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Case Note

RESPECTIVE POWERS OF THE EUROPEAN MEMBER STATE AND COMMISSION REGARDING EMISSIONS TRADING AND ALLOWANCE ALLOCATION

Case T-183/07 Republic of Poland v Commission of the European Communities and Case T-263/07 Republic of Estonia v Commission of the European Communities

Keywords: European Union Emission Trading System, allocation of competences between Member States and the Commission, National Allocation Plans (NAPs), equal treatment, duty to state reasons

INTRODUCTION

In 2003, the European Union adopted the legislation needed to create a market for emission allowances aimed at achieving greenhouse gas emission reductions in a cost-effective and efficient manner.¹ The premise underlying the emission trading scheme is that emission allowances, which represent the right to emit a certain amount of CO₂ equivalent, will be traded among polluters, dependent on the relevant marginal reduction costs of these companies. Firms which have lower marginal emission reduction costs will choose to lower their emissions and sell their excess allowances, whereas other firms may choose to buy extra allowances rather than reduce their emissions. The European Union Emissions Trading Scheme ('EU ETS'), put in place by Directive 2003/87/EC ('the Directive'), has become the focal point of European climate change and energy policy and key in the ongoing post-Kyoto climate negotiations.² Moreover, with a trading volume of at least €28bn, it represents the largest carbon market in the world and is of significant financial interest to European industries and Member States.³

Simultaneously, the EU ETS is the source of a growing body of case law of the European Court of Justice and the Court of First Instance (now the General Court).⁴ Over 30 rulings

- 1 Directive 2003/87/EC of 13 October 2003 establishing a scheme for greenhouse gas emission allowance trading within the Community and amending Council Directive 96/61/EC, [2003] OJ L 275/32, Article 1.
- 2 The EU's negotiation positions can be found in the Communication 'Towards a comprehensive climate change agreement in Copenhagen' COM (2009) 39 final (28 January 2009), available at <<http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:52009DC0039:EN:NOT>>.
- 3 See K. Roine, 'Carbon 2008 – Post-2012 is now', Annual Report Point Carbon, available at <<http://www.pointcarbon.com/research/carbonmarketresearch/analyst/1.912721>>.
- 4 As the judgments discussed in this annotation were decided by the Court of First Instance before the enactment of the Lisbon Treaty, reference will be made to the Court by its prior name.

have already been handed down by the Courts and more than a dozen applications are pending.⁵ Considering the speed with which the legal foundation of the EU ETS was laid, the need for further clarification should not come as a surprise.⁶ Moreover, the politically sensitive business of charging companies for the so-called 'right to pollute' has led many companies, and Member States, to try their luck in court in order to obtain additional emission allowances. From this point of view, most challenges of the EU ETS have been unsuccessful. Thus far, all such applications brought by companies have been ruled inadmissible for lack of legal standing. In some important cases, however, the Court of First Instance has gone beyond a simple finding of inadmissibility and reacted to some of the substantive issues raised by the applications.⁷ The seemingly highly formalist and restrictive interpretations by the Court of First Instance in these cases have been argued to be a way of 'bullet proofing' Commission decisions adopted under Article 9(3) of Directive 2003/87/EC and ensuring that Member States uphold their reduction commitments.⁸

The recent Court of First Instance judgments in the cases of *Republic of Poland v Commission*⁹ and *Republic of Estonia v Commission*,¹⁰ however, show a Court that does not appear to be primarily concerned with 'bullet proofing' of the said Commission decisions. Rather, the Court annulled the Commission decisions regarding the Polish and Estonian NAPs for the 2008–2012 period, despite the Commission's plea that this would have severe disruptive effects on the carbon market as the initial decisions reduced the number of allowances for Polish and Estonian NAPs by 26.7 per cent and 47.8 per cent, respectively.¹¹ This annotation will provide an overview of the arguments put forward in these cases and explore the implications of the rulings for the EU ETS system and market.

5 For an analysis of the Courts' case law updated until June 2009, see J.A.W. van Zeven, 'The European Emissions Trading Scheme Case Law', 18(2) *Review of European Community & International Environmental Law (RECIEL)*, (2009) 119 onwards.

6 Commission Proposal October 2001 (Com 2001/0581 Final ; OJ C 75E/2002 P 33), Decision by the Council given in July 2003, see also <<http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:32003L0087:EN:NOT>>.

7 Important examples of these types of decisions include CFI 30 April 2007, Case T-387/04 *EnBW Energie Baden-Württemberg v Commission*, [2007] ECR II 1195; CFI 1 October 2007, Case T-489/04 *US Steel Košice v Commission*, [2007] ECR II 127; CFI 1 October 2007, Case T-27/07 *US Steel Košice v Commission*, [2007] ECR II 128; CFI 6 November 2007, Case T-13/07 *Cemex UK Cement v Commission*, [2007] ECR II 146; CFI 11 September 2007, Case T-28/07 *Fels-Werke and others v Commission*, [2007] ECR II 98. In this case, the Court of First Instance also clarified the position on banking (the possibility for companies to use their allocations of one period, in this case 2005–2007, for another, 2008–2012). Banking between the 'learning by doing phase' (2005–2007) and the 'Kyoto commitment phase' (2008–2012) was expressly forbidden. The applicants later launched an appeal but in ECJ 8 April 2008, Case C-503/07 *Saint-Gobain Glass Deutschland v Commission*, [2008] ECR I 2217, the Commission's plea of inadmissibility was upheld; and Case C-127/07 *Arcelor Atlantique and Others*, reference for a preliminary ruling lodged 5 March 2007, OJ [2007] C 177.

8 See N.S. Ghaleigh, 'Emissions Trading before the European Court of Justice: Market Making in Luxembourg', in D. Freestone and C. Streck (eds), *Legal Aspects of Carbon Trading: Kyoto, Copenhagen and Beyond* (Oxford University Press: Oxford, 2009), found at <<http://ssrn.com/abstract=1371513>> at 32. N. Van Aken, on the other hand, argues that 'the ETS system would probably be better if the subjects of it, the companies, could explain their points of view before a Court that could correctly appreciate their arguments'. See N. Van Aken, 'The "Emissions Trading Scheme" case law: Some new paths for a better European environmental protection?' in M. Faure and M. Peeters (eds), *Climate Change and European Emissions Trading – Lessons for Theory and Practice* (Edward Elgar Publishing, Cheltenham, 2008) at 116.

9 CFI 23 September 2009, Case T-183/07 *Republic of Poland v Commission*, [2009], not yet reported.

10 CFI 23 September 2009, Case T-263/07 *Republic of Estonia v Commission*, [2009], not yet reported.

11 Above n. 9, para. 129.

FACTUAL BACKGROUND

Case T-183/07 *Republic of Poland v Commission*

In June 2006, the Republic of Poland sent notice of its NAP for the period 2008–2012. In its NAP, Poland intended to allocate 285 million tonnes CO₂ equivalent. The NAP was accompanied by a letter from the Polish Environment Minister stating that further updated data on emissions forecasts would be sent to the Commission as soon as these became available together with a definite list of operators and installations covered by the NAP. In its response of 30 August, the Commission stated that the NAP as it stood was incomplete and, as such, incompatible with criteria 2 and 5 of Annex III of the Directive. After further correspondence, the Commission received the final and complete set of data on 9 January 2007. Consequently, the Commission adopted Decision C(2007) 1295 ('the Decision') concluding that the NAP was incompatible with criteria 1, 2 and 3 of Annex III,¹² and reducing the total annual quantity of emission allowances to 208.515395 million tonnes of CO₂ equivalent.¹³

In response to the Commission Decision, the Republic of Poland lodged an application with the Court of First Instance on 28 May 2007 seeking to have the Decision (wholly or partially) annulled. Moreover, on 7 September 2007, Poland applied for interim relief by means of suspended operation of the contested Decision. The President of the Court of First Instance dismissed this application on 9 November 2007,¹⁴ stating that the 'urgency' and 'prejudice' requirements were not fulfilled and that Poland had not proven that companies could not be indemnified for any damage under Article 288 EC (now Article 340 TFEU).¹⁵

Case T-263/07 *Republic of Estonia v Commission*

The case of *Republic of Estonia v Commission* proceeded along broadly similar lines to that of *Republic of Poland v Commission*. The Republic of Estonia submitted its original NAP around the end of June 2006.¹⁶ However, after further correspondence between Estonia and the Commission, a new and final version of the NAP was submitted in February 2007. In its Decision of 4 May 2007, the Commission stated that the NAP was incompatible with criteria 1, 2, 3, 5 and 6 of Annex III of the Directive¹⁷ and that the proposed number of allowances to be allocated should be reduced by 47.8 per cent.¹⁸ Consequently, the Republic of Estonia, like the Republic of Poland, applied to the Court for an annulment of the Commission's decision.

In anticipation of the substantive pleas made by the Republic of Estonia, the Commission sought to have Estonia's action dismissed as inadmissible in relation to Articles 1(3) and (4); 2(3) and (4); and 3(2) and (3) of the contested Decision. It argued that the pleas entered by Estonia referred only to other articles of the Decision and, as such, were not in line with the Statute of the Court of Justice.¹⁹ Estonia, on the other hand, stressed that it sought the annulment of the entire Decision from the outset and that partial annulment

12 Decision C(2007) 1295 final, Article 1(1). The remainder of Article 1 refers to incompatibility with several other criteria of Annex III but these are not addressed in any detail by the Court in its decision.

13 Decision, above n. 12, Article 2(1).

14 Above n. 9.

15 Under Article 288 EC, the Community can be held liable for both contractual and non-contractual damages caused by its institutions or its servants.

16 Estonia claims the NAP was submitted on 30 June while the Commission claims it was 7 July 2006.

17 Commission Decision of 4 May 2007, Article 1.

18 Amounting to 12 million tonnes CO₂ equivalent per year.

19 Above n. 10, paras 22–23.

was not possible in any case because of the absence of severability. Using similar reasoning as in the case of *Poland v Commission*, the Court found that in the case of annulment of part of the contested Decision, the Decision as a whole would have to be annulled. As a consequence the Commission's action for annulment was dismissed.²⁰

JUDGMENTS

Case T-183/07 *Republic of Poland v Commission*

The Polish submission was divided into two pleas: the first concerned the procedural issue of the three-month adoption period stipulated for the Commission Decision contained in Article 9(3). The second claim was substantive and concerned, first, an alleged infringement of the duty to state reasons and, second, infringement of Article 9(3) in so far as the Commission had arguably exceeded the powers of review as conferred upon it by the Directive.²¹

As to the first plea, the Court's judgment may be summarised by stating that, since the Polish Environment Minister had asked for the extension of the deadline in order to submit its answers to the Commission's questions and its request for further information, the Commission was right in holding that there was no need to reject the NAP before these answers were received. As such the three-month period did not start to run until the Commission had received the response from Poland in January 2007 and thus this claim was dismissed as unfounded.²²

The operative part of the judgment concerned Poland's second plea relating to the Commission's alleged infringement of Article 9(3) through the use of alternative data and the imposition of a *de facto* emission ceiling in its Decision. In the Court's judgment, the second part of this plea is considered before the first; this order will be followed in this note.

The Commission's powers of review under Article 9(3)

In answering the second part of Poland's second plea, regarding the Commission's power of review under Article 9(3), the Court recalled the stated aim of Directive 2003/87/EC – 'to reduce greenhouse gas emissions substantially in order to be able to fulfil the commitments of the Community and its Member States under the Kyoto Protocol'.²³ The Court also considered the traditional allocation of powers between the Commission and Member States in the case of the transposition of a directive as set out in Article 249 EC (now Article 288 TFEU) – namely the Member States are free with regard to the form and method as long as the effectiveness of the directive is ensured.²⁴ The Court stressed the exclusive power of the Member States to draw up NAPs. Furthermore it acknowledged that the powers of the Commission under Article 9(3) to review the said NAPs, and to propose alterations in order to deal with specific criticisms or make recommendations regarding incompatibilities with the criteria in Annex III and Article 10 of the Directive, must be (re)viewed in light of the principle of subsidiarity and the specific provisions in Articles 9(1), 9(3) and 11(2) of the Directive.²⁵

²⁰ Ibid., para. 34.

²¹ Above n. 9, paras 27, 48 and 61.

²² Ibid., paras 46–47.

²³ Ibid., para. 81.

²⁴ Ibid., para. 82.

²⁵ See also *ibid.*, paras 85–90.

With regard to the role of the Community judiciary in reviewing the Commission's decisions, the Court considered itself as being confined to verifying that the Commission did not 'clearly exceed the bounds of its discretion and that the procedural guarantees [...] have been fully observed'.²⁶ In light of this, the Court considered the question before it to be:

Whether, in adopting the contested decision, the Commission infringed Article 9(1) and (3) of the Directive by encroaching on the Member State's power to draw up and implement NAPs, in accordance with Articles 9(1) and 11(2) of the Directive, and thus exceeding the power to review NAPs conferred on it by Article 9(3) of the Directive?²⁷

In the Court's assessment of this question, the main point of contestation was the fact that the Commission had used its own data and economic model to draw up an alternative Polish NAP, which was then used in order to test the 'compatibility' of the Polish NAP.²⁸ Although the Commission has the discretion to develop its own method of assessing the NAPs,²⁹ Poland argued that the Commission could not set aside the data in the NAP and replace it with its own, even if the latter was allegedly obtained on the basis of a single method of assessment applied to all Member States.³⁰ The Court agreed with this line of reasoning and added that the fact that the Commission went on to include a maximum total quantity of allowances showed that the Commission had clearly misjudged the extent of its powers of review under Article 9(3). It is well established in past case law that it is for each Member State and not for the Commission to decide on the total quantity of allowances.³¹ In the event, the Commission Decision deprived the provisions of Article 11(2) of their effect and encroached on the exclusive competences of the Member State in deciding the total number of allowances. In consequence, the Court held that the second part of the second plea was well founded.

Infringement of the duty to state reasons

Under Article 253 EC (now Article 296 TFEU), the Community authorities are required to clearly show the reasoning employed in adopting a contested measure so as to enable the persons concerned to defend their rights and the competent court to exercise its power of review.³² The Court of First Instance stressed the importance of this duty in light of the complex economic and ecological assessments involved in the Commission's review function under Article 9(3) of the Directive. Importantly, the Commission decided to set aside the data and economic analysis used by Poland and to replace it with its own. It had done so on the basis that the data and method employed by Poland were 'unreliable', but had not provided any justification for this conclusion despite bearing the burden of proof in this respect.³³ This, combined with the recognised margin for manoeuvre which Member States enjoy in drawing up their NAPs and the fact that the Commission had not contested the fact that the Polish data had been used for the United Nations Framework Convention on Climate Change (UNFCCC) report,³⁴ caused the Court to hold that the

²⁶ Ibid., para. 91.

²⁷ Ibid., para. 92.

²⁸ Ibid., para. 108.

²⁹ See CFI 7 November 2007, Case T-374/04 *Germany v Commission*, [2007] ECR II 4431, para. 80 as referred to in n. 9, para. 89.

³⁰ Above n. 9, para. 120.

³¹ See Order in Case C-503/07 P *Saint-Gobain Glass Deutschland v Commission*, [2008] ECR I 2217, para. 75 as referred to in n. 9, para. 126.

³² See also n. 9, para. 136.

³³ Ibid., paras 144–149.

³⁴ Ibid., para. 151.

Commission had indeed infringed the obligation to state reasons for its decision and the first part of the second plea too was declared well founded.³⁵

From the above, it followed that Articles 1(1), 2(1) and 3(1) of the Commission Decision had to be annulled. Since partial annulment of the Decision was not possible in light of the requirement of severability,³⁶ the Court annulled the Commission Decision in its entirety.³⁷

Case T-263/07 *Republic of Estonia v Commission*

In substance, in this case Estonia raised five pleas claiming (i) the infringement of Article 9(1) and (3) by the Commission; (ii) manifest errors of assessment by the Commission; (iii) infringement of Article 175 EC; (iv) breach of the principle of sound administration; and (v) inadequate statement of reasons. With reference to the first plea regarding the infringement of Article 9(1) and (3) by the Commission, Estonia's reasoning was very similar to that of the Republic of Poland in *Poland v Commission*. Estonia too referred to the use of alternative data and economic models in order to determine the compatibility of the NAP, admissible allowances and the imposition of a 'ceiling' for allowances.³⁸ Regarding the fourth claim of infringement of the principle of sound administration, Estonia argued that the Commission failed to take into account all the facts and information it had supplied and therefore failed to show sufficient diligence in adopting the contested decision.³⁹ As Estonia also referred to some of the defects of the Commission's decision in its first plea, the Court only considered the issue regarding the presence, or argued absence, of a 'reserve' in the Estonian NAP and whether the Commission's assessment of the reserve amounted to an infringement of the principle of sound administration. In this respect it found, by comparing the conclusions reached by the Commission in the contested decision with the information received by the Court, that the Commission had failed to properly examine the NAP and particularly Annexes 1 and 3 thereof.

As to the substantive legal questions raised in the first Estonian plea, the Court again stressed the division of power between the Commission and the Member States under the Directive and confirmed that, by setting a specific limit of allowances based on its own data and economic calculations, the Commission had effectively taken the place of the Member State.⁴⁰ This renders Article 11(2) devoid of purpose, especially since in this case the specific limit set by the Commission represents only 52.2 per cent of the allowances which the Republic of Estonia planned to allocate.⁴¹ Moreover, the Commission's reasoning on the contested Decision shows that the Commission had replaced the data supplied with its own analysis, rather than confining itself to testing the Estonian data against its own, as in *Poland v Commission*, again without providing any evidence as to its own figures being more reliable or representative.⁴² Concerning the specific use of the PRIMES

35 Ibid., para. 153.

36 Ibid., para. 160. The principle of severability dictates that partial annulment of a Community Act is possible only if the elements of which the annulment is sought may be severed from the remainder of the Act without altering the Act's substance. See also *ibid.*, para. 156.

37 Ibid., paras 155–163.

38 Above n. 10, paras 36–39.

39 Ibid., para. 95. In this regard, Estonia particularly referred to the fact that the Commission held there had been no 'reserve of allowances' for new entrants, which was in fact included in Annexes 1 and 3. The Commission argued that the information was contradictory.

40 Ibid., para. 64.

41 Ibid., para. 65.

42 Ibid., paras 74–77.

model⁴³ by the Commission, the Court found that also in this regard the Commission had exceeded its power of review. The Republic of Estonia was justified in including geostrategic considerations in its NAP such as the security of the gas supply coming from Russia, especially considering the fact that national circumstances are supposed to be taken into consideration in composing the NAPs in order to make them more accurate.⁴⁴ Therefore, as in the case of *Poland v Commission*, the Court found that the Commission had exceeded its powers of review in replacing the Estonian data with its own and annulled Articles 1(1), 2(1) and 3(1) of the contested decision and, on the basis of these findings, the Court moved to annul the decision in its entirety.

COMMENTARY

It is difficult to fault the Court's legal analysis in this case. The Commission quite clearly surpassed its powers of review under Directive 2003/87/EC and to hold otherwise would amount to evident judicial activism (or, depending on one's perspective, judicial passivism). The Commission's, arguably valid, submission in *Poland v Commission*, that annulment of the decision could have negative repercussions for the greenhouse gas emissions trading market⁴⁵ and the United Kingdom's plea in *Estonia v Commission* that additional allocated allowances would risk a significant drop in prices on the market – which, in turn, would undermine the effects of the Directive as a tool to reduce emissions – did nothing to change the Court's decision. Rather, the Court stated that any decision made in breach of the division of competences allocated to the Commission and the Member States could not be maintained.⁴⁶ More specifically, in response to the argument raised by the Commission in *Poland v Commission* concerning possible detrimental effects on the EU ETS market, the Court stated that:

Even if that argument were well founded, it cannot justify maintaining the contested decision in force in a community governed by the rule of law such as the Community,⁴⁷ since that act was adopted in breach of the distribution of powers between the Member States and the Commission, as defined in the Directive.⁴⁸

Nevertheless, by simply dismissing the economic implications of the case, the Court in fact left the Commission, the Member States and the market with even greater uncertainty regarding the short-term future of the EU ETS market. One of the most visible effects of the judgments so far has been the reaction of the EU ETS market and the market play-

43 PRIMES is an economic model used to stimulate market equilibrium situations regarding energy supply and demand, taking account of abatement possibilities, energy prices and environmental policies, which includes the EU ETS and the number of allowances which a country is allocated under the system. It can indicate the costs which a Member State will incur in terms of energy prices and assess what is possible in terms of abatement. For an in-depth (economic) description of the model, see P. Capros, 'The PRIMES Energy System Model', available at <<http://www.e3mlab.ntua.gr/manuals/PRIMsd.pdf>>.

44 Above n. 10, paras 80–82. Other disputed data involved the GDP growth and the rate of improvement of the intensity of carbon emission per unit of GDP. Also, in this respect, the Court found that the data used by the Commission was neither the best nor was it justified in rejecting that data used by Estonia.

45 Above n. 9, para. 129.

46 Above n. 10, paras 42 and 50 respectively.

47 The definition of a 'Community governed by the rule of law' was given by the Court many years ago in its judgment in *Les Verts* where it stated that '[T]he European Community is a Community based on the rule of law, inasmuch as neither its Member States nor its institutions can avoid a review of the question whether the measures adopted by them are in conformity with the basic constitutional charter, the Treaty'. See Case 294/83, *Parti ecologiste 'Les Verts' v European Parliament* [1986] ECR 1339.

48 Above n. 9, para. 129.

ers.⁴⁹ Despite the Court's implicit assumption that a line can be drawn between its judgments and the carbon market, the 2.9 per cent⁵⁰ price drop immediately after the judgments makes it clear that such a line in fact does not exist. Moreover, *Republic of Poland* and *Republic of Estonia v Commission* are only two of several cases where the Commission's assessment of Member States' NAPs concerning the total number of allocated allowances was called in question. At present, Bulgaria, Hungary, the Czech Republic, Lithuania, Latvia and Romania⁵¹ are awaiting judgment in their cases for which many believe the *Republic of Poland* and *Republic of Estonia v Commission* cases are likely to function as a blueprint. This could mean that these countries would also be eligible for a higher number of allowances and ultimately result in the economic implications of these judgments being potentially more far reaching owing to an influx of allowances.⁵²

At the same time, the uncertainty regarding the consequences of these judgments could also result in no tangible effect at all. Pursuant to the Court's annulment of the two Decisions, the Commission has proceeded to reject the Polish and Estonian NAPs again, this time on different grounds.⁵³ Much will therefore depend on the renegotiation between the two Member States and the Commission and the outcome of the Commission's appeal to the ECJ. Finally, the Commission has been quick to stress that any uncertainty created by these judgments will disappear with the beginning of the next trading phase which will see the abolition of the NAP system.⁵⁴ Nonetheless, the effect of these judgments in undermining confidence in the carbon market and increasing the volatility of the already unstable price signal cannot be denied. The appeal lodged by the Commission may be seen as a reflection of the (at least, psychological) blow that has been dealt to the EU ETS.⁵⁵

Regardless of the economic consequences which may or may not materialise, *Poland v Commission* and *Estonia v Commission* have accurately and successfully pointed at some of the key weaknesses of the EU ETS system and the broader institutional difficulties in which the European Union finds itself. Despite the updated framework presented in the Treaty of Lisbon, the legislative procedures within the EU are such that policies like the

49 For the purposes of the EU ETS, the 'traditional' definition of market players must be expanded to include not only those parties directly active on the market but also the Member States and Commission, who are indirectly very much involved.

50 Available at <<http://www.bloomberg.com/apps/news?pid=20601072&sid=a1NXFyRROhiM>>.

51 CFI, Case T-499/07, *Bulgaria v Commission*, [2008] OJ C64/50 (pending); CFI, Case T-500/07, *Bulgaria v Commission*, [2008] OJ C64/51 (pending); CFI, Case T-221/07, *Hungary v Commission*, [2007] OJ C199/41; CFI, Case T-194/07, *Czech Republic v Commission*, [2007] OJ C 199/38; CFI, Case T-368/07, *Lithuania v Commission*, [2007] OJ C283/35; CFI, Case T-369/07, *Latvia v Commission*, [2007] OJ C269/66 (pending); CFI, Case T-483/07, *Romania v Commission*, [2008] OJ C51/56 (pending); CFI, Case T-484/07, *Romania v Commission*, [2008] OJ C51/57 (pending).

52 The author estimates that – based on the numbers released in the NAPs of all Member States, as available at <http://ec.europa.eu/environment/climat/emission/2nd_phase_ep.htm> – a ruling in favour of these Member States combined with the rulings in *Poland v Commission* and *Estonia v Commission* would result in a 7.8 per cent increase in the total amount of allowances in the EU ETS market.

53 Statement by Commissioner Stavros Dimas on the court rulings related to the Commission Decisions on the Estonian and Polish National Allocation Plans for 2008–2012, IP/09/1355, Brussels, 24 September 2009. See also the memo on the new decision on the Polish and Estonian NAPs, Memo IP/09/1907, available at <<http://europa.eu/rapid/pressReleasesAction.do?reference=IP/09/1907>>.

54 See the new Article 9 of Directive 2009/29/EC.

55 The Commission's official statement regarding the appeal states that 'the CFI has interpreted too narrowly the powers of the Commission in the NAP assessment process. The CFI has not sufficiently taken into account the fundamental purpose of the EU ETS to reduce overall EU emissions of greenhouse gases, and the need to ensure the equal treatment of Member States during the NAP assessment process'. See also Q&A in relation to the Commission's decision to appeal in Cases T-183/07 and T-263/07 (CFI rulings on Commission Decisions on the Polish and Estonian NAPs) available at <http://ec.europa.eu/environment/climat/emission/pdf/qa_appeal_091203.pdf>.

EU ETS may be advanced without full consideration of their later implications for the division of competences between the European institutions *inter se* and with the Member States. More broadly, the Court's decision to shift its focus from the economic implications of the judgment to impressing a sense of humility upon the Commission regarding its place within the European institutional setting was arguably a wise one. Regrettably, though, this means that the internal and external credibility of the European carbon market has been undermined. A long-term solution, by means of clearer legislation and more transparent division of powers, would have been preferable and could have been included in Directive 2009/29/EC. However, because of the great amount of additional legislation which is to be created through comitology procedures, the effects of the Directive remain unclear and a real redress of the competence balance between the Commission and Member States is yet to be effected.

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