Reports of Cases

OPINION OF ADVOCATE GENERAL
HOGAN
delivered on 30 September 2021 [1]

Case C-139/20

European Commission
v

Republic of Poland

(Failure of a Member State to fulfil obligations – Article 258 TFEU – Directive 2003/96/EC – Framework for the taxation of energy products and electricity – Article 17 – Energy products used by energy-intensive undertakings covered by the EU Emission Trading System – Exemption from excise duty)

I. Introduction

1. The pressing need for action on climate change, coupled with a desire to reduce greenhouse gas emissions while simultaneously promoting energy efficiency are among the considerations that have prompted a series of environmental initiatives on the part of the EU legislature. While Council Directive 2003/96/EC of 27 October 2003 [2] cites as its primary objective the proper functioning of the internal market by ensuring that the potentially distorting effects of energy tax competition between the Member States are thereby avoided, [3] it is also one such measure. Whereas it provides for certain tax exemptions for energy-intensive undertakings where Member States elect to avail of this option, the directive also requires, however, the implementation of particular measures leading to the achievement of environmental protection objectives or to improvements in energy efficiency. [4]

2. In the present infringement proceedings brought under Article 258 TFEU, the substance of the complaint advanced by the Commission is that in its national legislation the Republic of Poland has indiscriminately exempted businesses from minimum excise duty on the consumption of energy products for heating purposes without obliging them to put in place schemes that achieve environmental or energy efficiency targets other than their participation in the EU Emissions Trading System, contrary to the requirements of Article 17(1)(b) and Article 17(4) of Directive 2003/96. To this the Republic of Poland responds by stating that this is permitted by

1 Original language: English.

2 Directive restructuring the Community framework for the taxation of energy products and electricity (OJ 2003 L 283, p. 51).

3 See, inter alia, recitals 2, 3 and 4 of Directive 2003/96.

4 See also, for environmental objectives in general, inter alia, recitals 6, 7, 11, 12. See also, judgment of 7 March 2018, *Cristal Union* (C-31/17, EU:C:2018:168, paragraph 34).

Article 17(1)(b), (2) and (4) of that directive and that as the participation in the EU Emissions Trading System is a pre-condition of the relevant national law, there is accordingly no infringement of EU law on its part.

3. The case accordingly turns on the interpretation of these provisions of Article 17 of Directive 2003/96, the quality of drafting of which, I regret to say, leaves a good deal to be desired. As will be seen, however, it also turns on whether the Commission has established a breach of those provisions on the grounds that it has raised. But before considering these arguments, it is first necessary to set out the relevant legal provisions.

II. Legal context

A. EU law

Directive 2003/96

4. Directive 2003/96 introduces minimum levels of taxation which Member States must apply to energy products and electricity as set out in Article 2 of Directive 2003/96. This includes, according to Article 2(1)(b) of the directive, carbon products and gas products.

5. Recitals 28 and 29 of Directive 2003/96 provide:

'(28) Certain exemptions or reductions in the tax level may prove necessary; notably because of the lack of a stronger harmonisation at Community level, because of the risks of a loss of international competitiveness or because of social or environmental considerations.

(29) Businesses entering into agreements to significantly enhance environmental protection and energy efficiency deserve attention; among these businesses, energy intensive ones merit specific treatment.'

6. Article 4 of Directive 2003/96 provides:

'1. The levels of taxation which Member States shall apply to the energy products and electricity listed in Article 2 may not be less than the minimum levels of taxation prescribed by this Directive.

2. For the purpose of this Directive "level of taxation" is the total charge levied in respect of all indirect taxes (except VAT) calculated directly or indirectly on the quantity of energy products and electricity at the time of release for consumption.'

7. Article 17 of Directive 2003/96 is one of the provisions dealing with tax reductions that may be granted. It concerns tax reductions and tax exemptions with respect to the consumption of energy products used for heating purposes and two more cases that are not relevant for the present purposes. It has the following wording:

'1. Provided the minimum levels of taxation prescribed in this Directive are respected on average for each business, Member States may apply tax reductions on the consumption of energy products used for heating purposes or for the purposes of Article 8(2)(b) and (c) and on electricity in the following cases:

(a) in favour of energy-intensive business

An "energy-intensive business" shall mean a business entity, as referred to in Article 11, where either the purchases of energy products and electricity amount to at least 3,0% of the production value or the national energy tax payable amounts to at least 0,5% of the added value. Within this definition, Member States may apply more restrictive concepts, including sales value, process and sector definitions.

"Purchases of energy products and electricity" shall mean the actual cost of energy purchased or generated within the business. Only electricity, heat and energy products that are used for heating purposes or for the purposes of Article 8(2)(b) and (c) are included. All taxes are included, except deductible VAT.

"Production value" shall mean turnover, including subsidies directly linked to the price of the product, plus or minus the changes in stocks of finished products, work in progress and goods and services purchased for resale, minus the purchases of goods and services for resale.

"Value added" shall mean the total turnover liable to VAT including export sales minus the total purchases liable to VAT including imports.

Member States, which currently apply national energy tax systems in which energy-intensive businesses are defined according to criteria other than energy costs in comparison with production value and national energy tax payable in comparison with value added, shall be allowed a transitional period until no later than 1 January 2007 to adapt to the definition set out in point (a) first subparagraph;

(b) where agreements are concluded with undertakings or associations of undertakings, or where tradable permit schemes or equivalent arrangements are implemented, as far as they lead to the achievement of environmental protection objectives or to improvements in energy efficiency.

2. Notwithstanding Article 4(1), Member States may apply a level of taxation down to zero to energy products and electricity as defined in Article 2, when used by energy-intensive businesses as defined in paragraph 1 of this Article.

3. Notwithstanding Article 4(1), Member States may apply a level of taxation down to 50% of the minimum levels in this Directive to energy products and electricity as defined in Article 2, when used by business entities as defined in Article 11, which are not energy-intensive as defined in paragraph 1 of this Article.

4. Businesses that benefit from the possibilities referred to in paragraphs 2 and 3 shall enter into the agreements, tradable permit schemes or equivalent arrangements as referred to in

paragraph 1(b). The agreements, tradable permit schemes or equivalent arrangements must lead to the achievement of environmental objectives or increased energy efficiency, broadly equivalent to what would have been achieved if the standard Community minimum rates had been observed.'

B. Polish law

8. Point 8 of Article 31a(1) of the Ustawa o podatku akcyzowym of 6 December 2008 [5] ('the Polish Law on Excise Duty') provides:

'1. Taxable transactions which are subject to excise duty shall be exempt from excise duty if they relate to carbon products for heating purposes:

…

8) by an energy-intensive business using carbon products in which a system has been put in place to achieve environmental protection objectives or increasing energy efficiency has been put in place.' [6]

9. Point 5 of Article 31b(1) of the Polish Law on Excise Duty provides:

'Taxable transactions which are subject to excise duty shall be exempt from excise duty if they relate to gas products for heating purposes:

…

5) by an energy-intensive business using gas products in which a system has been put in place to achieve environmental protection objectives or increasing energy efficiency has been put in place.' [7]

10. Article 31c of the Polish Law on Excise Duty contains the following definition:

'The following shall be considered a scheme for achieving environmental protection objectives or an increase in energy efficiency referred to in point 8) of Articles 31a(1) and point 5) of 31b(1):

1) the European emissions trading system in accordance with the law of 12 June 2015 on the greenhouse gas emissions allowance trading scheme (Dz. U. item 1223, and of 2016, items 266, 542, 1579 and 1948) and the provisions adopted on the basis of Articles 25(4) and 29(1) of that law; [8]

…'

[5] Dz. Ustaw RP (*Journal of Laws of the Republic of Poland*) 2014, item 752, as amended.

[6] In its version as amended by the law of 21 October 2016 amending the Polish Law on Excise Duty, which entered into force on 1 July 2017.

[7] This provision has been added by the law of 27 September 2013 amending the Polish Law on Excise Duty, which entered into force on 1 November 2013.

[8] In its version of the law of 21 October 2016 amending the Polish Law on Excise Duty, which came into force on 1 July 2017.

III. Background to the dispute and pre-litigation procedure

11. On 3 February 2016, in the context of the EU-Pilot system, the Commission informed the Polish authorities that it had concerns that that Member State was not complying with the requirements of Article 17(1)(b) and (4) of Directive 2003/96. The reason for this was that the Polish Law on Excise Duty grants an automatic exemption from excise duty on energy products (carbon and gas products) used by energy-intensive companies covered by the EU Emissions Trading System provided for in Directive 2003/87/EC. [9] The Commission considers that, in order to benefit from a tax exemption under Article 17(2) of Directive 2003/96, Article 17(4) of the directive requires that undertakings must first put in place systems as described in paragraph 1(b) of that provision which lead to the achievement of environmental objectives or increased energy efficiency over and beyond those achieved by their simply participating in the EU Emissions Trading System.

12. In their response of 31 March 2016, the Polish Government argued that the EU Emissions Trading System qualified as a tradeable permit scheme as described in Article 17(1)(b) of Directive 2003/96 that leads to the achievement of environmental objectives or increased energy efficiency in so far as the objectives of that directive comprise the achievement of environmental protection by the use of fiscal measures. They also considered that commercial undertaking that, in furthering their objectives have to bear additional cost (other than of a purely fiscal nature) should not be burdened a second time by excise duty.

13. On 8 March 2018, the Commission sent a letter of formal notice to the Republic of Poland. According to the Commission, by exempting energy-intensive businesses covered by the EU Emissions Trading System from excise duty for carbon and gas products, the Republic of Poland had failed in its obligations as per Article 17(1)(b) and (4) of Directive 2003/96. The Commission reiterated its opinion that, in order to qualify for reductions or exemptions under Article 17 of the directive, businesses must put in place schemes that achieve environmental or energy efficiency targets other than those of the EU Emissions Trading System.

14. By letter of 8 May 2018, the Polish authorities replied to that letter of formal notice. They rejected the Commission's position in its entirety, arguing that the EU Emissions Trading System constituted a 'tradable permit scheme' within the meaning of Article 17(1)(b) and (4) of Directive 2003/96.

15. On 26 July 2019, the Commission sent a reasoned opinion to the Republic of Poland concerning its alleged failure to fulfil its obligations under Article 17(1)(b) and (4) of Directive 2003/96.

16. As the Commission was not satisfied with the reply of 19 September 2019 in which the Polish authorities maintained their position, the Commission took the decision on 27 October 2019 to bring the present action before the Court.

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

IV. Forms of order sought and procedure before the Court

17. By the present action for failure to fulfil obligations, which was received by the Court on 16 March 2020, the Commission claims that the Court should:

– declare that, by implementing a law which grants an exemption from excise duty for energy products used by energy-intensive businesses covered by the EU Emissions Trading System, the Republic of Poland has failed to fulfil its obligations under Article 17(1)(b) and Article 17(4) of Directive 2003/96;

– order the Republic of Poland to pay the costs.

18. The Republic of Poland contends that the Court should:

– dismiss the action in its entirety as unfounded, and

– order the Commission to pay the costs.

19. The parties submitted written observations. Pursuant to Article 76(2) of its Rules of Procedure, the Court decided not to hold a hearing.

V. Arguments of the parties

A. Arguments of the Commission

20. In order to benefit from the exemption from the minimum level of taxation for heating fuels as per Article 17(2) of Directive 2003/96, energy-intensive businesses must accept agreements, tradable permit schemes or equivalent arrangements, as referred to in Article 17(1)(b) and (4) of Directive 2003/96. In the Commission's view, the participation in the EU Emissions Trading System which follows from Article 2(1) of Directive 2003/87 cannot be considered a 'tradable permit scheme' for the purposes of Article 17(1)(b) and (4) of Directive 2003/96.

21. The Commission comes to that conclusion in spite of its acknowledgement that the EU Emissions Trading System does constitute a tradable permit scheme within the general sense of that term and that it leads to the achievement of environmental objectives, namely the reduction of greenhouse gas emissions. In its view, the term 'tradable permit scheme' which is not defined in Directive 2003/96, must be interpreted in the light of the objectives followed by the EU legislature and in such a way as to guarantee the coherence of its legislation. The Commission argues that, if one were to consider the EU Emissions Trading System to be a 'tradable permit scheme' for the purposes of Article 17 of Directive 2003/96, and therefore, to exempt energy-intensive businesses from excise duty on heating fuels, Directive 2003/87 could no longer achieve its objective, namely 'to promote reductions of greenhouse gas emissions in a cost-effective and economically efficient manner'. [10]

22. In support of its opinion, the Commission relies on statements to be entered in an annex to the minutes of the Council meeting at which Directive 2003/96 was adopted. These minutes provide in their point 2: 'On the basis of a proposal from the Commission, the Council

[10] See the first paragraph of Article 1 of Directive 2003/87.

undertakes to positively examine tax measures which will accompany the future implementation of a Community emission trading scheme, particularly in order to avoid cases of double taxation.'[11] The Commission infers from this statement that taxation under Directive 2003/96 and the application of the EU Emission Trading System are meant to coexist in principle.

23. In addition, the Commission relies on recitals 28 and 29 of Directive 2003/96 in support of their argument that the tax advantages provided for in Article 17 thereof were introduced by the legislature in order to improve environmental protection or energy efficiency. Such objectives would not be achieved if the tax exemption were granted simply because a given operator is covered by another mandatory instrument of EU law, such as the emission trading scheme. Therefore, according to the Commission, the concept of 'tradable permit schemes' within the meaning of Article 17(1)(b) and (4) of Directive 2003/96 covers only schemes allowing the achievement of environmental objectives or increased energy efficiency exceeding the results of the implementation of other mandatory schemes established by EU acts. The provisions of the Polish Law on Excise Duty could in fact completely outweigh the cost for emission certificates which would deprive the EU Emissions Trading System of its purpose as the avoidance of such costs is the driving aspect underlying that scheme.

24. Article 17(1)(b) and (4) of Directive 2003/96 must therefore be interpreted as relating to an improvement in environmental protection or energy efficiency going beyond what is envisaged by binding instruments of EU law, such as the emission trading scheme.

25. The Commission also observes that Directive 2003/87 contains its own specific instruments designed to preserve the integrity of the internal market and to avoid distortions of competition within the scope of the application of the EU Emissions Trading System.[12] These are the allocation of free allowances as per Articles 10a, 10b and 10c of Directive 2003/87 (with regard to stationary installations) or the right of Member States to adopt financial measures in favour of sectors or subsectors exposed to a significant risk of carbon leakage with respect to the indirect emission costs that were passed on and lead to an increase in the price of electricity. Such measures are, however, subject to state aid rules. In the Commission's opinion, the above-described rules of the Polish Law on Excise Duty which are outside of and in addition to the measures envisaged by that directive bear the risk of leading to a distortion of competition.

26. As the Republic of Poland has confirmed in its written answer to questions asked by the Court, the exemptions from excise duty provided for in point 8 of Article 31a(1) and in point 5 of Article 31b(1) of the Polish Law on Excise Duty apply irrespective of whether the energy-intensive companies benefiting from it already received or also receive free emission allocations under Directive 2003/87.

27. The Commission further explains that Poland had notified a State aid scheme for the years 2019 and 2020 under which certain companies can apply for the compensation of a share of their 'indirect emission costs'. As foreseen by the applicable guidelines,[13] that aid had a maximum intensity of 75% and it was only applicable to electricity consumption which exceeded 1 GWh per year. The Commission considered that aid compatible with the internal market.[14] An important

[11] Council Directive restructuring the Community framework for the taxation of energy products and electricity, Common Guidelines, Council document 13253/03 ADD1.

[12] See recital 7 of Directive 2003/87.

[13] Guidelines on certain State aid measures in the context of the greenhouse gas emission allowance trading scheme post-2012 (OJ 2012 C 158, p. 4).

[14] Decision C(2019) 6371 final of the Commission regarding Compensation for indirect emission costs in Poland. Decision not to raise objections published in OJ 2019 C 354, p. 1.

consideration was, however, that the aid could not be cumulated with a tax abatement/a tax exemption under the rules of the Polish Law on Excise Duty described above.[15] The Commission also specifies that only very few undertakings took advantage of that State aid scheme. It surmises that the tax advantages granted under the Polish Law on Excise Duty which are not limited to 'costs relating to greenhouse gas emissions passed on in electricity prices' but are granted automatically for coal and gas used by businesses for heating purposes once an energy-intensive undertaking is covered by the emission trading scheme is more attractive for businesses than the scheme for compensation of indirect emission costs.

28. The Commission further argues that, contrary to the Polish government's allegation, its position that Article 17(1)(b) does not cover the EU emission trading system is not at odds with its proposal of 13 April 2011 for a Council Directive amending Directive 2003/96/EC restructuring the Community framework for the taxation of energy products and electricity.[16] It had proposed an amendment to Article 14 of Directive 2003/96 by adding a point (d). That point contained a (mandatory) exemption from taxation of 'energy products used for activities subject to and not excluded from, the Union scheme within the meaning of Directive 2003/87/EC'.[17] The Commission points out, however, that this only concerned 'CO_2-related taxation'. An explicit distinction was to be introduced by the proposed amendment into Directive 2003/96 between energy taxation specifically linked to CO_2-emissions attributable to the consumption of the products concerned, on the one hand, and energy taxation based on the energy content of the products (general energy consumption taxation), on the other. The taxation of heating fuels for business purposes covered by Article 17 of Directive 2003/96 (including according to its proposed amendment) concerned the latter of these two cases. Therefore, and for clarification, the Commission further proposed to amend Article 17 by inserting a paragraph 3, which was to provide that 'tradable permit schemes' for the purpose of that provision 'shall mean tradable permit scheme other than the Union scheme within the meaning of Directive 2003/87/EC'.[18]

B. Arguments of the Republic of Poland

29. As I have already indicated, the Republic of Poland, on the other hand, argues that the EU Emissions Trading System does in fact constitute a 'tradable permit scheme' for the purposes of Article 17(1)(b) and (4) of Directive 2003/96.

30. It contends that, on the basis of the way in which it is conceived and the principles governing its operation, the EU Emissions Trading System fulfils all the criteria of a 'tradable permit scheme'. That scheme also leads to the achievement of environmental objectives. In that respect, the Republic of Poland relies on the Court's judgment of 29 March 2012, *Commission* v *Poland* in which the Court declared that it is the 'principal objective of Directive 2003/87 … 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'.[19] The Republic of Poland maintains in particular that the wording of Article 17(1)(b) and (4) of Directive 2003/96 gives no

[15] Poland had introduced a mechanism according to which when applying for compensation under the scheme an undertaking had to declare that it resigned from support under the Polish Law on Excise Duty, notified the relevant entity thereof (an electricity supplier or the settlement body) and reimbursed any support previously received under that law (and indeed any other acts), see ibid., at paragraph 27.

[16] COM(2011) 169 final. Withdrawal of Commission proposal, OJ 2015 C 80, p. 17.

[17] Such a clarification is also contained in the second paragraph of Article 18(b) of the Commission's latest Proposal for a Council Directive restructuring the Union framework for the taxation of energy products and electricity, of 14 July 2021 (COM(2021) 563 final).

[18] Ibid. See, also, recital 22 of the proposal, the last sentence of which provides: 'Furthermore, it should be made clear that references to tradable permit schemes in Article 17 of Directive 2003/96/EC do not include the Union scheme under Directive 2003/87/EC.'

[19] C-504/09 P, EU:C:2012:178, paragraph 77.

indication that the environmental objectives or improvements in energy efficiency must be above and beyond those that can be achieved by a mandatory system envisages under EU law. Neither do recitals 28 and 29 of Directive 2003/96 support such a view.

31. Given that Directives 2003/96 and 2003/87 were elaborated almost simultaneously, the Republic of Poland is of the opinion that if the EU Emissions Trading System were not to be considered to be a 'tradable permit scheme' for the purposes of Article 17(1)(b) and (4) of Directive 2003/96, this would have been stated in express terms by the EU legislature. In its opinion, those provisions were meant to avoid the 'double taxation' of energy-intensive businesses that were also covered by the EU Emissions Trading System.

32. According to the Republic of Poland, the Commission proposal of 13 April 2011 for a Council Directive amending Directive 2003/96/EC envisaged amendments to Article 17(2) and (3) of Directive 2003/96 in order to exclude the EU Emissions Trading System from the ambit of 'tradable permit schemes' for the purpose of Article 17 of Directive 2003/96. Such an amendment was only necessary because, under the still prevailing rules the EU Emissions Trading System was covered by those provisions. The proposal was not, in any event, adopted by the Council.

33. As for the statements to be entered in an annex to 'the minutes of the Council meeting at which … Directive [2003/96 was] adopted' – statements on which the Commission relies – the Republic of Poland considers that that did not refer to the application of Article 17 of Directive 2003/96 but rather only contained general statements, as for example the fact that, on the basis of a proposal by the Commission, the Council had undertaken to analyse in a constructive manner the fiscal measures which were to accompany the future implementation of the EU emission trading system in order to avoid double taxation.

VI. Assessment

34. It is settled case-law that, in proceedings under Article 258 TFEU, it is for the Commission to prove the existence of the alleged infringements and to provide the Court with the information necessary for this purpose.[20] It is also settled case-law that the Court may only examine grounds of complaint that were formulated by the Commission already at the stage of its reasoned opinion.[21]

35. It follows that in a case of this kind where the alleged infringement rests upon the contention that national law does not comply with the terms of a directive, the success of the Commission's case must rest in turn upon whether it has interpreted the terms of the directive correctly and the actual arguments raised by the Commission in both the precontentious proceedings and the present procedure.

36. As there is general agreement between the parties as to the underlying facts, it will be seen that this case turns entirely on a question of interpretation of Article 17 of Directive 2003/96. The parties are in agreement that the Polish Republic has passed a law that grants an exemption from excise duty to energy products (coal and gas products) used by energy-intensive companies

[20] Judgments of 19 May 2011, *Commission* v *Malta* (C-376/09, EU:C:2011:320, paragraph 32 and the case-law cited), and of 14 January 2021, *Commission* v *Italy (Contribution towards the purchase of motor fuel)* (C-63/19, EU:C:2021:18) paragraph 74).

[21] See to that effect, inter alia, judgments of 24 June 2004, *Commission* v *Netherlands* (C-350/02, EU:C:2004:389, paragraph 20), of 29 April 2010, *Commission* v *Germany* (C-160/08, EU:C:2010:230, paragraph 43) and of judgment 4 September 2014, *Commission* v *France* (C-237/12, EU:C:2014:2152, paragraph 74).

covered by the EU Emissions Trading System provided for in Directive 2003/87. They further agree – and this is relevant with respect to the Commission's arguments – that the effect of this national law is that this exemption is granted automatically, and irrespective of whether businesses might have already benefited from any supportive measures under Directive 2003/87, such as, for example, the allocation of emission allowances free of charge. The question therefore is, whether such a method of implementation is covered by Article 17(1)(b) and (4) of Directive 2003/96.

37. Article 4 of Directive 2003/96 obliges Member States to impose minimum levels of taxation on energy products and electricity as defined in Article 2 thereof. This obligation is subject to a number of exemptions from the minimum rate, which, in the case of Article 14 of the directive, are mandatory. In other instances, Member States may choose whether to apply them. Such is the case with Article 17 of Directive 2003/96, the interpretation of which is the focus of the present proceedings.

38. One general object of Directive 2003/96 is to discourage Member States from competing for the industrial location of undertakings by offering low energy tax rates on the use of fossil fuels. This is done by prescribing minimum EU levels of taxation according to Article 1 of the directive. The indirect aim of this measure is also to discourage the use of fossil fuels in general. Article 17 of directive 2003/96, however, permits Member States to derogate from the terms of these taxation obligations by applying certain excise duty exemptions and reductions where the conditions specified in that provision have been satisfied. It favours – although not only – energy-intensive businesses. The rationale for this – similar to that of the measures aimed at sectors at risk of carbon leakage according to Directive 2003/87[22] – is two-fold. The provisions aim to counter the risk of relocation of energy-intensive businesses to countries where no such taxes or much lower ones apply. This would tend to impair the European Union as an industrial location and its competitiveness.[23] Further, such relocations might take place to countries where energy is not only much cheaper but where environmental standards in general are considerably inferior to the European ones.

A. The interpretation of Article 17(1) of Directive 2003/96 and the meaning of 'tradable permit schemes' in Article 17(1)(b) and Article 17(4) of Directive 2003/96

39. As I have already observed, the Commission's case rests essentially on the contention that the reference to 'tradable permit schemes' in Article 17(1)(b) and (4) of Directive 2003/96 does not extend to participation in the EU Emissions Trading System.

40. The wording of Article 17 of Directive 2003/96 is, admittedly, somewhat unclear. The first paragraph of that article provides that Member States may apply tax reductions on the consumption of energy products used for heating purposes, (1) in favour of energy-intensive business and (2) where agreements are concluded with undertakings or associations of undertakings, or where tradable permit schemes or equivalent arrangements are implemented, as far as they lead to the achievement of environmental protection objectives or to improvements in energy efficiency. These possibilities require, however, that the minimum levels of taxation prescribed in the directive are respected on average for each business.

[22] See Article 10a(6) and Article 10b of Directive 2003/87 in its versions as amended by Directive (EU) 2018/410 of the European Parliament and of the Council of 14 March 2018 amending Directive 2003/87/EC to enhance cost-effective emission reductions and low-carbon investments, and Decision (EU) 2015/1814, OJ 2018 L 76, p. 3.

[23] See reference in recital 28 of Directive 2003/96.

41. Article 17(2) of Directive 2003/96 provides that, the provisions of Article 4(1) notwithstanding, Member States may exempt businesses entirely from such taxation on the consumption of energy products and electricity (as defined in Article 2 of the directive) when used 'by energy-intensive businesses' as defined by Article 17(1) of Directive 2003/96. Article 17(3) of the directive then provides for a separate category of up to 50% tax reduction when 'used by business entities as defined by Article 11, which are not energy-intensive as defined in paragraph 1 of this Article'.

42. Article 17(4) of Directive 2003/96 provides that undertakings which benefit from such a tax exemption in Article 17(2) or tax reduction in Article 17(3) shall enter into the 'agreements, tradable permit schemes or equivalent arrangements as referred to in paragraph 1(b)'. These agreements, tradable permit schemes or equivalent arrangements must, however, lead to energy efficiency or the achievement of environmental objectives which are 'broadly equivalent to what would have been achieved if the standard Community minimum rates had been observed'. By contrast, paragraph 1(b) of Article 17 of Directive 2003/96 does not make any mention of this requirement. [24]

43. Given that the Polish Law on Excise Duty deals with a complete exemption from taxation for energy-intensive businesses, it is clear that Poland based point 8 of Article 31a(1) and point 5 of Article 31b(1) of the Polish Law on Excise Duty on the provisions of Article 17(2) of Directive 2003/96. This means that, notwithstanding the abovementioned general lack of clarity of Article 17 of the directive, Article 17(4) of that directive is applicable. According to that provision, 'businesses that benefit … shall enter into … tradable permit schemes or equivalent arrangement as referred to in paragraph 1(b)', and these 'tradable permit schemes or equivalent arrangements must lead to the achievement of environmental objectives or increased energy efficiency, broadly equivalent to what would have been achieved if the standard Community minimum rates had been observed'.

44. When considering the question whether Poland has fulfilled its obligations, the critical question, therefore, is what is meant by a 'tradable permit scheme' as set out in Article 17(1)(b) of Directive 2003/96. A further question is when such a scheme can be considered as achieving, first 'environmental objectives or increased energy efficiency' in accordance with the wording of Article 17(4), and second, whether these achievements are 'broadly equivalent to what would have been achieved if the standard Community minimum rates had been observed'. As will be seen, however, the Court is not in a position to examine the second of these requirements as a ground of complaint. The consideration of that question might nevertheless serve in the interpretation of the provision as a whole.

45. It is agreed between the parties that the EU Emissions Trading System has all the features of a 'tradable permit scheme'. With regard to the further requirement set out in Article 17(4) of Directive 2003/96, namely, that environmental objectives or increased energy efficiency has to be reached, there are different approaches to the interpretation of that provision. The question whether the tradable permit scheme leads to the achievement of environmental objectives or

[24] Some commentators interpret Article 17(1) of Directive 2003/96 as containing conditions that aim to be applied to paragraphs 2 and 3 of that provision (see Deloitte, *Technical and legal aspects of Council Directive 2003/96/EC of 27 October 2003 restructuring the Community framework for the taxation of energy products and electricity*, p. 204). Others interpret Article 17(2) and (3) of Directive 2003/96 as exceptions to the requirement that minimum levels of taxation prescribed in the directive have to be respected on average for each business. This, however, requires that the conditions set out in paragraph 4 of that provision are fulfilled. For the difference in approaches by different Member States to that requirement, see ibid., at pp. 205 and 206. Given that the question of whether 'the minimum levels of taxation prescribed … are respected on average for each business' is not at issue in these proceedings, one may assume that the Commission as well as the Polish Government follow this second interpretation.

increased energy efficiency, may be approached differently. One might argue that it is sufficient for the purposes of Article 17(1)(b) and (4) of Directive 2003/96 that participation in the tradable permit scheme is *in itself* such to achieve environmental objectives or increased energy efficiency because the scheme has such objectives. This is the argument on which Poland relies. Alternatively, one could argue that the entry into the tradable permit scheme must also demonstrably lead to the achievement of those goals. Yet, looking at it in the abstract, participation in the EU Emissions Trading System certainly fulfils that latter requirement. After all, the Court has already ruled that the EU Emissions Trading System furthers environmental protection objectives by reducing greenhouse gases,[25] which means that it also by definition fulfils the further requirements stated in Article 17(1)(b) of Directive 2003/96.

46. Looking at the specific case, however, this assessment is perhaps less certain. Whereas, under the premises of Article 31c of the Polish Law on Excise Duty, energy-intensive businesses are *automatically* entitled to an exemption from excise duties on the consumption of energy products used for heating purposes, those same businesses, for their installations that are considered to be at risk of carbon leakage,[26] obtain 100% of their emission allowances free of charge according to Article 10b of Directive 2003/87, as currently in force. This means that they will in fact not be financially burdened under the EU Emissions Trading System so that one could argue that the participation of *those businesses* in the EU Emissions Trading System does not lead to the achievement of environmental objectives or increased energy efficiency because they have no incentives to act in such a way. It could therefore be argued that an exemption from excise duty on the consumption of energy products used for heating purposes is therefore not justified. This becomes even more obvious when one looks at the second condition of Article 17(4) of Directive 2003/96 which requires the achievement of 'environmental objectives or [an] increase [in] energy efficiency, *broadly equivalent to what would have been achieved if the standard Community minimum rates had been observed*'.[27]

47. The reference to 'the standard Community minimum rates' appears to be a reference to the minimum rate of taxation, prescribed by Directive 2003/96, although if this is what was intended, it would have been helpful if Article 17(4) of the directive had in fact stated this in express terms. Article 17(4) of Directive 2003/96 accordingly appears to envisage that any business availing of the excise duty exemption (or reduction) must demonstrate that by participating in a tradable permit scheme it achieved environmental objectives or energy efficiencies which approximated to those which would have been achieved had the minimum rate of excise duty been applied to its products. In some instances at least, proof of such a hypothetical counter-factual could require complex econometric and other evidence. On the other hand, it is quite clear that a criterion specified in a legal text cannot readily be disregarded, no matter how difficult its application.

[25] The Commission does not argue that the Polish Law on Excise Duty's definition of 'energy-intensive business' is outside the parameters set in Article 17(1)(a) of Directive 2003/96.

[26] As can be inferred from Article 30 of Directive 2003/87 as amended by Directive 2018/410 (for the determination of sectors considered to be at a risk of carbon leakage prior to that change, see Commission Decision of 24 December 2009 determining, pursuant to Directive 2003/87/EC of the European Parliament and of the Council, a list of sectors and subsectors which are deemed to be exposed to a significant risk of carbon leakage (OJ 2010 L 1, p. 10)), the notions of energy-intensive as defined in Article 17(1)(a) of Directive 2003/96 and that of being 'at risk of carbon leakage' according to Article 10b of Directive 2003/87 are not identical, although many businesses will in fact be covered by both.

[27] Emphasis added. Article 17(4) of Directive 2003/96 requires that a tradable permit scheme *must lead* to the achievement of environmental objectives or increased energy efficiency, *broadly equivalent* to what would have been achieved if the standard Community minimum rates had been observed. The wording 'must lead to' conveys a clear obligation. The notion of 'broadly equivalent' does not seem to be used very often in legislative acts of the EU, although there are some instances. It has, however, not been scrutinised in any detail by the Court. In its judgment of 16 January 2014, *Commission* v *Spain* (C-67/12, EU:C:2014:5, paragraph 72), the Court dealt with Article 8(b) of Directive 2002/91 which states that '[t]he overall impact of this approach should be broadly equivalent to that arising from the provisions set out in (a)….'. The Court objected to the transposition, inter alia, because it did not consider the imposition of an obligation to maintenance companies rather than to independent experts as 'broadly equivalent'. This at least indicates that the Court is willing to consider such criteria in detail.

48. It has been shown that 100% of the allowances might be issued free of charge under the EU Emissions Trading System according to Directive 2003/87 to energy-intensive businesses which pertain to a sector that is at risk of carbon leakage. All of this suggests that in those cases the criterion that environmental objectives or increased energy efficiency broadly equivalent to what would have been achieved if the standard Community minimum rates of taxation had been observed is not fulfilled. In any case, by automatically applying the exemption from excise duty of carbon products and gas products for heating purposes to energy-intensive businesses, the Polish law on excise duty does not in any way whatsoever take into consideration this criterion.

49. This, however, is not an argument which has been advanced by the Commission in the present case. What the Commission does in fact argue is that the term 'tradable permit schemes' should be interpreted as excluding the EU Emissions Trading System for the purposes of Article 17(1)(b) and (4) of Directive 2003/96. It fears that Directive 2003/87 could no longer achieve its objective of promoting reductions of greenhouses gas emissions if Member States were allowed to exempt energy-intensive businesses from minimum levels of excise duty simply because they participated in the EU Emissions Trading System.

50. The Commission has thus contended that the reference to a tradable permit scheme must be to a scheme in respect of which the businesses concerned enter into voluntarily, rather than a mandatory scheme such as the EU Emissions Trading System. It further contends that only a scheme that achieves environmental objectives and energy efficiency over and beyond those achieved by mandatory EU instruments qualify for the exemptions under Article 17(1)(b) and (4) of Directive 2003/96 without reference to the fact that no such objectives might be achieved at all if an energy intensive business obtains 100% of its emission allowances free of charge. Ambiguous though Article 17 of Directive 2003/96 might be in many ways, any contention that tradable permit schemes for the purpose of those provisions must achieve environmental objectives and energy efficiency beyond those achieved under mandatory EU schemes is not supported by the actual wording of this provision.

51. The Commission argues that statements to be entered in an annex to the minutes of the Council meeting at which Directive 2003/96 was adopted plead in favour of the coexistence of taxation under Directive 2003/96 and the EU Emissions Trading System. This argument is, however, not convincing. Such minutes are not legislative texts and cannot change an otherwise clear description in a EU legislative instrument, namely, 'tradable permit schemes … as far as they lead to the achievement of environmental protection objectives or to improvements in energy efficiency'. Nor is the meaning of the statements made in those minutes entirely clear in the sense argued by the Commission.

52. Further, while it is true that Directive 2003/87 functions on the basis that the price of emission allowances acts as an incentive to change to technologies that emit less greenhouse gases, Directive 2003/87 has developed considerably over the years whereas Directive 2003/96 has not. This is exemplified by the fact that rules regarding carbon leakage (dealing with a risk that is higher in energy-intensive industries) were only introduced into Directive 2003/87 by Directive 2009/29/EC. [28]

53. It should also be borne in mind that Article 17 of Directive 2003/96 is only aimed at tax reductions on the consumption of energy products used for heating purposes, stationary motors as well as plant and machinery used in construction, civil engineering and public works

[28] Directive of the European Parliament and of the Council of 23 April 2009 amending Directive 2003/87/EC so as to improve and extend the greenhouse gas emission allowance trading scheme of the Community (OJ 2009 L 140, p. 63).

according to Article 8(2)(b) and (c) of that directive and on electricity. Directive 2003/87, on the other hand, is aimed at the avoidance of emissions from a large array of activities leading to certain greenhouse gases. While there is clearly an overlap between Article 17 of Directive 2003/96 and the Directive 2003/87, I cannot see – and this is regrettable – that this has been dealt with in a consistent manner by the EU legislature. This also means that it is difficult to limit the application of one instrument in order to protect the effectiveness of another that, furthermore, has changed vastly over the years.[29] To this, one might add that if the EU legislature wished to exclude participation in an EU Emissions Trading System for this purpose, this could readily have been so specified, not least given that the emission trading scheme was itself established by a directive (Directive 2003/87) which was promulgated within two weeks of Directive 2003/96.

54. With regard to the Commission's argument that only voluntary tradable permit schemes are covered by Article 17(1)(b) and (4) of Directive 2003/96 one may accept that some language versions of Article 17(4) of the directive seem to point to the voluntary nature of a participation in a tradable permit scheme. In its English version, paragraph 4 states '*shall enter into* the agreements, tradable permit schemes or equivalent arrangements'.[30] This might lead one to wonder whether only a tradable permit scheme to which a business 'shall enter into' is actually embraced by that provision. If this is so, this in turn implies that an 'action' of some description (whether voluntary or not) is envisaged.

55. As the Court has pointed out in its judgment in *ExxonMobil Production Deutschland*,[31] by virtue of Article 2(1) of Directive 2003/87, which defines the latter's scope, the directive is to apply to 'emissions' of greenhouse gases – which are listed in Annex II thereto and include CO_2 – 'from the activities listed in Annex I'.[32] Therefore, no voluntary or involuntary act of any business is required. Once an installation fulfils the requirements, the EU Emissions Trading System applies to it and the business has to surrender allowances equal to the installation's emissions according to Article 12(3) of Directive 2003/87.

56. The notion that schemes require what might be termed 'a voluntary act of accession' to tradable permit schemes is not, however, supported by all language versions.[33] Furthermore, the wording in Article 17(4) of Directive 2003/96 refers to 'agreements, tradable permit schemes or equivalent arrangements *as referred to in paragraph 1(b)*'. The inclusion of these particular words makes it difficult, in my opinion, to come to any conclusion other than that the 'tradable permit schemes' referred to in Article 17(1)(b) (where the wording does not foresee such a

[29] Neither is there a rule, however, that a double burden or indeed a double taxation is to be avoided, as argued by the Republic of Poland. Rather, the Court has already found that Directive 2003/96 does not exclude all risk of double taxation. Even in the area of the mandatory exception according to Article 14 of Directive 2003/96, Member States may, in accordance with the second sentence of Article 14(1)(a) of the directive, tax 'electricity products and electricity used to produce electricity' if that is done for reasons of environmental policy. See, to that effect, judgments of 4 June 2015, *Kernkraftwerke Lippe-Ems* (C-5/14, EU:C:2015:354, paragraph 51), and of 7 March 2018, *Cristal Union* (C-31/17, EU:C:2018:168, paragraphs 32).

[30] In French 'acceptent les accords ou les régimes de permis négociables ou les mesures équivalentes', in Spanish 'suscribirán los acuerdos, regímenes de permisos negociables o medidas equivalentes', in Dutch 'gaan overeenkomsten, regelingen inzake verhandelbare vergunningen of gelijkwaardige regelingen aan', in Italian 'sottoscrivono gli accordi, i regimi concernenti diritti commercializzabili o le misure equivalenti'. Different however in German 'gelten die … genannten Vereinbarungen, Regelungen über handelsfähige Zertifikate oder gleichwertigen Regelungen', Portuguese 'devem ser partes nos acordos, regimes de autorização negociáveis ou convénios equivalentes', and Swedish 'genomföra de system för handel med utsläppsrätter eller likvärdiga arrangemang'.

[31] Judgment of 20 June 2019 (C-682/17, EU:C:2019:518).

[32] Judgment of 20 June 2019, *ExxonMobil Production Deutschland* (C-682/17, EU:C:2019:518, paragraph 47 and case-law cited).

[33] See the German, Portuguese and Swedish versions in footnote 30.

potentially voluntary element)[34] are the same as those referred to in Article 17(4) of Directive 2003/96 and, consequently, that *both* provisions do not exclude participation in a mandatory scheme. It is this wording which is fatal to the case as advanced by the Commission in these proceedings.

57. It is true that recital 29 of the directive envisages that 'businesses entering into agreements to significantly enhance environmental protection and energy efficiency deserve attention; among these businesses, energy intensive ones merit specific treatment'. But this general statement of principle cannot take from the plain words which the EU legislature actually used in Article 17(1)(b) and Article 17(4). Had it been intended that participation in an EU Emissions Trading System should not count as a 'tradable permit scheme' for this purpose, the EU legislature could – and should – have said so in express terms.

B. Ground of complaint

58. As I have set out above, the Commission has not based its complaint on the fact that the Polish Law on Excise Duty grants an exemption from the minimum level of taxation on the consumption of coal and gas for heating purposes by energy-intensive businesses on the fact that this was done without taking into consideration whether, by entering into the EU Emissions Trading System, environmental objectives or increased energy efficiency were realised in a manner that was broadly equivalent to what would have been achieved if the standard Community minimum rates had been observed. It has rather confined its case to a single argument, namely, that the EU Emissions Trading System was not a 'tradable permit scheme' for the purposes of Article 17(1)(b) and (4) of Directive 2003/96 per se, because it contends that only a tradable permit scheme that a business enters into voluntarily and that achieves environmental objectives or increased energy efficiency targets other than those of the EU Emissions Trading System qualifies for this purpose.

59. Neither did the Commission argue that the application of Directive 2003/87 itself might not lead to the achievement of environmental objectives or increased energy efficiency in a given case because the application of that directive's rules, such as the allocation of 100% of the emission allowances free of charge to installations exposed to the risk of carbon leakage, means that a business will have no incentives to reduce its emissions of greenhouse gases.

60. For all the reasons I have just mentioned, however, I do not think that the particular contention of the Commission regarding the meaning to be attributed to the words 'tradable permit schemes' can be sustained in view of the actual express wording of Article 17(1)(b) and (4) of Directive 2003/96.

61. As is clear from Article 120(c) of the Rules of Procedure of the Court of Justice and from the case-law relating to that provision, an application must state the subject matter of the proceedings and a summary of the pleas in law on which the application is based, and that statement must be sufficiently clear and precise to enable the defendant to prepare his or her defence and for the Court to rule on the application.

[34] In English 'where tradable permit schemes or equivalent arrangements are implemented', in French 'des régimes de permis négociables ou des mesures équivalentes sont mises en œuvre', in Spanish 'se apliquen regímenes de permisos negociables o medidas equivalentes', in Portuguese 'sejam … aplicados regimes de autorização negociáveis ou convénios equivalentes', in Dutch 'regelingen inzake verhandelbare vergunningen of gelijkwaardige regelingen worden toegepast', in German 'es werden Regelungen über handelsfähige Zertifikate oder gleichwertige Regelungen umgesetzt', in Italian 'attuati regimi concernenti diritti commercializzabili o misure equivalenti', and in Swedish 'eller när system för handel med utsläppsrätter eller likvärdiga arrangemang har genomförts'.

62. It is therefore necessary for the essential points of law and of fact on which a case is based to be indicated coherently and intelligibly in the application itself[35] and for the heads of claim to be set out unambiguously so that the Court does not rule *ultra petita* or indeed fail to rule on an objection.[36] In the present case, since the Commission based its application on the single complaint of infringement, namely, that 'tradable permit schemes' for the purposes of Article 17(1)(b) and (4) of Directive 2003/96 only cover voluntary schemes that achieve environmental objectives or energy savings beyond those reached by mandatory EU schemes, it is appropriate solely to examine that ground of complaint. It is not for the Court to give a ruling that goes beyond the grounds for complaint and form of order sought in the Commission's application under Article 258 TFEU.[37]

63. As the Commission's contentions do not support a finding that the Republic of Poland has not fulfilled its obligations under Article 17 of Directive 2003/96, I find myself accordingly obliged to conclude that the Commission has not established its case.

VII. Costs

64. Article 138(1) of the Rules of Procedure of the Court of Justice provides that the unsuccessful party is to be ordered to pay the costs if they have been applied for in the successful party's pleadings. Since the Republic of Poland has applied for the costs to be awarded against the Commission and as the Commission has been ultimately unsuccessful, it must be ordered to bear its own costs and to pay those incurred by the Republic of Poland.

VIII. Conclusion

65. In view of the above considerations, I propose that the Court should:

First, dismiss the action.

Second, order the Commission to pay the costs.

[35] And indeed as early as at the time of the Commission's reasoned opinion.

[36] Judgment of 28 October 2010, *Commission* v *Malta* (C-508/08, EU:C:2010:643, paragraph 16).

[37] See to that effect, judgments of 15 June 2006, *Commission* v *France* (C-255/04, EU:C:2006:401, paragraph 24); of 11 January 2007, *Commission* v *Greece* (C-251/04, EU:C:2007:5, paragraph 27); and of 28 October 2010, *Commission* v *Malta* (C-508/08, EU:C:2010:643, paragraph 16).