



Reports of Cases

Case T-370/11

Republic of Poland
v
European Commission

(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)

Summary — Judgment of the General Court (Seventh Chamber), 7 March 2013

1. *Acts of the institutions — Choice of legal basis — Choice must rest on objective factors which are amenable to judicial review*

(Art. 5 TEU)

2. *Member States — Retained powers — Determination of conditions for exploiting energy resources, choice between different energy sources, and structure of energy supply — Competence of the EU to adopt environmental measures*

(Arts 192(2), first para., (c), TFEU and 194(2), second para., TFEU)

3. *EU law — Principles — Equal treatment — Concept — Limits*

(Charter of Fundamental Rights of the European Union, Arts 20 and 21)

4. *Environment — Elaboration of EU policy — Discretion of the EU legislature — Scope — Limits — Observance of the principle of proportionality*

(Directive 2003/87 of the European Parliament and of the Council, Art. 10a(1))

5. *Environment — Atmospheric pollution — Directive 2003/87 — Greenhouse gas emission allowance trading scheme — Transitional rules for allocating free allowances — Benchmarks to be applied in calculating the allocation — No distinction between the installations falling within the trading system by reference to the fuel used — No breach of the principle of equal treatment*

(Directive 2003/87 of the European Parliament and of the Council, Art. 10a(1))

6. *Environment — Atmospheric pollution — Directive 2003/87 — Greenhouse gas emission allowance trading scheme — Transitional rules for allocating free allowances — Benchmarks to be applied in calculating the allocation — Use of natural gas as the reference fuel — No breach of the principle of equal treatment*

(Directive 2003/87 of the European Parliament and of the Council, Art. 10a(1); Commission Decision 2011/278)

7. *Environment — Atmospheric pollution — Directive 2003/87 — National allocation plan for the allocation of greenhouse gas emission allowances (NAP) — Allocation of powers between the Commission and the Member States — Powers of the Member States — Allowance trading periods from 2013 onwards — Discretion of the Member States in the exercise of their powers — Limits*

(Directives of the European Parliament and of the Council 2003/87, Art. 9(3), and 10a(1), and 2009/29, recital 8)

8. *Environment — Atmospheric pollution — Directive 2003/87 — Aim — Reduction of greenhouse gas emissions — Compliance with sub-objectives and instruments defined by the directive*

(Directive 2003/87 of the European Parliament and of the Council, as amended by Directive 2009/29, recitals 2, 3, 5 and 7, and Art. 1, first and second paras)

9. *Judicial proceedings — Application initiating proceedings — Formal requirements — Brief summary of the pleas in law on which the application is based*

(Statute of the Court of Justice, Arts 21, first para., and 53, first para.; Rules of Procedure of the General Court, Art. 44(1)(c))

1. See the text of the decision.

(see para. 14)

2. 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. On the one hand, Article 194 TFEU is a general provision which relates solely to the energy sector and, consequently, delineates a sectoral competence. 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 to an action taken by the European Union within the framework of its environment policy.

(see para. 17)

3. See the text of the decision.

(see paras 30, 33)

4. The Commission has a wide discretion in the exercise of its powers in the environmental area, 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. 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. With regard to the application of the principle of proportionality in the strict sense, even if it is appropriate and necessary for achieving legitimately pursued goals, the Commission's decision must not cause disadvantages that are disproportionate to the aims pursued.

(see paras 36, 65, 89, 100)

5. In the context of the greenhouse gas emission allowance trading scheme established by Directive 2003/87, establishing a scheme for greenhouse gas emission allowance trading within the Community, the equal treatment of installations that are in different situations due to the use of different fuels when determining the product benchmarks for the purposes of allocating quotas in Decision 2011/278 determining transitional Union-wide rules for harmonised free allocation of emission allowances from 2013 onwards can be regarded as objectively justified.

The differentiation of product benchmarks according to the fuel used would not encourage industrial installations that use high CO₂ 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 CO₂ emission fuel may have to replace it with a higher CO₂ emission fuel in order to obtain more free emission allowances.

Moreover, the introduction of an additional factor, consisting of taking into account the fuel used, would not encourage full harmonisation across the European Union of the implementing measures relating to harmonised allocation of the said allowances, but would result in different rules for installations in the same sector or the same subsector. Indeed, the introduction of a correction factor according to the fuel used would risk creating a different treatment of the sectors according to the Member State. In that regard, by reason of the absence of such a factor, no installation obtains a competitive advantage by way of a greater amount of free allowances because of the fuel used.

(see paras 39, 41-44, 81)

6. In the context of the greenhouse gas emission allowance trading scheme established by Directive 2003/87, establishing a scheme for greenhouse gas emission allowance trading within the Community, the use by the Commission of natural gas as the reference fuel for defining the heat and fuel benchmarks for the purposes of allocating allowances in Decision 2011/278, determining transitional Union-wide rules for harmonised free allocation of emission allowances from 2013 onwards may be regarded as objectively justified.

The choice of natural gas as a low CO₂ 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.

Moreover, 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 CO₂ 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 CO₂ emission fuels.

(see paras 49, 50, 58, 106)

7. Whilst Member States have a certain margin for manoeuvre in transposing Directive 2003/87, establishing a scheme for greenhouse gas emission allowance trading within the Community and in the preparation of national allowance allocation plans before the start of the second trading period, namely the period 2008 to 2012, that is not the case for trading periods from 2013 onwards. The rules introduced by Directive 2009/29 for the trading periods starting in 2013 have profoundly changed the methods of allocating allowances.

Contrary to point 1 of Annex III to Directive 2003/87, 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.

(see paras 51-53, 56)

8. It is clear from the second paragraph of Article 1 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.

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.

(see paras 68, 69)

9. See the text of the decision.

(see para. 113)