JUDGMENT OF THE GENERAL COURT (Third Chamber)

2 March 2010 *

In Case T-16/04,

Arcelor SA, established in Luxembourg (Luxembourg), represented initially by W. Deselaers, B. Meyring and B. Schmitt-Rady, and subsequently by W. Deselaers and B. Meyring, lawyers,

applicant,

v

European Parliament, represented initially by K. Bradley and M. Moore, and subsequently by L. Visaggio and I. Anagnostopoulou, acting as Agents,

and

* Language of the case: English.

Council of the European Union, represented initially by B. Hoff-Nielsen and M. Bishop, subsequently by E. Karlsson and A. Westerhof Löfflerova, and subsequently by A. Westerhof Löfflerova and K. Michoel, acting as Agents,

defendants,

supported by

European Commission, represented by U. Wölker, acting as Agent,

intervener,

APPLICATION for partial annulment 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 (OJ 2003 L 275, p. 32), on the one hand, and application for compensation for the damage suffered by the applicant following the adoption of that directive, on the other,

THE GENERAL COURT (Third Chamber),

composed of J. Azizi (Rapporteur), President, E. Cremona and S. Frimodt Nielsen, Judges,

Registrar: K. Pocheć, Administrator,

having regard to the written procedure and further to the hearing on 15 April 2008,

gives the following

Judgment

Legal context

I — *Rules of the EC Treaty*

1 Article 174 EC provides inter alia:

‘1. Community policy on the environment shall contribute to pursuit of the following objectives:

— preserving, protecting and improving the quality of the environment,

— protecting human health,

— prudent and rational utilisation of natural resources,

— promoting measures at international level to deal with regional or worldwide environmental problems.

2. Community policy on the environment shall aim at a high level of protection taking into account the diversity of situations in the various regions of the Community. It shall be based on the precautionary principle and on the principles that preventive action should be taken, that environmental damage should as a priority be rectified at source and that the polluter should pay.

…

3. In preparing its policy on the environment, the Community shall take account of:

— available scientific and technical data,

— environmental conditions in the various regions of the Community,

— the potential benefits and costs of action or lack of action,

— the economic and social development of the Community as a whole and the balanced development of its regions.

…'

2 Article 175(1) EC provides:

'The Council, acting in accordance with the procedure referred to in Article 251 [EC] and after consulting the Economic and Social Committee and the Committee of the Regions, shall decide what action is to be taken by the Community in order to achieve the objectives referred to in Article 174 [EC].'

II — *The contested directive*

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; 'the contested directive'), which came into force on 25 October 2003, establishes a scheme for greenhouse gas emission allowance trading within the European Community ('allowance trading scheme'), in order to promote reductions of greenhouse gas emissions, in particular carbon dioxide ('CO2') in a cost-effective and economically efficient manner (Article 1 of the contested directive). It is based on the Community's obligations under the United Nations Framework Convention on Climate Change and the Kyoto Protocol. The Protocol was approved by Council Decision 2002/358/EC of 25 April 2002 concerning the approval, on behalf of the European Community, of the Kyoto Protocol to the United Nations Framework Convention on

Climate Change and the joint fulfilment of commitments thereunder (OJ 2002 L 130, p. 1). The Kyoto Protocol came into force on 16 February 2005.

4 The Community and its Member States entered into commitments to reduce their aggregate anthropogenic emissions of greenhouse gases listed in Annex A to the Kyoto Protocol by 8% compared with 1990 levels in the period from 2008 to 2012 (recital 4 in the preamble to the contested directive). To that end, they agreed to fulfil their commitments to reduce emissions jointly, in accordance with Article 4 of the Kyoto Protocol, under what is known as the 'Burden Sharing' Agreement; the table of contributions for each Member State appears in Annex II to Decision 2002/358.

5 The Kyoto Protocol sets out three mechanisms to permit the participating countries to achieve their objectives to reduce greenhouse gas emissions, namely, first, the international trade in emission allowances, second, the joint implementation of reduction projects and, third, the 'clean' development mechanism, the last two mechanisms also being known as 'flexible mechanisms'. While the joint implementation of reduction projects is designed to reduce greenhouse gas emissions in the countries participating in the Kyoto Protocol, the 'clean' development mechanism relates to emission reduction projects to be implemented in those developing countries which have not subscribed to the objectives of the Kyoto Protocol.

6 For the purposes of implementing within the Community the reduction objectives set out in the Kyoto Protocol and Decision 2002/358, the contested directive provides that, within the framework of the allowance trading scheme, the operators of the installations set out in Annex I to the directive must cover their greenhouse gas emissions by allowances which are allocated to them in accordance with national allocation plans ('NAPs'). If an operator succeeds in reducing its emissions, it may sell the excess allowances to other operators. Conversely, the operator of an installation from which the emissions are excessive may buy the necessary allowances from an operator with a surplus.

7 Under Annex I to the contested directive, certain combustion installations in particular fall within its scope, namely those for the production of energy and for the production and processing of ferrous metals such as '[i]nstallations for the production of pig iron or steel (primary or secondary fusion) including continuous casting, with a capacity exceeding 2.5 tonnes per hour'.

8 The contested directive provides for an initial phase running from 2005 to 2007 ('the first allocation period'), which precedes the first period of commitments laid down by the Kyoto Protocol, then a second phase running from 2008 to 2012 ('the second allocation period'), which corresponds to that first period of commitments (Article 11 of the contested directive). During the first allocation period, the contested directive applies to only one of the greenhouse gases listed in Annex II, namely CO2, and only to emissions from the activities listed in Annex I (Article 2 of the contested directive), including the production and processing of ferrous metals.

9 More specifically, the allowance trading scheme is founded, first, on the requirement to hold a permit before emitting greenhouse gases (Articles 4 to 8 of the contested directive), and, second, on the principle of allowances authorising the permit-holding operator to emit a certain quantity of those gases, with an obligation on that operator to surrender each year the amount of allowances equal to the total emissions from that installation (Article 12(3) of the contested directive).

10 Thus, any installation referred to in Annex I to the contested directive must hold a permit issued by the competent national authority. Under Article 4 of the contested directive, 'Member States shall ensure that, from 1 January 2005, no installation undertakes any activity listed in Annex I resulting in emissions specified in relation to that activity unless its operator holds a permit issued by a competent authority in accordance with Articles 5 and 6, or the installation is temporarily excluded from the Community [allowance trading] scheme pursuant to Article 27' of that directive.

11 Moreover, Article 6(2) of the contested directive provides:

'Greenhouse gas emissions permits shall contain the following:

…

(c) monitoring requirements, specifying monitoring methodology and frequency;

(d) reporting requirements; and

(e) an obligation to surrender allowances equal to the total emissions of the installation in each calendar year, as verified in accordance with Article 15 [of the contested directive], within four months following the end of that year.'

12 The conditions and procedures under which the competent national authorities allocate allowances to operators of installations on the basis of a NAP are set out in Articles 9 to 11 of the contested directive.

13 The first subparagraph of Article 9(1) of the contested directive stipulates:

'For each period referred to in Article 11(1) and (2) [of the contested directive], each Member State shall develop a [NAP] stating the total quantity of allowances that it intends to allocate for that period and how it proposes to allocate them. The [NAP] shall be based on objective and transparent criteria, including those listed in Annex III, taking due account of comments from the public. The Commission shall, without prejudice to the [EC] Treaty, by 31 December 2003 at the latest develop guidance on the implementation of the criteria listed in Annex III.'

14 The Commission of the European Communities issued the initial guidance in its Communication COM(2003) 830 final of 7 January 2004 on guidance to assist Member States in the implementation of the criteria listed in Annex III to the contested directive and on the circumstances under which force majeure is demonstrated. In its Communication COM(2005) 703 final of 22 December 2005 the Commission issued further guidance on NAPs for the second allocation period ('the Commission further guidance').

15 Under the second subparagraph of Article 9(1) of the contested directive:

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

16 Article 9(3) of the contested directive provides:

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

17 Article 10 of the contested directive states that the Member States are to allocate free of charge at least 95% of the allowances for the first allocation period, and at least 90% for the second allocation period.

18 Article 11 of the contested directive, which deals with the allocation and issue of allowances, provides:

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

2. For the five-year period beginning 1 January 2008, and for each subsequent five-year period, each Member State shall decide upon the total quantity of allowances it will allocate for that period and initiate the process for the allocation of those

allowances to the operator of each installation. This decision shall be taken at least 12 months before the beginning of the relevant period and be based on the Member State's [NAP] developed pursuant to Article 9 and in accordance with Article 10 [of the contested directive], taking due account of comments from the public.

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

…'

19 Annex III to the contested directive lists 11 criteria applicable to NAPs.

20 Criterion 1 of Annex III to the contested directive states:

'The total quantity of allowances to be allocated for the relevant period shall be consistent with the Member State's obligation to limit its emissions pursuant to Decision 2002/358 … and the Kyoto Protocol, taking into account, on the one hand, the proportion of overall emissions that these allowances represent in comparison with emissions from sources not covered by this Directive and, on the other hand, national energy policies, and should be consistent with the national climate change programme. The total quantity of allowances to be allocated shall not be more than is likely to be needed for the strict application of the criteria of this Annex. Prior

to 2008, the quantity shall be consistent with a path towards achieving or over-achieving each Member State's target under Decision 2002/358 … and the Kyoto Protocol.'

21 Criterion 3 of Annex III to the contested directive stipulates:

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

22 Under criterion 6 of Annex III to the contested directive, '[t]he [NAP] shall contain information on the manner in which new entrants will be able to begin participating in the [allowance trading] scheme in the Member State concerned.'

23 Under criterion 7 of Annex III to the contested directive, '[t]he [NAP] may accommodate early action [to reduce emissions] and shall contain information on the manner in which early action is taken into account'. Also under that criterion, '[b]enchmarks derived from reference documents concerning the best available technologies may be employed by Member States in developing their [NAPs], and these benchmarks can incorporate an element of accommodating early action [to reduce emissions]'.

24 Article 12(1) of the contested directive provides that allowances may be transferred between natural or legal persons within the Community or to natural or legal persons in third countries, where an agreement has been concluded between those countries and the Community in accordance with Article 25 of the contested directive and those allowances have been mutually recognised by the competent authority of each

Member State. Under Article 12(3) of the contested directive, by 30 April each year, the operator of each installation is to surrender to the competent authority a number of allowances equal to the total emissions from that installation during the preceding calendar year, in order that those allowances can subsequently be cancelled.

25 Article 13(1) of the contested directive provides that allowances are to be valid only for emissions during the period for which they are issued.

26 Under Article 16(2) of the contested directive, Member States are required to ensure publication of the names of operators which are in breach of requirements to surrender sufficient allowances under Article 12(3) of the contested directive. Under Article 16(3) and (4) of the contested directive, any operator which does not surrender sufficient allowances to cover its emissions during the preceding year is to be held liable for the payment of an excess emissions penalty amounting to EUR 40 in the first period and EUR 100 in subsequent periods for each excess tonne of CO2 equivalent emitted but not covered by a surrendered allowance. Moreover, payment of the excess emissions penalty does not release the operator from the obligation to surrender an amount of allowances equal to its total emissions.

27 Under Article 24 of the contested directive, subject to approval by the Commission in accordance with the procedure referred to in Article 23(2) of that directive, read in conjunction with Council Decision 1999/468/EC of 28 June 1999 laying down the procedures for the exercise of implementing powers conferred on the Commission (OJ 1999 L 184, p. 23), Member States may apply emission allowance trading to additional activities, installations and greenhouse gases, taking into account all relevant criteria, in particular effects on the internal market, potential distortions of competition, the environmental integrity of the allowance trading scheme and the reliability of the planned monitoring and reporting system.

28 Article 27 of the contested directive provides that Member States may also apply to the Commission for certain installations to be temporarily excluded from the allowance trading scheme, and the Commission may respond to that application by way of a decision. Furthermore, under Article 28 of the contested directive, Member States may, with the agreement of the Commission, allow operators of installations which so request to form a pool of installations from the same sector of activity. Finally, Article 29 of the contested directive provides that Member States may apply to the Commission for certain installations to be issued with additional allowances in cases of *force majeure*.

29 Article 30 of the contested directive, under the heading 'Review and further development', provides:

'…

2. On the basis of experience of the application of this Directive and of progress achieved in the monitoring of emissions of greenhouse gases and in the light of developments in the international context, the Commission shall draw up a report on the application of this Directive, considering:

(a) how and whether Annex I should be amended to include other relevant sectors, inter alia the chemicals, aluminium and transport sectors, activities and emissions of other greenhouse gases listed in Annex II, with a view to further improving the economic efficiency of the [allowance trading] scheme;

…'

Facts and procedure

30 The applicant, Arcelor SA, was formed following a merger between ARBED, Aceralia and Usinor in 2001. Since its merger with Mittal in 2006, the applicant has been known as ArcelorMittal and has become the world's largest steel producer. However, at the time when the present action was brought, with a production volume of 44 million tonnes per year, more than 90% of which was produced in the European Union, the applicant accounted for less than 5% of the world's steel production. It has 17 installations in the European Union for the production of pig iron and steel, which are located in France (Fos-sur-Mer, Florange and Dunkirk), Belgium (Liège and Ghent), Spain (Gijón-Avilés) and Germany (Bremen and Eisenhüttenstadt).

31 By application lodged at the Registry of the Court on 15 January 2004, the applicant brought the present action.

32 In its application, the applicant claims that the Court should:

— declare Articles 4, 6(2)(e), 9, 12(3) and 16(2), (3) and (4), in conjunction with Article 2, Annex I and Annex III, criterion 1, of the contested directive void to the extent that those provisions ('the contested provisions') apply to installations for the production of pig iron or steel, including continuous casting, with a capacity exceeding 2.5 tonnes per hour;

— declare that the European Parliament and the Council of the European Union are bound to make good the damage that the applicant has suffered as a result of the adoption of the contested provisions;

— order the Parliament and the Council to bear the costs.

33 In its reply, the applicant further claims that the Court should, in the alternative, annul the contested directive in its entirety.

34 By separate documents lodged at the Court Registry on 1 and 6 April 2004, the Parliament and the Council respectively submitted a plea of inadmissibility under Article 114 of the Rules of Procedure of the Court. The applicant submitted its observations on those pleas on 25 June 2004.

35 By document lodged at the Court Registry on 5 May 2004, the Commission applied, in accordance with Article 115(1) of the Rules of Procedure, for leave to intervene in the present proceedings in support of the Parliament and Council. By order of 24 June 2004, the President of the Third Chamber of the Court granted the Commission leave to intervene. In accordance with Article 116(4) of the Rules of Procedure, the Commission lodged its statement in intervention, limited to the issue of admissibility, on 2 September 2004.

36 The Parliament and the Council, in their pleas of inadmissibility, and the Commission, in its statement in intervention on admissibility, claim that the Court should:

— dismiss the action as inadmissible; and

— order the applicant to pay the costs.

37 By order of the Court of 26 September 2005, the decision on the pleas of inadmissibility were reserved for final judgment and the costs were reserved.

38 The Council, in its defence, the Parliament, in its rejoinder, and the Commission, in its statement in intervention on the substance of the case, further claim that the Court should, in the alternative, dismiss the action as unfounded.

39 Upon hearing the report of the Judge-Rapporteur, the Court (Third Chamber) decided to open the oral procedure and, by way of the measures of organisation of procedure laid down in Article 64 of the Rules of Procedure, invited the Parliament, the Council and the Commission to reply to certain questions in writing before the hearing. The Parliament, the Council and the Commission replied to those questions within the period prescribed.

40 The parties presented oral argument and replied to the questions put by the Court at the hearing on 15 April 2008.

41 At the hearing, after the parties had been heard, the President of the Third Chamber of the Court ordered the proceedings to be stayed, pursuant to Article 77(a) of the Rules of Procedure, read in conjunction with the third paragraph of Article 54 of the Statute of the Court of Justice, until the Court of Justice had delivered its judgment in Case C-127/07, which was duly noted in the minutes of the hearing.

42 Given that the Court of Justice delivered judgment on 16 December 2008 in Case C-127/07 *Arcelor Atlantique et Lorraine and Others* [2008] ECR I-9895, the parties were invited to submit their observations regarding the possible consequences to be drawn from that judgment in the context of the present proceedings. The parties submitted their observations within the period prescribed and the oral procedure was then closed.

43 Following the entry into force of the Treaty of Lisbon on 1 December 2009, the Court decided to reopen the oral procedure and called on the parties to set out their views on the possible consequences to be drawn from that fact and, in particular, from the entry into force of the fourth paragraph of Article 263 TFEU in the context of the present proceedings. The parties submitted their observations and the oral procedure was then closed.

Law

I — *Admissibility of the application for annulment*

A — *Arguments of the parties*

1. Arguments of the Parliament, the Council and the Commission

44 The Parliament and the Council, supported by the Commission, take the view that the application for partial annulment of the contested directive is inadmissible.

45 According to the Parliament and Council, the contested directive constitutes a 'true directive' for the purposes of the third paragraph of Article 249 EC, that is, an act of general application which has to be transposed by the Member States into domestic law and which applies in the abstract to situations determined objectively. The fourth paragraph of Article 230 EC makes no provision, for the benefit of individuals, for a direct action challenging such a directive.

46 The Parliament and the Council, supported by the Commission, further contend that the applicant is neither directly nor individually concerned by the contested provisions within the meaning of the fourth paragraph of Article 230 EC.

47 As regards the criterion of direct concern, the Parliament and the Council essentially submit that, unlike a regulation, a 'true directive' cannot, before implementing measures at national or Community level have been adopted or before the period allowed for adopting such measures has expired, directly produce binding legal effects on the legal position of individuals, or impose legal obligations on them. Consequently, such a directive cannot, of itself, directly concern such individuals within the meaning of the fourth paragraph of Article 230 EC. Thus, the contested provisions, which relate, in particular, to the issuing of emission permits, adoption of reporting and monitoring requirements, adoption of a NAP, and allocation and issue of emission allowances, do not impose any obligations on the applicant and do not change its legal position as long as they have not been transposed into domestic law.

48 In addition, the Parliament and the Council, supported by the Commission, consider that the contested directive leaves a very wide discretion to the Member States in their implementation and adoption of national measures, in particular in the elaboration of the NAP in accordance with Article 9, the determination of the minimum percentage of allowances to be allocated free of charge under Article 10, the establishment, under Article 11, of the total quantity of allowances for the allocation period in question, and their individual allocation to the operators of installations in accordance with the criteria set out in Annex III to the contested directive.

49 The Council, supported by the Commission, disputes the argument that the contested directive deprives the applicant of the benefit of existing permits obtained under Council Directive 96/61/EC of 24 September 1996 concerning integrated pollution prevention and control (OJ 1996 L 257, p. 26). Directive 96/61 is merely a coordinating

instrument which establishes a general framework for sectoral pieces of legislation and which lays down, inter alia, general operator obligations and permit conditions (recital 9 in the preamble to Directive 96/61). However, that directive does not grant any emission rights, nor are such rights granted directly on its basis. In particular, no emission limit values are fixed in Directive 96/61 itself (Article 18 of Directive 96/61).

50 The Parliament and the Council conclude from all of the foregoing that the applicant is not directly concerned by the contested provisions.

51 As regards the criterion of individual concern, the Council points out that the contested directive applies in a general and abstract manner to all operators engaged in the activities listed in Annex I to that directive and to all large industrial installations emitting CO2, including installations which produce pig iron and steel. The applicant has not proved that its situation is different to that of the other pig iron and steel producers. The Council adds that, under the terms of criterion 6 of Annex III to the contested directive and Article 11(3) thereof, the Member States must take into account the need for allowances to new entrants. Furthermore, the contested directive has been applicable from 1 May 2004 to pig iron or steel producers established in the 10 Member States which joined the Union on that date and whose activities are also covered by Annex I to that directive.

52 The Parliament and the Council take the view that neither Article 175(1) EC, which constitutes the legal basis for actions to be taken by the Community on environmental matters, nor Article 174 EC imposes on the Community legislature any obligation, when adopting measures of general application, to take account of the particular situation of individual operators. Nor can such an obligation flow from a higher-ranking rule of law such as the principles of proportionality and equal treatment or fundamental rights. According to the Parliament and the Council, those provisions cannot establish the *locus standi* of an individual before the Community Courts, as the prerequisites for *locus standi* laid down in the fourth paragraph of Article 230 EC

would otherwise be emptied of their substance. In any event, the applicant has not shown that the contested provisions produced 'dramatic consequences' for its particular situation to such an extent that they could be regarded as being contrary to the higher-ranking rules of law invoked.

53 On that point, the Council disputes the applicant's arguments that it is in a particular situation and, as the largest steel producer in Europe, involved in a restructuring process, with a limited profit margin, and having already achieved significant CO2 emission reductions, it is particularly seriously affected. It is not sufficient that certain operators are economically more affected by a measure than their competitors for that measure to be of individual concern to them. In the Council's opinion, the applicant is affected only by reason of its objective status as a producer of pig iron and steel, in the same way as any other operator in the same situation. Similarly, the fact that a measure of general scope may have specific effects which differ according to the various persons to which it applies is not such as to differentiate the applicant from all the other operators concerned, where that measure, like the contested directive in the present case, is applied on the basis of an objectively determined situation.

54 As regards the applicant's claim that the contested directive impedes the restructuring of its group in that it does not permit the cross-border transfer of allowances linked to the production capacity of installations established in different Member States, the Council contends that the applicant has failed to explain why it is the only company affected, even though it itself refers to the example of the ongoing restructuring of Corus. In any event, the possibility of using the allowances allocated to closed installations is largely dependent on the discretion of the Member States. Thus, almost half of the Member States allow for a transfer of allowances from a closed installation to a replacement installation, even if in several instances such transfers are allowed only within a Member State's territory. The Council, supported by the Commission, also submits that, in exercising their powers of discretion, all Member States have chosen, pursuant to Article 11(3), in conjunction with criterion 6 of Annex III to the

contested directive, to provide for free-of-charge access to reserve allowances for new entrants. In addition, even if the applicant were unable to transfer the allowances of its closed-down installations to other installations of its group, it will none the less be entitled to receive allocations in connection with the extension of the capacity of such other installations free of charge, given that, in accordance with Article 3(h) of the contested directive, 'new entrant' includes an extension of an existing installation. Finally, as regards early action on emissions reductions, the Council observes that, under criterion 7 of Annex III to the contested directive, a NAP may accommodate such measures and that, on that basis, Member States have a degree of freedom.

55 According to the Parliament and the Council, the applicant has failed to demonstrate that, with regard to the contested directive, it was in a similar situation to the applicants in the case-law which it invokes (judgments in Case 11/82 *Piraiki-Patraiki and Others* v *Commission* [1985] ECR 207; Case C-152/88 *Sofrimport* v *Commission* [1990] ECR I-2477, paragraph 28; Case C-309/89 *Codorníu* v *Council* [1994] ECR I-1853; Joined Cases T-480/93 and T-483/93 *Antillean Rice Mills and Others* v *Commission* [1995] ECR II-2305, paragraph 67; and Case T-135/96 *UEAPME* v *Council* [1998] ECR II-2335). As regards the applicant's argument founded on the existence of long-term agreements for the supply of gas which it concluded with power stations prior to the adoption of the contested directive, the Council takes the view that the two cumulative conditions laid down in the case-law cited above for determining the existence of individual concern within the meaning of the fourth paragraph of Article 230 EC are not met in the present case. The first of those conditions is that a higher-ranking rule of law must require the Community institutions to take account of the specific situation of the applicant as compared with that of any other person concerned by the contested measure, while the second is that the execution of the contracts concluded must be prevented wholly or in part during the period of application of that measure. The applicant itself states that the gas referred to by the agreements in question is delivered both to its own power plants and to third parties. Consequently, the applicant can benefit from the allowances allocated to the power plants belonging to its group or transfer them between its various production installations. The Council notes that, under the terms of point 92 of the Commission further guidance (see paragraph 14 above), where a waste gas from a production process at one installation is used as a fuel at another installation, the distribution of

allowances between those two installations is a matter for Member States to decide. The Member State may thus choose to allocate allowances to the operator of the installation transferring the waste gas, in this case to a pig iron or steel producer, even though the emissions from the combustion of that gas are not generated by the steel-producing installation as such, but by the central power station. Consequently, the applicant has failed to demonstrate that the contested directive would prevent it from performing the contracts for the supply of gas at issue. In any event, the mere fact that the contested directive might, through national implementing measures, render the performance of such contracts more difficult cannot lead to establishing that the applicant is individually concerned.

56 The Parliament and the Council, supported by the Commission, submit that the applicant has also failed to demonstrate that it belonged to a closed group of operators. As the contested directive is a measure of general scope which applies to all operators carrying out the activities listed in Annex I thereto, the applicant is differentiated only in its objective capacity as an entity which produces pig iron and steel, in the same way as any other operator in the same situation. Therefore, the possible existence of only 15 pig iron and steel producers at the time when the contested directive was adopted is not sufficient to differentiate the applicant individually. The Parliament states that, even if the applicant belongs to a 'closed and identifiable group' known at the time when the contested directive was adopted or is economically more affected by a measure than its competitors, that would not suffice for it to be differentiated as an addressee.

57 The Council disputes that the applicant is likely to become a 'net buyer of allowances' because of its particular situation. On that point, it recalls, first, that, during the first allocation period, the Member States are obliged to allocate at least 95% of their allowances under the NAP free of charge and at least 90% of allowances during the second allocation period. Second, under Article 12(1) and (2) of the contested directive, the allowances are transferable without restrictions within the same group of undertakings, with persons within the Community and with persons in third countries. Third, the number of allowances initially allocated is determined, in a discretionary manner, by each Member State, having regard to a range of factors and criteria (see paragraph 48 et seq. above). Finally, the availability of the Kyoto Protocol flexible

mechanisms (see paragraph 5 above) opens a possibility for pig iron or steel producers to convert the emissions credits they earn from the relevant projects into allowances that can be used for compliance under the emissions trading scheme. Consequently, it may very well be that the applicant is allocated allowances for 100% of its emissions free of charge.

58 On the basis of studies, the Council, supported by the Commission, rejects the claim with regard to the creation of a 'unique lock-in situation' for pig iron and steel producers in that the option of further reducing CO2 emissions is not technically available to the iron and steel industry. In that regard, the Council essentially submits that there is technical potential to reduce such emissions in the iron and steel sector, from both a short-term and a long-term perspective, that the Community provides extensive funding for research in that sector and that the allowance trading scheme provides economic incentives for pig iron and steel producers to further reduce their CO2 emissions.

59 As regards the applicant's claim that pig iron and steel producers will not be able to pass on to their customers any increase in production costs resulting from the need to purchase emission allowances, the Council, supported by the Commission, contends that whether such a producer will be obliged to purchase any allowances will depend on the initial amount of allowances allocated to it under the NAP and on its efforts to decrease emissions. The applicant itself makes reference to its group restructuring process and to the reduction in the number of its blast furnaces by 2012, which is likely to bring emission reductions in itself, especially when, as stated in the applicant's press release, its blast furnaces are replaced by electric arc furnaces which have lower CO2 emissions per tonne of steel produced. Even assuming that the applicant had to purchase additional allowances, the associated costs could always be passed on, at least to some extent, to consumers, given the substantial increase in prices in the expanding steel sector.

60 The Parliament and the Council, supported by the Commission, submit, for all the reasons presented above, that the contested directive is not of individual concern to the applicant and that the action for annulment must therefore be declared inadmissible.

61 In addition, the Parliament, supported by the Commission, argues that the application for annulment is inadmissible on the ground that the contested provisions cannot be severed from the rest of the contested directive without the latter being emptied of its substance. According to the Parliament, if, for example, the obligations as to permits to emit greenhouse gases (Articles 4 and 6) and in respect of NAPs (Article 9) were removed, the result would be an act the substance of which would be completely 'inverted'.

62 On that point, the Parliament disputes the applicant's assertion that the allowance trading scheme would remain 'substantially intact' if steel and pig iron producers were to be excluded from its scope, as that aspect bears no relation to the relevant question of whether or not the annulment of the contested provisions would have the effect of altering the substance of the remainder of the contested directive. Moreover, according to the Parliament and the Council, the applicant's relatively late attempt, at the stage of its reply and therefore contrary to the requirements of Article 48(2) of the Rules of Procedure, to amend its submissions to the effect that its action is to be interpreted 'as including a request for complete annulment of the [contested] directive if partial annulment should not be possible' cannot succeed. That approach would amount to an extension, rather than a reduction, of the applicant's initial plea, which was aimed solely at a 'partial annulment' of the contested directive. However, the applicant has not claimed that any new matters of fact or law such as to justify the introduction of a new plea within the meaning of Article 48(2) of the Rules of Procedure have come to light during the course of the proceedings.

63 Consequently, the Parliament and the Council take the view that the application for annulment should be declared inadmissible on that ground also.

64 In their observations on the consequences to be drawn from the entry into force of the fourth paragraph of Article 263 TFEU, the Parliament and the Council, supported by the Commission, submit that that circumstance is not such as to alter that assessment, as that article is not applicable to the present proceedings and the contested directive is not a regulatory act within the terms of that provision.

2. Arguments of the applicant

65 The applicant submits, first, that, according to established case-law in relation to the fourth paragraph of Article 230 EC, the mere fact that the contested measure is a directive is not sufficient to render an action for annulment inadmissible. Therefore, an action which seeks the annulment of certain provisions of a directive is admissible if those provisions are of direct and individual concern to the applicant.

66 As regards the criterion of direct concern, the applicant submits that, although, in accordance with the third paragraph of Article 249 EC, directives require implementing measures by the Member States in order to produce direct effects on the legal situation of economic operators, that requirement does not of itself suffice to justify the conclusion that there is no direct concern to the applicant within the meaning of the fourth paragraph of Article 230 EC. If that were the case, directives could never be challenged by such operators, which would be at variance with the case-law and with the principle of effective judicial protection. Where a Community measure, including a directive, does not leave the Member States with any discretion as to the obligation to be imposed on an applicant, that is to say, where implementation is purely automatic, such an applicant is directly concerned. The Community institutions cannot, solely by their choice of legal instrument, deprive that applicant of the judicial protection offered by the fourth paragraph of Article 230 EC.

67 In the present case, the contested provisions leave no discretion to the Member States to impose certain obligations on the applicant.

68 In that regard the applicant submits, first, that, according to Article 4 of the contested directive, Member States have been required to ensure that, from 1 January 2005, no pig iron or steel producers would undertake any activity in their installations without an emissions permit. Member States have no discretion in the matter. Article 27(1) of the contested directive provided for the possibility of a temporary exclusion of certain installations from the allowance trading scheme only up to 31 December 2007, with the consequence that the obligation was to take effect as of 1 January 2008 at the very latest. Similarly, under Article 27(2) of the contested directive, Member States could provide for a temporary exclusion from 2005 to 2007 but that did not imply that Member States had a discretion and, because the conditions laid down therein were so restrictive, such exclusion had no relevance in practice.

69 Second, the argument concerning the Member States' alleged considerable discretion in the elaboration of the NAPs is, in the view of the applicant, without relevance, given that the contested directive distinguishes clearly between, on the one hand, the permit (Article 4) and, on the other, the allowances (Article 9). The requirement of a CO2 emissions permit as such affects the legal position of the applicant because it partly invalidates the applicant's existing operating permits and CO2 emission rights under Directive 96/61 which it had previously obtained for its production installations. According to Article 6(2) of the contested directive, this permit imposes additional obligations in respect of monitoring and reporting and the obligation to surrender the number of allowances required to cover the CO2 emissions of the installation concerned in each calendar year. In the applicant's opinion, Member States have no discretion as to the obligations to be imposed on the applicant in this respect.

70 Third, according to Article 9 of the contested directive, read in conjunction with criterion 1 of Annex III thereto, the total allowances to be allocated for the relevant allocation period must, on the one hand, be consistent with the Member State's obligation to limit its emissions pursuant to Decision 2002/358 and the Kyoto Protocol and, on the other, not go beyond what is likely to be needed for the strict application of the criteria of Annex III to the contested directive. That results in the establishment of an 'absolute cap on allowances' which Member States are required to observe, with no margin for discretion, when setting the total quantity of allowances to be allocated. This interpretation, it contends, is confirmed by paragraph 10 of the Commission

further guidance on criterion 3 of Annex III to the contested directive (see paragraph 14 above).

71 Fourth, and finally, under Articles 12(3) and 16 of the contested directive, Member States, without having any discretion in that regard, are required, first, to ensure that, by 30 April each year at the latest, the operator of each installation surrenders an amount of allowances equal to the total emissions from that installation during the preceding calendar year and, second, to impose sanctions on it if it fails to comply with that obligation.

72 The applicant concludes from this that the contested provisions leave the Member States no discretion with regard to the obligations to be imposed on it and, consequently, that those provisions are of direct concern to it within the meaning of the fourth paragraph of Article 230 EC.

73 The applicant considers that the contested provisions are also of individual concern to it. First, the Community legislature is under a duty to take into account the serious consequences of the contested provisions for the particular situation of the applicant and, second, the applicant forms part of a closed category consisting of a limited number of pig iron and steel producers affected by those provisions.

74 First, in the applicant's opinion, the duty of the Community legislature to take account of the consequences for the situation of certain persons of a measure which it envisages adopting distinguishes those persons individually (*Piraiki-Patraiki and Others* v *Commission*, cited in paragraph 55 above, paragraph 19; *Sofrimport* v *Commission*, cited in paragraph 55 above, paragraph 11; and *Codorníu* v *Council*, cited in paragraph 55 above, paragraph 20); that duty may arise under a specific provision of the EC Treaty (*Antillean Rice Mills and Others* v *Commission*, cited in paragraph 55 above, paragraph 67) or any other higher-ranking rule of law (*UEAPME* v *Council*, cited in paragraph 55 above, paragraph 90), such as the principles of proportionality and equality or fundamental rights.

75 On that point, the applicant essentially submits that the Community legislature was under a duty, pursuant to the principles of proportionality and equal treatment and in view of its property rights and its right to pursue an economic activity, to take into account the very serious consequences of the contested directive for its particular situation. Thus, by failing, contrary to the initial proposals of the Parliament and the Commission, to include other sectors in Annex I to the contested directive – in particular the competing non-ferrous metals and chemicals sectors – the Community legislature infringed the principles of equal treatment and undistorted competition. Similarly, it infringed the applicant's rights of property, its freedom of establishment and its freedom to pursue an economic activity as well as the principle of proportionality by failing to take account of the technical and economic impossibility for steel producers to reduce CO2 emissions any further. In doing so, the Community legislature placed a disproportionate burden on the applicant which put its existence at risk in so far as it would necessarily become a 'net buyer of allowances' with no possibility of passing on the associated costs to its customers. The contested provisions are, moreover, disproportionate to the extent that they are not coupled with measures which would at the very least alleviate their drastic consequences for the applicant, such as a control mechanism concerning the price of the allowances or the cross-border transfer of allowances within the same group of companies. In the absence of such a transfer option, which impacts seriously on the applicant's restructuring efforts and its competitiveness, the contested directive also affects the applicant's right of property and its freedom of establishment. The applicant states that the unacceptable restriction on its freedom of establishment which results from the lack of a rule in the contested directive permitting the cross-border transfer of emission allowances between different production installations in the same group of companies cannot be offset by the argument that an extension of the production capacities of an installation is likely to benefit from the allowance rules for 'new entrants', which are subject to the discretion of the destination Member State concerned.

76 Second, the applicant submits that it belongs to a closed category of companies particularly affected by the contested directive. In the European Union of 15 Member States there were only 15 companies or groups of companies which operated installations for the production of pig iron and steel, namely the applicant, Corus, Thyssen-Krupp, HKM, Riva, Lucchini, SSAB, Voest Alpine, Salzgitter, Duferco, Rauttaruukki, Fundia, Saint Gobain, DHS and Neue Maxhütte, to which may be added, since 1 May

2004, 5 producers of pig iron or steel in the 10 new Member States, namely Ispat Polska, Czech Steel Company, Moravia Steel, Dunaferr Dunai and US Steel Košice. However, the enlargement of the European Union as such cannot deprive this group of its categorisation as a closed group within the meaning of the case-law, given that that enlargement was fixed by Article 2 of the Act concerning the conditions of accession to the European Union of the Czech Republic, the Republic of Estonia, the Republic of Cyprus, the Republic of Latvia, the Republic of Lithuania, the Republic of Hungary, the Republic of Malta, the Republic of Poland, the Republic of Slovenia and the Slovak Republic and the adjustments to the Treaties on which the European Union is founded (OJ 2003 L 236, p. 33) before the contested directive entered into force. Moreover, new entrants are *de facto* excluded, given that market entry by way of setting up new blast furnace operations is not an economically viable option. Since the entry into force of the contested directive, and having regard to the decrease in the number of blast furnaces in the European Union since 1975, a new entrant can establish itself on the market only by way of an acquisition.

77 According to the applicant, the 'unique lock-in situation' of that group of producers, which distinguishes them from all other persons, results from the fact that, in the foreseeable future, for technical reasons, pig iron and steel producers, unlike the other economic sectors affected, such as the cement, electricity, paper and glass sectors, will not be in a position to reduce CO2 emissions to any significant extent in accordance with the targets in the contested directive. Therefore, the choice between emissions reduction and the purchase of additional allowances is essentially not available to producers in that group, thereby placing them necessarily in the position of 'net buyers of allowances'. In the steel production process, the emission of CO2 is inevitable because coal is used as a raw material, and not as a fuel. Thus, economically efficient alternatives for CO2 reduction, such as switching to natural gas as a fuel, for example, are not available. Blast furnace technology has been perfected in terms of energy output and is now approaching its theoretical optimum, which still results in two tonnes of CO2 being emitted for each tonne of steel produced. A further reduction of emissions would be possible only through a technological breakthrough, the development of which will take at least 20 to 30 years. A decrease in production, however, is no option, given that blast furnaces must, for technological reasons, always operate at near to full capacity.

78 On the basis of studies which have been carried out, the applicant submits that, for the coming 25 years or so, blast furnace operators will have to work with the existing technologies, which have very limited margins of progress since, so far, all attempts at replacement have failed for technical and/or economic reasons. It also adds that, contrary to the Council's assertions, the emissions reductions which it achieved by 2002 were not a result of technological improvements but were mainly due to the closure of five blast furnaces, the capacity increase in other ones and a raw-material switch from Lorraine ore to Brazilian ore, which has a better energy output. Similarly, the applicant's reduction target for 2008 to 2012 should be achieved mainly by closures of plants along with a transfer of production to facilities in other Member States.

79 The applicant further submits that steel is the only one of the four sectors in Annex I to the contested directive which is faced with competition from other sectors not covered by that directive, namely non-ferrous metals and plastics. That situation places pig iron and steel producers at an even more serious competitive disadvantage, on the one hand, because of a 'very concentrated' demand, namely from the automotive industry and, on the other, because of intensified competition from sectors not covered by the contested directive and steel producers from third countries, such as the United States of America, with no corresponding obligations under the Kyoto Protocol and accounting for 65% of world production. Thus, European steel producers will not be able to pass on to their customers any increase in the production costs resulting from the need to purchase CO2 allowances, which will further affect their already low profitability. In that regard, the competitive situation for the other sectors referred to in Annex I to the contested directive is different. For example, in view of the expected substantial rise in electricity prices, energy suppliers will be able to pass on to their customers any increase in production costs and to improve their profitability appreciably.

80 The applicant states that, by contrast, even the recent price increase in steel will not enable it to pass on to its customers the part of the increase in its production costs which results from the need to buy emission allowances. That price increase is merely

the result of the increase in the costs of raw materials and transportation at a worldwide level. Globally, European pig iron and steel producers face severe competition from producers from third countries which have not ratified the Kyoto Protocol, such as the United States of America, the Commonwealth of Australia and the Republic of Turkey, or from third countries which have ratified the Kyoto Protocol but are not initially required to reduce their CO2 emissions, such as the Republic of India, the People's Republic of China and the Federative Republic of Brazil (Annex B to the Kyoto Protocol), or countries which, under the Kyoto Protocol, are only under the obligation not to increase their emissions, such as the Russian Federation and Ukraine. Therefore, the European pig iron and steel producers are the only companies which have additional production costs resulting from the implementation of the Kyoto Protocol, while they are exposed to increasingly vigorous competitive pressure from third country imports, the scale of which is dependent on price levels on the European market. The applicant adds that, as the costs for emission allowances are currently EUR 26 per tonne of CO2 emitted, the extra costs per tonne of steel produced, which implies the emission of approximately two tonnes of CO2, are approximately EUR 52, whereas the global transport price for one tonne of steel is normally no more than EUR 20. The applicant also states that, unlike pig iron or steel producers, energy suppliers, in particular those established in Germany and the United Kingdom, are presumed to include in their electricity prices the value of emission allowances received free of charge in order to make significant windfall profits from them.

81 The applicant concludes from the foregoing that the pig iron and steel producers in the European Union are in a 'unique lock-in situation' which distinguishes them from all other persons. That situation is aggravated by the fact that the contested directive does not provide for any cap or control mechanism concerning the price of allowances. Pig iron and steel producers are thus exposed, according to recent studies, to prices ranging from EUR 20 to EUR 60 or more for one allowance to emit one tonne of CO2, when even a price of EUR 20 per tonne would destroy the gross profit in the steel sector.

82 Third, the applicant submits that, as by far the largest pig iron and steel producer in Europe – with a production of 40 million tonnes of steel, followed by Thyssen-Krupp (17 million tonnes) and Corus (16 million tonnes) – it is particularly seriously affected

by the contested directive. By using its highly advanced blast furnace technology, the applicant has already reduced its greenhouse gas emissions, including its CO2 emissions, clearly beyond the 8% target of the Kyoto Protocol, namely by 19% in absolute terms and 24% in relative terms (per tonne of steel produced) since 1990 and cannot, for the technical reasons set out in paragraphs 77 and 78 above, further reduce CO2 emissions to any significant extent. Moreover, in 2002 the applicant achieved a gross profit of EUR 16, and a net profit of EUR 4, per tonne of CO2 emitted for its blast furnace operations. Consequently, even at the lowest price of an allowance as currently estimated (EUR 20), which would correspond for the applicant to an extra cost of EUR 40 per tonne of steel, production would become unprofitable to such an extent that continued operation of its installations in Europe would no longer be viable.

83 Fourth, the applicant is the only European pig iron and steel producer faced with a particular problem created by the contested directive because of the ongoing restructuring process within its group aimed at increasing its competitiveness. That restructuring, initiated by the 2001 concentration (see paragraph 30 above), that is to say, before the contested directive was adopted, concerned the closure of, or a capacity reduction at, less efficient installations in one Member State and compensating increases in production at more efficient installations in other Member States. That situation is particular to the applicant and distinguishes it from all other European pig iron or steel producers, which have concentrated their production in one Member State. The only exception is Corus, which has installations in the United Kingdom and the Netherlands but which has already optimised its production. The contested directive seriously compromises that restructuring process, by not requiring the Member States to allow for a cross-border transfer of allowances from an installation earmarked for closure to other installations established in other Member States. Hence, the Belgian and German Governments have already indicated that the applicant would lose its emission allowances for the installations established in Wallonia (Belgium) and in Bremen (Germany) in the event of closure, with the result that it would not be in a position to transfer those allowances to its installations established in Spain or France, where a corresponding increase in production capacity is planned. Similarly, the German NAP and the first sentence of Article 10(1) of the German draft Law on the national allocation plan during the first allocation period provide for the cancellation of allowances in the event of the closure of an installation

unless the operator commissions a new installation in Germany (and not in another Member State). Similarly, the French NAP provides that an operator may keep the allowances for an installation which is terminated only if the activity is transferred to another installation established in French territory. The applicant is thus forced to act counter to its objective of restructuring and increased competitiveness. It has to purchase additional emission allowances to cover the production capacity of the installations which it initially intended to close and transfer to installations established in other Member States and to continue to operate less profitable installations for the sole purpose of not losing the allowances which have already been allocated.

84 The applicant adds that it is also the only operator in all of the sectors covered by Annex I to the contested directive which faces the problem of cross-border transfer of production capacity between installations established in different Member States. That problem is unknown in the cement, glass, energy and paper sectors, in which installations, unlike steel production installations, are located either close to customers or in areas with sufficient quantities of raw materials. Consequently, for producers operating in those sectors, the closure of an installation in one Member State and the transfer of production to another Member State is normally not a viable option.

85 However, in the light of the freedom of establishment, there is no justification for leaving to the discretion of the Member States the question of the extent to which cross-border transfers of production capacities remain possible. That is all the more so the case since there are important economic and political incentives for Member States not to permit such a transfer of production capacity, including the incentive of the emission allowances associated with those production capacities. On the one hand, from the point of view of the Member State which initially allocated those allowances, there is no interest in facilitating such a transfer and losing both the production capacity concerned and the associated jobs in its territory, and also the allowances which have already been allocated. On the other hand, the Member State which is the destination of such a transfer, in particular if it is a small State, would not necessarily have any interest in allocating allowances free of charge to the new entrant, given the risk of breaching its national cap and, consequently, failing to meet its reduction obligations under Decision 2002/358 and the Kyoto Protocol.

As is apparent from point 5 in Annex 4 to the Commission further guidance (see paragraph 14 above), these reservations are confirmed by the fact that the majority of the Member States do not allow cross-border transfers of allowances. In its further guidance, the Commission itself draws attention to the problems described above, noting that, in the first allocation period, the Member States adopted a multitude of detailed provisions governing reserves for new entrants and closures, including transfer rule arrangements, and that this contributes to a high degree of complexity and lack of transparency in the internal market and may result in distortions of competition. The Commission concluded that it is necessary to consider the set-up of a Community new entrant reserve, accompanied by a harmonisation of the administrative rules applicable to new entrants, closures and cross-border transfers within the internal market (Annex 7 to the Commission further guidance). The applicant also invokes a study according to which, under the allowance trading scheme and regard being had to the Member States' interest in keeping the tax base and the job opportunities that installations established in their territory provide, it is rational at present for Member States to take allowances away from installations that close, or at least to make the retention of those allowances subject to the opening of a new installation in their territory in order to prevent the operator from leaving the country. This could result in an economically inefficient and politically undesirable regulatory contest between Member States to retain and attract investment. For those reasons, that study concludes that there is a need for harmonisation, at Community level, of the rules permitting installations to keep their allocation even in the event of closure. Consequently, in the applicant's opinion, the effectiveness of the freedom of establishment can be safeguarded only by the intervention of the Community legislature itself.

86 Fifth, the applicant submits that it is particularly affected by the contested directive by reason of long-standing long-term agreements with power stations, some of which do not belong to the applicant's group, concerning the transfer of blast furnace gas containing carbon monoxide, CO2 and nitrogen for purposes of electricity generation. The applicant raises the question whether, in the light of Article 3(b) and (e) of the contested directive, the emission allowances at issue must be allocated to it or to the power plants. If the allowances were to be allocated to the power plants, the applicant's situation would be further worsened since, as appropriate, it would be forced to purchase the necessary allowances on the trading market or, if deliveries were no longer to be made to the power stations, it would have to flare its blast furnace gas

but without having the corresponding number of allowances. This would place the applicant at a serious competitive disadvantage compared with competitors which happen to use their own power plants.

87 Sixth, and finally, the applicant observes that, because it is particularly affected by the contested provisions, it has been very closely and actively involved in the legislative process, in particular in various meetings with representatives of the Commission, the Parliament and the Council. Within that context, in a number of cases, concerns expressed by the applicant were initially taken up but were finally rejected without any reasons being given.

88 In the light of the foregoing, the applicant submits that it has established the existence of a set of factors which is peculiar to it and which differentiates it from all other persons, thereby rendering the present application for annulment admissible under the fourth paragraph of Article 230 EC.

89 As regards the plea of inadmissibility raised by the Parliament in respect of the application for the partial annulment of the contested directive, the applicant emphasises that it does not seek complete removal of the contested provisions, but only that they be declared inapplicable to installations for the production of pig iron or steel. Therefore, that application does not require any alteration of the emissions trading scheme in relation to the other sectors listed in Annex I to the contested directive. The scope of the contested directive can be extended to other sectors, as has been proposed in respect of the non-ferrous metals and chemicals sectors, or reduced without affecting the functioning and very substance of the allowance trading scheme. Thus, the partial annulment sought would have the effect only of removing the – distinct and clearly defined – part of Annex I to the contested directive which refers to installations for the production of pig iron or steel.

90 According to the applicant, even assuming that the contested provisions were not severable from the contested directive as a whole, the application for annulment would be admissible in any case. That application must be interpreted as including a request for annulment of the contested directive in its entirety if partial annulment should not be possible. That can be inferred from the need to interpret the form of order sought in context and in the light of the purpose of the application, which is to end the infringement of fundamental rights of the applicant. Should the Court not follow the approach set out in paragraph 89 above, the applicant requests, in the alternative, the complete annulment of the contested directive. Such a request can, it argues, still be made after submission of the application.

91 For all of these reasons, the applicant submits that the application for annulment is admissible.

92 In its observations on the consequences to be drawn from the entry into force of the fourth paragraph of Article 263 TFEU, the applicant submits, in essence, first, that that provision is applicable to the present proceedings and, second, that, by reason of its content, the contested directive is a regulatory act within the meaning of that provision on the ground that the contested provisions do not leave any scope to the Member States as regards their implementation, thereby releasing the applicant from having to demonstrate that it is individually concerned by that directive.

B — *Findings of the Court*

93 Under the fourth paragraph of Article 230 EC, any natural or legal person may institute proceedings against a decision addressed to that person or against a decision which, although in the form of a regulation or a decision addressed to another person, is of direct and individual concern to the former.

94 It is settled case-law that the fact that that Treaty provision does not expressly recognise the admissibility of actions brought by private persons for annulment of a directive within the meaning of the third paragraph of Article 249 EC is not of itself sufficient to render such actions inadmissible. The Community institutions cannot, merely by means of their choice of legal instrument, deprive individuals of the judicial protection which is afforded to them by the Treaty, even if that legal instrument is a directive (orders in Case T-223/01 *Japan Tobacco and JT International* v *Parliament and Council* [2002] ECR II-3529, paragraph 28; Case T-154/02 *Villiger Söhne* v *Council* [2003] ECR II-1921, paragraph 39; Case T-213/02 *SNF* v *Commission* [2004] ECR II-3047, paragraph 54; and the order of 25 April 2006 in Case T-310/03 *Kreuzer Medien* v *Parliament and Council*, not published in the ECR, paragraphs 40 and 41). Similarly, the mere fact that the contested provisions form part of a measure of general application which constitutes a real directive and not a decision, within the meaning of the fourth paragraph of Article 249 EC, taken in the form of a directive is not of itself sufficient to exclude the possibility that those provisions may be of direct and individual concern to an applicant (see, to that effect, the orders in *Japan Tobacco and JT International* v *Parliament and Council*, paragraph 30, and in Case T-321/02 *Vannieuwenhuyze-Morin* v *Parliament and Council* [2003] ECR II-1997, paragraph 21).

95 It must be noted, in the present case, that the contested directive, by means of both its form and its substance, is a measure of general application which applies to objectively defined situations and gives rise to legal effects in respect of categories of persons defined in general or abstract terms, namely, all operators of installations which pursue one of the activities listed in Annex I to the contested directive, including the production of pig iron and steel undertaken by the applicant.

96 However, it cannot be excluded that, in certain circumstances, the provisions of such a measure of general application may concern certain individuals directly and individually (see, to that effect, Case C-358/89 *Extramet Industrie* v *Council* [1991] ECR I-2501, paragraph 13; *Codorníu* v *Council*, cited in paragraph 55 above, paragraph 19; and Case C-50/00 P *Unión de Pequeños Agricultores* v *Council* [2002] ECR I-6677, paragraph 36).

97 In addition, it is settled case-law that the condition that the measure forming the subject-matter of the proceedings must be of direct concern to a natural or legal person, within the meaning of the fourth paragraph of Article 230 EC, requires that that measure should affect directly the legal situation of the individual and leave no discretion to its addressees, who are entrusted with the task of implementing it, such implementation being purely automatic and resulting from Community rules without the application of other intermediate rules (Case C-486/01 P *Front national* v *Parliament* [2004] ECR I-6289, paragraph 34, and Case C-15/06 P *Regione Siciliana* v *Commission* [2007] ECR I-2591, paragraph 31).

98 The Court considers it appropriate to examine, in the first place, whether the applicant is individually concerned by the contested provisions. Only then, if necessary, will the Court also examine whether the applicant is directly concerned by those provisions.

99 As has been held in the settled case-law, natural or legal persons other than those to whom a measure is addressed may claim to be individually concerned, for the purposes of the fourth paragraph of Article 230 EC, only if that measure affects them by reason of certain attributes which are peculiar to them or by reason of circumstances in which they are differentiated from all other persons and by virtue of these factors distinguishes them individually just as in the case of the person to whom the measure is addressed (Case 25/62 *Plaumann* v *Commission* [1963] ECR 95, at 107; *Unión de Pequeños Agricultores* v *Council*, cited in paragraph 96 above, paragraph 36; and Case C-263/02 P *Commission* v *Jégo-Quéré* [2004] ECR I-3425, paragraph 45).

100 In the light of the foregoing, it is necessary to examine whether the obligations which may result from the contested provisions are capable of distinguishing the applicant individually as an addressee. In that regard, it should be noted that the applicant seeks the annulment, first, of Article 4 of the contested directive, which establishes the requirement to hold an emissions permit, second, of Article 6(2)(e) and Article 12(3) of that directive, which provide for the obligation to surrender a number of allowances

equal to the total emissions from the installation during the preceding calendar year, third, of Article 9, in conjunction with criterion 1 of Annex III to the contested directive, concerning the establishment of NAPs and the alleged obligation on Member States to issue installation operators with a maximum quantity of emission allowances, and, fourth, of Article 16(2), (3) and (4) of the contested directive, concerning penalties for failure to comply with the obligation to surrender, in so far as all those provisions apply to pig iron and steel producers by virtue of Article 2 of the contested directive, in conjunction with Annex I thereto.

101 In support of its claim that it is individually concerned by the contested provisions, the applicant essentially submits, first, that the Community legislature was required, by virtue of numerous higher-ranking rules of law, including its fundamental rights, to take account of the particular situation of the pig iron and steel producers established in the internal market, and especially of the applicant's particular situation (*Piraiki-Patraiki and Others* v *Commission*, cited in paragraph 55 above, paragraph 19; *Sofrimport* v *Commission*, cited in paragraph 55 above, paragraph 11; and *UEAPME* v *Council*, cited in paragraph 55 above, paragraph 90).

102 It should be noted, in this regard, that there is no express or specific provision which is either higher-ranking or of secondary legislation which would have required the Community legislature, when adopting the contested directive, to take any particular account of the situation of pig iron and steel producers, let alone of the applicant's situation, vis-à-vis the situation of operators in the other industrial sectors referred to in Annex I to that directive (see, to that effect, Case T-47/00 *Rica Foods* v *Commission* [2002] ECR II-113, paragraphs 41 and 42; see also the orders in Case T-45/02 *DOW AgroSciences* v *Parliament and Council* [2003] ECR II-1973, paragraph 47; Case T-264/03 *Schmoldt and Others* v *Commission* [2004] ECR II-1515, paragraph 117; and Case T-142/03 *Fost Plus* v *Commission* [2005] ECR II-589, paragraphs 61 to 65). Thus, Article 174 EC and Article 175(1) EC in particular, as legal bases for the regulatory activity of the Community on environmental issues, do not provide for such an obligation. In addition, apart from the reference to its fundamental rights and to certain general principles of law which protect it, the applicant does not put forward any concrete higher-ranking rule which concerns it specifically or, at the very least,

the pig iron and steel producers, which is capable of creating such an obligation in its favour.

103 Although it is true that, when adopting a measure of general application, the Community institutions are required to respect higher-ranking rules of law, including fundamental rights, the claim that such a measure infringes those rules or rights is not sufficient in itself to establish that the action brought by an individual is admissible, without running the risk of rendering the requirements of the fourth paragraph of Article 230 EC meaningless, as long as that alleged infringement does not distinguish the applicant individually just as in the case of the addressee of a measure (see, in relation to the right to property, the order in Case T-94/04 *EEB and Others* v *Commission* [2005] ECR II-4919, paragraphs 53 to 55; see also, to that effect, the order of 29 June 2006 in Case T-311/03 *Nürburgring* v *Parliament and Council*, not published in the ECR, paragraphs 65 and 66). In that regard, the applicant cannot reasonably invoke the judgment in *Codorníu* (cited in paragraph 55 above, paragraphs 20 to 22), in which the action against the contested regulation was deemed admissible as a result solely of the differentiating nature, in relation to the contested provisions, of the denomination at issue, on the basis of which the applicant had been the only trade mark proprietor for a very long time.

104 In any event, the applicant has not established that the contested provisions, in particular the requirement of an emissions permit in Article 4 of the contested directive, the obligation to surrender in Article 12(3), in conjunction with Article 6(2)(e), and the penalties laid down in Article 16(2), (3) and (4) of that directive infringed its fundamental rights and caused it serious harm in such a way as to distinguish it individually as an addressee from any other operator concerned by those provisions (see, to that effect, the order in *Nürburgring* v *Parliament and Council*, cited in paragraph 103 above, paragraph 66). Those provisions apply, in a general and abstract manner, to all operators listed in Annex I to the contested directive and to objectively determined situations. They are therefore capable of affecting the legal position of all those operators in the same way.

105 Consequently, the applicant's arguments based on the Community legislature's obligation to respect certain general principles of law and fundamental rights do not lead to the conclusion that the applicant is individually concerned by the contested provisions and it is, therefore, not necessary to examine whether, in that regard, those provisions concern it directly.

106 Second, as regards the applicant's argument that it is part of a closed group of operators which are particularly affected by the contested provisions, it should be noted, first, that the possibility of determining, at the time of adoption of the contested measure, more or less precisely the number, or even the identity, of the persons to whom a measure applies by no means implies that it must be regarded as being of individual concern to those persons as long as it is established that that application takes effect by virtue of an objective legal or factual situation defined by the measure in question (see, to that effect, the order in Case C-503/07 P *Saint-Gobain Glass Deutschland* v *Commission* [2008] ECR I-2217, paragraph 70 and the case-law cited therein). Second, the fact that certain operators are more affected economically by a measure of general application than others is not sufficient to distinguish them individually from all other operators, since the application of that measure takes effect by virtue of an objectively determined situation (see, to that effect, the order in Case C-409/96 P *Sveriges Betodlares and Henrikson* v *Commission* [1997] ECR I-7531, paragraph 37; order of 11 September 2007 in Case T-28/07 *Fels-Werke and Others* v *Commission*, not published in the ECR, paragraph 60 and the case-law cited therein; and order in Case T-391/02 *Bundesverband der Nahrungsmittel- und Speiseresteverwertung and Kloh* v *Parliament and Council* [2004] ECR II-1447, paragraph 53 and the case-law cited therein).

107 It must be noted that the applicant is affected by the contested provisions primarily in its objective capacity as an installation operator producing greenhouse gas emissions, on the one hand, and as a pig iron and steel producer, on the other, in the same way as any other operator or pig iron or steel producer whose activity is listed in Annex I to the contested directive. Therefore, even if, at the time when the contested directive came into force, the applicant was one of a group of only 15 pig iron or steel producers

operating within the internal market, that fact alone is not sufficient to distinguish it individually, in the same way as an addressee, from all other operators pursuing activities covered by Annex I to the contested directive, including pig iron and steel producers in that same group.

108 In addition, even considering that pig iron and steel producers constitute a group of operators which is particularly affected, they are all liable to suffer the same legal and factual consequences as the applicant by reason of an objectively determined situation, namely the inclusion of their activity in Annex I to the contested directive. Thus, the alleged technical and economic impossibility for those producers, compared with operators in other industrial sectors, to reduce their greenhouse gas emissions further and to pass on to their customers the additional costs incurred in purchasing emission allowances, affects the pig iron and steel production sector as a whole and in exactly the same way. Likewise, since the implementation of the allowance trading scheme, all of those producers are exposed in the same way to developments on the trading market and on the market for the goods at issue, including competition from other industrial sectors or pig iron and steel producers from third countries.

109 In that respect, the applicant's claim that the pig iron and steel producers established in the internal market constitute a closed group of operators, whose composition is no longer likely to change, must also be rejected. In that regard, the Parliament and the Council were correct to refer to the increase in the number of pig iron and steel producers coming within the scope of the contested directive following the enlargement of the European Union since 2004 and to the possibility that other European countries with a steel industry may join the Union in the future. Furthermore, the applicant has failed to demonstrate that, at the time of the entry into force of the contested directive, those pig iron and steel producers had particular characteristics which distinguished them from other producers or new entrants, for example the fact that they held earlier specific rights (see, to that effect, Case C-125/06 P *Commission* v *Infront WM* [2008] ECR I-1451, paragraphs 71 to 77). Even supposing that those

producers held emission rights granted under Directive 96/61 (see paragraph 49 above), those alleged rights, far from being specific, or unique to the applicant, would have benefited in the same way all operators pursuing the activities listed in Annex I to the contested directive. Finally, the mere fact that, in the applicant's view, entry on to the relevant market is possible only by means of acquisition of a producer which is already established on the market does not rule out the possibility that the identity of the producer or new entrant which buys it out may change and thus alter the composition of the group of producers at issue.

110 Consequently, the legal effects of the contested provisions, namely the obligations to have an emissions permit and to surrender allowances, penalties in the event of non-compliance with those obligations, and the alleged capping of allowances under Article 9 of the contested directive, affect the economic activity and legal position of the operators concerned by Annex I to the contested directive, including those in the pig iron and steel production sector, in the same way and by reason of an objectively determined situation. Those provisions are thus not capable of characterising the factual and legal situation of the applicant in comparison with those other operators and, consequently, of distinguishing it individually in the same way as an addressee, with the result that there is no need to examine whether those provisions are of direct concern to it.

111 Third, as regards the argument based on the applicant's large size, its annual production volume and its individual economic and/or technological inability to reduce further its CO2 emissions, it should be noted that the applicant fails to give any reasons why the pig iron and steel producers in competition with it are not exposed to adaptation problems and to similar difficulties as regards their size, volume of production and their efforts to reduce emissions. A smaller operator with a lower pig iron or steel production than the applicant will inevitably have a lower quantity of allowances, with the result that, proportionately, its economic and/or technological difficulties in reducing its emissions should be comparable to those of the applicant. In accordance with Annex I to the contested directive, the obligations resulting from the contested provisions apply in a uniform and general manner to all installation operators whose production exceeds the threshold set out therein, irrespective of their size. In

addition, the extent of those obligations depends solely on the quantity of greenhouse gas emissions which, in the absence of proof of the contrary, is likely to increase with the size and production capacity of the installation at issue, in such a way that all operators concerned are in a comparable situation (see, to that effect, *Arcelor Atlantique et Lorraine and Others*, cited in paragraph 42 above, paragraph 34). Therefore, the applicant cannot reasonably claim that it is particularly affected in such a way as to distinguish it individually in the same manner as an addressee and, consequently, there is no need to examine whether it is directly concerned in that regard.

112 Fourth, the applicant has failed sufficiently to demonstrate that its alleged 'unique lock-in situation', in particular as a result of the restructuring of its group, was capable of distinguishing it individually from all other operators. Even if it were the only pig iron and steel producer established in the internal market which had undertaken such restructuring, the applicant has not shown that there were no other producers in the other sectors covered by Annex I to the contested directive which were affected by similar consequences following the implementation of that directive on the ground that they undertook or abandoned similar steps. In that regard, the applicant's claims that the undertakings in the other sectors covered by Annex I to the contested directive cannot have been exposed to the same difficulties as itself are too vague and hypothetical for it to be ruled out that other producers were affected in a similar way, for example, those in the energy sector, which, following the liberalisation at Community level, was subject to significant cross-border restructuring.

113 In any event, the applicant has not proved that the fact that it was affected by reason of its alleged 'unique lock-in situation' was due specifically to the legal effects of the contested provisions in such a way as to concern it directly. According to the applicant's own statements, that situation essentially results, first, from the alleged lack of emission allowances allocated free of charge by the national authorities which make it a 'net buyer of allowances', second, from the possible increase in the price of allowances available on the exchange market, or the high level of that price, and, third, from the impossibility for it to transfer, within the internal market, allowances

allocated to installations earmarked for closure to other installations in which it plans to increase production capacity.

114 Similarly, even supposing that the alleged restructuring is a characteristic particular to the applicant, it must be noted that the alleged 'unique lock-in situation' resulting from the aspects described in paragraph 112 above is not attributable to the obligation to be in possession of an emissions permit under Article 4 of the contested directive, or to the obligation to surrender under Article 12(3), in conjunction with Article 6(2)(e), or to the penalties provided for in Article 16(2), (3) and (4) of that directive, but, if that situation were proved to exist, is the consequence of the implementation by the Member States of their NAPs and the relevant legislation. Under Article 9(1) and Article 11(1) of the contested directive, the Member States have a broad discretion both as regards the allocation of allowance quotas to various industrial sectors and the issue of allowances to, or withdrawal from, individual operators, including in the case of closure of an installation (see, to that effect, Case T-374/04 *Germany* v *Commission* [2007] ECR II-4431, paragraphs 102 to 106).

115 Article 4 of the contested directive does nothing more than subject all operators which emit greenhouse gases to an obligation to obtain an emissions permit, but does not specify the conditions or specific rules for the allocation or withdrawal of emission allowances, which is the case in certain Member States. The applicant claims that such conditions and rules are at the origin of its restructuring problems. That reasoning is applied by analogy to the obligation to surrender laid down in Article 12(3) of the contested directive, in conjunction with Article 6(2)(e), and to the penalties provided for in Article 16(2), (3) and (4) of that directive, since the applicant has not explained why it considers that those provisions are in some way linked to its difficulties. Accordingly, the possible harm suffered by the applicant because of the price increase for the acquisition of allowances and/or a possible loss of allowances, even though it may be substantial and greater than for other operators, following the closure of one of its installations or the withdrawal of the allowances allocated to that installation by the national authorities, cannot be attributed to the obligations resulting from

those provisions in order to enable the applicant to base its claim that it is directly concerned within the meaning of the fourth paragraph of Article 230 EC.

116 Finally, in so far as the applicant also challenges Article 9 of the contested directive, read in conjunction with criterion 1 in Annex III thereto, on the ground that it imposes on the Member States an 'absolute cap on allowances', suffice it to point out that, even if that argument were well founded, such a cap would not directly affect the applicant for the purposes of the fourth paragraph of Article 230 EC since it would not make it possible to identify, even approximately, the number of allowances which are to be allocated by the national authorities to the various industrial sectors and even less those to individual operators. That finding is confirmed by the fact that, throughout the proceedings, the applicant has been unable to specify or anticipate, with regard to the contested directive and Decision 2002/358, either the quantity of allowances which the Member States will allocate it free of charge for its production installations established in the internal market or the extent of the possible burden which it would have to assume in the event that those allowances prove to be insufficient.

117 Consequently, the applicant has not established that it was directly and individually concerned by the contested provisions by reason of its alleged 'unique lock-in situation' resulting, in particular, from the cross-border restructuring of its group.

118 Fifth, as regards the long-term agreements for the supply of gas which the applicant claims to have concluded with several power stations prior to the entry into force of the contested directive, those agreements are also not capable of distinguishing the applicant individually in relation to the contested provisions. Those provisions govern, in a general and abstract manner, the obligations of operators which are subject to the allowance trading scheme, but do not specify the conditions or specific rules for the allocation or withdrawal of emission allowances by the Member States (see paragraphs 112 to 116 above). It follows, in any event, that the possibility that the performance of those gas supply agreements may be affected can result only from national rules governing the allocation of allowances, with the result that, in this

regard, the applicant also has no basis on which to support its claim that it is directly concerned. In addition, as submitted by the Council, the applicant itself states that those gas supply agreements concern, at least in part, power stations belonging to its own group of undertakings. Thus, in so far as the activity of those power stations falls within the scope of Annex I to the contested directive because it exceeds the production volume set out therein, the applicant will, on the basis of the NAPs and national rules applicable, necessarily be in possession of emission allowances for the combustion of the gases at issue. Finally, in spite of the fact that energy production constitutes, in principle, an activity covered by Annex I to the contested directive, the applicant has neither specified the extent to which those gas supply agreements link it to third party power stations, nor indicated whether the latter were in a position to obtain emissions allowances of their own accord or needed them because they were included in that annex, nor explained under what circumstances a possible lack of allowances for those power stations affected the performance of those agreements. Accordingly, the conclusion must be that the applicant has not demonstrated that it was directly and individually concerned by the contested provisions on the basis that the performance of the long-term agreements for the supply of gas at issue was allegedly affected.

119 Sixth, as regards the applicant's argument, which is very short on detail, that it participated in the decision-making procedure which led to the adoption of the contested directive, it should be noted that the fact that a person intervenes in one way or another in the procedure leading to the adoption of a Community measure may distinguish that person as an individual in relation to the measure in question only when the applicable Community law grants that person certain procedural guarantees. Except where there is an express provision to the contrary, neither the process of enacting measures of general application nor those measures themselves require, under the general principles of Community law, such as the right to a hearing, the participation of the persons affected as the interests of those persons are deemed to be represented by the political bodies called to adopt those measures. Consequently, in the absence of expressly guaranteed procedural rights, it would be contrary to the letter and spirit of Article 230 EC to allow any individual, simply because he has participated in the preparation of a measure of a legislative nature, subsequently to bring an action challenging that measure (see, to that effect, the order in Case T-369/03 *Arizona Chemical and Others* v *Commission* [2005] ECR II-5839, paragraphs 72 and 73 and the case-law cited therein).

120 In the present case, it must be noted, first, that the process of enacting and adopting the contested directive, under Article 175(1) EC and Article 251 EC, constituted a decision-making process involving the joint participation of the Council and the Parliament as the Community legislature and resulting in the adoption of a measure of general application. No form of intervention on the part of operators is foreseen in that context and, second, the applicant has neither claimed nor shown that it had procedural rights capable of establishing its standing to bring an action within the meaning of the case-law cited in paragraph 116 above.

121 It follows that the applicant's alleged participation in the decision-making procedure which led to the adoption of the contested directive is not capable of distinguishing the applicant individually for the purposes of the fourth paragraph of Article 230 EC, without there being any need to examine whether it was directly affected in that regard.

122 It follows from all of the foregoing considerations that the applicant is not individually or directly concerned by the contested provisions within the meaning of the fourth paragraph of Article 230 EC and its application for annulment must therefore be declared inadmissible, without there being any need to examine whether the contested provisions can be severed or not from the contested directive as a whole.

123 This solution is, moreover, not brought into question by the fourth paragraph of Article 263 TFEU. As has been pointed out in paragraph 114 above, the Member States have a broad discretion with regard to implementation of the contested directive. For that reason, contrary to what the applicant contends, that directive cannot, in any event, be regarded as being a regulatory act which does not entail implementing measures within the terms of the fourth paragraph of Article 263 TFEU.

II — *Admissibility of the application for damages*

A — *Arguments of the parties*

124 The Parliament and the Council, supported by the Commission, claim that the application for damages is also inadmissible.

125 The application brought by the applicant does not, they argue, satisfy the requirements of Article 44(1)(c) of the Rules of Procedure in that the alleged damage is neither imminent nor certain, it is not sufficiently identified and there is no causal link between the contested directive and the alleged damage. The Parliament adds that the applicant has failed to shift the burden of proof resting on it to demonstrate that the choice of the Community legislature amounted to a grave and manifest disregard of the higher-ranking rules of law invoked, such as the principle of equal treatment. Thus, the applicant has not proved that the chemicals and aluminium sectors occupy the same market sector as that of pig iron and steel and that they produce directly such significant amounts of CO2 that they ought to have been included in the contested directive from the outset.

126 As regards the existence of damage, the Council submits that the contested directive, although it had already entered into force, had not yet, at the time when the application was lodged, had any direct effect whatsoever upon the applicant's economic activity and any possible future effects cannot be considered imminent. Furthermore, the applicant has failed to demonstrate the existence of any certain damage, since that is impossible at this stage for a number of reasons. On that point, the Parliament and the Council submit in particular that the applicant's alleged situation as a 'net buyer of allowances' is merely hypothetical and not a direct, necessary and certain consequence of the contested directive.

127 According to the Council, the question whether the applicant will become a 'net buyer of allowances' depends on a range of factors which are unknown and have not

been established in the case at issue, such as the total level of the initial allocation of allowances by the national authorities in accordance with the NAPs and the costs of reducing emissions compared with the market price for allowances. The total level of allowance allocation, in turn, is determined by several factors, such as the Member States' reduction targets, and whether a Member State is planning to buy Kyoto Protocol units on the international market, as well as how the Member State decides to distribute any necessary emission reductions across its industry sector. The Council also submits that, where the allowances allocated prove to be insufficient, the impact of the contested directive will depend on the choice made by the operator, regard being had for the respective investment costs, between buying additional allowances to cover its CO2 emissions, on the one hand, and taking emission-reduction measures, on the other.

128 The absence of certain damage is, moreover, corroborated by the fact that the contested directive provides expressly, in criteria 3 and 7 of Annex III thereto, that the quantity of allowances must be consistent with the potential – including technological potential – of the operators' activities, and that the NAP may accommodate early action, such as the applicant's ostensible CO2 emission reductions since 1990. The Council also points out that the applicant has the possibility of transferring unused allowances between installations in its group in other countries, as that possibility of cross-border transfers forms the very basis of the allowance trading scheme.

129 The Parliament and the Council, supported by the Commission, observe that the applicant has failed to demonstrate that it will have to incur extra costs in connection with the implementation of the contested directive, such as the employment costs in relation to the monitoring and reporting on CO2 emissions, as such requirements already exist under Directive 96/61. The Council submits that the applicant's assertions with regard to costs for new staff and loss of future profit are too vague and imprecise to constitute evidence of future damage. Similarly, potential losses of market share or profit are uncertain and depend on a number of factors that are unknown and independent of the contested directive, such as future trends in prices for pig iron and steel and for competing products.

130 According to the Parliament and the Council, supported by the Commission, the applicant has also failed to demonstrate that there is a causal link between the contested directive and the alleged future damage. In view of the discretion afforded to the Member States, the contested directive cannot directly and in itself cause any damage to the applicant, as such damage can result only from national implementing legislation and, in particular, from the allocation of emission allowances.

131 The applicant takes the view that its application for damages satisfies the requirements of Article 44(1)(c) of the Rules of Procedure and is therefore admissible.

B — *Findings of the Court*

132 Under the first paragraph of Article 21, in conjunction with the first paragraph of Article 53, of the Statute of the Court of Justice and Article 44(1)(c) of the Rules of Procedure, every application must state the subject-matter of the proceedings and contain a summary of the pleas in law on which it is based. That statement must be sufficiently clear and precise to enable the defendant to prepare its defence and the Court to rule on the application, if necessary without any further information. In order to guarantee legal certainty and sound administration of justice, it is necessary, in order for an action to be admissible, that the essential legal and factual particulars relied on be indicated, at least in summary form, coherently and intelligibly in the application itself. More specifically, in order to satisfy those requirements, an application seeking compensation for damage caused by a Community institution must state the evidence from which the conduct which the applicant alleges against the institution can be identified, the reasons why the applicant considers that there is a causal link between the conduct and the damage it claims to have suffered, and the nature and extent of that damage (Case T-19/01 *Chiquita Brands and Others* v *Commission*

[2005] ECR II-315, paragraphs 64 and 65; Case T-279/03 *Galileo International Technology and Others* v *Commission* [2006] ECR II-1291, paragraphs 36 and 37; Case T-304/01 *Abad Pérez and Others* v *Council and Commission* [2006] ECR II-4857, paragraph 44; Case T-138/03 *É.R. and Others* v *Council and Commission* [2006] ECR II-4923, paragraph 34; and the order of 27 May 2004 in Case T-379/02 *Andolfi* v *Commission*, not published in the ECR, paragraphs 41 and 42).

133 The Court takes the view that the application satisfies those formal requirements and that the arguments of the Parliament and the Council in that regard, the majority of which concern the assessment of the soundness, and not the admissibility, of the application for damages, must be rejected. In the application, the applicant has adduced sufficient evidence to identify the conduct of the Community legislature which it criticises, the reasons why it takes the view that there is a causal link between that conduct and the harm which it claims to have suffered, and the nature and possible extent of that harm. That evidence has also enabled the Parliament and the Council to defend themselves properly in that regard by submitting arguments seeking, in reality, to show that the application for damages is unfounded.

134 As regards the alleged unlawful conduct of the Parliament and the Council, it should be pointed out that, in accordance with the requirements established in the case-law (Case C-352/98 P *Bergaderm and Goupil* v *Commission* [2000] ECR I-5291, paragraph 39 et seq., and Case C-198/03 P *Commission* v *CEVA and Pfizer* [2005] ECR I-6357, paragraph 61 et seq.), the applicant has raised detailed arguments with a view to showing that there was a sufficiently serious infringement of several rules – and even of higher-ranking rules of law – designed to confer rights on individuals, such as the principle of equal treatment and the freedom of establishment.

135 As regards the harm suffered, first, in the light of the circumstances at the time when the application was lodged, that harm could not fail to have a future element since the contested directive was still in the process of being transposed into the national

legal systems and the Member States had only just begun to prepare their NAPs and their legislation in relation to the first allocation period. Furthermore, in the light of the scope of the Member States with regard to the implementation of the allowance trading scheme in their territories by means of their NAPs (see paragraph 116 above), the applicant was unable to specify the exact extent of that future harm at the time at which it brought its action. In such particular circumstances, to which the applicant made reference, it is not essential to specify in the application, as a condition of admissibility, the exact extent of the harm suffered, and even less to specify the amount of compensation sought since that is possible, in any event, up to the reply stage, on the condition that the applicant pleads such circumstances and provides the information which makes it possible to assess the nature and extent of the harm suffered, thereby enabling the defendant to defend itself (see, to that effect, the orders in *Andolfi* v *Commission*, cited in paragraph 132 above, paragraphs 48 and 49 and the case-law cited, and Case T-376/04 *Polyelectrolyte Producers Group* v *Council and Commission* [2005] ECR II-3007, paragraph 55).

136 Next, the applicant has put forward sufficient information to identify the damage which it will incur in the future, including the nature, extent and various components thereof, to satisfy the requirements laid down in Article 44(1)(c) of the Rules of Procedure. In its application the applicant referred, first, to the damage resulting from the additional costs incurred in having to employ staff to carry out the monitoring and reporting activities under Articles 14 and 15 of the contested directive. In addition, in its observations on the pleas of inadmissibility the applicant put forward a concrete estimate of those additional costs. Second, the applicant claimed that it suffered both material and non-material damage as a result of the loss of market shares and the damage caused to its reputation in environmental matters by the failure to bring the competing non-ferrous metals and chemical products sectors within the scope of the contested directive. Third, the applicant alleged, with the support of estimated figures (see paragraphs 80 and 81 above), that it suffered harm as a result of its situation as a 'net buyer of allowances' and the foreseeable rise in costs of those allowances which could potentially destroy its gross profit. Fourth, the applicant sought damages for the loss in profit resulting from the fact that it is impossible for it to implement its cross-border reconstruction strategy. Consequently, the minimum conditions governing identification of the damage are satisfied in the present case.

137 Finally, as regards the causal link between the unlawful conduct and the damage, the applicant submitted in a sufficiently precise manner, in accordance with the logic of its reasoning, that the Member State did not have any discretion as regards the transposition into national law of the contested provisions and the resulting obligations for operators and that, consequently, any possible damage incurred by it would be attributable to the allegedly unlawful conduct of the Community legislature. In that regard, the arguments of the Parliament, the Council and the Commission that the applicant should have 'established' or 'proved' such a casual link in order to render the application admissible cannot be accepted, since such an assessment falls within the examination of the validity of that application, and not within that of its admissibility.

138 In the light of all of the foregoing considerations, the pleas of inadmissibility raised by the Parliament and the Council must be rejected in so far as they concern the application for damages.

III — *The soundness of the application for damages*

A — *The requirements governing the non-contractual liability of the Community*

139 It is settled case-law that the non-contractual liability of the Community for unlawful conduct on the part of its organs, within the meaning of the second paragraph of Article 288 EC, depends on fulfilment of a set of conditions, namely the unlawfulness of the conduct alleged against the institutions, the fact of damage and the existence of a causal link between that conduct and the damage complained of (see Case C-243/05 P *Agraz and Others* v *Commission* [2006] ECR I-10833, paragraph 26 and the case-law cited therein; Case T-333/03 *Masdar (UK)* v *Commission* [2006]

ECR II-4377, paragraph 59; *Abad Pérez and Others* v *Council and Commission*, cited in paragraph 132 above, paragraph 97; *É.R. and Others* v *Council and Commission*, cited in paragraph 132 above, paragraph 99; and the judgment of 12 September 2007 in Case T-259/03 *Nikolaou* v *Commission*, not published in the ECR, paragraph 37).

140 Given the cumulative nature of those conditions, the action must be dismissed in its entirety where one of those conditions is not satisfied (see, to that effect, *Abad Pérez and Others* v *Council and Commission*, cited in paragraph 132 above, paragraph 99, and *É.R. and Others* v *Council and Commission*, cited in paragraph 132 above, paragraph 101 and the case-law cited therein).

141 As regards the first of those conditions, there must be a sufficiently serious breach of a rule of law which is intended to confer rights on individuals (*Bergaderm and Goupil* v *Commission,* cited in paragraph 134 above, paragraph 42). In relation to the requirement that there must be a sufficiently serious breach, the decisive criterion for establishing that a breach of Community law is sufficiently serious is whether the Community institution concerned manifestly and gravely disregarded the limits on its discretion. It is solely where that institution has only considerably reduced, or even no, discretion, that the mere infringement of Community law may suffice to establish the existence of a sufficiently serious breach (Case C-312/00 P *Commission* v *Camar and Tico* [2002] ECR I-11355, paragraph 54; Joined Cases T-198/95, T-171/96, T-230/97, T-174/98 and T-225/99 *Comafrica and Dole Fresh Fruit Europe* v *Commission* [2001] ECR II-1975, paragraph 134; *Abad Pérez and Others* v *Council and Commission*, cited in paragraph 132 above, paragraph 98; and *É.R. and Others* v *Council and Commission*, cited in paragraph 132 above, paragraph 100).

142 It is first necessary to assess the soundness of the pleas of illegality raised by the applicant in the light of the criteria set out in paragraph 141 above.

143 In that regard, it must be pointed out, in the context of the present case, that a possible sufficiently serious breach of the rules of law at issue must be based on a manifest and serious failure to have regard for the limits of the broad discretion enjoyed by the Community legislature when exercising its powers on environmental issues under Article 174 EC and 175 EC (see, to that effect and by analogy, first, Joined Cases T-125/96 and T-152/96 *Boehringer* v *Council and Commission* [1999] ECR II-3427, paragraph 74; Joined Cases T-64/01 and T-65/01 *Afrikanische Frucht-Compagnie* v *Council and Commission* [2004] ECR II-521, paragraph 101 and the case-law cited therein; and, second, Case T-13/99 *Pfizer Animal Health* v *Council* [2002] ECR II-3305, paragraph 166; and Joined Cases T-74/00, T-76/00, T-83/00 to T-85/00, T-132/00, T-137/00 and T-141/00 *Artegodan and Others* v *Commission* [2002] ECR II-4945, paragraph 201). The exercise of that discretionary power implies first, the need for the Community legislature to anticipate and evaluate ecological, scientific, technical and economic changes of a complex and uncertain nature and, second, the balancing and arbitration by that legislature of the various objectives, principles and interests set out in Article 174 EC (see, to that effect, Case C-284/95 *Safety Hi-Tech* [1998] ECR I-4301, paragraphs 36 and 37; Case C-86/03 *Greece* v *Commission* [2005] ECR I-10979, paragraph 88; and *Arcelor Atlantique et Lorraine and Others*, cited in paragraph 42 above, paragraphs 57 to 59; see also, by analogy, *Chiquita Brands and Others* v *Commission*, cited in paragraph 132 above, paragraph 228). In the contested directive, that is reflected in the establishment of a series of objectives and sub-objectives which are in part contradictory (see, to that effect, *Arcelor Atlantique et Lorraine and Others*, cited in paragraph 42 above, paragraphs 28 to 33; and *Germany* v *Commission*, cited in paragraph 114 above, paragraphs 121 to 125 and 136 to 139).

144 Consequently, it is necessary to assess whether the alleged infringement of the rules of law invoked by the applicant involves a manifest and grave disregard for the limits of the broad discretion which the Community legislature enjoyed when adopting the contested directive.

145 Given that the applicant's arguments in support of the two first pleas of illegality overlap to a very large extent, it is appropriate to examine them together.

B — *The existence of a sufficiently serious breach of the right to property, of the freedom to pursue an economic activity and of the principle of proportionality*

1. Arguments of the parties

146 The applicant submits that the contested provisions infringe its right to property and its freedom to pursue an economic activity, which constitute fundamental rights guaranteed by the Community legal order, as confirmed by Articles 16 and 17 of the Charter of Fundamental Rights of the European Union, proclaimed on 7 December 2000 in Nice (OJ 2000 C 364, p. 1). Mandatory measures that impose certain conditions on the 'use of property' are liable to restrict the exercise of the right to property and, where such measures prevent an individual from exercising that right, they encroach on the very substance of that right.

147 The applicant takes the view that the contested provisions encroach disproportionately on the substance of its right to property and its freedom to pursue an economic activity because they require the applicant to operate its plants under economic conditions which are unsustainable. First, those provisions have the effect of placing the applicant in a position of a 'net buyer of allowances' (see paragraphs 75 and 77 above) given that, in spite of its reduction efforts in the past, and unlike companies in other sectors, it has no technological potential to reduce further its CO2 emissions in the near future (see paragraphs 77 and 78 above). Second, in view of the particular competitive conditions in the steel sector (see paragraph 79 above), the applicant will no longer be able to pass on the increased production costs to its customers (see paragraph 80 above). Consequently, its production will become loss-making, and it will therefore be obliged either to continue to operate unprofitable and inefficient plants within the internal market or to close them and relocate them to countries which have no emission reduction obligations under the Kyoto Protocol.

148 In its reply, the applicant states that the contested directive leads to a distortion of competition on three levels. Firstly, whereas European production is subject to CO2 emission reduction constraints, which increase the cost of production, production

costs in third countries remain unchanged, and are even decreasing because of projects forming part of the 'clean' development mechanism provided for in the Kyoto Protocol (see paragraph 5 above). Secondly, within the internal market, the rise in production costs varies by reason of the disparity in national reduction objectives and allocation policies. Thirdly, the production of only a few materials, including steel, is affected by the allowance trading scheme. In the applicant's opinion, all materials should be affected in the same way, in proportion to the amount of CO2 emitted and taking into account both the production process and the life cycle of the product in question.

149 The applicant considers that the contested directive contains no incentive for producers to reduce their emissions. First, there is no incentive for technological innovation, since newly established installations receive allowances based on their actual needs, which leads to the continued operation of non-profitable installations. Second, the contested directive does not provide any recompense for emission reductions, including the considerable reductions made by the European steel sector in the past. On the contrary, allocations for inefficient installations scheduled for closure are revoked since those allowances cannot be transferred to installations established in another Member State (see paragraphs 83 to 85 above). Therefore, there is no incentive for pig iron and steel producers to decrease emissions or to relocate their production to more efficient, and thus more environmentally sound, installations. In the light of this serious infringement of its right to property, its freedom to pursue an economic activity and its freedom of establishment, the applicant also doubts whether the objective of environmental protection through a reduction in greenhouse gas emissions can be achieved as envisaged in the contested directive. As regards the steel sector, it is rather likely that in total there will be no reduction of emissions due to the continued operation of inefficient operations and the transfer of steel production to third countries.

150 According to the applicant, it results from those considerations demonstrating the infringement of its right to property, of its freedom to pursue an economic activity and its freedom of establishment, that the contested provisions also infringe the principle

of proportionality. In accordance with that principle, the legality of Community acts and measures is subject to the condition that those acts and measures are appropriate and necessary for meeting the objectives legitimately pursued by the legislation in question. Similarly, the third paragraph of Article 5 EC requires that legal acts of the Community should not go beyond what is necessary to achieve the objectives of the EC Treaty. Moreover, where there is a choice among a number of appropriate measures, the least restrictive should be applied, and the burdens imposed should not be disproportionate to the objectives sought. However, the inclusion of pig iron and steel production installations in Annex I to the contested directive was, from the outset, not appropriate for meeting the objective of the contested directive, which is to contribute to reducing emissions and protecting the environment, and the contested provisions impose a heavy and disproportionate burden on the applicant, thus threatening its very existence (see paragraphs 147 to 149 above).

151 The Parliament and the Council dispute the assertion that the contested directive affects in a disproportionate manner the applicant's right to property and freedom to pursue an economic activity. Even if the resulting obligations for the applicant constitute restrictions in that respect, those restrictions cannot be regarded as a disproportionate and intolerable interference with those rights in the light of the general interest pursued by the contested directive and by the allowance trading scheme, namely protection of the environment.

152 Therefore, they claim, the first and second pleas should be rejected as unfounded.

2. Findings of the Court

153 It should be noted, at the outset, that, although the right to property and the freedom to pursue an economic activity form part of the general principles of Community law, those principles do not constitute absolute prerogatives, but must be viewed in

relation to their social function. Consequently, the exercise of the right to property and the right to pursue a trade or profession freely may be restricted, provided that those restrictions in fact correspond to objectives of general interest pursued by the Community and that they do not constitute, with regard to the aim pursued, a disproportionate and intolerable interference which infringes upon the very substance of the rights guaranteed (see, to that effect, Case C-295/03 P *Alessandrini and Others* v *Commission* [2005] ECR I-5673, paragraph 86 and the case-law cited therein, and *Chiquita Brands and Others* v *Commission*, cited in paragraph 132 above, paragraph 220).

154 More specifically, in relation to the alleged infringement of the right to property, it should be noted that, apart from the very general claim that the contested provisions give rise to a situation in which the applicant is no longer able to exploit, in a profitable manner, its steel-production installations established within the internal market, the applicant has not made it clear to what extent its right to property in relation to certain tangible or intangible assets involved in its production process is actually affected or rendered meaningless as a result of the application or transposition into national law of those provisions. The applicant has also failed to indicate which production installations would be particularly affected by the contested provisions and why exactly those installations would be affected in the light of the individual situation of each of those installations in the territory within which they are established and in the light of the relevant NAP. In that regard, the applicant has merely stated, in vague terms, that it would not be able to close certain inefficient and non-profitable installations so as not to lose the emission allowances allocated to them, but it has failed to explain to what extent that lack of efficiency or profitability and the resulting economic difficulties are specifically attributable to the application of the contested provisions as such. According to its own assertions, those economic difficulties already existed well before the 2001 merger (see paragraph 30 above) and was one of the economic reasons behind that merger.

155 In addition, as regards the alleged violation of the right to property and the freedom to pursue an economic activity, taken together, the applicant has failed in both its written pleadings and at the hearing to explain in a plausible and substantiated

manner how and to what extent, by reason of the implementation of the contested directive, it was likely to become a 'net purchaser of emissions allowances' unable to pass on its costs to its customers. The applicant did not claim that, during the first allocation period, which ended in 2007, it was obliged to purchase additional emissions allowances because of a possible allowance shortage in one of its production installations established in the internal market. On the contrary, at the hearing, in response to a question put by the Court, the applicant acknowledged that, in 2006, it had sold surplus allowances on the exchange market and made a profit of EUR 101 million, which was noted in the minutes of the hearing. Therefore, it cannot reasonably be claimed that, taken together, the contested provisions necessarily give rise to negative financial consequences which adversely affect the applicant's right to property and its freedom to pursue an economic activity.

156 In addition, it should be noted that the applicant has not claimed, within the context of its application for damages, that some of its production installations within the internal market had suffered losses due to the application of the contested provisions and it failed to produce precise figures in relation to the changes in the profitability of those installations since the allowance trading scheme became operational. The applicant also failed to provide information, first, on the way in which each of those installations had adapted to the different objectives of reducing emissions in the Member States concerned, some of which, such as the Kingdom of Spain, even have the possibility of increasing emissions in accordance with Decision 2002/358 and the burden-sharing agreement, and, second, on the question whether the emissions allowance quota to which it was entitled for those installations on the basis of the various NAPs was sufficient or not. Finally, even assuming that the various NAPs and the national reduction objectives are liable to infringe the applicant's rights, the latter has neither claimed nor shown that that infringement was attributable to the contested provisions as such and not to the national legislation which the Member States adopted in the exercise of their discretion with regard to the implementation of the contested directive under the third paragraph of Article 249 EC.

157 As regards the applicant's argument that steel producers are unable, for technical and economic reasons, to reduce their CO2 emissions any further, it is sufficient to state

that criterion 3 of Annex III to the contested directive requires the Member States, when determining the quantities of allowances to be allocated, to take account of the potential, including the technological potential, of activities covered by the allowance trading scheme to reduce emissions (see, to that effect, the Opinion of Advocate General Poiares Maduro in *Arcelor Atlantique et Lorraine and Others*, cited in paragraph 42 above, at point 57). It follows that, when allocating allowances to the various industrial sectors and to operators of installations within those sectors, the Member States have to take account of the reduction potential of all those sectors and operators, including that of the steel sector and of pig iron and steel producers. In addition, under criterion 7 of Annex III to the contested directive '[t]he [NAP] may accommodate early action [to reduce emissions]', with the result that the Member States have at least the possibility of taking account of efforts to reduce emissions which have already been made within the sector and by the operators at issue. Consequently, the possible failure on the part of the Member State to take sufficient account of that reduction capacity in its legislation transposing the contested directive cannot be attributed to the contested provisions.

158 In those circumstances, it appears that the contested provisions cannot infringe the applicant's right to property and its freedom to pursue a professional activity, or even that that alleged infringement is capable of causing it damage. It must therefore be concluded that the applicant has established neither a sufficiently serious breach or disproportionate restriction of those rights by the contested provisions nor that that alleged infringement may be the cause of the damage which it claims to have suffered.

159 In addition, in so far as the applicant alleges an infringement of the principle of proportionality as an independent plea of illegality, it is already apparent from the findings in paragraphs 154 to 158 above that it has failed to demonstrate the existence of the heavy and disproportionate burden which it claims to have incurred. Similarly, without its being necessary to examine the soundness of the claims concerning the various dysfunctions of the allowance trading scheme (see paragraphs 149 and 150 above), the applicant's main argument that the participation of steel producers, as

the largest proven industrial emitters of CO2, is unfit or inappropriate to contribute to the main objective of the contested directive, which is to protect the environment by reducing greenhouse gas emissions, must be rejected as being manifestly unfounded. Finally, in any event, the applicant has not established that the allowance trading scheme as such was manifestly inappropriate to achieve the goal of reducing CO2 emissions and that the Community legislature thus manifestly and gravely disregarded the limits on its broad discretion.

160 The pleas of illegality alleging a sufficiently serious breach of the right to property, of the freedom to pursue an economic activity and of the principle of proportionality must therefore be rejected as unfounded.

C — *The existence of a sufficiently serious breach of the principle of equal treatment*

1. Arguments of the parties

161 The applicant submits that the contested provisions infringe the principle of equal treatment.

162 First, it argues, the competing non-ferrous metal and chemical product sectors are excluded from the scope of the contested directive for no objective reason, even though they are responsible for comparable, or even higher, CO2 emissions than the steel sector. In that regard, the applicant disputes the contention that the inclusion in the allowance trading scheme of the chemical products sector, with a large number

of installations, would involve a substantial increase in the administrative complexity of the scheme. The need for an additional administrative effort as such cannot justify the serious distortion of competition, such as that at stake in the case at issue. Moreover, as was originally envisaged, large chemical plants for commodity products, which contribute significantly to total emissions, should have been included within the scope of the contested directive at the very least. With regard to the exclusion of the sector of non-ferrous metals such as aluminium (recital 15 in the preamble to the contested directive), no attempt whatsoever was made by the Parliament and the Council to justify this unequal treatment. Lastly, no alternative measures were imposed on these competing sectors to alleviate the abovementioned competitive distortions. Second, the fact of treating in the same way the steel and other sectors covered by Annex I to the contested directive without objective reasons being given infringes the principle of equal treatment, given that they are in different situations. The 'unique lock-in situation' of pig iron and steel producers (see paragraph 76 et seq. above) differentiates them from those of the other sectors, placing them in the position of a 'natural loser' among the participants of the allowance trading scheme.

163 In its reply, the applicant states that the sectors of non-ferrous metals and chemical products are comparable to the steel sector and that, as confirmed by the Commission in its merger practice, there is competition between those different sectors. Thus, major car manufacturers are increasingly replacing steel with aluminium for 'external parts', such as engines, bonnets, and doors. Moreover, steel cans are increasingly being replaced by aluminium cans and plastic bottles in the soft drinks beverages market. Furthermore, while the total amount of CO2 emissions of the steel sector is higher than that of the aluminium and the plastic sectors, that in itself does not suffice to differentiate those sectors from each other, given that other sectors with a lower level of emissions than the chemicals sector, namely the glass, pottery and building materials sectors, and the paper and printing sectors are also included in Annex I to the contested directive. It is precisely because of the comparability of those sectors that the Parliament proposed to include 'installations for the production and processing of aluminium' and 'the chemical industry' in the contested directive. Finally, the fact that the aluminium sector is indirectly affected by the contested directive through higher electricity prices is not sufficient to differentiate it from the steel sector, which suffers from the same effects.

164 In the applicant's opinion, Article 24 of the contested directive cannot be relied on in this context. The unilateral inclusion, under that provision, of other activities and installations in the allowance trading scheme is only an option, and not an obligation, for the Member States and requires approval by the Commission, taking various criteria into account. In any case, such – uncertain – inclusion by the Member States of the sectors that are competitors of the steel sector was possible only from 2008 onwards and thus could not remedy an infringement of the principle of equal treatment in the first allocation period. Finally, there is no objective justification for this unequal treatment, given that the contested provisions are neither necessary nor proportionate in regard to the objective of environmental protection that is being pursued.

165 At the hearing and in its observations on the consequences to be drawn from the judgment in *Arcelor Atlantique et Lorraine and Others* (paragraph 42 above), the applicant reiterated and supplemented its arguments regarding the infringement of the principle of equal treatment.

166 The Parliament, Council and Commission conclude that this plea should be rejected, particularly as the Court of Justice has ruled conclusively to that effect in its judgment in *Arcelor Atlantique et Lorraine and Others* (paragraph 42 above).

2. Findings of the Court

167 It should be noted, at the outset, that this plea of illegality, which alleges a sufficiently serious breach of the principle of equal treatment, is divided into two parts: first, an allegation of unequal treatment of comparable situations and, second, an allegation of equal treatment of dissimilar situations.

168 As regards the first part, reference must be made to paragraph 25 et seq. of the judgment in *Arcelor Atlantique et Lorraine and Others* (paragraph 42 above), in which the Court of Justice held as follows:

'Different treatment of comparable situations

25 A breach of the principle of equal treatment as a result of different treatment presumes that the situations concerned are comparable, having regard to all the elements which characterise them.

26 The elements which characterise different situations, and hence their comparability, must in particular be determined and assessed in the light of the subject-matter and purpose of the Community act which makes the distinction in question. The principles and objectives of the field to which the act relates must also be taken into account (see, to that effect, Case 6/71 *Rheinmühlen Düsseldorf* [1971] ECR 823, paragraph 14; Joined Cases 117/76 and 16/77 *Ruckdeschel and Others* [1977] ECR 1753, paragraph 8; Case C-280/93 *Germany* v *Council* [1994] ECR I-4973, paragraph 74; and Joined Cases C-364/95 and C-365/95 *T. Port* [1998] ECR I-1023, paragraph 83).

27 In the present case, the validity of [the contested] [d]irective … must be assessed with respect to the inclusion of the steel sector in the scope of the directive and the exclusion from its scope of the chemical and non-ferrous metal sectors, to which … the plastics and aluminium sectors respectively belong.

28 Under Article 1 of [the contested] [d]irective …, the aim of the directive is to establish a … scheme for allowance trading. According to points 4.2 and 4.3 of the Green Paper [of 8 March 2000 on greenhouse gas emissions trading within the

European Union], the Community's intention was to introduce, by the directive, such a system at the level of companies, thus referring to economic activities.

29 According to recital 5 in the preamble to [the contested] [d]irective…, its objective is to establish that scheme in order to contribute to fulfilling the commitments of the Community and its Member States under the Kyoto Protocol, which aims to reduce greenhouse gas emissions in the atmosphere to a level that prevents dangerous anthropogenic interference with the climate system, with the ultimate objective of protection of the environment.

30 Community policy on the environment, to which the legislative act at issue in the main proceedings relates, and one of whose principal objectives is the protection of the environment, aims, in accordance with Article 174(2) EC, at a high level of protection and is based in particular on the precautionary principle, the principle that preventive action should be taken, and the polluter-pays principle (see Case C-157/96 *National Farmers' Union and Others* [1998] ECR I-2211, paragraph 64, and Joined Cases C-14/06 and C-295/06 *Parliament and Denmark* v *Commission* [2008] ECR [I-1649], paragraph 75 and the case-law cited).

…

34 It follows that, in relation to the subject-matter of [the contested] [d]irective …, the objectives of that directive referred to in paragraph 29 above, and the principles on which Community policy on the environment is based, the different sources of greenhouse gas emissions relating to economic activities are in principle in a comparable situation, since all emissions of greenhouse gases are liable to contribute to dangerous interference with the climate system and all sectors of the economy which emit such gases can contribute to the functioning of the allowance trading scheme.

35 Furthermore, it should be pointed out, first, that recital 25 in the preamble to [the contested] [d]irective … states that policies and measures should be implemented across all sectors of the economy of the Union in order to generate substantial emissions reductions and, second, that Article 30 of [the contested] [d]irective … provides that a review is to be carried out with a view to including other sectors in the scope of the directive.

36 It follows that, as regards the comparability of the sectors in question from the point of view of [the contested] [d]irective …, the possible existence of competition between those sectors cannot constitute a decisive criterion …

37 Nor, … is the quantity of CO2 emitted by each sector essential for assessing their comparability, in view in particular of the objectives of [the contested] [d]irective … and the functioning of the allowance trading scheme, as described in paragraphs 31 to 33 above.

38 The steel, chemical and non-ferrous metal sectors are therefore, for the purposes of examining the validity of [the contested] [d]irective … from the point of view of the principle of equal treatment, in a comparable position while being treated differently.

Disadvantage as a result of the different treatment of comparable situations

39 … [F]or the Community legislature to be accused of breaching the principle of equal treatment, it must have treated comparable situations differently, thereby subjecting some persons to disadvantages as opposed to others (see Joined Cases 17/61 and 20/61 *Klöckner-Werke and Hoesch* v *High Authority* [1962] ECR 325,

345; Case 250/83 *Finsider* v *Commission* [1985] ECR 131, paragraph 8; and Case C-462/99 *Connect Austria* [2003] ECR I-5197, paragraph 115).

…

42 The subjection of certain sectors … to the … scheme of allowance trading involves for the undertakings concerned, first, an obligation to hold a permit to emit greenhouse gases and, second, an obligation to surrender allowances equal to the total emissions of their installations during a specified period, on pain of financial penalties. If the emissions from an installation exceed the quantities allocated to the operator concerned under a national allowance allocation plan, the operator is obliged to obtain additional allowances by means of the allowance trading scheme.

43 By contrast, there are no such legal obligations, aimed at the reduction of greenhouse gas emissions, at Community level for operators of installations not covered by Annex I to [the contested] [d]irective … Consequently, the inclusion of an economic activity in the scope of [the contested] [d]irective … creates a disadvantage for the operators concerned in relation to those carrying on activities not so included.

44 Even if … being subject to such a scheme does not necessarily and systematically entail unfavourable economic consequences, the existence of a disadvantage cannot be denied for that reason alone, since the disadvantage to be taken into account from the point of view of the principle of equal treatment may also be such as to affect the legal situation of the person concerned by a difference in treatment.

45 Moreover, … the disadvantage suffered by operators of installations in the sectors subject to [the contested] [d]irective … cannot be offset by national measures not determined by Community law.

Justification for different treatment

46 The principle of equal treatment will not, however, be infringed if the different treatment of the steel sector, on the one hand, and the chemical and non-ferrous metal sectors, on the other, is justified.

47 A difference in treatment is justified if it is based on an objective and reasonable criterion, that is, if the difference relates to a legally permitted aim pursued by the legislation in question, and it is proportionate to the aim pursued by the treatment (see, to that effect, Case 114/76 *Bela-Mühle Bergmann* [1977] ECR 1211, paragraph 7; Case 245/81 *Edeka Zentrale* [1982] ECR 2745, paragraphs 11 and 13; Case C-122/95 *Germany* v *Council* [1998] ECR I-973, paragraphs 68 and 71; and Case C-535/03 *Unitymark and North Sea Fishermen's Organisation* [2006] ECR I-2689, paragraphs 53, 63, 68 and 71).

48 Since a Community legislative act is concerned, it is for the Community legislature to demonstrate the existence of objective criteria put forward as justification and to provide the Court with the necessary information for it to verify that those criteria do exist (see, to that effect, Joined Cases 124/76 and 20/77 *Moulins et Huileries de Pont-à-Mousson and Providence agricole de la Champagne* [1977] ECR 1795, paragraph 22, and Case C-122/95 *Germany* v *Council*, paragraph 71).

…

57 The Court acknowledges that, in the exercise of the powers conferred on it, the Community legislature has a broad discretion where its action involves political, economic and social choices and where it is called on to undertake complex assessments and evaluations (see Case C-344/04 *IATA and ELFAA* [2006] ECR I-403, paragraph 80). In addition, where it is called on to restructure or establish a complex system, it is entitled to have recourse to a step-by-step approach (see, to that effect, Case 37/83 *Rewe-Zentrale* [1984] ECR 1229, paragraph 20; Case C-63/89 *Assurances du crédit* v *Council and Commission* [1991] ECR I-1799, paragraph 11; and Case C-233/94 *Germany* v *Parliament and Council* [1997] ECR I-2405, paragraph 43) and to proceed in the light of the experience gained.

58 However, even where it has such a discretion, the Community legislature is obliged to base its choice on objective criteria appropriate to the aim pursued by the legislation in question (see, to that effect, Case 106/81 *Kind* v *EEC* [1982] ECR 2885, paragraphs 22 and 23, and [Case 106/83] *Sermide* [[1984] ECR 4209], paragraph 28), taking into account all the facts and the technical and scientific data available at the time of adoption of the act in question (see, to that effect, Case C-284/95 *Safety Hi-Tech* [1998] ECR I-4301, paragraph 51).

59 When exercising its discretion, the Community legislature must, in addition to the principal objective of protecting the environment, fully take into account all the interests involved (see, concerning measures relating to agriculture, Joined Cases C-96/03 and C-97/03 *Tempelman and van Schaijk* [2005] ECR I-1895, paragraph 48, and Case C-504/04 *Agrarproduktion Staebelow* [2006] ECR I-679, paragraph 37). In examining the burdens associated with various possible measures, it must be considered that, even if the importance of the objectives pursued is such as to justify even substantial negative economic consequences for certain operators (see, to that effect, Case C-331/88 *Fedesa and Others* [1990] ECR I-4023, paragraphs 15 to 17, and Case C-86/03 *Greece* v *Commission* [2005] ECR I-10979, paragraph 96), the Community legislature's exercise of its discretion must not

produce results that are manifestly less appropriate than those that would be produced by other measures that were also suitable for those objectives.

60 In the present case, it is common ground, first, that the allowance trading scheme introduced by [the contested] [d]irective … is a novel and complex scheme whose implementation and functioning could have been disturbed by the involvement of too great a number of participants, and, second, that the original definition of the scope of the [contested] directive was dictated by the objective of attaining the critical mass of participants necessary for the scheme to be set up.

61 In view of the novelty and complexity of the scheme, the original definition of the scope of [the contested] [d]irective … and the step-by-step approach taken, based in particular on the experience gained during the first stage of its implementation, in order not to disturb the establishment of the system were within the discretion enjoyed by the Community legislature.

62 It should be observed here that, while the legislature could lawfully make use of such a step-by-step approach for the introduction of the allowance trading scheme, it is obliged, in particular in view of the objectives of [the contested] [d]irective … and of Community policy in the field of the environment, to review the measures adopted, inter alia as regards the sectors covered by [the contested] [d]irective …, at reasonable intervals, as is, moreover, provided for in Article 30 of the directive.

63 However, … the Community legislature's discretion as regards a step-by-step approach could not, in the light of the principle of equal treatment, dispense it from having recourse, for determining the sectors it thought suitable for inclusion in the scope of [the contested] [d]irective … from the outset, to objective criteria based on the technical and scientific information available at the time of adoption of the directive.

64 As regards, first, the chemical sector, it may be seen from the history of [the contested] [d]irective … that that sector has an especially large number of installations, of the order of 34 000, not only in terms of the emissions they produce but also in relation to the number of installations currently included in the scope of the [contested] directive, which is of the order of 10 000.

65 The inclusion of that sector in the scope of [the contested] [d]irective … would therefore have made the management of the allowance trading scheme more difficult and increased the administrative burden, so that the possibility that the functioning of the scheme would have been disturbed at the time of its implementation as a result of that inclusion cannot be excluded. Moreover, the Community legislature was able to take the view that the advantages of excluding the whole sector at the start of the implementation of the allowance trading scheme outweighed the advantages of including it for attaining the objective of [the contested] [d]irective … It follows that the Community legislature has shown to the requisite legal standard that it made use of objective criteria to exclude the entire chemical sector from the scope of [the contested] [d]irective … in the first stage of implementation of the allowance trading scheme.

66 The argument … that the inclusion in the scope of [the contested] [d]irective … of undertakings in that sector emitting a quantity of CO2 above a certain threshold would not have caused administrative problems cannot call into question the above assessment.

…

69 In the light of the foregoing and having regard to the step-by-step approach on which [the contested] [d]irective … is based, in the first stage of implementation of the allowance trading scheme, the difference in treatment between the chemical sector and the steel sector may be regarded as justified.

70 As regards, second, the non-ferrous metal sector, … [at the time of] drafting and adopting [the contested] [d]irective …, th[e] direct emissions from that sector amounted to 16.2 million tonnes of CO2 in 1990, while the steel sector emitted 174.8 million tonnes of CO2.

71 In view of its intention of defining the scope of [the contested] [d]irective … in such a way as not to upset the administrative feasibility of the allowance trading scheme in its initial stage by involving too many participants, the Community legislature was not required to have recourse solely to the method of introducing, for each sector of the economy that emitted CO2, a threshold for emissions in order to attain its objective. Thus, in circumstances such as those in which [the contested] [d]irective … was adopted, it could, when introducing the scheme, legitimately delimit its scope by means of a sectoral approach without exceeding the bounds of its discretion.

72 The difference in the levels of direct emissions between the two sectors concerned is so substantial that the different treatment of those sectors may, in the first stage of implementation of the allowance trading scheme and in view of the step-by-step approach on which [the contested] [d]irective … is based, be regarded as justified without there having been any need for the Community legislature to take into consideration the indirect emissions attributable to the various sectors.

73 Accordingly, the Community legislature did not infringe the principle of equal treatment by treating comparable situations differently when it excluded the chemical and non-ferrous metal sectors from the scope of [the contested] [d]irective ...'

169 Given that the reasoning of the Court of Justice in the aforecited judgment provides a full answer to the first part of this plea of illegality, alleging a lack of justification for different treatment as between the steel sector and the non-ferrous metal and chemical products sectors, it is necessary to reject that part of the plea as unfounded.

170 As regards the second part of the plea, alleging a lack of justification for equal treatment of the steel sector and the other sectors covered by Annex I to the contested directive, while, unlike those other sectors, the steel sector would be a 'natural loser' as it is in a 'unique lock-in situation', suffice it to note that, from the point of view of, first, the overall objective of protecting the environment by reducing greenhouse gas emissions and, second, the polluter-pays principle, all those sectors are in a comparable situation (see, to that effect and by analogy, *Arcelor Atlantique et Lorraine and Others*, cited in paragraph 42 above, paragraphs 29 to 38). In addition, it is clear from paragraphs 112 to 116 above that the applicant has not shown that the steel sector was in a particular situation which distinguishes it from all the other sectors covered by Annex I to the contested directive (see also, to that effect, the Opinion of Advocate General Poares Maduro in *Arcelor Atlantique et Lorraine and Others*, cited in paragraph 157 above, point 57).

171 Consequently, the plea of illegality, based on a sufficiently serious breach of the principle of equal treatment, must be rejected as unfounded in its entirety.

D — *The existence of a sufficiently serious breach of the freedom of establishment*

1. Arguments of the parties

172 The applicant submits that the contested provisions severely infringe its freedom of establishment under the first paragraph of Article 43 EC.

173 The prohibition of restrictions on the freedom of establishment not only applies to State measures but, as a legal principle, is also binding on the Community. Articles 39 EC and 43 EC seek to implement the fundamental principle contained in Article 3(1)(c) EC, in which it is stated that, for the purposes set out in Article 2 EC, the

activities of the Community are to include the abolition, as between Member States, of obstacles to the free movement of persons and services. In addition, the Community institutions themselves must also have due regard to freedom of trade as a fundamental principle of the common market, of which the freedom of establishment is a derivative. The applicant states that Article 43 EC guarantees that companies can choose freely the location of their production within the common market, in accordance with economic criteria. Similarly, that fundamental freedom also prohibits the introduction of obstacles in the Member State of origin which are aimed at preventing relocation of undertakings to another Member State, as the rights guaranteed by Article 43 EC would otherwise be rendered meaningless.

174 According to the applicant, however, the contested provisions affect its right to transfer production from a less efficient installation in one Member State to a more efficient installation in another Member State by not guaranteeing a corresponding transfer of the allowances allocated to the production capacity which is to be closed and transferred (see paragraph 149 et seq. above). This forces the applicant, without objective justification, to continue to operate less efficient plants solely in order not to lose the corresponding allowances. That restriction on its freedom of establishment is disproportionate, bearing in mind the inappropriateness of the contested directive for the purpose of achieving the objective of environmental protection that is pursued (see paragraph 149 above), and the vital importance of exercising the freedom of establishment for the completion of the internal market.

175 The Parliament and the Council submit that this plea should be rejected.

2. Findings of the Court

176 By this plea the applicant essentially claims that, in the light of the freedom of establishment within the meaning of Article 43 EC, read in conjunction with Article 3(1)(c) EC, the broad discretion of the Community legislature under Articles 174 EC and 175 EC (see paragraph 143 above) is restricted to such a point that, in the context of the contested directive, which was adopted pursuant to Article 175(1) EC, it was not

lawfully in a position to be able to refuse to resolve, by itself, the problem of the free cross-border transfer of emission allowances within a group of undertakings, and instead to reserve to the Member States a broad scope, for the purposes of transposing that directive, resulting in the adoption of divergent national rules liable to give rise to unlawful infringements of the freedom of establishment.

177 In that regard, it is settled case-law that the Community institutions must respect, in the same way as the Member States, the fundamental freedoms, such as the freedom of establishment, which serve to achieve one of the essential objectives of the Community, namely the completion of the internal market provided for in Article 3(1)(c) EC (see, to that effect, Case 37/83 *Rewe-Zentrale* [1984] ECR 1229, paragraph 18).

178 However, it does not follow from that general obligation that the Community legislature is required to regulate the area at issue in such a way that the Community legislation, particularly where that legislation takes the form of a directive within the meaning of the third paragraph of Article 249 EC, must provide an exhaustive and definitive solution to certain problems raised from the perspective of completing the internal market or effect a complete harmonisation of national legislation in order to exclude any conceivable barriers to intra-Community trade. Where the Community legislature is called on to restructure or establish a complex scheme, such as the allowance trading scheme, it is entitled to have recourse to a step-by-step approach (see, to that effect, *Arcelor Atlantique et Lorraine and Others*, cited in paragraph 42 above, paragraph 57) and to carry out only a progressive harmonisation of the national legislation at issue, as the implementation of such measures is generally difficult inasmuch as it supposes, on the part of the competent Community institutions, the elaboration, by means of diverse and complex national provisions, of common rules consistent with the objectives defined by the EC Treaty and receiving the approval of a qualified majority of the members of the Council (see, to that effect, *Rewe-Zentrale*, cited in paragraph 177 above, paragraph 20; Case C-63/89 *Assurances du credit* v *Council and Commission* [1991] ECR I-1799, paragraph 11; Case C-233/94 *Germany* v *Parliament and Council* [1997] ECR I-2405, paragraph 43; Case C-166/98 *Socridis* [1999] ECR I-3791, paragraph 26; and C-221/05 *Sam Mc Cauley Chemists (Blackpool) and Sadja*

[2006] ECR I-6869, paragraph 26). That is also the case for Community legislation in the area of protection of the environment under Articles 174 EC and 175 EC.

179 In addition, it should be noted, first, that, under the third paragraph of Article 249 EC, a directive is binding upon each Member State to which it is addressed only as to the result to be achieved, but leaves to the national authorities the choice of form and methods, which logically implies that the Member States are left with the necessary discretion to define transposition measures (see, to that effect, Case C-275/06 *Promusicae* [2008] ECR I-271, paragraph 67) and, second, that recital 30 in the preamble to the contested directive refers to the principle of subsidiarity laid down in the second paragraph of Article 5 EC. According to that principle, in areas which do not fall within its exclusive competence, the Community is to take action only if and in so far as the objectives of the proposed action cannot be sufficiently achieved by the Member States and can therefore, by reason of the scale or effects of the proposed action, be better achieved at Community level. It is apparent from Articles 174 EC to 176 EC that, in the area of protection of the environment, the Community and the Member States have shared competence. Therefore, the Community rules do not seek to effect complete harmonisation in that area and Article 176 EC allows the Member States to introduce more stringent protective measures, subject only to the conditions that they should be compatible with the EC Treaty and that they should be notified to the Commission (see, to that effect, Case C-6/03 *Deponiezweckverband Eiterköpfe* [2005] ECR I-2753, paragraph 27 and the case-law cited therein).

180 In accordance with those principles, the contested directive does not provide for complete harmonisation at Community level of the conditions underlying the establishment and functioning of the allowance trading scheme. Provided that they respect the rules of the EC Treaty, the Member States enjoy broad discretion regarding the implementation of that scheme, in particular in the context of the elaboration of their NAPs and their independent decisions on emission allowance allocation under Article 9(1) and Article 11(1) of the contested directive (*Germany* v *Commission*, cited in paragraph 114 above, paragraphs 102 to 106). Consequently, the mere fact that the Community legislature left open a particular question falling within the scope of the contested directive and of a fundamental freedom, in such a way that it is the task

of the Member States to regulate that issue in the exercise of their discretion, albeit in accordance with the higher-ranking rules of Community law, does not in itself justify that omission being classified as being contrary to the rules of the EC Treaty (see, to that effect, the Opinion of Advocate General Jacobs in Case C-377/98 *Netherlands* v *Parliament and Council* [2001] ECR I-7079, I-7084, points 87 and 88). That is made all the more evident by the fact that the Member States are required, pursuant to their duty of genuine cooperation under Article 10 EC, to ensure the effectiveness of directives (see, in that sense, Case C-40/04 *Yonemoto* [2005] ECR I-7755, paragraph 58), which also implies that they are required to interpret national law in the light of the objectives and principles underlying the directive at issue (see, in relation to the principle of interpretation in the light of a directive, Case C-321/05 *Kofoed* [2007] ECR I-5795, paragraph 45).

181 In addition, both the Community legislature, when adopting a directive, and the Member States, when transposing that directive into national law, are required to ensure that the general principles of Community law are respected. Thus, it is apparent from settled case-law that the requirements flowing from the protection of the general principles recognised in the Community legal order, which include fundamental rights, are also binding on Member States when they implement Community rules, and that consequently they are bound, as far as possible, to apply the rules in accordance with those requirements (see Case C-540/03 *Parliament* v *Council* [2006] ECR I-5769, paragraph 105 and the case-law cited therein; see also, to that effect, Case C-101/01 *Lindqvist* [2003] ECR I-12971, paragraphs 84 to 87).

182 The Court takes the view that those principles apply by analogy to the fundamental freedoms of the EC Treaty. The contested directive, and in particular Articles 9(1) and 11(1) thereof, grants the Member States discretion and, in principle, that discretion is broad enough to enable them to apply the rules of that directive in conformity with the requirements resulting from the protection of the fundamental rights and fundamental freedoms under the EC Treaty. In addition, since the implementation

of the contested directive is subject to review by the national courts, it is incumbent upon those courts, if they encounter difficulties relating to the interpretation or validity of the directive, to refer a question to the Court of Justice for a preliminary ruling in the circumstances set out in Article 234 EC (see, to that effect and by analogy, *Parliament* v *Council*, cited in paragraph 181 above, paragraphs 104 and 106).

183 Consequently, the authorities and the courts in the Member States must not only interpret their national law in a manner consistent with the contested directive but also ensure that they do not rely on an interpretation of the latter which would be in conflict with the fundamental rights protected by the Community legal order, with the other general principles of Community law or with the fundamental freedoms of the EC Treaty, such as the freedom of establishment (see, to that effect and by analogy, *Lindqvist*, cited in paragraph 181 above, paragraph 87; Case C-305/05 *Ordre des barreaux francophones et germanophone and Others* [2007] ECR I-5305, paragraph 28; and *Promusicae*, cited in paragraph 179 above, paragraph 68).

184 It follows from all of the foregoing that the Community legislature cannot be accused of having failed to resolve in an exhaustive and definitive manner, within the framework of a directive, a problem coming within the scope of the freedom of establishment, where that directive grants the Member States a discretion which enables them fully to respect the rules of the EC Treaty and the general principles of Community law.

185 In the light of the above considerations, the Court finds it appropriate in the present case to examine whether the contested directive may be interpreted and transposed by the Member States in conformity with the freedom of establishment under Article 43 EC (see, to that effect, Joined Cases C-465/00, C-138/01 and C-139/01 *Österreichischer Rundfunk and Others* [2003] ECR I-4989, paragraphs 68 and 91, and Joined Cases C-482/01 and C-493/01 *Orfanopoulos and Others* [2004] ECR I-5257, paragraphs 109 and 110).

186 As submitted by the applicant, the contested directive does not provide for any specific rule offering the operators of installations subject to the allowance trading scheme the possibility of transferring the allowance quota allocated to one installation, following its closure, to another installation established in another Member State and belonging to the same group of companies.

187 However, it follows from Article 12(1), read in conjunction with Article 3(a) and (g), of the contested directive that 'Member States shall ensure that allowances can be transferred between … [natural and legal] persons within the Community'. In addition, Article 12(2) of the contested directive requires that 'Member States … ensure that allowances issued by a competent authority of another Member State are recognised for the purpose of meeting an operator's obligations [to surrender unused allowances] under paragraph 3' of that article. It follows, first, in accordance with the objective set out in recital 5 in the preamble to the contested directive, which provides for the creation of an 'efficient European market in greenhouse gas emission allowances', that the exchange market established by the contested directive has a Community dimension and, second, that that market is founded on the principle of the free cross-border transfer of emission allowances between natural and legal persons.

188 In the absence of the free cross-border transfer of emission allowances within the meaning of Article 12(2) and (3) of the contested directive, read in conjunction with Article 3(a) thereof, the efficiency and performance of the allowance trading scheme for the purposes of Article 1 of the contested directive would be seriously disrupted. It is for that reason that Article 12(2) of the contested directive imposes on the Member States the general obligation to 'ensure' that that freedom is made effective in the relevant national legislation. Conversely, it should be noted that the contested directive does not provide for any restriction on cross-border transfers of allowances between legal persons within the same group of companies, irrespective of where their registered office and/or principal place of business are located within the internal market. In the light of the aforecited provisions of the contested directive, it cannot therefore be concluded that that directive contains an unlawful restriction on the fundamental freedoms of the EC Treaty, including the freedom of establishment, or that it encourages the Member States not to respect those freedoms.

189 On the contrary, as the applicant itself states in its written pleadings, the problem which it raises originates in the partially divergent legislation adopted by the Member States when transposing the contested directive, without being able to target its claim at one specific provision thereof or at the contested provisions. In that regard, it should be noted that the Member States are required, within the bounds of the freedom left to them by the third paragraph of Article 249 EC, to choose the most appropriate forms and methods to ensure the effectiveness of directives (*Yonemoto*, cited in paragraph 180 above, paragraph 58) and to apply their national law in conformity with those directives and the fundamental freedoms of the EC Treaty, such as the freedom of establishment (see, to that effect and by analogy, *Lindqvist*, cited in paragraph 181 above, paragraph 87, and *Promusicae*, cited in paragraph 179 above, paragraph 68).

190 Therefore, without there being any need to rule on the question as to whether or not the relevant national laws, which are at the origin of the fact that the applicant cannot freely transfer its allowance quotas between its installations established in different Member States, are consistent with the freedom of establishment under Article 43 EC, it must be concluded that such a restriction on that freedom cannot be attributed to the contested directive on the sole ground that the latter does not explicitly prohibit such practice on the part of the Member States. *A fortiori*, the Community legislature cannot be held responsible for having failed in that respect, in a manifest and grave manner, to have regard to the limits of its discretion under Article 174 EC in conjunction with Article 43 EC.

191 Accordingly, there is no need to examine the validity of the arguments raised by the parties concerning the possibility for the applicant to benefit from the national rules providing all new entrants with free access to the allowances in the reserve. Although Article 11(3) of the contested directive, in conjunction with criterion 6 of Annex III thereto, requires that the Member States take account of the need to make access to allowances available to new entrants, the contested directive does not provide, as such, for the establishment of such a reserve. Thus, the possible inadequacy of that access to offset the loss of allowances as a result of the closure of an installation also cannot be attributed to the Community legislature.

192 Consequently, the plea of illegality alleging a sufficiently serious breach of the freedom of establishment must be rejected as unfounded.

E — *The existence of a sufficiently serious infringement of the principle of legal certainty*

1. Arguments of the parties

193 The applicant submits that the contested provisions infringe the principle of legal certainty. Community legislation, including directives, must be certain, clear and precise, and its application must be foreseeable by individuals so that they know without ambiguity what are their rights and obligations and may act accordingly. These requirements must be observed all the more strictly in the case of legislation which is liable to entail financial consequences.

194 In the opinion of the applicant, the contested provisions infringe the principle of legal certainty for two reasons. First, in the absence of any cap or control mechanism concerning the price of the allowances provided for by the contested directive, the applicant, as a 'net buyer of allowances' by reason of its inability to reduce its CO2 emissions, will be required to purchase allowances at 'prices which are completely unpredictable', estimated at between EUR 20 and EUR 60 per allowance (see paragraph 80 et seq. above). Second, the contested directive provides no rule which guarantees the transfer of allowances initially allocated to an installation earmarked for closure to an installation of the same group established in another Member State. Member States, however, have a strong interest in cancelling allowances for installations to be closed, given that such closures allow them to reduce further their CO2 emissions in order to meet their respective reduction targets under Decision 2002/358. The resulting legal uncertainty makes it impossible for the applicant to draw up any long-term business plans and to move forward with its restructuring strategy, consisting of transferring production to its most profitable installations. Given that that strategy formed the very rationale for the merger in 2001 (see paragraph 30 above), the contested directive also infringes the principle of the protection of legitimate expectations. In its reply, the applicant states that long-term planning of investments and economic projects has become impossible, owing in particular to the divergences in emissions reduction objectives and measures among the Member States. That uncertainty is

confirmed by the significant price increase for CO2 allowances. Thus, between February 2005 and March 2006, the price of CO2 allowances increased from around EUR 6 to more than EUR 26. Furthermore, it is unclear how the future allocation of allowances will develop, in particular as regards the second allocation period and the periods thereafter.

195 The Parliament and the Council contend that this plea should be rejected.

2. Findings of the Court

196 By this plea the applicant essentially submits that the contested provisions are not sufficiently clear and precise in so far as they involve a significant financial burden for it, which makes it impossible for it to plan its economic decisions. In that regard, the Community legislature should have provided, first, for a cap or control mechanism for the price of emission allowances and, second, for a special rule guaranteeing the cross-border transfer of allowances between different installations of the same group of companies.

197 In so far as the applicant reiterates, in the second part of the plea, its arguments concerning the alleged infringement of the freedom of establishment, it follows from the findings in paragraphs 176 to 192 above that those arguments also cannot be upheld in relation to the claim that there has been a sufficiently serious infringement of the principle of legal certainty. Therefore, the second part of this plea must be rejected as unfounded.

198 As regards the first part of this plea, reference should first be made to the case-law according to which the principle of legal certainty requires, inter alia, that rules of law be clear, precise and predictable as regards their effects, in particular where they may have unfavourable consequences for individuals and undertakings (see, to that effect,

Case C-17/03 *VEMW and Others* [2005] ECR I-4983, paragraph 80 and the case-law cited therein).

199 Next, it should be pointed out in that regard that the contested directive does not contain any provisions governing the extent of the financial consequences which may result from both a possible insufficiency of allowances allocated to an installation and the price of those allowances, since that price is determined exclusively by the market forces which came into being following the establishment of the allowance trading scheme, which, pursuant to Article 1 of the contested directive, seeks to 'promote reductions of greenhouse gas emissions in a cost-effective and economically efficient manner'. In the light of the findings in paragraphs 178 to 184 above, the Community legislature was not required to adopt specific provisions in that regard and thereby to restrict the scope of the Member States in relation to the transposition of the contested directive.

200 On the contrary, regulation at Community level of the prices of allowances might thwart the main objective of the contested directive, which is to reduce greenhouse gas emissions through an efficient allowance trading scheme in which the cost of emissions and investments made to reduce such emissions is essentially determined by market forces (recital 5 in the preamble to the contested directive). Consequently, in the event of an insufficiency of allowances, the incentive for operators to reduce, or not to reduce, their greenhouse gas emissions will depend on a complex economic decision taken in the light, first, of the price of emission allowances available on the exchange market and, second, of the costs of possible measures to reduce emissions which may aim either to reduce production or to invest in more efficient methods of production in terms of energy output (recital 20 in the preamble to the contested directive; see also, to that effect, *Germany* v *Commission*, cited in paragraph 114 above, paragraph 132 et seq.).

201 In such a scheme, the increase in the cost of emissions and, consequently, in the price of allowances, which depends on a series of economic parameters, cannot be regulated in advance by the Community legislature without reducing, or even completely

removing, the economic incentives which constitute its very basis and thereby adversely affecting the effectiveness of the allowance trading scheme. In addition, the establishment of such a scheme, including its economic premises, in order to comply with the obligations resulting from the Kyoto Protocol, comes within the broad discretion granted to the Community legislature under Article 174 EC (see paragraph 143 above) and constitutes, in itself, a legitimate and appropriate choice on the part of the latter and the validity of which as such has not been contested by the applicant.

202 In addition, it is on the basis of that legitimate choice that the Community legislature based the allowance trading scheme on the premise that, under Article 9(1) and Article 11(1) of the contested directive, it is the task of the Member States to decide, on the basis of their NAPs and in the exercise of the discretion granted to them in that regard, on the total quantity of allowances to be allocated and the individual allocation of those allowances to the installations established in their territory (see, to that effect, *Germany* v *Commission*, cited in paragraph 114 above, paragraphs 102 to 106). In addition, that decision is subject only to a restricted initial review by the Commission, pursuant to Article 9(3) of the contested directive, particularly in the light of the criteria set out in Annex III thereto (order in Case T-387/04 *EnBW Energie Baden-Württemberg* v *Commission* [2007] ECR II-1195, paragraph 104 et seq.). Therefore, the variations to which the objectives and emission reduction measures of the various Member States will be subject, which are the result of their obligations under the Kyoto Protocol, as reflected in the burden sharing agreement laid down in Decision 2002/358 and, consequently, the uncertainty regarding the total quantity and the individual quantities of allowances to be allocated to the different industrial sectors and to operators on the basis of the various NAPs, cannot be attributed to the contested provisions as such.

203 Finally, the applicant has not specifically called into question the clarity and precision of the other contested provisions in order to show that it was not in a position to establish unambiguously its resulting rights and obligations. The need to have an emissions permit under Article 4 of the contested directive, the obligation to surrender within the meaning of Article 6(2)(e), read in conjunction with Article 12(3), and the penalties laid down in Article 16(2), (3) and (4) of that directive constitute

provisions which are sufficiently clear, precise and foreseeable as to their effects, the effective scope of which depends only on the quantity of free allowances made available to operators or the price of the quotas available on the exchange market. As regards that latter aspect, it should be noted that the fact that it is not possible to predict how the exchange market will develop constitutes an element which is inherent and inseparable from the economic mechanism characterising the allowance trading scheme, which is subject to the classic rules of supply and demand, characteristic of a free and competitive market, in accordance with the principles laid down in Article 1 of, in conjunction with recital 7 in the preamble to, the contested directive and Articles 2 EC and 3(1)(c) and (g) EC. That aspect cannot therefore be categorised as being contrary to the principle of legal certainty without calling into question the very economic bases of the allowance trading scheme as set out in the contested directive in a manner consistent with the rules of the EC Treaty.

204 Accordingly, the lack of a specific rule in the contested directive establishing a cap or control mechanism for allowance prices cannot be categorised as constituting a manifest and grave disregard for the limits of the discretion of the Community legislature.

205 Consequently, this plea must be rejected as unfounded.

206 It follows from all of the foregoing that the applicant has failed to demonstrate that, in adopting the contested directive, the Community legislature acted unlawfully or committed a sufficiently serious breach of a rule of law designed to confer rights on the applicant. Consequently, the application for damages must be rejected without there being any need to rule on the other conditions giving rise to non-contractual liability on the part of the Community or on the plea of inadmissibility raised by the Council in relation to certain annexes to the reply.

Costs

207 Under Article 87(2) of the Rules of Procedure, the unsuccessful party is to be ordered to pay the costs if they have been applied for in the successful party's pleadings. Since the applicant has been unsuccessful, it must be ordered to pay the costs in accordance with the forms of order sought by the Parliament and the Council.

208 Under the first subparagraph of Article 87(4) of the Rules of Procedure, institutions which have intervened in the proceedings are to bear their own costs. Consequently, the Commission, which has intervened in support of the Parliament and Council, must bear its own costs.

On those grounds,

THE GENERAL COURT (Third Chamber)

hereby:

1. Dismisses the action;

2. Orders Arcelor SA to bear its own costs and those incurred by the European Parliament and the Council of the European Union;

3. Orders the European Commission to bear its own costs.

Azizi Cremona Frimodt Nielsen

Delivered in open court in Luxembourg on 2 March 2010.

[Signatures]

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