



Reports of Cases

JUDGMENT OF THE GENERAL COURT (First Chamber)

1 February 2012 *

(Environment — Directive 2003/87/EC — Scheme for greenhouse gas emission allowance trading — National emission allowance allocation plan for Belgium in respect of the period from 2008 to 2012 — Article 44 of Regulation (EC) No 2216/2004 — Subsequent correction — New entrant — Decision instructing the Central Administrator of the Community independent transaction log to enter a correction into the national allocation plan table)

In Case T-237/09,

Région wallonne (Belgium), represented by J.-M. De Backer, A. Lepière, I.-S. Brouhns and S. Engelen, lawyers,

applicant,

v

European Commission, represented by E. White and O. Beynet, acting as Agents,

defendant,

APPLICATION for partial annulment of the Commission's decision of 27 March 2009 relating to the national plan for the allocation of greenhouse gas emission allowances notified by the Kingdom of Belgium for the period from 2008 to 2012, instructing the Central Administrator to enter a correction to the Belgian national allocation plan table into the Community independent transaction log,

THE GENERAL COURT (First Chamber),

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

Registrar: C. Kristensen, Administrator,

having regard to the written procedure and further to the hearing on 20 September 2011,

gives the following

* Language of the case: French.

Judgment

Legal context

- 1 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), as amended by Directive 2004/101/EC of the European Parliament and of the Council of 27 October 2004 (OJ 2004 L 338, p. 18), establishes, as provided in Article 1 thereof, a scheme for greenhouse gas emission allowance trading within the European Community ('the allowance trading scheme'), in order to promote reductions of greenhouse gas emissions, in particular carbon dioxide emissions, in a cost-effective and economically efficient manner.
- 2 To this end, Directive 2003/87 provides in essence that greenhouse gas emissions from installations listed in Annex I must be covered by prior authorisation and by allowances allocated in accordance with a national allocation plan ('NAP').
- 3 Article 9 of Directive 2003/87 provides:

'1. For each period referred to in Article 11(1) and (2), 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 ...

...

3. 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. The Member State shall only take a decision under Article 11(1) or (2) if proposed amendments are accepted by the Commission. Reasons shall be given for any rejection decision by the Commission.'
- 4 Article 11(2) of Directive 2003/87 provides:

'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, taking due account of comments from the public.'
- 5 Article 38(1) and (2) of Commission Regulation (EC) No 2216/2004 of 21 December 2004 for a standardised and secured system of registries pursuant to Directive 2003/87 and Decision No 280/2004/EC of the European Parliament and of the Council (OJ 2004 L 386, p. 1), as amended by Commission Regulation (EC) No 916/2007 of 31 July 2007 (OJ 2007 L 200, p. 5), provides, under the heading '[NAP] table for the [allocation] period [from 2005 to 2007]':

'1. By 1 October 2004, each Member State shall notify to the Commission its [NAP] table, corresponding to the decision taken under Article 11 of Directive 2003/87/EC. If the [NAP] table is based upon the [NAP] notified to the Commission which was not rejected under Article 9(3) of Directive 2003/87/EC or on which the Commission has accepted proposed amendments, the Commission shall instruct the Central Administrator to enter the [NAP] table into the Community independent transaction log ...

2. A Member State shall notify each correction to its [NAP] together with each corresponding correction in its [NAP] table to the Commission. If the correction to the [NAP] table is based upon the [NAP] notified to the Commission which was not rejected under Article 9(3) of Directive 2003/87/EC or on which the Commission has accepted amendments and that correction is in accordance with methodologies set out in that [NAP] or results from improvements in data, the Commission shall instruct the Central Administrator to enter the corresponding correction into the [NAP] table ... In all other cases, the Member State shall notify the correction to its [NAP] to the Commission and if the Commission does not reject this correction in accordance with the procedure in Article 9(3) of Directive 2003/87/EC, the Commission shall instruct the Central Administrator to enter the corresponding correction into the [NAP] table ...'

- 6 Article 44(1) and (2) of Regulation No 2216/2004, as amended, provides, under the heading '[NAP] table for the [allocation] period [from 2008 to 2012]':

'1. By 1 January 2007 ..., each Member State shall notify to the Commission its [NAP] table, corresponding to the decision taken under Article 11 of Directive 2003/87/EC. If the [NAP] table is based upon the [NAP] notified to the Commission which was not rejected under Article 9(3) of Directive 2003/87/EC or on which the Commission has accepted proposed amendments, the Commission shall instruct the Central Administrator to enter the [NAP] table into the Community independent transaction log ...

2. A Member State shall notify each correction to its [NAP] together with each corresponding correction in its [NAP] table to the Commission. If the correction to the [NAP] table is based upon the [NAP] notified to the Commission which was not rejected under Article 9(3) of Directive 2003/87/EC or on which the Commission has accepted amendments and that correction results from improvements in data, the Commission shall instruct the Central Administrator to enter the corresponding correction into the [NAP] table ...

All such corrections relating to new entrants shall be made in accordance with the automatic [NAP] table change process as set out in Annex XIa to this Regulation.

All such corrections not relating to new entrants shall be made in accordance with the initialisation procedures as set out in Annex XIV to this Regulation.

In all other cases, the Member State shall notify the correction to its [NAP] to the Commission and if the Commission does not reject this correction in accordance with the procedure in Article 9(3) of Directive 2003/87/EC, the Commission shall instruct the Central Administrator to enter the corresponding correction into the [NAP] table ...'

Background to the dispute

- 7 By letter of 29 September 2006, the Kingdom of Belgium notified its NAP for the allocation period from 2008 to 2012 to the Commission of the European Communities, in accordance with Article 9(1) of Directive 2003/87.
- 8 The Belgian NAP is composed of three allocation plans respectively drawn up by the Flemish, Brussels and Walloon Regions, whose competence includes environmental protection. The Belgian NAP is the result of coordination on the basis of cooperation agreements concluded between those three regions and the federal State.

- 9 By decision of 16 January 2007 ‘concerning the [NAP] notified by [the Kingdom of] Belgium in accordance with Directive 2003/87/EC of the European Parliament and of the Council’, the Commission stated that it was raising no objections to the Belgian NAP provided that certain amendments were made to it.
- 10 On 28 February 2008, the Kingdom of Belgium notified an amended NAP to the Commission. The amendments to it concerned in particular the Walloon part of the NAP.
- 11 By letter of 18 April 2008, signed by the Director-General of the Directorate-General (DG) Environment, the Commission informed the Kingdom of Belgium that certain amendments made to the Belgian NAP concerning its Walloon part were inadmissible.
- 12 By letter of 27 June 2008, the Kingdom of Belgium notified a new amended NAP to the Commission.
- 13 On page 37 of the amended Belgian NAP, under the heading ‘Information on the management of the reserve of allowances for new entrants’, it is stated *inter alia* as follows:

‘... some allowances forming part of the Walloon Region’s aggregate quantity of emission trading allowances are reserved for new entrants, in the amount of 1 750 277 allowances per year.

...

The Walloon Region envisages using the allowances in the reserve for new entrants on the following bases:

Installations concerned by the reserve: the Walloon decree of 10 November 2004 establishing an allowance trading scheme ... defines new entrants as follows:

“... a new entrant in the allowance trading scheme ..., for a given reference period, shall mean:

- (a) any establishment which engages in the exploitation, not referred to in the Walloon regional allocation plan notified to the Commission, of one or more activities or installations emitting specified greenhouse gases ... and has obtained an environmental permit concerning those emissions of specified greenhouse gases after the abovementioned notification to the Commission;
- (b) any establishment which engages in the exploitation, referred to in the Walloon regional allocation plan notified to the Commission, of one or more activities or installations emitting specified greenhouse gases ... where either that establishment has obtained an environmental permit concerning those emissions of specified greenhouse gases because of a change in its nature or operation, or an extension of the installation, which significantly increases its emissions of specified greenhouse gases compared with the emissions upon which the determination of the initial allocation was based, after the abovementioned notification to the Commission, or an alteration or extension, registered by the operator ..., results in a significant increase of those emissions of specified greenhouse gases compared with the emissions upon which the determination of the initial allocation was based, after the abovementioned notification to the Commission.”

- 14 On page 38 of the amended Belgian NAP, it is stated, *inter alia*, that the Walloon Region will allocate the allowances in the reserve on the ‘basis of a first come, first served rule, up to the total volume of the reserve for the period from 2008 to 2012’.
- 15 Pages 51 and 52 of the amended Belgian NAP contain Annexes Va, Vb and Vc.

- 16 Annex Va, headed 'New entrants already considered in the [NAP]' and 'New entrants requiring to be allocated allowances from 2008', contains a table with a list of installations, which include, numbered 11, 'Arcelor-Mittal haut fourneau [blast furnace] 6'. It is specified in a footnote that that installation and another installation which is specified in the table 'will be allocated allowances as and when the reserve is supplied'. For the installation 'Arcelor-Mittal haut fourneau 6', the table provides for a total quantity of 12 949 538 allowances in respect of the period from 2008 to 2012. In addition, the table breaks down on an annual basis the quantity of allowances intended for that installation during the period indicated. Thus, in the table's second column, concerning 2008, the quantity of allowances intended for the installation 'Arcelor-Mittal haut fourneau 6' is 700 000, whilst in the third to sixth columns, concerning 2009 to 2012, that quantity is 1 000 000 for 2009 and 3 749 846 for each of 2010, 2011 and 2012.
- 17 Annex Vb contains a list of installations under the heading 'New entrants having obtained an environmental permit but not yet operating (Estimate)'.
- 18 Annex Vc contains a list of installations under the heading 'New entrants not yet having obtained an environmental permit and not yet operating (Estimate)'.
- 19 Finally, Annex VI to the Belgian NAP, headed 'Average annual allocations that will be allocated to existing undertakings and to new installations (or production increase) already included in the 2008 to 2012 allocation (Allocation table)', contains an installation allocation table. The installations listed include, as the installation bearing the number 11, 'Arcelor — Cockerill Sambre_HF6_Seraing', which is designated, in the respective boxes below the years 2008 to 2012, as a 'new entrant', but the number of allowances to be allocated is not indicated.
- 20 By letter of 30 June 2008, signed by the Director-General of DG Environment, the Commission informed the Kingdom of Belgium that it would raise no objection in relation to the new amended Belgian NAP.
- 21 By letter of 30 July 2008, the Kingdom of Belgium notified to the Commission its allocation decision, under Article 11(2) of Directive 2003/87, and its NAP table, pursuant to Article 44(1) of Regulation No 2216/2004, for the allocation period from 2008 to 2012.
- 22 By Article 1 of a decision of 10 October 2008, the Commission instructed the Central Administrator to enter the Belgian NAP table into the Community independent transaction log. In recital 2 of that decision it is stated that 'the Commission finds that the notified [Belgian NAP] table corresponds to the allocation decision and is based upon the [NAP] notified by Belgium, as revised, without objections from the Commission'. As stated in Article 2 of the decision of 10 October 2008, the Belgian NAP table is annexed to that decision.
- 23 By letter of 18 February 2009, the Kingdom of Belgium notified to the Commission an amended Belgian NAP table which included corrections. In the table which is annexed to that letter and is headed 'Corrections to Belgium's [NAP] table 2008-2012' and 'Corrections of allocations', reference is made to an installation of Arcelor-Mittal bearing the number 116, named 'Arcelor-Cockerill Sambre_HF6_Seraing' and located at Seraing ('installation No 116'), in favour of which provision is made for a quantity of 700 000 allowances for 2008 and no allowances (boxes left blank) for 2009 to 2012. Thus, the total of the allowances to be allocated to that installation for the entire allocation period from 2008 to 2012 is indicated in the final column of the table and amounts to 700 000.
- 24 By Article 1 of its decision of 27 March 2009 ('the contested decision') adopted on the basis, in particular, of Article 44(2) of Regulation No 2216/2004, the Commission instructed the Central Administrator to enter the requested corrections in Belgium's NAP table into the Community independent transaction log.

25 According to Article 2 of the contested decision, the corrections to Belgium's NAP table are set out in the annex to the decision. The annex does not contain a correction relating to installation No 116.

26 Recital 3 of the contested decision states as follows:

'The Commission found that the corrections notified for installation No 116 ... are inadmissible because they are not in accordance with the methodologies set out in Belgium's [NAP].'

27 As stated in recital 4 of the contested decision, the Commission found that the rest of the corrections notified were in accordance with Belgium's NAP.

Procedure and forms of order sought

28 By application lodged at the Court Registry on 17 June 2009, the applicant, the Région wallonne (the Walloon Region), brought the present action.

29 By separate document, lodged at the Court Registry on the same day, the Walloon Region requested that the case be adjudicated upon under the expedited procedure referred to in Article 76a of the Rules of Procedure of the Court.

30 By document lodged at the Court Registry on 9 July 2009, the Walloon Region withdrew its request for the expedited procedure.

31 The Walloon Region claims that the Court should:

- annul the contested decision in so far as it rejects the correction of the Belgian NAP table concerning the allocation of allowances to installation No 116 for the allocation period from 2008 to 2012;
- order the Commission to pay the costs.

32 The Commission contends that the Court should:

- dismiss the action;
- order the Walloon Region to pay the costs.

33 By way of measures of organisation of procedure under Article 64 of the Rules of Procedure, the Court requested the parties to produce certain documents and to reply in writing to questions. The parties complied with those measures of organisation of procedure within the prescribed period.

34 As one member of the Chamber was unable to sit in the present case, the President of the Court designated another judge to complete the Chamber pursuant to Article 32(3) of the Rules of Procedure.

35 Upon hearing the report of the Judge-Rapporteur, the Court (First Chamber) decided to open the oral procedure.

36 The parties presented oral argument and replied to the oral questions put by the Court at the hearing on 20 September 2011.

Law

Summary of the pleas for annulment

- 37 The Walloon Region puts forward four pleas in law in support of its claim seeking the partial annulment of the contested decision.
- 38 The first plea alleges infringement of Article 44(2) of Regulation No 2216/2004. It is divided into two parts, relating to an error of law and to a manifest error of assessment.
- 39 The second plea alleges infringement of the obligation to state reasons as provided for in Article 253 EC.
- 40 The third plea alleges infringement of the principle of legal certainty and the principle of the protection of legitimate expectations.
- 41 The fourth plea alleges infringement of a ‘principle of Community good faith and of good administration’.

Effectiveness of the pleas put forward by the applicant

- 42 The Commission’s primary contention is that the pleas for annulment put forward by the Walloon Region are ineffective.
- 43 According to the Commission, under the fourth subparagraph of Article 44(2) of Regulation No 2216/2004 any amendment of the NAP that does not comply with the criteria in the first subparagraph of Article 44(2) of the regulation must be the subject of a fresh notification by the Member State pursuant to the procedure envisaged in Article 9(3) of Directive 2003/87, since the procedure for registering corrections to the NAP table cannot replace that notification procedure and authorise the Commission to register corrections requiring an amendment of the NAP itself. In the present instance, the Kingdom of Belgium merely requested the registration of certain corrections made to the NAP table, including the correction relating to installation No 116, but this correction required an amendment of the Belgian NAP itself since it was not based upon the methodologies provided for by that NAP. Consequently, in the contested decision the Commission did not make a determination upon the correction relating to installation No 116. It is only for the sake of completeness that in recital 3, and not in the operative part, the contested decision sets out the correction requested. Thus, the reference to the correction concerning installation No 116 not being registered is not capable of altering the substance or the nature of the contested decision and of transforming it into an implied decision of rejection in this regard, as the applicant pleads.
- 44 It must be held, however, that the Commission is wrong in asserting that the contested decision does not entail binding legal effects adversely affecting the Walloon Region in this respect.
- 45 It is true that, as has been recognised by settled case-law, only the operative part of a decision is capable of producing legal effects and, consequently, of adversely affecting a person’s legal interests, regardless of the grounds on which the decision is based. By contrast, the assessments made in the recitals of a decision are not in themselves capable of forming the subject of an action for annulment and can be subject to review by the European Union judicature only to the extent that, as grounds for an act adversely affecting a person’s interests, they constitute the necessary basis for the operative part of that act (see, to this effect, the order in Case C-164/02 *Netherlands v Commission* [2004] ECR I-1177, paragraph 21, and the order in Case T-387/04 *EnBW Energie Baden-Württemberg v Commission* [2007] ECR II-1195, paragraph 127). Here, however, although the operative part of the contested decision does not expressly reject the correction requested relating to installation No 116 as

inadmissible, it is apparent upon reading Article 2 of the decision, the annex and recital 3 together that it is specifically because of the ground of inadmissibility adopted in recital 3 that that correction was not included in the annex containing the corrections which the Central Administrator was instructed, under Article 1 of the decision, to integrate into the Belgian NAP table.

- 46 Thus, even if, as the Commission submits, the Kingdom of Belgium had to follow in this instance the procedure of notifying the amended NAP pursuant to Article 9(3) of Directive 2003/87 and the Commission did not have the power to examine and reject the request for correction relating to installation No 116 on the basis of Article 44(2) of Regulation No 2216/2004, the fact remains that it is apparent, in essence, from the contested decision, as read in the light of its fundamental grounds, that the Commission expressly adopted a position on that request and found it inadmissible.
- 47 Neither the Commission's argument that it did not make a determination on the correction at issue nor the argument concerning the lack of effect of recital 3 of the contested decision on its operative part calls that assessment into question, as was indeed acknowledged by the Commission at the hearing. In clarifying the scope of both Article 2 of the contested decision and the annex thereto, which do not include the correction requested relating to installation No 116, recital 3 constitutes, for the purposes of the case-law cited in paragraph 45 above, the necessary basis not only of Article 2 but also of Article 1 of that decision, provisions which jointly determine the extent of the instruction to enter corrections that was given to the Central Administrator and which have to be read in the light of that recital.
- 48 It follows that the pleas for annulment put forward in support of the action are effective and that the Commission's line of argument in this regard should be rejected.

The plea alleging infringement of Article 44(2) of Regulation No 2216/2004

- 49 In the first part of this plea, alleging an error of law, the Walloon Region contends in essence that the Commission was not entitled to adopt the contested decision in so far as it rejects the correction requested concerning installation No 116 and to found it on the second sentence of Article 44(2) of Regulation No 2216/2004, whose scope it misconstrued. Unlike the second sentence of Article 38(2) of the regulation, which is applicable to the allocation period from 2005 to 2007, that provision does not concern the rejection of a correction to the NAP table on the ground relied upon by the Commission, namely the alleged failure of the correction at issue to accord with methodologies set out in the NAP.
- 50 In the second part, alleging a manifest error of assessment, the Walloon Region observes that Article 44(2) of Regulation No 2216/2004 distinguishes two types of corrections which the Member States may make to the NAP table, namely, on the one hand, in the first subparagraph, corrections which are based upon the provisions of a NAP not rejected by the Commission and which result from improvements in data and, on the other hand, in the fourth subparagraph, corrections entailing an amendment to the NAP and therefore necessitating an examination in accordance with Article 9(3) of Directive 2003/87. According to the Walloon Region, the correction requested relating to installation No 116 is based upon the Belgian NAP and it is not necessary to amend that NAP pursuant to the second correction method provided for in Article 44(2) of Regulation No 2216/2004. It explains, in essence, that it is clear from Annex Va to the Belgian NAP that the allocation of allowances to installation No 116 will take place 'as and when the reserve is supplied', thus making it possible for it to be allocated allowances progressively, having regard to budgetary constraints and to the state of the reserve, in the light in particular of any closures of existing installations and of whether industrial projects that have been announced are actually carried out.
- 51 The Commission submits in the alternative that the present plea for annulment is unfounded.

- 52 As regards the first part of the plea, the Commission contends, in essence, that the NAP table can be regarded as based upon the NAP only if it is based upon the allocation mechanisms provided for by the NAP and not on other methodologies for which it does not provide. Under Article 44(2) of Regulation No 2216/2004, two conditions must be met, that is to say, the correction requested must be based upon the NAP and must result from improvements in data, which was not the case here. According to the Commission, non-registration on the ground that the correction at issue was not based upon the Belgian NAP included the ground of failure to comply with the methodologies provided for by that NAP. Accordingly, it was able to base the contested decision and the non-registration of the correction at issue on the ground that that correction was incompatible with the methodologies provided for by the Belgian NAP.
- 53 As regards the second part of the plea, the Commission states, in essence, that the allowance allocation requested for installation No 116 is contrary to the methodologies provided for by the Belgian NAP, which provides that for all new entrants the issuing of allowances will be decided upon until the end of the period from 2008 to 2012. Also, according to that NAP, installation No 116 does not enjoy access to the reserve, but is granted allowances only ‘as and when the reserve is supplied’. This allocation method cannot be interpreted as conferring a discretion upon the competent authority to determine each year the amount of allowances that it intends to allocate to the installation concerned. On the contrary, the set of allocation methods provided for by the Belgian NAP should be interpreted in a coherent manner and ‘as obliging the competent authority to award [installation No 116], for the whole of the period from 2008 to 2012, allowances whose overall amount and annual amount may be lower than those provided for by Annex Va to the Belgian NAP, depending on the state of the reserve’.
- 54 The Commission submits that this assessment is consistent with the spirit of Directive 2003/87 — especially Article 9(1) under which NAPs must comply with the criteria in Annex III, in particular criteria 5 and 6 concerning the prohibition of discrimination between undertakings and the obligation to ensure that new entrants have access to the trading scheme. The Commission submits in this connection that the argument concerning the differentiation between ‘first-tier’ new entrants, to which alone the rules of section 5 of the Belgian NAP apply, and ‘second-tier’ new entrants, which are subject to a supplementary allocation rule, namely allocation ‘as and when the reserve is supplied’, cannot succeed as the general rules of that section must apply to all new entrants, including ‘second-tier’ new entrants. Indeed, according to the Commission, if the reserve is not sufficient to enable allowances to be granted to ‘second-tier’ new entrants and it is not resupplied, those new entrants, pursuant to the ‘first come, first served’ rule, do not receive any allowances. The Commission draws the conclusion that, in accordance with the rule that allowances are to be allocated for the whole of the period from 2008 to 2012, a ‘second-tier’ new entrant, such as installation No 116, must be granted allowances for the years 2008 to 2012, and not for just one or two years. The number of allowances to be granted must therefore be determined in advance for the whole of that period — and not annually and in the exercise of discretion — in the amount of the existing number of allowances in the resupplied reserve, in accordance with the rule prohibiting the use of the reserve to make ex-post adjustments to the initial allocation received by the installations concerned. Thus, in the present instance, only 700 000 allowances were available for installation No 116 for the whole of that period.
- 55 The Court notes that Article 44(2) of Regulation No 2216/2004 lays down two criteria which must both be met in order for a correction to be capable of being made to the NAP table without it being necessary to follow the procedure for notifying an amended NAP pursuant to Article 9(3) of Directive 2003/87. First, the correction must be based upon the NAP, as notified to the Commission and not rejected by it, and second, it must result from ‘improvements in data’. Also, when those two cumulative criteria are met, the Commission is required, under the final words of the second sentence of the first subparagraph of Article 44(2) of Regulation No 2216/2004, to instruct the Central Administrator to enter the correction in question into the NAP table.

- 56 As to the first of those criteria, it must be determined whether the Commission has demonstrated that it was entitled to conclude in the contested decision that it was not appropriate to instruct the Central Administrator to enter the correction requested relating to installation No 116 into the Belgian NAP table, on the ground that that correction was not ‘based upon the [NAP] notified to the Commission which was not rejected [by it]’.
- 57 In that regard, it should be noted first of all that, although the contested decision is formally based on Article 44(2) of Regulation No 2216/2004, recital 3 of the decision merely states, in essence, that the request for correction relating to installation No 116 is inadmissible since it is not ‘in accordance with the methodologies set out in Belgium’s [NAP]’, reasoning corresponding, in essence, to that provided for by Article 38(2) of the regulation, which is not applicable to the case in point as it relates to the first allocation period from 2005 to 2007.
- 58 Next, even if it is accepted, as argued by the Commission, that the criterion applied by it in this instance, namely the criterion concerning accordance with ‘the methodologies set out in [the NAP]’, is indissociable from the criterion that the request for correction should be ‘based upon the [NAP]’, the reason for which the correction requested concerning installation No 116 is not based on the Belgian NAP as notified to the Commission and not rejected by it, within the meaning of Article 44(2) of Regulation No 2216/2004, is not apparent either from the contested decision or from the views adopted by the Commission in these proceedings.
- 59 Also, Annex Va to the Belgian NAP, headed ‘New entrants already considered in the [NAP]’ and ‘New entrants requiring to be allocated allowances from 2008’, contains a table which includes, numbered 11, the installation ‘Arcelor-Mittal haut fourneau 6’. The parties have both accepted, in response to written questions from the Court, that that installation corresponds to the installation ‘Arcelor — Cockerill Sambre_HF6_Seraing’ referred to, first, under the same number, in the table in Annex VI to that NAP and, second, numbered 116, in the request at issue for correction of the Belgian NAP table, as sent to the Commission by letter of the Kingdom of Belgium of 18 February 2009, which provided for a quantity of 700 000 allowances intended for that installation both in respect of 2008 and in respect of the entire allocation period from 2008 to 2012 (see paragraph 23 above).
- 60 It is also common ground that the table in Annex Va to the Belgian NAP provides, in respect of the period from 2008 to 2012, for a total quantity of 12 949 538 allowances intended for the installation ‘Arcelor-Mittal haut fourneau 6’, broken down on an annual basis into 700 000 for 2008, 1 000 000 for 2009 and 3 749 846 for each of 2010, 2011 and 2012 (see paragraph 16 above), a breakdown which is not included, however, in the table in Annex VI to the Belgian NAP where, in the boxes corresponding to the years 2008 to 2012, only the term ‘new entrant’ appears (see paragraph 19 above).
- 61 Thus, the quantity of 700 000 allowances that is intended for installation No 116 in respect of 2008, which is the subject of the request at issue for correction of the Belgian NAP table, clearly corresponds, precisely, to the quantity provided for, in favour of the same installation, in the table in Annex Va to the Belgian NAP. The Commission does not deny this coincidence of quantities or the fact that it did not contest the content of that NAP in the review procedure provided for under Article 9(3) of Directive 2003/87.
- 62 In that regard, the Commission has merely put forward, in essence, that those 700 000 allowances should be regarded as being the maximum quantity available for installation No 116 for the entire allocation period from 2008 to 2012 and not for 2008 alone (see the end of paragraph 54 above). Such an interpretation is admittedly corroborated by the final column of the amended Belgian NAP table, as notified by the Kingdom of Belgium on 18 February 2009, in which there is set out, repeating the quantity of allowances provided for in respect of 2008 in the first column, the total volume of 700 000 allowances for the entire period from 2008 to 2012. However, that fact in itself cannot provide support for the Commission’s principal objection, that the request for correction at issue is not based upon the

Belgian NAP as notified and not rejected, within the meaning of Article 44(2) of Regulation No 2216/2004, but on the contrary confirms that the total volume of allowances that was intended for installation No 116, requested for that period as a whole, was markedly below the allowance ceiling provided for in the table in Annex Va to the Belgian NAP. Accordingly, the Commission cannot complain during the proceedings that the Kingdom of Belgium submitted a request for correction intended to bring about an amendment of the volume of allowances which would be available only for 2008 and not for the following years of the allocation period concerned.

- 63 In those circumstances, it must be held that the Commission erred with regard to the application of Article 44(2) of Regulation No 2216/2004 in asserting, in essence, that the request for correction at issue concerning installation No 116 was not based upon the Belgian NAP, as notified to the Commission and not rejected by it. There is accordingly no need to rule on whether that request concerned ‘improvements in data’, an aspect upon which the Commission moreover did not express a view either in the contested decision or in its pleadings.
- 64 Finally, the Commission cannot call this assessment into question by submitting that the request for correction at issue was nevertheless incompatible with the Belgian NAP because, first, it did not reflect the methodologies provided for by that NAP and, second, as the Commission has elaborated upon in particular at the hearing, under the general principles governing the operation of the allowance trading scheme the maximum number of allowances to be allocated to all new entrants must be determined in advance and for the allocation period at issue in its entirety.
- 65 In the case of the first argument, as the Commission itself acknowledges, the table in Annex Va to the Belgian NAP includes a provision in a footnote, in which it is stated that installations listed in that table ‘will be allocated allowances as and when the reserve is supplied’. The Commission raised no objection in that regard during the procedure for review of the Belgian NAP pursuant to Article 9(3) of Directive 2003/87, nor has it contested in the course of the proceedings that that provision concerns a special ‘allocation method’ in respect of allowances for ‘second-tier’ new entrants (see paragraph 53 above). According to the explanations of the Walloon Region, which have not in themselves been challenged by the Commission, that provision authorises the Belgian authorities to allocate to the installations concerned allowances up to the maximum annual quantity provided for in that table only in so far as the reserve is sufficiently supplied for that purpose. Accordingly, inasmuch as the request for correction relating to installation No 116 is in fact based upon that allocation method, the Commission cannot plead that it is incompatible with the Belgian NAP (see, in particular, recital 3 of the contested decision). Furthermore in this regard, the Commission’s argument that that allocation method cannot be interpreted as conferring a discretion upon the competent authority to determine each year the amount of allowances that it intends to allocate to the installation concerned is ineffective, since the request for correction at issue is limited specifically to requesting the entry, in the Belgian NAP table, of the same quantity of allowances intended for installation No 116 in respect of 2008 as that provided for by the table in Annex Va to the Belgian NAP and a quantity of allowances markedly below the ceiling provided for in that table in respect of the entire period from 2008 to 2012.
- 66 In the case of the second argument, concerning failure to comply with the general principles governing the operation of the allowance trading scheme which require the Member State to set in advance the maximum quantity of allowances available for the installations concerned during the entire allocation period, it must be pointed out that that argument finds no support in the contested decision. Furthermore, as is already apparent from paragraph 62 above, the Commission has not demonstrated that, in the present instance, the grant of 700 000 allowances to installation No 116, both for 2008 alone, as provided for by the first column of the table in Annex Va to the Belgian NAP, and for the entire period from 2008 to 2012, as provided for by the final column of that table, would be contrary to those general principles. It is true that, having regard to the general rule under which, by virtue of Article 11(2) of Directive 2003/87, read in conjunction with the allocation criteria referred to in Annex III thereto, the total amount of allowances available during the allocation period concerned

must be set in advance, the cumulative criteria of ‘correction’ and of ‘improvements in data’ must, as exceptions, be interpreted restrictively, in order to preserve the effectiveness of the notification procedure under the fourth subparagraph of Article 44(2) of Regulation No 2216/2004, read in conjunction with Article 9(3) of Directive 2003/87. Only a restrictive interpretation is such as to ensure full prior review, in the light of the abovementioned allocation criteria, of subsequent amendments requested by the Member State. However, in accordance with what has been stated in paragraph 62 above, it follows only that the request for correction at issue must be interpreted as covering the entire period from 2008 to 2012.

- ⁶⁷ Accordingly, the first plea must be upheld and the contested decision must be annulled in so far as it rejects the request for correction at issue relating to installation No 116, without there being any need to examine the other pleas and complaints put forward by the Walloon Region.

Costs

- ⁶⁸ 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 Commission has been unsuccessful, it must be ordered to pay the costs, in accordance with the form of order sought by the Walloon Region.

On those grounds,

THE GENERAL COURT (First Chamber)

hereby:

- 1. Annuls the Commission’s decision of 27 March 2009 instructing the Central Administrator to enter a correction to the Belgian national allocation plan table into the Community independent transaction log, in so far as it contains a refusal to instruct the Central Administrator to enter an allowance allocation correction in favour of installation No 116 named ‘Arcelor-Cockerill Sambre_HF6_Seraing’, as requested by the Kingdom of Belgium in its letter of 18 February 2009;**
- 2. Orders the European Commission to pay the costs.**

Azizi

Martins Ribeiro

Frimodt Nielsen

Delivered in open court in Luxembourg on 1 February 2012.

[Signatures]