Reports of Cases

JUDGMENT OF THE GENERAL COURT (Seventh Chamber)

7 March 2013 *

(Environment — Directive 2003/87/EC — Scheme for greenhouse gas emission allowance trading — Transitional rules for harmonised free allocation of emission allowances from 2013 — Benchmarks to be applied to calculate the allocation of emission allowances — Equal treatment — Proportionality)

In Case T-370/11,

Republic of Poland, represented by M. Szpunar, B. Majczyna, C. Herma and M. Nowacki, acting as Agents,

applicant,

v

European Commission, represented by E. White, K. Herrmann and K. Mifsud-Bonnici, acting as Agents,

defendant,

APPLICATION for annulment of Commission Decision 2011/278/EU of 27 April 2011 determining transitional Union-wide rules for harmonised free allocation of emission allowances pursuant to Article 10a of Directive 2003/87/EC of the European Parliament and of the Council (OJ 2011 L 130, p. 1),

THE GENERAL COURT (Seventh Chamber),

composed of A. Dittrich (Rapporteur), President, I. Wiszniewska-Białecka and M. Prek, Judges,

Registrar: C. Heeren, Administrator,

having regard to the written procedure and further to the hearing on 28 November 2012,

gives the following

* Language of the case: Polish.

Judgment

Background to the dispute

1 On 13 October 2003, the European Parliament and the Council of the European Union adopted Directive 2003/87/EC 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 last amended by Directive 2009/29/EC of the European Parliament and of the Council of 23 April 2009, so as to improve and extend the greenhouse gas emission allowance trading scheme of the Community (OJ 2009 L 140, p. 63) ('Directive 2003/87'). That scheme for greenhouse gas emission allowance trading was established in order to reduce such emissions in the European Union.

2 Under Article 10a of Directive 2003/87, the European Commission is to adopt Union-wide and fully-harmonised implementing measures for the harmonised free allocation of emission allowances. In that regard, the Commission is required, inter alia, to determine the benchmark for each sector and to take, as a starting point, the average performance of the 10% most efficient installations in a sector or subsector of the European Union in the years 2007 and 2008. The number of emission allowances to be allocated free of charge, from 2013 onwards, to each of the installations concerned is calculated on the basis of those benchmarks.

3 On 27 April 2011, the Commission adopted Decision 2011/278/EU determining transitional Union-wide rules for harmonised free allocation of emission allowances pursuant to Article 10a of Directive 2003/87 (OJ 2011 L 130, p. 1) ('the contested decision'). In accordance with Article 2 of the contested decision, it applies to the free allocation of emission allowances in relation to the installations referred to in Chapter III of Directive 2003/87 in trading periods from 2013 onwards, with the exception of transitional free allocation of emission allowances for the modernisation of electricity generation pursuant to Article 10c of that directive. According to recital 1 in the preamble to the contested decision, allocations are to be fixed prior to the trading period so as to enable the market to function properly. In Annex I to the contested decision, the Commission set out the benchmarks referred to in Article 10a of Directive 2003/87.

Procedure and forms of order sought

4 By application lodged at the Registry of the Court on 8 July 2011, the Republic of Poland brought the present action.

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

6 The parties presented oral argument and their answers to the questions put by the Court at the hearing on 28 November 2012. During that hearing, the Republic of Poland indicated that its considerations concerning the chemical industry sector and the refinery sector appearing in the application, set out in the plea alleging a breach of the principle of proportionality, sought only to support that plea and did not contain an independent plea.

7 The Republic of Poland claims that the Court should:

— annul the contested decision;

— order the Commission to pay the costs.

8 The Commission contends that the Court should:

— dismiss the action;

— order the Republic of Poland to pay the costs.

Law

9 In support of the action, the Republic of Poland raises four pleas. The first alleges an infringement of the second subparagraph of Article 194(2) TFEU, read in conjunction with point (c) of the first subparagraph of Article 192(2) TFEU, on the ground that the Commission did not take into account the specificity of each Member State in respect of fuel, used the reference performance of natural gas to derive the emission indices and used natural gas as the reference fuel. The second plea concerns an alleged breach of the principle of equal treatment and an infringement of Article 191(2) TFEU, read in conjunction with Article 191(3) TFEU, on the ground that the Commission did not take into account, in preparing the contested decision, the difference in situation between the regions of the European Union. The third plea alleges breach of the principle of proportionality on the ground that the Commission, in the contested decision, established emission benchmarks that are more restrictive than required by the objectives of Directive 2003/87. The fourth plea concerns an alleged infringement of Article 10a of Directive 2003/87, read in conjunction with Article 1 thereof, and the fact that the Commission was not competent to adopt the contested decision.

The first plea, alleging infringement of the second subparagraph of Article 194(2) TFEU, read in conjunction with point (c) of the first subparagraph of Article 192(2) TFEU

10 The Republic of Poland argues that, in adopting the contested decision, the Commission infringed the second subparagraph of Article 194(2) TFEU, read in conjunction with point (c) of the first subparagraph of Article 192(2) TFEU, due to the fact that that decision affects a Member State's right to determine the conditions for exploiting its energy resources, its choice between different energy sources and the general structure of its energy supply. According to the Republic of Poland, in adopting rules to define the emission benchmarks for certain products from installations included in the greenhouse gas emission trading scheme, the Commission has focused on natural gas, which is dominant only in some Member States, compared to other fuels such as coal, which is used as the main fuel in other Member States. The Commission used natural gas as the reference fuel to determine the product, heat and fuel benchmarks. Given that coal technology has given rise to a steady decline in emission intensity, that choice is arbitrary and unjustified. An installation that uses the most recent coal technology would therefore obtain less free allowances than another installation using an older technology, but based on natural gas, which would result in a drastic decline in the competitiveness of companies using coal technology. That situation would lead to a reduction in their production and, consequently, a decrease in the gross domestic product (GDP) of the Member States using coal as the main fuel, as well as 'carbon leakage', that is relocation of business activities in sectors exposed to strong international competition, located in the European Union, to third countries where the requirements regarding greenhouse gas emissions are less stringent. Redirecting companies towards purchasing gas technology, as a consequence of the contested decision, would increase the natural gas needs of the State concerned, disrupt its energy balance and force it to redefine its overall energy policy.

11 First, in relation to an alleged infringement of the second subparagraph of Article 194(2) TFEU, it should be noted that that provision was introduced by the Lisbon Treaty and concerns the measures taken by the institutions in the area of energy policy, in accordance with the first subparagraph of that paragraph.

12 Under the first and second subparagraphs of Article 194(2) TFEU, the necessary measures to achieve the objectives of the European Union in the area of energy, referred to in paragraph 1, does not affect the law of a Member State to determine the conditions for exploiting its energy resources, its choice between different energy sources and the general structure of its energy supply, without prejudice to point (c) of the first subparagraph of Article 192(2) TFEU.

13 However, the contested decision constitutes an implementing measure of Directive 2003/87, since its legal basis is Article 10a of that directive. The legal basis of the latter, in turn, is Article 175(1) EC (now, after amendment, Article 192(1) TFEU). The contested decision is therefore a measure taken in the area of environment policy and not a measure taken in accordance with the first subparagraph of Article 194(2) TFEU.

14 Contrary to what the Republic of Poland claims, the formulations set out in the preamble to Directive 2003/87 and in the contested decision that refer, on the one hand, to the EC Treaty and in particular Article 175(1), and, on the other hand, to Directive 2003/87 and to Article 10a thereof, do not lead to the conclusion that all the provisions of the EC Treaty or of Directive 2003/87 constitute the legal basis of that directive or of the contested decision. According to settled case-law, the choice of the legal basis for a European Union measure must rest on objective factors which are amenable to judicial review, including in particular the purpose and the content of that measure. In the present case, Directive 2003/87 was adopted on the sole legal basis of Article 175(1) EC and Article 10a of that directive is the only legal basis of the contested decision (see, to that effect, Case C-155/07 *Parliament* v *Council* [2008] ECR I-8103, paragraphs 34 to 38, and the case-law cited).

15 Therefore, as the contested decision was adopted on the basis of a directive that is not within the scope of the first subparagraph of Article 194(2) TFEU, and the choice of the legal basis of that directive is not disputed by the Republic of Poland, the complaint alleging infringement of the second subparagraph of that provision must, in any event, be rejected.

16 That conclusion is not undermined by the arguments of the Republic of Poland that the assessment of the conformity of each act of the European Union is carried out having regard to all the provisions of the Treaty and not by taking into account only those provisions relating to the policy objectives that are to be achieved by a specific act. In that regard, the Republic of Poland contends that the second subparagraph of Article 194(2) TFEU includes the right of a Member State to determine the conditions for exploiting its energy resources, its choice between different energy sources and the general structure of its energy supply, without prejudice to point (c) of the first subparagraph of Article 192(2) TFEU. That right constitutes a principle relating to all policies of the European Union, taking into account the exception in point (c) of the first subparagraph of Article 192(2) TFEU. According to the Republic of Poland, the measures adopted in the context of other policies cannot affect that right. The Member States, it claims, never assigned exclusive jurisdiction to the European Union regarding the matter referred to in the second subparagraph of Article 194(2) TFEU.

17 However, it is true that, under the second subparagraph of Article 194(2) TFEU, measures established in accordance with the procedure laid down in the first subparagraph of that paragraph and necessary to achieve the policy objectives of the European Union in the area of energy, referred to in paragraph 1 of that article, cannot affect the right of a Member State to determine the conditions for exploiting its energy resources, its choice between different energy sources and the general structure of its energy supply. However, there is no reason to suppose that the second subparagraph of Article 194(2) TFEU establishes a general prohibition to assign that right that is applicable in European Union policy in the area of the environment (see, to that effect, Case C-490/10 *Parliament* v *Council* [2012] ECR, paragraph 77). On the one hand, Article 194 TFEU is a general provision which relates solely to the energy sector and, consequently, delineates a sectoral competence (Opinion of Advocate General Mengozzi in *Parliament* v *Council*, point 33). On the other hand, it should be noted that the second subparagraph of Article 194(2) TFEU expressly refers to point (c) of the first subparagraph of Article 192(2) TFEU. Indeed, the second subparagraph Article 194(2) TFEU provides that the

prohibition on affecting the right of a Member State to determine the conditions for exploiting its energy resources, its choice between different energy sources and the general structure of its energy supply applies without prejudice to point (c) of the first subparagraph of Article 192(2) TFEU. While it is true that that latter provision is only procedural in nature, it none the less provides specific rules relating to the environment policy of the European Union. It follows that the right referred to in the second subparagraph of Article 194(2) TFEU is not applicable in the present case, since the contested decision constitutes an action taken by the European Union within the framework of its environment policy.

18 It should be noted that the measures referred to in point (c) of the first subparagraph of Article 192(2) TFEU imply the involvement of the European Union institutions in the area of energy policy (Case C-36/98 *Spain* v *Council* [2001] ECR I-779, paragraph 54, and Case C-176/03 *Commission* v *Council* [2005] ECR I-7879, paragraph 44). Article 192(2) TFEU must, however, be read in the light of Article 192(1). Pursuant to Article 192(1) TFEU, the Council is to act in accordance with the procedure referred to therein when it decides what action is to be taken by the European Union in order to achieve the objectives of European Union policy on the environment as specified in Article 191 TFEU. According to Article 192(2) TFEU, the decision-making procedure provided for therein is to apply, by way of derogation from that provided for in Article 192(1) TFEU, where the Council adopts the decisions and measures set out therein. It therefore follows from the very wording of those two provisions that Article 192(1) TFEU in principle constitutes the legal basis of acts adopted by the Council in order to attain the objectives referred to in Article 191 TFEU. On the other hand, Article 192(2) TFEU was drafted in such a way that it is to apply where the measures indicated therein, such as those that significantly affect a Member State's choice between different energy sources and the general structure of its energy supply, are concerned (see, to that effect, *Spain* v *Council*, paragraphs 45 and 46).

19 Second, to the extent that the Republic of Poland alleges an infringement of point (c) of the first subparagraph of Article 192(2) TFEU, it should be noted that that provision provides that, by way of derogation from the decision-making procedure provided for in Article 192(1) TFEU and without prejudice to Article 114 TFEU, the Council, acting unanimously in accordance with a special legislative procedure and after consulting the European Parliament, the European Economic and Social Committee (EESC) and the Committee of the Regions of the European Union, are to adopt measures significantly affecting a Member State's choice between different energy sources and the general structure of its energy supply.

20 It should be recalled that the contested decision constitutes a measure implementing Directive 2003/87 and is based on the legal basis of Article 10a of that directive. That provision was inserted into Directive 2003/87 by Directive 2009/29.

21 However, as the Republic of Poland acknowledges, it has made no complaints against Directive 2009/29. Accordingly, in the absence of a plea of illegality concerning Article 10a of Directive 2003/87, the Republic of Poland cannot validly claim that the contested decision infringes point (c) of the first subparagraph of Article 192(2) TFEU, in so far as it is merely a measure implementing Article 10a of that directive. However, it should be noted that the argument of the Republic of Poland in relation to point (c) of the first subparagraph of Article 192(2) TFEU must be taken into account when assessing the alleged infringement of Article 10a of Directive 2003/87 (see paragraphs 104 to 107 below).

22 The first plea must therefore be rejected.

The second plea, alleging a breach of the principle of equal treatment and an infringement of Article 191(2) TFEU, read in conjunction with Article 191(3) TFEU

23 This plea consists of two parts. The first concerns an alleged breach of the principle of equal treatment and the second an alleged infringement of Article 191(2) TFEU, read in conjunction with Article 191(3) TFEU.

The first part, alleging a breach of the principle of equal treatment

24 The Republic of Poland argues, in essence, that, by determining in a uniform manner in the contested decision the *ex ante* benchmarks to derive the number of emission allowances to be allocated to installations concerned free of charge, the Commission has arbitrarily favoured installations using natural gas compared to those using other sources of energy. In so doing, the Commission breached the principle of equal treatment.

25 At the outset, it should be noted that the contested decision constitutes an implementing measure of Directive 2003/87, which established, in Article 1 of that directive, a scheme for greenhouse gas emission allowance trading within the European Union in order to promote reductions of greenhouse gas emissions in a cost-effective and economically efficient manner. The second paragraph of Article 1 of the directive also provides for the reductions of greenhouse gas emissions to be increased so as to contribute to the levels of reductions that are considered scientifically necessary to avoid dangerous climate change.

26 To that end, the first paragraph of Article 9 of Directive 2003/87 provides that the Union-wide quantity of allowances issued each year starting in 2013 shall decrease in a linear manner beginning from the mid-point of the period from 2008 to 2012. Under the second paragraph of Article 9 of that directive, the Commission must publish the absolute Union-wide quantity of the allowances for 2013. In that regard, it adopted Decision 2010/634/EU of 22 October 2010 adjusting the Union-wide quantity of allowances to be issued under the Union scheme for 2013 and repealing Decision 2010/384/EU (OJ 2010 L 279, p. 34). That total quantity is distributed according to the rules set out in Articles 10, 10a and 10c of Directive 2003/87. Accordingly, a part of the allowances is allocated free of charge on the basis of Article 10a of that directive and of the contested decision. Another part of those allowances is allocated free of charge for the modernisation of electricity generation, in accordance with Article 10c of that directive. Under Article 10 of the directive, from 2013 onwards, Member States shall auction all allowances which are not allocated free of charge in accordance with Articles 10a and 10c.

27 It is important to note that, according to recital 15 in the preamble to Directive 2009/29, auctioning is the basic principle for allocation of allowances. Article 10a of Directive 2003/87 and the contested decision, which has that article as its legal basis, establish a transitional scheme for issuing allowances free of charge for sectors other than the electricity generation sector referred to in Article 10c of Directive 2003/87. The transitional nature of allocation free of charge is clearly apparent from the rules referred to in the second sentence of Article 10a(11) of Directive 2003/87, according to which free allocation shall decrease each year after 2013 by equal amounts, resulting in 30% free allocation in 2020, with a view to reaching no free allocation in 2027.

28 To determine how to allocate allowances free of charge, the Commission, in accordance with the first subparagraph of Article 10a(2) of Directive 2003/87 defines three types of *ex ante* benchmark. The Commission defined product benchmarks where, according to recital 5 in the preamble to the contested decision, taking into account the complexity of the production processes, product definitions and classifications were available that allow for verification of production data and a uniform application of the product benchmark across the European Union for the purposes of allocating emission allowances. Where deriving a product benchmark was not feasible, but greenhouse

gases eligible for the free allocation of emission allowances occur, the Commission used fallback approaches, in accordance with recital 12 in the preamble to the contested decision. Accordingly, the heat benchmark was defined for heat consumption processes where a measurable heat carrier is used. Furthermore, the fuel benchmark was defined where non-measurable heat is consumed. Recital 12 in the preamble to the contested decision states that the heat and fuel benchmark values have been calculated on the basis of the principles of transparency and simplicity, using the reference efficiency of a widely available fuel that can be regarded as second-best in terms of greenhouse gas efficiency, considering energy-efficient techniques. The Commission stated in that regard that that fuel was natural gas. According to it, if biomass, the most efficient fuel in terms of emissions of greenhouse gases, had been chosen as the benchmark, it would have resulted in negligible amounts of free allowances for heat and fuel consumption.

29 In the light of the above, it is therefore necessary to assess whether the Commission, in determining the product, heat and fuel benchmarks in the contested decision, breached the principle of equal treatment.

30 The principle of equal treatment, as a general principle of European Union law, requires that comparable situations must not be treated differently and that different situations must not be treated in the same way, unless such treatment is objectively justified (Case C-127/07 *Arcelor Atlantique et Lorraine and Others* [2008] ECR I-9895, paragraph 23, and Case C-505/09 P *Commission* v *Estonia* [2012] ECR, paragraph 64).

31 In the first place, with regard to the product benchmarks defined in the contested decision, the Republic of Poland argues that their application to companies using natural gas in the same way as to those using coal with high carbon dioxide (CO_2) emissions distorts competition in the internal market and thus breaches the principle of equal treatment. According to the Republic of Poland, those companies were in different situations due to the use of different fuels. However, without objective justification, such companies are treated equally by the contested decision. To ensure that that decision is consistent with the principle of equal treatment, the product benchmark must be corrected appropriately, for example, according to the proposal of the Republic of Poland on fuel emission parameters.

32 It should be noted that the Commission does not deny having treated equally installations that are in different situations due to the use of different fuels. However, it argues that that equal treatment in the contested decision is objectively justified in the light of Directive 2003/87.

33 According to the case-law, such treatment is justified if it is based on an objective and reasonable criterion (see, to that effect, *Arcelor Atlantique et Lorraine and Others*, paragraph 30 above, paragraph 47).

34 According to recital 5 in the preamble to the contested decision, when setting the product benchmark, no differentiation was made on the basis of geography or on the basis of technologies, raw materials or fuels used, so as not to distort comparative advantages in carbon efficiency across the European Union economy, and to enhance harmonisation of the transitional free allocation of emission allowances.

35 In view of the scheme for greenhouse gas emission allowance trading, as established by Directive 2003/87 for the trading periods starting in 2013, it is therefore necessary to assess whether the equal treatment of installations that are in different situations, due to the use of different fuels when determining the product benchmarks, is objectively justified.

36 The Courts of the European Union acknowledge that, in the exercise of the powers conferred on them, the authorities of the European Union have a wide discretion where their action involves political, economic and social choices and where they are called on to undertake complex assessments and evaluations. However, even where they have such a discretion, the authorities of the European Union

are obliged to base their choice on objective criteria appropriate to the aim pursued by the legislation in question, taking into account all the facts and the technical and scientific data available at the time of adoption of the act in question (see *Arcelor Atlantique et Lorraine and Others*, paragraph 30 above, paragraphs 57 and 58, and the case-law cited).

37 First, it should be noted that under the first paragraph of Article 1 of Directive 2003/87, the establishment of a scheme for greenhouse gas emission allowance trading is intended to promote reductions of greenhouse gas emissions in a cost-effective and economically efficient manner. That scheme does not, however, of itself, reduce those emissions but encourages and promotes the pursuit of the lowest cost of achieving a given amount of emission reductions (*Arcelor Atlantique et Lorraine and Others*, paragraph 30 above, paragraph 31). According to the second paragraph of that provision, that directive also provides for the reductions of greenhouse gas emissions to be increased so as to contribute to the levels of reductions that are considered scientifically necessary to avoid dangerous climate change. According to recital 20 in the preamble to Directive 2003/87, that directive is intended to encourage the use of more energy-efficient technologies, including combined heat and power technology, producing less emissions per unit of output.

38 Those objectives are reflected in the third subparagraph of Article 10a(1) of Directive 2003/87, which contains rules for determining the *ex ante* benchmarks. According to that provision, those benchmarks must be determined so as to ensure that allocation takes place in a manner that provides incentives for reductions in greenhouse gas emissions and energy-efficient techniques, by taking account of the most efficient techniques, substitutes, alternative production processes, high efficiency cogeneration, efficient energy recovery of waste gases, use of biomass and capture and storage of CO_2, where such facilities are available, and are not to provide incentives to increase emissions.

39 In the light of those rules, it should be noted that, as the Commission has argued, the differentiation of product benchmarks according to the fuel used would not encourage industrial installations that use high CO_2 emission fuel to seek solutions to reduce their emissions, but would rather encourage maintenance of the status quo, which would be contrary to the third subparagraph of Article 10a(1) of Directive 2003/87. In addition, such a differentiation would involve the risk of increased emissions because industrial installations using low CO_2 emission fuel may have to replace it with a higher CO_2 emission fuel in order to obtain more free emission allowances.

40 Second, according to the first subparagraph of Article 10a(1), the Commission must adopt Union-wide and fully-harmonised implementing measures for the allocation of free allowances. The fourth subparagraph of that provision provides that, for each sector and subsector, the benchmark is, in principle, to be derived for products rather than for inputs, in order to maximise greenhouse gas emission reductions and energy efficiency savings throughout each production process of the sector or the subsector concerned.

41 The application of a correction factor depending on the fuel used by a product benchmark installation, as proposed by the Republic of Poland as an opportunity to correct that benchmark, would have the consequence that the number of free emission allowances allocated to such an installation would be different depending on an input, namely the fuel used by the latter. Under Article 10(2)(a) of the contested decision, that number is, in principle, calculated on the basis of the product benchmark and historical activity level for the corresponding product. The introduction of an additional factor consisting of the inclusion of the fuel used would not encourage full harmonisation across the European Union of the implementing measures relating to harmonised allocation of free allowances, in the context of which the benchmark is, in principle, calculated for the products, as required in the first and fourth subparagraphs of Article 10a(1) of Directive 2003/87, but would result in different rules because of an input for installations in the same sector or subsector. In that regard, it should also be noted that, according to recital 8 in the preamble to Directive 2009/29, the legislature envisaged, in the light of the experience gathered during the first and second trading periods,

establishing a more harmonised emission trading system in order to better exploit the benefits of emission trading, to avoid distortions in the internal market and to facilitate the linking of emissions trading systems.

42 Third, recital 17 in the preamble to Directive 2009/29 indicates that the objectives of eliminating distortions within European Union competition and of ensuring the highest degree of economic efficiency in the transformation of the European Union economy towards a safe and sustainable low-carbon economy make it inappropriate to treat economic sectors differently under the scheme for greenhouse gas emission allowance trading in individual Member States. The negative response of the legislature to such different treatment is contrary to the argument of the Republic of Poland that the measures referred to in the first subparagraph of Article 10a(1) of Directive 2003/87 must take account of the specific context of each Member State. Indeed, if the shares of various primary energy consumption in the Member States are, as the Republic of Poland states, so different, the introduction of a correction factor according to the fuel used would create a different treatment of the sectors according to the Member State.

43 In that regard, it should also be noted that, in the absence of such a correction factor, no installation obtains a competitive advantage by way of a greater amount of free allowances because of the fuel used. As recital 23 in the preamble to Directive 2009/29 indicates, the legislature envisaged that transitional free allocation to installations should be provided for through harmonised Union-wide rules (*ex ante* benchmarks) in order to minimise distortions of competition with the European Union. The assertion of the Republic of Poland, that the determination of the product benchmark in the contested decision distorts competition, must be rejected.

44 In view of the foregoing, the equal treatment of installations that are in different situations due to the use of different fuels when determining the product benchmarks can be regarded as objectively justified.

45 In the second place, with regard to the heat and fuel benchmarks defined in the contested decision, the Republic of Poland argues that, by using natural gas as the reference fuel for defining those benchmarks, the Commission arbitrarily favoured installations using that source of energy compared to those using other sources such as coal and lignite. In so doing, the Commission breached the principle of equal treatment, favouring Member States with a structure of energy supply based largely on natural gas and to a lesser extent on coal, compared to Member States in which the structure in question differs significantly. The General Court has ruled, it is claimed, that the fact that the Commission treated Member States uniformly in the system of trading emissions of greenhouse gases cannot permit it to disregard the specific context of the national energy market of each Member State. In Poland, it is alleged, coal and lignite constituted, in 2009, up to 57% of primary energy consumption, while the share of natural gas and renewable energy were, respectively 14% and 5% of such consumption, far below that recorded in other Member States. Furthermore, in Poland, 92% of electricity is generated from coal and lignite. Thus, the Republic of Poland recorded the highest rate of industries threatened by the phenomenon known as ‘carbon leakage’.

46 At the outset, with regard to data on primary energy consumption and electricity generation submitted by the Republic of Poland, it should be noted that the allocation of free allowances to electricity generators is, in principle, precluded under Article 10a(3) of Directive 2003/87. While the Commission does not dispute the data on primary energy consumption in Poland and in other Member States, those relating to electricity generation are not relevant to the present case.

47 It should be noted that, according to recital 12 in the preamble to the contested decision, the heat and fuel benchmark values have been calculated on the basis of the principles of transparency and simplicity, using the reference efficiency of a widely available fuel that can be regarded as second-best in terms of greenhouse gas efficiency, considering energy-efficient techniques. As already stated (see paragraph 28 above), that fuel was natural gas whereas, according to the Commission, if biomass, the

most efficient fuel in terms of emissions of greenhouse gases, had been chosen as the benchmark, it would have resulted in negligible amounts of free allowances for heat and fuel consumption. In so doing, the Commission does not dispute the fact that installations which are in different situations due to the use of different fuels have been treated equally. Nevertheless, it argues that that treatment is objectively justified having regard to Directive 2003/87.

48 In view of the greenhouse gas emission trading scheme, as set out in Directive 2003/87 for the trading periods starting in 2013, it is necessary to assess whether the determination of the heat and fuel benchmarks defined using the reference efficiency of natural gas is objectively justified. While having a wide discretion, the Commission was required to base its choice on objective criteria appropriate to the aim pursued by the legislation in question (see paragraph 36 above).

49 First, it should be noted that, due to the choice of using the reference efficiency of natural gas to determine the heat and fuel benchmarks, the installations concerned will receive less free emission allowances than if a high CO_2 emission fuel such as coal had been chosen by the Commission. Thus, it is indisputable that the choice of natural gas as a low CO_2 emission fuel aims to reduce emissions of greenhouse gases. More specifically, that choice is intended to encourage the use of effective techniques to reduce greenhouse gas emissions and improve energy efficiency, as provided in the third subparagraph of Article 10a(1) of Directive 2003/87. Indeed, in order to avoid additional costs generated by the auction purchase of emission allowances on the market, the installations concerned will be induced not to exceed the allowances allocated free of charge.

50 Second, it should be noted that the choice of using the efficiency of a fuel other than natural gas, such as coal, to determine the heat and fuel benchmarks, would not have prevented installations that are in different situations, due to the use of different fuels, from being treated equally. If those benchmarks were based on a higher CO_2 emission fuel than natural gas, that would simply result in higher heat and fuel benchmarks. That could only lead to increasing by the same factor the number of free emission allowances allocated to all the installations concerned, and therefore also to installations using low CO_2 emission fuels.

51 Third, as regards the argument of the Republic of Poland on the need to take into account the specific context of the national energy market, it is true that the Court has already ruled that the Member States have a certain margin for manoeuvre in transposing Directive 2003/87 and, therefore, in choosing the measures which they consider most appropriate to achieve, in the specific context of the national energy market, the objective laid down by that directive (Case T-183/07 *Poland* v *Commission* [2009] ECR II-3395, paragraph 88, and Case T-263/07 *Estonia* v *Commission* [2009] ECR II-3463, paragraph 53).

52 However, that case-law involved the preparation of national allowance allocation plans before the start of the second trading period, namely the period 2008 to 2012, and it therefore took place in a legal context different from that of the contested decision.

53 The rules introduced by Directive 2009/29 for the trading periods starting in 2013 profoundly changed the methods of allocating allowances to implement a more harmonised emission trading system in order to better exploit the benefits of emission trading, to avoid distortions in the internal market and to facilitate the linking of emission trading systems, as set out in recital 8 in the preamble to Directive 2009/29.

54 The rules in force for the trading periods from 2005 to 2007 and from 2008 to 2012 sought to ensure that each Member State would prepare a national plan stating the total quantity of allowances that it intended to allocate for the period considered and the manner in which it proposed to allocate them. That plan should be based on objective and transparent criteria, including the criteria listed in Annex III to Directive 2003/87 in its version before amendment by Directive 2009/29. According to point 1 of that annex, the total quantity of allowances to be allocated for the relevant period should

be consistent with the Member State's obligation to limit its emissions pursuant to 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) and in accordance with the Kyoto Protocol, taking into account, on the one hand, the proportion of overall emissions that those allowances represent in comparison with emissions from sources not covered by Directive 2003/87 in its version before amendment by Directive 2009/29 and, on the other hand, national energy policies, and should be consistent with the national climate change programme. To the extent that that plan was incompatible, in particular, with the criteria of that Annex III, the Commission could reject it. Under Article 10 of Directive 2003/87, prior to its amendment by Directive 2009/29, for the trading periods from 2005 to 2007 and from 2008 to 2012, the Member States had to allocate, respectively, at least 95% and 90% of the allowances free of charge.

55 By contrast, for the trading periods starting in 2013, Article 9 of Directive 2003/87 provides that the Union-wide quantity of allowances issued each year starting in 2013 shall decrease in a linear manner beginning from the mid-point of the period from 2008 to 2012. That quantity shall decrease by a linear factor of 1.74% compared to the average annual total quantity of allowances issued by Member States in accordance with the Commission decisions on their national allocation plans for the period from 2008 to 2012. In that regard, the Commission adopted Decision 2010/634 by which it determined the absolute Union-wide quantity of allowances for 2013, based on the total quantities of allowances issued or to be issued by the Member States in accordance with its decisions on their national allocation plans for the period from 2008 to 2012.

56 The case-law of the General Court referred to in paragraph 51 above should be read in light of the applicable law for the second trading period. The Court was obliged to interpret Article 9(3) of Directive 2003/87, in its version before amendment by Directive 2009/29, which refers to Annex III to that directive, as is also apparent from the judgment in Case T-374/04 *Germany* v *Commission* [2007] ECR II-4431, paragraph 80, to which the case-law cited in paragraph 51 above expressly refers. Contrary to point 1 of Annex III to that directive, paragraph 1 of Article 10a of Directive 2003/87 no longer refers to national energy policy. In contrast, according to recital 8 in the preamble to Directive 2009/29, after the second trading period, the legislature considered it imperative to implement a more harmonised emission trading system in order to better exploit the benefits of emission trading, to avoid distortions in the internal market and to facilitate the linking of emission trading systems. In this regard, it should be added that, while the legislature has, in the context of the transitional allocation of free allowances for the modernisation of electricity generation under Article 10c(1)(c) of Directive 2003/87, taken into account the national energy mix, it has not done so with regard to the allocation of free allowances to the industrial sectors referred to in Article 10a of that directive.

57 Fourth, with regard to the argument of the Republic of Poland, according to which it recorded the highest rate of industries threatened by the phenomenon known as 'carbon leakage', it should be noted that among the transitional rules referred to in Article 10a of Directive 2003/87 are special rules for installations in sectors or subsectors which are exposed to a significant risk of carbon leakage. Those installations must receive, in principle, in 2013 and each subsequent year until 2020, in accordance with Article 10a(1) and (12) of Directive 2003/87, an amount of free allowances representing 100% of the amount determined in accordance with the measures referred to in Article 10a(1). To determine those sectors or subsectors, the Commission must use, as a criterion for its analysis, the inability of industries to pass on the direct cost of the required allowances and the indirect costs from higher electricity prices resulting from the implementation of that directive into product prices, without significant loss of market share to less carbon-efficient installations outside the European Union. However, the evidence submitted by the Republic of Poland cannot lead to the conclusion that those rules cannot clearly address the phenomenon of 'carbon leakage'.

58 In view of the foregoing, the determination by the Commission of the heat and fuel benchmarks by using the reference performance of natural gas may be regarded as objectively justified.

59 Consequently, the first part of this plea must be rejected.

The second part, alleging infringement of Article 191(2) TFEU, read in conjunction with Article 191(3) TFEU

60 The Republic of Poland declares that, by favouring one source of energy over others and failing to take account of the energy structure of energy production from different Member States, the Commission infringed Article 191(2) TFEU, read in conjunction with Article 191(3) TFEU, as those provisions require the institutions responsible for implementing the European Union environment policy to take account of differences between the various regions of the European Union during the implementation of the policy in question.

61 In that regard, it should be recalled that the contested decision constitutes a measure implementing Directive 2003/87 and that Article 10a of that directive constitutes its legal basis. As was argued in the context of the first plea (see paragraph 21 above), it should be noted that, given the lack of any plea of illegality concerning Article 10a of Directive 2003/87, the argument of the Republic of Poland concerning an alleged infringement of Article 191(2) TFEU, read in conjunction with Article 191(3) thereof, is inoperative. However, it should be noted that the argument of the Republic of Poland, based on Article 191(2) TFEU, read in conjunction with Article 191(3) TFEU, must be taken into account in the assessment of an alleged infringement of Article 10a of Directive 2003/87 (see paragraphs 108 to 111 below).

62 Consequently, the second part of this plea and therefore this plea in its entirety must be rejected.

The third plea, alleging a breach of the principle of proportionality

63 The Republic of Poland argues, in essence, that by establishing, in the contested decision, the *ex ante* benchmarks more restrictively than required by the objectives of Directive 2003/87, the Commission breached the principle of proportionality. More specifically, it argues that the objective of reducing greenhouse gas emissions, which is binding on the Commission and on the Member States, is that of a 20% reduction by 2020. However, as a result of the contested decision, the reduction would exceed the 20% threshold in 2013. According to the Republic of Poland, the Commission disregarded the appropriateness and necessity of the contested decision by defining the benchmarks too strictly. Furthermore, due to an imbalance between the harm and the benefit arising from the contested decision, that decision is not proportionate in the strict sense.

64 It should be borne in mind that, according to settled case-law, the principle of proportionality, which is one of the general principles of European Union law, requires that measures adopted by the European Union institutions do not exceed the limits of what is appropriate and necessary in order to attain the objectives legitimately pursued by the legislation in question; when there is a choice between several appropriate measures, recourse must be had to the least onerous, and the disadvantages caused must not be disproportionate to the aims pursued (see Case C-343/09 *Afton Chemical* [2010] ECR I-7027, paragraph 45, and the case-law cited).

65 With regard to judicial review of the conditions referred to in the preceding paragraph, the Commission must be allowed a wide discretion in an area such as that involved in the present case, which entails political, economic and social choices on its part, and in which it is called upon to undertake complex assessments and evaluations with the general objective of reducing greenhouse gas emissions by means of a cost-effective and economically efficient emission trading scheme (first paragraph of Article 1 of and recital 5 in the preamble to Directive 2003/87). The lawfulness of a measure adopted in that sphere can be affected only if the measure is manifestly inappropriate in

relation to the objective which the competent institutions are seeking to pursue (see, to that effect, Case C-380/03 *Germany* v *Parliament and Council* [2006] ECR I-11573, paragraph 145, and *Germany* v *Commission*, paragraph 56 above, paragraphs 80 and 81, and the case-law cited).

66 In the first place, as regards the appropriateness of the contested decision, the Republic of Poland argues that, by defining the benchmarks too strictly, without taking into account the specific context of each Member State, the Commission disregarded two objectives of Directive 2003/87, namely the effectiveness of the measures adopted in terms of costs and their economic efficiency. By issuing to the installations less free allowances than necessary to achieve the objectives related to the volume of production and emission levels, the Commission is, it is claimed, seeking to obtain, at any price, the greatest emission reduction possible, regardless of the economic and social consequences of its decisions.

67 In that regard, it should be noted that the principal declared objective of Directive 2003/87, prior to its amendment by Directive 2009/29, was to reduce greenhouse gas emissions substantially in order to be able to fulfil the commitments of the European Union and its Member States under the Kyoto Protocol, approved by Decision 2002/358 (Case C-504/09 P *Commission* v *Poland* [2012] ECR, paragraph 77, and *Commission* v *Estonia*, paragraph 30 above, paragraph 79). Under recital 4 in the preamble to Directive 2003/87, that protocol committed the European Union and its Member States to reducing their aggregate anthropogenic emissions of greenhouse gases by 8% compared to 1990 levels in the period 2008 to 2012.

68 It is clear from the second paragraph of Article 1of and recital 3 in the preamble to Directive 2003/87 that, after its amendment by Directive 2009/29, Directive 2003/87 provides for the reductions of greenhouse gas emissions to be increased so as to contribute to the levels of reductions that are considered scientifically necessary to avoid dangerous climate change. As is apparent from those provisions and recitals 3, 5, 6 and 13 in the preamble to Directive 2009/29, the principal objective of Directive 2003/87, after its amendment by Directive 2009/29, is to reduce by 2020 global greenhouse gas emissions in the European Union by at least 20% compared to 1990 levels.

69 That objective must be achieved in compliance with a series of 'sub-objectives' and through recourse to certain instruments. The principal instrument for that purpose is constituted by the scheme for greenhouse gas emission trading, as is apparent from the first paragraph of Article 1 of Directive 2003/87 and recital 2 in its preamble. The first paragraph of Article 1 of that directive states that that scheme promotes emission reductions in a cost-effective and economically efficient manner. The other sub-objectives to be fulfilled by that scheme are, inter alia, as set out in recitals 5 and 7 in the preamble to the directive, the safeguarding of economic development and employment and the preservation of the integrity of the internal market and of conditions of competition (*Commission* v *Poland*, paragraph 67 above, paragraph 77, and *Commission* v *Estonia*, paragraph 30 above, paragraph 79).

70 Regarding the main objective of Directive 2003/87, namely the reduction of greenhouse gas emissions in the European Union, the Republic of Poland acknowledges that the measures contained in the contested decision achieve that result.

71 However, in stating that the contested decision, by defining the benchmarks too strictly, infringes, by not taking into account the economic and social consequences, two other objectives of Directive 2003/87, namely the effectiveness of the measures adopted in terms of cost and economic efficiency, the Republic of Poland denies that the contested decision reduces greenhouse gas emissions in a cost-effective and efficient manner.

72 In that regard, it should be noted that the determination of the benchmarks is only one part of the greenhouse gas emission trading scheme, the economic logic of which is to ensure that the reductions of greenhouse gas emissions required to achieve a predetermined environmental outcome take place at the lowest cost (*Arcelor Atlantique et Lorraine and Others*, paragraph 30 above, paragraph 32). That

determination is part of the transitional rules concerning the issuance of free allowances under Article 10a of Directive 2003/87. These measures aim, as stated in the third subparagraph of Article 10a(1) of that directive, to ensure that the manner of allocating allowances encourages the use of effective techniques to reduce greenhouse gas emissions and improve energy efficiency, and do not encourage increased emissions. Recital 15 in the preamble to Directive 2009/29 states that auctioning, as provided for in Article 10 of Directive 2003/87, should be the basic principle for the allocation of allowances. It is also clear from that recital that that principle was chosen in order to provide the greenhouse gas emission trading scheme with maximum economic efficiency. In particular, by allowing the allowances that have been allocated to be sold, the scheme is intended to encourage a participant in the scheme to emit quantities of greenhouse gases that are less than the allowances originally allocated to him, in order to sell the surplus to another participant who has emitted more than his allowance (*Arcelor Atlantique et Lorraine and Others*, paragraph 30 above, paragraph 32).

73 Furthermore, it should be noted that the legislature, in the context of the functioning of the emission trading scheme, did take into account the situation and the economy of the various regions. First, the rules of operation starting in 2013 will be introduced gradually. Thus, according to the first paragraph of Article 9 of Directive 2003/87, the Union-wide quantity of allowances issued each year starting in 2013 will decrease in a linear manner beginning from the mid-point of the period from 2008 to 2012. Furthermore, under Article 10a(11) of Directive 2003/87, the amount of allowances allocated free of charge in 2013 will be 80% of the quantity determined in accordance with the measures referred to in Article 10a(1). Thereafter the free allocation will decrease each year by equal amounts resulting in 30% free allocation in 2020, with a view to reaching no free allocation in 2027. Therefore, according to these rules, high CO_2 emitting installations, such as those using coal in some regions of the European Union, and which therefore need a large number of allowances for their production, will get at the start of the third trading period an even greater amount of free allowances to cover their needs.

74 Moreover, as is apparent from recital 17 in the preamble to Directive 2009/29, the legislature has established mechanisms to support the efforts of those Member States with relatively lower income per capita and higher growth prospects to reduce the carbon intensity of their economies by 2020. Accordingly, under Article 10(2)(a) of Directive 2003/87, 88% of the total quantity of allowances to be auctioned are distributed amongst Member States in shares that are identical to the share of verified emissions under the greenhouse gas emission trading scheme for 2005 or the average of the period from 2005 to 2007, whichever one is the highest, of the Member State concerned. Furthermore, in accordance with Article 10(2)(b) of that directive, 10% of the total quantity of allowances to be auctioned is distributed amongst certain Member States for the purpose of solidarity and growth within the European Union, to reduce emissions and adapt to the consequences of climate change. As is apparent from Annex IIa to Directive 2003/87, the Republic of Poland is one of the main beneficiaries of the additional 10% of revenue generated by the auction. The same is true with regard to the 2% of the total quantity of allowances to be auctioned divided between the Member States whose emissions of greenhouse gases in 2005 were at least 20% below the levels of their emissions for the reference year applicable to them under the Kyoto Protocol, in accordance with Article 10(2)(c) of Directive 2003/87, read in conjunction with Annex IIb to that directive. Moreover, it should be noted that, under Article 10c(1)(c) of Directive 2003/87, a Member State in which, in 2006, more than 30% of electricity was generated from a single fossil fuel, and in which the GDP per capita at market price did not exceed 50% of the average GDP per capita at market price of the European Union, may issue a transitional allocation of free allowances to electricity generation installations.

75 Moreover, the Republic of Poland is merely disputing the appropriateness of the contested decision in relation to the achievement of those sub-objectives without developing its argument more thoroughly or taking into account the objectives referred to in the third subparagraph of Article 10a(1) of Directive 2003/87. Thus, the Republic of Poland argues that installations that obtain fewer free allowances than they issue in the context of their production process invest in technologies using the same fuel, but for

which the emissions are low. However, it does not take into account the fact that those investments may also give an impetus to the development of new economic sectors that create employment. Accordingly, the argument of the Republic of Poland is too narrow and should, therefore, be rejected.

76 It follows from the foregoing that the Republic of Poland has not advanced evidence to show that the determination of the benchmarks was manifestly inappropriate having regard to the objectives to be achieved.

77 In the second place, as regards the necessity of the contested decision, the Republic of Poland argues that, by defining the benchmarks too strictly, the contested decision goes beyond what is necessary to achieve the reduction targets regarding emission volumes. According to it, Directive 2003/87 does not provide a corrective mechanism when the number of free allowances is insufficient for the installations concerned, but the reduction objectives have been achieved. Moreover, benchmark thresholds that are too low will lead to a drastic one-off reduction of free allowance volumes in 2013. The installations concerned do not, it is alleged, have enough time to change their technology or fuel used. It states that it proposed, during the development phase of the contested decision, the introduction of a correction factor that would be applied to all the reduction benchmarks and would have been calculated on the basis of the results of the most efficient coal installations or of installations using a higher emission fuel than natural gas and decreased to 90% of its value, which would, for example, allow the three sub-objectives of Directive 2003/87 to be achieved, namely to reduce greenhouse gas emissions cost-effectively and economically. The Commission rejected that proposal.

78 In support of its argument that the benchmarks were determined too strictly, the Republic of Poland states that the market price of emission allowances, which were about EUR 15 per tonne of CO_2, could cost, during the third trading period, between EUR 30 and EUR 48 per tonne of CO_2. With regard to the cement industry, the benchmark for clinker, as determined by the Commission, would involve a reduction in emissions of at least 30% for the installations due to the use of another fuel. In relation to the heat sector, the application of the heat benchmark established in the contested decision, without taking into account corrections for households, would result in an allowance deficit of about 50% for that sector. The Polish chemical industry would then have to bear charges amounting to EUR 257 million in 2013 and EUR 381 million in 2020. Thus, for the production of soda, it would be necessary to reduce emissions by 30%. With regard to the paper industry, the Polish sector would have to reduce emissions by about 45%. For the refinery sector, the Republic of Poland argues that the allowance deficit will be 28% in 2013. Moreover, those industries already apply the best available techniques to reduce emissions.

79 First, with regard to the assertion of the Republic of Poland that, because of the contested decision, the reduction of greenhouse gas emissions will exceed the 20% threshold in 2013, it should be noted that that statement is not supported by any factual proof and is not based on any evidence. As the Commission notes, the magnitude of the reduction depends not only on the level of the benchmarks, but on several factors, including the economic situation in Europe and conditions that constantly vary.

80 Second, as regards the argument of the Republic of Poland that the determination of the benchmarks in the contested decision will result, for installations in certain industries, in an emissions reduction of more than 20% in 2013, it should be noted that the main objective of Directive 2003/87 is the overall reduction of greenhouse gas emissions in the European Union by 2020 of at least 20% compared to 1990 levels. The fact that the determination of the benchmarks is likely to lead to a deficit of free allowances of more than 20% in 2013 for installations in certain industries, cannot lead to the conclusion that those installations are also reducing their emissions to a such a level. Since, under Article 10(1) of Directive 2003/87, from 2013 onwards, Member States are to auction all allowances that are not allocated free of charge, those installations are not required to make such a reduction, but can buy the missing allowance quantities by auction. They are thus free to determine the level to which they wish to reduce their emissions of greenhouse gases. Furthermore, it should be noted that

the objective of reducing those emissions globally in the European Union by 2020, by least 20% compared to 1990 levels, is to obtain an average reduction and therefore does not concern a specific installation.

81 Third, the Republic of Poland states that it was necessary to introduce a corrective coefficient that is applied to all the reduction benchmarks and that has been calculated on the basis of the results of the most efficient coal installations or of installations using a higher emission fuel than natural gas and decreased to 90% of its value, which would allow greenhouse gas emissions to be reduced cost-effectively and economically. In that regard, it should be noted, first, that, in determining the emission benchmarks, the Commission must comply with the provisions of Article 10a of Directive 2003/87. However, the introduction of an additional factor, consisting of taking into account the fuel used, did not encourage full harmonisation across the European Union of the implementing measures relating to harmonised allocation of free allowances, in the context of which the benchmark is calculated, in principle, for the products, as provided for in the first and fourth subparagraphs of Article 10a(1) of Directive 2003/87, but resulted in different rules for installations in the same sector or the same subsector (see paragraph 41 above).

82 Furthermore, the Republic of Poland has in no way established that the introduction of such a corrective coefficient would be effective in the light of the main objective of Directive 2003/87, namely the reduction of greenhouse gas emissions by at least 20% by 2020. Moreover, it is not apparent from developments in the Republic of Poland that the introduction of such a corrective coefficient would be effective in the light of the objectives referred to in the third subparagraph of Article 10a(1) of Directive 2003/87 for determining the benchmarks, namely ensuring that the manner of allocating allowances encourages the use of effective techniques to reduce greenhouse gas emissions and improve energy efficiency, and does not encourage increased emissions. The fact that the legislature has chosen, as a starting point for defining the principles for setting *ex ante* benchmarks by sector or subsector, the average performance of the 10% most efficient installations in a sector or subsector of the European Union in the years 2007 and 2008 shows that it intended to set those benchmarks at an ambitious level. In that regard, it should be noted that, contrary to what the Republic of Poland claims, that provision does not require that installations must obtain, by sector, the amount of free allowances corresponding to the emission of the 10% most efficient installations using a particular fuel. As regards the reference made by the Republic of Poland to costs and economic efficiency, it has already been noted that the legislature, in the context of the functioning of the emission trading scheme, took into account the situation and the economy of the various regions (see paragraphs 73 and 74 above).

83 It should also be noted that the increase in the level of a benchmark due to the introduction of a correction factor for certain installations would result in a greater quantity of free allowances. However, such an increase could result in exceeding the maximum annual quantity of allowances referred to in Article 10a(5) of Directive 2003/87 and make it necessary to apply the uniform cross-sectoral correction factor. The application of that factor would lead to a uniform reduction of the initial quantities of free allowances in all sectors and sub-sectors concerned. Increasing the quantities of allowances to be allocated free of charge for the installations covered by the introduction of such a correction coefficient could therefore result in a reduction of such quotas for other installations.

84 Fourth, as regards the Republic of Poland's argument that setting benchmark thresholds too low would lead to a drastic one-off reduction of volumes of free allowances in 2013, it should be noted that, for the trading periods from 2013, auctioning should be the basic principle for the allocation of allowances (recital 15 in the preamble to Directive 2009/29). Furthermore, prior to its amendment by Directive 2009/29, Article 10 of Directive 2003/87 provided that, for the trading periods from 2005 to 2007 and from 2008 to 2012, the Member States had to allocate, respectively, at least 95% and 90% of the allowances free of charge. However, the scheme established in Article 10a of Directive 2003/87 is, according to recital 21 in the preamble to Directive 2009/29, aimed at ensuring that the amount of

free allocation in 2013 is 80% of the amount that corresponded to the percentage of the overall Community-wide emissions throughout the period from 2005 to 2007 that those installations emitted as a proportion of the annual Community-wide total quantity of allowances.

85 Furthermore, the Commission was required, under the first and fourth subparagraphs of Article 10a(1) of Directive 2003/87, to adopt Union-wide and fully-harmonised implementing measures for the free allocation of the allowances and to calculate the benchmark for each sector and subsector, in principle, for products in order to maximise greenhouse gas emission reductions and energy efficiency savings. It is inherent to such general rules that they have a greater impact on some installations than others. However, while the assessment of the need must be made having regard to all installations concerned throughout the European Union, that fact does not lead to the conclusion that the level of the benchmarks was clearly not necessary in relation to the objectives of Directive 2003/87.

86 Furthermore, it should be noted that, under Article 10a(11) of Directive 2003/87, it was provided that the quantities of free allocations will decrease each year by equal amounts resulting in 30% free allocation in 2020, with a view to reaching no free allocation in 2027. Moreover, since Directive 2009/29, which included the rules for determining the *ex ante* benchmarks, was adopted two years before the adoption of the contested decision and more than three and a half years before the application of those benchmarks provided as of 2013, the Republic of Poland cannot claim that the installations concerned did not have enough time to prepare for the rules governing the trading periods beginning in 2013.

87 Fifth, the Republic of Poland states that Directive 2003/87 does not provide a corrective mechanism when the number of free allowances is insufficient for the installations concerned, but the reduction objectives have been achieved. It is true that, with the application of a uniform cross-sectoral correction factor, Article 10a(5) of Directive 2003/87 provides a corrective mechanism when the initial total number of free allowances notified by Member States exceeds the maximum quantity of free allowances. However, that directive does not provide for an inverse corrective mechanism. More specifically, the directive does not require the Commission to define *ex ante* benchmarks in such a way that the maximum annual quantity of free allowances referred to in Article 10a(5) of Directive 2003/87 is exhausted. On the contrary, since auctioning is the basic principle for allocation of allowances, the rules on the issuance of allowances free of charge, set out in Article 10a of that directive, are transitional in nature.

88 It follows that the Republic of Poland has not advanced evidence to show that the determination of the benchmarks by the Commission in the contested decision was clearly not necessary in relation to the objectives of Directive 2003/87.

89 In the third place, with regard to proportionality in the strict sense of the contested decision, it should be noted that, under that principle, even if it is appropriate and necessary for achieving legitimately pursued goals, the contested decision must not cause disadvantages that are disproportionate to the aims pursued. In that regard, the Republic of Poland argues that the contested decision will result in a decrease in the competitiveness of firms in the Member States where production is based on the use of coal as fuel, compared to competitors located in Member States where production is based on the use of other energy sources such as natural gas. According to the Republic of Poland, this will result, in the former group of States, in drastic increases in the prices of goods, which will have serious social and economic consequences. Moreover, the contested decision has a significant negative influence on the functioning of the internal market and constitutes an obstacle to its proper functioning. It claims that, if the heat benchmarks adopted by the Commission are implemented, beginning in 2013 the price of district heating will increase by approximately 22%.

90 First, it should be noted that the burdens referred to by the Republic of Poland for the installations concerned are related to the obligation to purchase the missing allowances by auction, which is the rule established by Directive 2009/29. In accordance with the polluter pays principle referred to in

Article 174(2) EC, the purpose of the trading scheme was to fix a price for greenhouse gas emissions and leave the operators to choose between paying the price or reducing their emissions. Furthermore, it should be noted that, under Article 10(3) of Directive 2003/87, Member States are to determine, within the limits referred to in that provision, the use of the revenue generated from the auctioning of the allowances. Thus, they can contribute to reducing the burdens referred to by the Republic of Poland for the installations concerned.

91 Second, the costs that will actually burden installations using a high greenhouse gas emitting fuel during trading periods from 2013 depend on the market price of emission allowances. According to the Republic of Poland, the price was EUR 15 per tonne of CO_2 in July 2011. The Commission states that, in October 2011, that price was EUR 11 per tonne of CO_2. With regard to the price for the trading period from 2013, that is estimated, according to the Republic of Poland, as being from EUR 30 to EUR 48 per tonne of CO_2. As those estimates are not certain, however, it is possible that the price of an emission allowance could be even lower or higher. The actual costs cannot be determined in advance.

92 Third, it should be noted that the legislature, by establishing the trading scheme, took into account the situation and the economy of the various regions (see paragraphs 73 and 74 above). Furthermore, it established rules for the allocation of free allowances to district heating and to cogeneration in order to meet an economically justifiable demand compared to the production of heat or cold (Article 10a(4) of Directive 2003/87). Furthermore, according to Article 10a(6) of Directive 2003/87, Member States may also adopt financial measures in favour of sectors or subsectors deemed to be exposed to a significant risk of carbon leakage due to greenhouse gas emissions-related costs passed on to electricity prices, in order to offset those costs. In addition, Article 10a(12) of Directive 2003/87 contains a special rule for the allocation of free allowances to installations in sectors or subsectors which are exposed to a significant risk of carbon leakage.

93 In the light of the above, the Republic of Poland has not submitted evidence to show that the determination of the benchmarks by the Commission in the contested decision was clearly not proportionate in the strict sense.

94 Consequently the third plea must be rejected.

The fourth plea, alleging an infringement of Article 10a of Directive 2003/87 and the Commission's lack of competence to make the contested decision

95 The Republic of Poland argues that, by adopting the contested decision, the Commission infringed Article 10a of Directive 2003/87, read in conjunction with Article 1 thereof, and that it exceeded its powers.

The first part, alleging infringement of the first subparagraph of Article 10a(2) of Directive 2003/87

96 The Republic of Poland argues, in substance, that the Commission infringed the first subparagraph of Article 10a(2) of Directive 2003/87 since, when defining the *ex ante* benchmarks, it should have chosen as the starting point the method referred to in that provision and then corrected the level thus obtained by taking into account the entire *acquis* of the European Union, namely, in particular, the right of Member States to define the structure of their energy supply, the principle of equal treatment, the principle of sustainable development, the principles of the European Union policy on the environment and the principle of proportionality. By stating, in recital 5 in the preamble to the contested decision, that no differentiation had been made on the basis of geography or on the basis of technologies, raw materials or fuels used, the Commission eliminated the possibility of applying the abovementioned rules of the *acquis*.

97 The first subparagraph of Article 10a(2) of Directive 2003/87 provides that, in defining the principles for setting *ex ante* benchmarks in individual sectors or subsectors, the starting point shall be the average performance of the 10% most efficient installations in a sector or subsector in the Community in the years 2007 and 2008.

98 That provision thus defines only the method that should be used as a starting point for defining the principles for determining *ex ante* benchmarks. However, the Republic of Poland does not argue that the Commission erred in defining that starting point, but it claims that, once that starting point had been determined by the method referred to in the first subparagraph of Article 10a(2) of Directive 2003/87, the Commission should have corrected it, taking into account the entire European Union *acquis*, in particular the provisions and principles of European Union law referred to in the context of the first, second and third pleas. However, such a correction obligation is not in any way evident from that provision.

99 On the basis of the starting point determined by applying the method referred to in the first subparagraph of Article 10a(2) of Directive 2003/87, the Commission must determine the *ex ante* benchmarks in accordance with the rules referred to in Article 10a(1) of that directive. Thus, inter alia, under the third and fourth subparagraphs of Article 10a(1), the determination of the benchmarks had to ensure that allocation of allowances takes place in a manner that provides incentives for reductions in greenhouse gas emissions and energy-efficient techniques, by taking account of the most efficient techniques, substitutes, alternative production processes, high efficiency cogeneration, efficient energy recovery of waste gases, use of biomass and capture and storage of CO_2, where such facilities were available, and did not provide incentives to increase emissions. Moreover, the benchmark must be calculated for products rather than for inputs, in order to maximise greenhouse gas emission reductions and energy efficiency savings throughout each production process of the sector or the subsector concerned.

100 As already noted, the Commission had a wide discretion when determining the level of the emission benchmarks. However, even with such discretion, the Commission was obliged to base its choice on objective criteria appropriate to the aim pursued by the legislation in question, taking into account all the facts and the technical and scientific data available at the time of adoption of the act in question (see paragraph 36 above).

101 It is apparent from recitals 5 to 12 in the preamble to the contested decision that the determination of the benchmarks by the Commission was preceded by a complex analysis and consultations with the sectors and subsectors. With regard, more specifically, to the determination of benchmark values, it is apparent from recital 8 in the preamble to the contested decision that the Commission analysed whether the starting points, referred to in the first subparagraph of Article 10a(2) of Directive 2003/87, sufficiently reflected the most efficient techniques, substitutes, alternative production processes, high efficiency cogeneration, efficient energy recovery of waste gases, use of biomass and capture and storage of CO_2, where such facilities were available.

102 It does not follow from that analysis that the Commission, in determining the benchmarks on the basis of Article 10a of Directive 2003/87, exceeded the bounds of its discretion.

103 That conclusion is not undermined by the arguments of the Republic of Poland concerning the provisions and principles of European Union law referred to in the context of the first, second and third pleas.

104 In the first place, with regard to the argument of the Republic of Poland, based on point (c) of the first subparagraph of Article 192(2) TFEU, that the contested decision significantly affects its choice between different energy sources and the general structure of its energy supply (see paragraph 10 above), it should be recalled that the legislature intended, by the adoption of Directive 2009/29, to establish a more harmonised emission trading scheme, as is apparent from recital 8. That scheme was

based, in particular, on the introduction of the principle of auctioning for the allocation of allowances from 2013, under Article 10 of Directive 2003/87, and provided transitional rules on the issue of allowances free of charge referred to in Article 10a of that directive.

105 As already noted, it is inherent to the fully-harmonised Union-wide measures relating to the harmonised free allocation of allowances referred to in Article 10a of Directive 2003/87 that they have a greater impact on some installations than others (see paragraph 85 above). In order to set off any negative consequences of the greenhouse gas emission trading scheme, as amended by Directive 2009/29, from 2013 for some Member States, the legislature took account of the situation and economy of the various regions (see paragraphs 73 and 74 above).

106 The transitional rules concerning the issue of free allowances which, under Article 10a(11) of Directive 2003/87, decrease each year by equal amounts are not limited to determining the benchmarks in the contested decision. It is true that the value of the benchmarks is decisive in calculating the quantity of allowances allocated free of charge to an installation (see paragraph 41 above). However, under Article 10a(5) of Directive 2003/87, the maximum annual quantity of allowances to be allocated free of charge is limited. If the provisional annual number of emission allowances allocated free of charge during the period from 2013 to 2020, as submitted by the Member States under Article 11(1) of that directive and Article 15(1) and 15(2)(e) of the contested decision, exceeds the limit referred to in Article 10a(5) of the directive, the Commission must apply a uniform cross-sectoral correction factor which reduces the number of free allowances in all sectors. Furthermore, it has already been noted that the choice of using the performance of a fuel other than natural gas, such as coal, would not have prevented installations that are in different situations, due to the use of different fuels, from being treated equally (see paragraph 50 above). Furthermore, it should be noted that installations are not required to reduce their greenhouse gas emissions, but can buy the missing allowance quantities by auction. They are thus free to determine the level to which they wish to reduce their emissions of greenhouse gases (see paragraph 80 above). Moreover, among the transitional rules referred to in Article 10a of the directive are special rules for installations in sectors or subsectors which are exposed to a significant risk of carbon leakage (see paragraph 57 above).

107 It follows that the effects of the emission trading scheme on the choice of a Member State between different energy sources and the general structure of its energy supply, alleged by the Republic of Poland, result, in essence, from the rules laid down in Directive 2003/87 and not from the benchmarks as determined in the contested decision. Therefore, even assuming that such effects exist, which the Republic of Poland has failed to demonstrate, since it referred only to the additional costs linked to an insufficient number of free allowances for the operators of installations due to *ex ante* benchmarks that are allegedly too low (see paragraph 78 above), they are the consequence of that directive and not of the contested decision, which is merely a correct application of it.

108 In the second place, with regard to the argument based on Article 191(2) TFEU, read in conjunction with Article 191(3) TFEU, the Republic of Poland argues that, without taking into account, to define the product benchmark, geographical criteria, technology, raw materials and fuels used, the Commission breached the principle of sustainable development, generally referred to in Article 11 TFEU and implemented in the field of the environment in Article 191(2) TFEU. Contrary to that provision, the Commission did not, it is alleged, take into account, in the implementation of its policy of environmental protection, the criterion of the diversity of situations in the various regions of the European Union. Furthermore, under Article 191(3) TFEU, the Commission should have taken into account the benefits and costs resulting from the implementation of environmental protection measures and, in that regard, should have considered the social, humanitarian and environmental aspects as well as the intangible benefits. According to the Republic of Poland, the comparison of these data concerning its use of different energy sources with the data concerning other Member States confirms its specificity as a Member State that has the highest coal-intensive consumption, while also being one of the largest producers of that fuel. Accordingly, the contested decision requires it to completely redefine its energy policy.

109 First, it should be recalled that Directive 2003/87 is based on Article 175(1) EC, according to which the Council was authorised to decide what action is to be taken by the Community in order to achieve the objectives referred to in Article 174 EC (now, after amendment, Article 191 TFEU). Those objectives were, according to Article 174(1) EC, preserving, protecting and improving the quality of the environment, protecting human health, prudent and rational utilisation of natural resources and promoting measures at international level to deal with regional or worldwide environmental problems. According to Article 174(2) EC, the Community policy on the environment aimed at a high level of protection, taking into account the diversity of situations in the various regions of the Community. It was 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. Article 174(3) provided that in preparing its policy on the environment, the Community is to take account, inter alia, of the potential benefits and costs of action or lack of action.

110 Second, as regards the argument of the Republic of Poland that the Commission, in determining the product benchmarks, did not take into account the diversity of situations in the various regions of the European Union, it should be recalled that, under the first subparagraph of Article 10a(1) of Directive 2003/87, the Commission had to adopt Union-wide and fully-harmonised implementing measures. In addition, a differential treatment of European Union regions according to the energy sources in their territory would, in fact, lead to accepting higher levels of greenhouse gas emissions in some regions. However, under the fourth subparagraph of Article 10a(1) of the directive, the benchmark must be calculated for products in order to maximise greenhouse gas emission reductions. Furthermore, it should be noted that the legislature, in the context of the functioning of the emission trading scheme, took into account the situation and the economy of the various regions (see paragraphs 73 and 74 above).

111 Third, with regard to the argument that, because of the failure to take into consideration the benefits and costs resulting from the determination of the product benchmarks in the contested decision, the Republic of Poland was obliged to completely redefine its energy policy, which is based on national coal resources, it should be recalled that, under Article 10a(3) of Directive 2003/87, the allocation of free allowances to electricity generators is, in principle, excluded. The possibility of transitional allocation of free allowances to electricity generation installations is provided for only as an exception to Article 10c of that directive. While it is true that the energy policy of a State does not concern the electricity sector only, but relates primarily to the structure of its energy supply, the interdependence between energy sources and the objectives of environmental protection, it should be noted that the determination of the product benchmarks in the contested decision does not preclude the use of technologies based on coal. On the one hand, that decision may have the consequence that installations that use those technologies must invest in innovative technologies to further reduce greenhouse gas emissions. In so doing, it is possible that those installations will continue to use technologies based on coal since, as the Republic of Poland states, they are recording a steady decline in emission intensity. On the other hand, the contested decision may have the consequence that those installations must, under the polluter pays principle referred to in Article 191(2) TFEU, purchase by auction the allowances required to cover those emissions generated by their production activity that are not covered by the allowances allocated free of charge. However, such consequences have already been provided for in that directive. Thus, the Republic of Poland has failed to demonstrate that the determination of the product benchmarks in the contested decision requires it to completely redefine its energy policy.

112 In the third place, with regard to the argument of the Republic of Poland based on the second subparagraph of Article 194(2) TFEU and the principle of equal treatment and the principle of proportionality, it is sufficient to note that it is apparent from the considerations relating to the first plea, the first part of the second plea and the third plea that that argument must be rejected.

113 Although the Republic of Poland claims, in its reply, that the contested decision must comply with European Union law in its entirety, it does not specify, to the requisite legal standard, the provision allegedly infringed. Under the first paragraph of Article 21 of the Statute of the Court of Justice of the European Union, which applies to the procedure before the General Court by virtue of the first paragraph of Article 53 of that statute, and Article 44(1)(c) of the Rules of Procedure of the General Court, all applications must, inter alia, contain a summary of the pleas in law on which the application is based. Those statements 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 supporting information (see judgment of 12 March 2008 in Case T-332/03 *European Service Network* v *Commission*, not published in the ECR, paragraph 229, and the case-law cited).

114 Consequently, the first part of this plea must be rejected.

The second part, based on an infringement of the second subparagraph of Article 10a(1) of Directive 2003/87, read in conjunction with Article 1 of that directive

115 The Republic of Poland argues that the Commission infringed the second subparagraph of Article 10a(1) of Directive 2003/87, since that provision should be applied taking into account the objectives of that directive, namely reducing greenhouse gas emissions, the cost-effectiveness of the measures and their economic efficiency. According to the second subparagraph of Article 10a(1) of the directive, the Commission was required to define a method for determining the emission benchmarks without amending the essential elements of that directive. In the contested decision, the Commission did not, it is alleged, consider the effects of that decision on the objectives relating to the cost-effectiveness and economic efficiency of the measures, while, under Article 1 of the directive, all the objectives set out in that directive are equally important.

116 It should be noted that that argument is merely a continuation of the argument submitted in the context of the third plea and relating to the alleged inappropriateness of the contested decision in relation to the objectives of Directive 2003/87. It must therefore be dismissed for the same reasons (see paragraphs 66 to 76 above).

117 Consequently, the second part of this plea must be rejected.

The third part, based on the Commission's lack of competence to make the contested decision

118 The Republic of Poland argues that, by adopting the contested decision, the Commission has exceeded the powers granted under Directive 2003/87, as it did not take into account the principles of European Union law mentioned in the first, second and third pleas and has substantially altered the essential elements of that directive. According to it, the contested decision does not constitute a measure implementing the directive, but a measure creating a climate policy independent of the European Union.

119 In that regard, first, it should be noted that, as regards the alleged failure to take into account the principles of European Union law mentioned in the first, second and third pleas, that argument is merely a continuation of that submitted in the context of the first part of the present plea, concerning an alleged obligation to correct the starting point for defining the principles for determining the *ex ante* benchmarks referred to in the first subparagraph of Article 10a(2) of Directive 2003/87. It must therefore be rejected for the same reasons (see paragraphs 96 to 114 above).

120 Second, with regard to the alleged modification of the essential elements of Directive 2003/87, it should be noted that the requirement, according to which the Union-wide and fully-harmonised implementing measures for the allocation of free allowances are aimed at amending non-essential elements of that directive, results from the second subparagraph of Article 10a(1) of the directive.

However, the argument of the Republic of Poland concerning an infringement of that provision has already been rejected in the context of the second part of this plea. As the Republic of Poland does not submit any additional evidence in this part of the plea, it must also be rejected.

121 Third, it should be noted that the arguments submitted by the Republic of Poland within the framework of this part of the plea do not go to prove that the Commission was not competent to make the contested decision. If the Commission did not take into account the principles of European Union law mentioned in the first, second and third pleas, and if it had substantially amended the essential elements of Directive 2003/87, it would have committed an error of law when determining the benchmarks. However, those arguments do not concern the issue of the competence of the Commission to determine the benchmarks.

122 Consequently, the third part of this plea and therefore this plea in its entirety must be rejected.

123 In the light of all the foregoing, the action must be dismissed.

Costs

124 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.

125 As the Republic of Poland has been unsuccessful, it must be ordered to pay the costs, in accordance with the form of order sought by the Commission.

On those grounds,

THE GENERAL COURT (Seventh Chamber)

hereby:

1. Dismisses the action;

2. Orders the Republic of Poland to pay the costs.

Dittrich Wiszniewska-Białecka Prek

Delivered in open court in Luxembourg on 7 March 2013.

[Signatures]