In any case, the Kingdom of the Netherlands considers that the General Court was correct in holding that, even if there was a general scheme, the distinction between the undertakings is justified because it is based only on the quantity of NO_x emissions and the specific reduction standard which applies to the undertakings with substantial emissions. The criterion of the measure in question, that is the quantity of emissions, is justified by the nature and structure of an overall scheme which aims to reduce atmospheric pollution.

— Findings of the Court

74 The General Court considered, in paragraph 99 of the judgment under appeal, 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 'ecological considerations justify distinguishing undertakings which emit large quantities of NO_x from other undertakings'. The General Court held that 'that objective criterion is furthermore in conformity with the goal of the measure, that is, the protection of the environment and with the internal logic of the system'.

75 According to settled case-law, Article 87(1) EC does not distinguish between measures of State intervention by reference to their causes or their aims but defines them in relation to their effects. Even if environmental protection constitutes one of the essential objectives of the European Community, the need to take that objective into account does not justify the exclusion of selective measures from the scope of Article 87(1) EC, as account may, in any event, usefully be taken of the environmental objectives when the compatibility of the State aid measure with the common market is being assessed pursuant to Article 87(3) EC (*Spain* v *Commission*, paragraph 46, and *British Aggregates* v *Commission*, paragraph 92).

76 In the present case, the substantial NO_x emissions of the undertakings covered by the measure in question and the specific reduction standard applicable to those undertakings are not sufficient to enable that measure to avoid classification as a selective measure for the purposes of Article 87(1) EC. As the Advocate General stated in point 55 of his Opinion, such a differentiation between undertakings based on a quantitative criterion, that is to say total installed thermal capacity of more than 20 MWth, cannot be regarded as inherent to a scheme intended to reduce industrial pollution and, therefore, justified only on environmental grounds.

77 Furthermore, it is for the Member State which has introduced such a differentiation between undertakings to show that it is actually justified by the nature and general scheme of the system in question (see Case C-159/01 *Netherlands* v *Commission*, paragraph 43).

78 In those circumstances, the distinguishing criterion used by the national legislation in question, that is thermal installation capacity greater than 20 MWth, is not justified either by the nature or general scheme of that legislation, meaning that it cannot deprive the measure in question of its character as State aid.

79 In the light of the foregoing considerations, the second branch of the second ground must also be upheld, as therefore must that ground as a whole.

The cross-appeals

80 Since the Court upholds the Commission's appeal in substance, the cross-appeals lodged by the Kingdom of the Netherlands and the Federal Republic of Germany must be examined.

81 Those two Member States rely on an identical ground of appeal, alleging that the General Court erred in law by considering that the measure in question must be regarded as an advantage financed through State resources within the meaning of Article 87(1) EC.

82 That ground comprises two branches which are directed, first, at the reasoning of the General Court contained in paragraphs 63 to 74 of the judgment under appeal according to which the tradability of the emission allowances provided for by the measure in question constitutes an advantage for the enterprises subject to the prescribed NO_x emission standard and, second, the reasoning of the General Court contained in paragraphs 74 to 77 of that judgment, regarding the fact that the measure in question constitutes an advantage granted to the undertakings concerned through State resources.

The first branch of the single ground of appeal

Arguments of the parties

83 With regard to the first branch of the single ground of appeal, the Kingdom of the Netherlands submits that the measure in question takes as its starting point the determination of an additional emission standard to be taken into consideration by certain undertakings. The quantity of tradable allowances is not therefore laid down in advance and depends entirely on the additional reduction which the undertakings could have achieved in relation to the standard. It states that, where the standard laid down is exceeded, the fine is a complementary sanction which does not constitute an alternative to the supply of missing emission allowances. Furthermore, according to the Kingdom of the Netherlands, the conclusion reached by the General Court, in paragraph 70 of the judgment under appeal, that any undertaking coming within the scheme may sell those allowances at any time, is mistaken.

84 According to the Federal Republic of Germany, the undertakings concerned can obtain a financial advantage in the sense of a tradable allowance only as a result of the efforts they make to reduce their emissions, which constitutes a consideration of an appropriate value for the tradable allowances. In that regard, that Member State notes the negative effects of the measure in question for the undertakings which are unable to comply with the authorised amount of emissions. An emission which exceeds the threshold is affected by the costs of purchasing emission allowances which are determined by the market or by a fine. Undertakings can obtain a tradable allowance and the economic advantage linked to it only by their own efforts in reducing their emission quotas below the authorised threshold.

85 According to the Federal Republic of Germany, the efforts of the undertakings in seeking to reduce their emissions constitute the consideration for that tradable asset and the value of that asset as such cannot by definition be an advantage. Moreover,

the concept of emission allowance credits as 'future bonds' does not affect undertakings' obligation to comply with emission objectives and does not, by definition, always amount to an advantage.

Findings of the Court

86 Article 87(1) EC defines State aid as aid granted by a Member State or through State resources in any form whatsoever which distorts or threatens to distort competition by favouring certain undertakings or the production of certain goods, in so far as it affects trade between Member States. The concept of State aid within the meaning of that provision is wider than that of a subsidy because it embraces not only positive benefits, such as the subsidies themselves, but also measures which, in various forms, mitigate the normal burdens on the budget of an undertaking, and which therefore, without being subsidies in the strict sense of the word, are of the same character and have the same effect. The supply of goods or services on preferential terms is one of the indirect advantages which have the same effects as (see Case C-276/02 *Spain* v *Commission* [2004] ECR I-8091, paragraph 24, and Joined Cases C-341/06 P and C-342/06 P *Chronopost and La Poste* v *UFEX and Others* [2008] ECR I-4777, paragraph 123).

87 Also, according to the case-law, measures which, whatever their form, are likely directly or indirectly to favour certain undertakings or are to be regarded as an economic advantage which the recipient undertaking would not have obtained under normal market conditions, are regarded as aid (Case C-280/00 *Altmark Trans and Regierungspräsidium Magdeburg* [2003] ECR I-7747, paragraph 84 and case-law cited).

88 In the light of the case-law cited, it must be held that the tradability of the NO_x emission allowances depends above all on the fact that the State, first, authorises the sale of those allowances and, second, allows those undertakings which have emitted a surplus of NO_x to acquire from other undertakings the missing emission allowances, thereby agreeing to the creation of a market for those allowances (see also paragraphs 64, 65 and 87 to 96 of the present judgment). That finding also follows from paragraph 70 of the judgment appealed against, in which the General Court correctly concluded that, by making those allowances tradable, the Kingdom of the Netherlands confers on them a market value.

89 With regard to the arguments that the tradability of those allowances constitutes a consideration, at the market price, for the efforts undertaken by the undertakings falling within the measure in question to restrict their NO_x emissions, they must be rejected in accordance with the case-law cited in paragraph 86 of the present judgment because the costs of reducing those emissions fall within the charges to which the budget of the undertaken is normally subject.

90 With regard to the arguments that the tradability of those allowances cannot be regarded as a real advantage for the undertakings concerned as a result of the unpredictability of the market, it must be held that the right of those undertakings to choose between the costs of acquiring the emission allowances and the costs linked to measures intended to reduce NO_x emissions, constitutes an advantage for them. Also, the right, for the undertakings covered by the measure in question, to trade all the emission allowances and not only the credits resulting at the end of the year from the positive difference between the authorised emission and the emission obtained, constitutes an additional advantage for those undertakings. The latter can enjoy liquidity by selling the emission allowances before the conditions for their final allocation have arisen, irrespective of the fact that a ceiling is applicable to them, and the undertakings which exceed the emission norm laid down must compensate for that surplus the following year.

91 Consequently, the measure in question, comprising the tradability of those emission allowances, must be regarded as an economic advantage which the recipient undertaking could not have obtained under normal market conditions.

92 Also, the conclusion stated 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 and whose balance at the end of the year is therefore negative, to avoid a fine by purchasing emission allowances from those who recorded a surplus, is disputed by the Kingdom of the Netherlands.

93 In that regard, the Kingdom of the Netherlands submits that, where the norm laid down is exceeded, the fine is an additional sanction which does not constitute an alternative to the supply of the missing emission credits.

94 In the present case, it must be concluded that the arguments of the Netherlands do not call into question in a clear or sufficient manner, in the appeal, the General Court's conclusion that the measure in question confers on the undertakings concerned the right to purchase emission credits on the market, before the end of the year, the emission ceiling limits being annual. Such a conclusion means that certain undertakings, before the checking by the national authorities of compliance with the applicable ceiling, grant themselves the right to purchase the missing emission allowances and, consequently, to avoid exceeding the emission standard and therefore having to pay a fine.

95 It follows that the Kingdom of the Netherlands' argument, calling into question the General Court's finding, in paragraph 73 of the judgment under appeal, that the undertakings may avoid payment of a fine by purchasing emission allowances, cannot be accepted.

96 In those circumstances, the first branch of the single ground of appeal, concerning the erroneous interpretation and application of the concept of advantage, within the meaning of Article 87(1) EC, must be rejected.

The second branch of the single ground of appeal

Arguments of the parties

97 With regard to the second branch of the single ground of appeal, regarding the concept of financing through State resources, the Kingdom of the Netherlands contests the findings of the General Court in paragraphs 75 to 77 of the judgment under appeal. In particular, that Member State considers that the General Court wrongly interpreted the concept of financing through State resources as applied by the Court in Case C-379/98 *PreussenElektra* [2001] ECR I-2099. With regard to the measure in question, the Kingdom of the Netherlands considers that it would be decisive to hold that there was no direct or indirect transfer of State resources as a result of the distribution of the additional financial burden between the undertakings. Since the emission standard laid down is a supplementary charge for the undertakings in question, the only purpose of the measure at issue, which constitutes 'compensation', is to allow the undertakings concerned to distribute themselves the additional burdens between the undertakings resulting from that standard.

98 According to the Kingdom of the Netherlands, the fine linked to the exceeding of the standard laid down is an additional sanction which does not constitute an alternative to the supply of missing emission credits. The sole fact that the value of the credits derives from legislation does not mean that the condition of financing of those credits through State resources is fulfilled. In its rejoinder, that Member State states that the fact that certain revenue in the form of fines is lost to the State where the undertakings comply with their obligations cannot constitute a relevant element with regard to

the legislation concerning State aids. It adds that if another emission allowance trading scheme is such as to generate revenue for the Member State, that is not sufficient to establish that that State loses resources within the meaning of Article 87 EC where it has not opted for that alternative system.

99 The Federal Republic of Germany also disputes the finding made by the General Court that the emission allowance trading scheme in question constitutes an advantage granted to the undertakings concerned through State resources. Under the Netherlands model, all undertakings must comply with the same obligations relating to a threshold which is not to be exceeded. The question whether certificates are on the market, and for what amount, depends on the way in which the undertakings fulfil their obligations in the emissions sector. The undertakings themselves create their own assets. If an undertaking exceeds the threshold value, it is affected by the costs of purchasing emission allowances which are determined by the market or by a fine. The undertakings can obtain a tradable allowance and the economic advantage which is linked to it only where they achieve the reduction of their emission quotas in order not to exceed the authorised threshold.

100 In addition, according to the Federal Republic of Germany, the assimilation of the free allocation of emission allowances to the sale of assets by the State authorities is not relevant with regard to the principle applicable, that is, that of the private investor acting in accordance with the law of the market. By the emission allowance trading scheme, the State establishes a normative framework.

101 That Member State submits, first, that the sales price is not predictable and, second, that the possibility of recourse to early sale does not represent a definitive advantage. It claims that the non-collection of fines is simply linked to the fact that the undertakings do not exceed the ceilings. The purchase of emission rights from undertakings

which are 'overachievers' is carried out using the undertaking's own resources and constitutes, from an economic standpoint, an equivalent to the possibility of itself reducing its emissions below the authorised ceiling. There is no foregoing by the State of the collection of resources.

Findings of the Court

102 In paragraph 75 of the judgment under appeal, the General Court considered that, by placing the NO_x emission allowance at the disposal of the undertakings concerned free of charge, rather than selling them or putting them up for auction, and by setting up a scheme making it possible to trade those allowances on the market, even if they are linked to a maximum ceiling, the Kingdom of the Netherlands conferred on those allowances the character of intangible assets and has therefore foregone the collection of State resources.

103 According to the case-law of the Court, for advantages to be capable of being categorised as aid within the meaning of Article 87(1) EC, they must, first, be granted directly or indirectly through State resources, and, second, be imputable to the State (Case C-482/99 *France* v *Commission* [2002] ECR I-4397, paragraph 24 and case-law cited).

104 In that regard, it should be noted that, according to settled case-law, it is not necessary to establish in every case that there has been a transfer of State resources for the advantage granted to one or more undertakings to be capable of being regarded as a State aid within the meaning of Article 87(1) EC (*France* v *Commission*, paragraph 36).

105 Also, the distinction made in that provision between 'aid granted by a Member State' and aid granted 'through State resources' does not signify that all advantages granted

by a State, whether financed through State resources or not, constitute aid, but is intended merely to bring within that definition both advantages which are granted directly by the State and those granted by a public or private body designated or established by the State (*PreussenElektra*, paragraph 58, and Case C-222/07 *UTECA* [2009] ECR I-1407, paragraph 43).

106 In the present case, an advantage granted by the national legislature, that is, the tradability of NO_x emission allowances, could entail an additional burden for the public authorities in the form of an exemption from the obligation to pay fines or other pecuniary penalties (see, to that effect, Case C-295/97 *Piaggio* [1999] ECR I-3735, paragraph 42). By establishing the 'dynamic cap' scheme, the Kingdom of the Netherlands gave to the undertakings covered by the measure in question the possibility of buying emission allowances in order to avoid the payment of fines. In addition, the consequence of that system is the creation, without real consideration supplied to the State, of emission allowances which, because of their tradable character, have an economic value. It must be concluded that the Member State could have sold such rights, or where appropriate put them up for auction, if it had structured that scheme differently (see, in that regard, paragraphs 63, 64 and 86 to 96 above).

107 Thus, the General Court's conclusion in paragraph 75 of the judgment under appeal that the undertakings concerned are free to sell their emission allowances even though they are linked to a maximum ceiling, is not called into question by the arguments submitted. As the Advocate General considered in point 87 of his Opinion, the Member State, by conferring on those emission allowances the character of tradable intangible assets and by making them available to the undertakings concerned free of charge instead of selling those allowances or putting them up for auction, foregoes public resources.

108 In addition, the fact that such a measure permits undertakings to offset among each other the surpluses or deficits in relation to the standard laid down and that that measure creates a legal framework for limiting the discharge of NO_x emissions in a

profitable manner for undertakings with large facilities, show that the undertakings covered by the measure in question have an alternative to the imposition of a fine by the State.

109 With regard to the arguments concerning *PreussenElektra*, the General Court correctly distinguished that judgment from the present case. According to that judgment, legislation of a Member State which, first, requires private electricity supply undertakings to purchase electricity produced in their area of supply from renewable energy sources at minimum prices higher than the real economic value of that type of electricity, and, second, allocates the financial burden arising from that obligation amongst those electricity supply undertakings and upstream private electricity network operators, does not constitute State aid within the meaning of Article 87(1) of the Treaty.

110 The Court considered, in that judgment, that even if the financial burden arising from the obligation to purchase at minimum prices was likely to have negative repercussions on the economic results of the undertakings subject to that obligation and entail a diminution in tax receipts for the State, that consequence was an inherent feature of such a legislative provision and could not be regarded as constituting a means of granting to producers of electricity from renewable energy sources a particular advantage at the expense of the State.

111 On the contrary, in the present case, as the Advocate General stated in point 92 of his Opinion, that foregoing of resources cannot be considered as 'inherent' in any instrument designed to regulate emissions of atmospheric pollutants by an emission allowance trading scheme. Where it has recourse to those instruments, the State has in principle a choice between allocating those allowances free of charge or selling or auctioning them. Furthermore, in the present case there is a sufficiently direct connection between the measure in question and the loss of revenue, a link which did not exist between the imposition of the obligation to purchase and the possible

diminution in tax receipts at issue in the case which led to the judgment in *PreussenElektra*. The facts of the two cases are therefore not comparable and the solution adopted by the Court in *PreussenElektra* thus cannot be applied to the present case.

112 Thus, the solution adopted by the Court in *PreussenElektra* cannot be applied to the present case. Consequently, the General Court correctly held in paragraph 75 of the judgment under appeal that the Kingdom of the Netherlands had foregone the collection of those resources.

113 In those circumstances, the cross-appeals by the Kingdom of the Netherlands and the Federal Republic of Germany must be dismissed.

Consequences of the second ground of the main appeal being well founded and of the dismissal of the cross-appeals

114 In the light of all those considerations, the judgment appealed against must be set aside in so far as it annuls the contested decision.

115 In accordance with the first paragraph of Article 61 of the Statute of the Court of Justice of the European Union, if the appeal is well founded, the Court of Justice is to quash the decision of the General Court and may itself give final judgment in the matter, where the state of the proceedings so permits, or refer the case back to the General Court for judgment. That is so in the present case.

The action at first instance

116 It follows from the considerations set out in the present case that the contested decision does not infringe Article 87(1) EC in so far as the Commission concludes therein that the measure in question results in State aid with regard to the undertakings covered by it.

117 It follows from paragraphs 86 to 96 and 102 to 113 above that the General Court did not err in law when confirming the Commission's argument that the measure in question results, with regard to the undertakings covered by it, in an advantage financed through State resources. In addition, for the reasons set out in paragraphs 59 to 79 above, the Court upheld the second ground of appeal put forward by the Commission which was intended to call into question the General Court's analysis in relation to the selective character of the advantage mentioned above. According to that reasoning, and that which underlies the dismissal of the cross-appeals, the Commission was entitled to conclude, correctly, in the contested decision, that the advantage derived from the measure in question is applied selectively.

118 The first plea for annulment by the Kingdom of the Netherlands submitted at first instance in respect of that decision must, therefore, be rejected.

119 The General Court considered that it was not necessary to rule on the second plea submitted by the Kingdom of the Netherlands because it annulled the contested decision in so far as the decision found that the measure in question constituted State aid within the meaning of Article 87(1) EC.

120 The second plea alleging infringement of the obligation to state the reasons for the decision must therefore be examined.

The second plea in the action at first instance

Arguments of the parties

121 The Kingdom of the Netherlands submits that the Commission failed to comply with the obligation to state the reasons for the decision by not giving the reasons why the notified scheme is classified as State aid. According to that Member State, the Commission erred in fact in stating that a producer which does not comply with its emission standard and on which a fine is imposed receives NO_x credits. It is clear that, under the notified scheme, a producer obtains credits only if its emissions fall below the standard which is allocated to it and it leaves space for further discharges.

122 In addition, the Kingdom of the Netherlands points out the contradictions in the reasoning of the Commission in the contested decision. That institution refers inter alia to the putting in place of the scheme granting credits free of charge while then stating that they constitute consideration for the reduction of NO_x emissions. The Kingdom of the Netherlands explains that the scheme put in place does not grant any credit to the polluter, that is to say to the person responsible for issuing the emissions going beyond the standard laid down. Only the undertaking which reduces its emissions below that standard may obtain credits. In addition, the Commission failed to provide a detailed explanation for the conclusion that the scheme does not achieve its objectives, inter alia because it is a 'dynamic cap' scheme the impact of which on the environment is uncertain and the administrative and implementing costs of which are higher than those of the 'cap-and-trade' scheme.

123 Furthermore, the Commission had failed to establish, in accordance with the requirements laid down in the case-law of the Court, its contention that the notified scheme affects trade and distorts competition between the Member States.

124 The Commission replies, first, that is it clear that every producer which emits NO_x receives emission credits free of charge. That finding is not at odds with the conclusion that the undertakings must, in that case, provide consideration, in the form of additional environmental investments, in order to be able to add those assets to their available income. Second, concerning the doubts expressed by the Commission concerning the effectiveness of the scheme at issue, those sections of the contested decision do not concern the reasons for the question whether that scheme constitutes State aid. Third, the reasoning of the Commission in the contested decision shows how the grant of emission allowances free of charge to large Netherlands industrial undertakings affects trade between Member States.

Findings of the Court

125 According to settled case-law, the statement of reasons required by Article 296 TFEU must be appropriate to the measure at issue and must disclose in a clear and unequivocal fashion the reasoning followed by the institution which adopted the measure, in such a way as to enable the persons concerned to ascertain the reasons for it and to enable the competent court to exercise its power of review. The requirements to be satisfied by the statement of reasons depend on the circumstances of each case, in particular the content of the measure in question, the nature of the reasons given and the interest which the addressees of the measure, or other parties to whom it is of direct and individual concern, may have in obtaining explanations. It is not necessary for the reasoning to go into all the relevant facts and points of law, since the question whether the statement of reasons meets the requirements of Article 296 TFEU must be assessed with regard not only to its wording but also to its context and to all the legal rules governing the matter in question (see Joined Cases C-121/91 and C-122/91 *CT Control (Rotterdam) and JCT Benelux* v *Commission* [1993] ECR I-3873, paragraph 31, and Case C-76/01 P *Eurocoton and Others* v *Council* [2003] ECR I-10091, paragraph 88).

126 Concerning the argument of the Kingdom of the Netherlands that the Commission wrongly concluded, in point 3.2 of the contested decision, that an undertaking which fails to comply with the emission ceiling laid down nevertheless receives NO_x emission credits, it repeats the argument set out in paragraphs 45 and 46 of the application at first instance in the context of the plea regarding the lack of State resources and at paragraph 65 of the application in the present proceedings, already rejected by the Court in paragraph 94 above. In any case, that argument concerns more an error of fact than a failure to comply with the obligation to state reasons with regard to the finding, in the contested decision, as to the existence of State aid. Consequently, that argument must be rejected.

127 In addition, according to the Kingdom of the Netherlands, there is a contradiction in the reasoning of the Commission which, on the one hand, relies on the fact that the Member State intends to create a system of distribution free of charge of NO_x credits and, on the other hand, considers that the fact that the undertakings concerned reduce their emissions in order to be able to receive the potential aid constitutes consideration, suggesting that the credits are in reality not granted free of charge. In that regard, it must be pointed out that the Commission's first conclusion concerns the existence of State aid in point 3.2 of the contested decision in so far as the Netherlands authorities enjoyed the right to sell or auction emission allowances and, by offering NO_x credits free of charge, as intangible assets, therefore suffered foregone revenue. The finding made in point 3.3 of the contested decision that the undertakings are encouraged to reduce their emissions further than the target level imposed on them constituted a counterpart 'in line with the spirit of the … guidelines on State aid for environmental protection' for the advantage granted to those undertakings by the measure in question, falls within the assessment of the compatibility of the measure in question with the internal market. Consequently, there is no contradiction in the Commission's reasoning.

128 Therefore, the Kingdom of the Netherlands' argument must be rejected.

129 That Member State submits next that the Commission's reasoning is imprecise in so far as it contends that the 'dynamic-cap' scheme, as it was adopted, does not constitute the preferred option since the effects of that scheme on the environment are more uncertain and the administrative and implementing costs higher than under the 'cap-and-trade' scheme. In that regard, those considerations appear in point 4 of the contested decision. As the Advocate General considered in point 101 of his Opinion, those considerations do not form part of the statement of reasons regarding the classification of the measure in question as State aid or of the statement of reasons concerning the examination of the compatibility of that measure with the internal market. The Kingdom of the Netherlands' argument must therefore be rejected.

130 With regard to the requirement concerning the Commission's reasoning in relation to the question whether the scheme at issue is such as to affect trade between the Member States and to distort or threaten to distort competition, the Commission states, in point 3.2 of the contested decision, that the undertakings which benefit from the scheme in question are the largest undertakings which are engaged in trade between the Member States. According to the Commission, their position is reinforced by the measure in question which confers a competitive advantage on them, that is to say extra revenue in order to cover part of their production costs. That advantage is therefore capable of affecting trade between the Member States.

131 Applied to the classification of a measure as State aid, the obligation to state the reasons for a decision requires that the reasons why the Commission considers that the measure in question falls within the scope of Article 87(1) EC be stated. In that regard, according to the case-law, the Commission is not required to establish the existence of a real impact of the aid on trade between Member States and an actual distortion of competition, but only to examine whether that aid is capable of affecting such trade and distorting competition (Case C-66/02 *Italy* v *Commission* [2005] ECR I-10901, paragraph 111, and Joined Cases C-71/09 P, C-73/09 P and C-76/09 P *Comitato 'Venezia vuole vivere' and Others* v *Commission* [2011] ECR I-4727, paragraph 134). Thus, where it is apparent from the circumstances under which an aid was granted that it is liable to affect trade between Member States and to distort or threaten to distort

competition, the Commission must set out those circumstances in the statement of reasons for its decision (see inter alia, Case 57/86 *Greece* v *Commission* [1988] ECR 2855, paragraph 15; Joined Cases C-329/93, C-62/95 and C-63/95 *Germany and Others* v *Commission* [1996] ECR I-5151, paragraph 52; Case C-156/98 *Germany* v *Commission* [2000] ECR I-6857, paragraph 98; Case C-334/99 *Germany* v *Commission* [2003] ECR I-1139, paragraph 59; *Portugal* v *Commission*, paragraph 89; and Case C-494/06 P *Commission* v *Italy and Wam* [2009] ECR I-3639, paragraph 49).

132 In point 3.2 of the contested decision, the Commission notes, immediately after having confirmed the existence of an advantage with regard to the undertakings covered by the measure in question, that they constitute 'a specific group of large industrial undertakings which are active in trade between Member States'. It continues by stating that 'the position of these undertakings will be strengthened by this scheme which may lead to a change in the market conditions for their competitors', before adding that 'this strengthening must be regarded as affecting that trade'.

133 Therefore, it must be concluded that the Commission referred, in the contested decision, to the circumstances by virtue of which the aid in question is, in its opinion, liable to affect trade between Member States and to distort or threaten to distort competition. Taking into account the case-law cited in paragraph 125 of the present judgment, that decision has thus been sufficiently reasoned with regard to how trade between Member States is affected and the distortion of competition.

134 In view of the above, the plea alleging insufficient reasoning of the contested decision with regard to the conditions for application of Article 87(1) EC must be rejected. Accordingly the action at first instance must be dismissed in its entirety.

Costs

135 Under the first paragraph of Article 122 of the Rules of Procedure, where the appeal is well founded and the Court itself gives final judgment in the case, it is to make a decision as to costs.

136 With regard to the costs relating to the proceedings at first instance, it must be noted that, under Article 69(2) of the Rules of Procedure, the unsuccessful party is to be ordered to pay the costs if they have been applied for in the successful party's pleadings. Since the Kingdom of the Netherlands has been unsuccessful and the Commission has applied for it to be ordered to pay costs, the Kingdom of the Netherlands must be ordered to pay the costs relating to the proceedings at first instance.

137 Concerning the costs relating to the appeal proceedings, it should be noted that under Article 69(3) of the Rules of Procedure of the Court, applicable to appeals pursuant to Article 118 thereof, where each party succeeds on some and fails on other heads, the Court may order that the parties bear their own costs. Since the Commission and the Kingdom of the Netherlands have each failed on one head of claim, they must be ordered to bear their own costs.

138 Pursuant to Article 69(4) of the Rules of Procedure, which also applies to appeals by virtue of Article 118 thereof, the Member States which have intervened in the proceedings are to bear their own costs. In accordance with that provision, the Federal Republic of Germany is to bear its own costs both at first instance and on appeal. In application of that provision, the French Republic, the Republic of Slovenia and the United Kingdom are to bear their own costs.

On those grounds, the Court (Third Chamber) hereby:

1. **Sets aside the judgment of the Court of First Instance of the European Communities of 10 April 2008 in Case T-233/04 *Netherlands* v *Commission*;**

2. **Dismisses the cross-appeals;**

3. **Dismisses the action at first instance;**

4. **Orders the Kingdom of the Netherlands to pay the costs incurred by the European Commission relating to the proceedings at first instance and to bear its own costs in those proceedings;**

5. **Orders the European Commission and the Kingdom of the Netherlands to bear their own costs relating to the appeal;**

6. **Orders the Federal Republic of Germany, the French Republic, the Republic of Slovenia and the United Kingdom of Great Britain and Northern Ireland to bear their own costs.**

[Signatures]