Case Notes

Member States Have a Wide Margin of Appreciation When Drawing National Action Plans in Environmental Protection

*Vihar Georgiev**

Case T-263/07 Republic of Estonia v. Commission[1]
Case T-183/07 Republic of Poland v. Commission[2]

The Commission's task is to verify the legality of the national allocation plan while respecting the "margin for manoeuvre" granted to the Member State in the implementation of Directive 2003/87/EC** in the context of the drawing up of that plan.
Within this "margin of manoeuvre" Member States also have the right to choose the data and its method of evaluation (author's headnote).

I. Facts

The Kyoto Protocol[3] to the United Nations Framework Convention on Climate Change[4] stipulated the reduction of the aggregate anthropogenic emissions of greenhouse gases listed in Annex A to the Protocol by 8 % compared to 1990 levels in the period 2008 to 2012 for the then Member States of the European Community. The Kyoto Protocol entered into force on 16 February 2005.

The Community and its Member States agreed to fulfil their commitments under the Kyoto Protocol jointly, in accordance with Decision 2002/358/EC. In order to achieve that, Directive 2003/87/EC was adopted[5], aiming for "*an efficient European market in greenhouse gas emission allowances, with the least possible diminution of economic development and employment*"[6].

Directive 2003/87/EC in its version after 2004[7] requires that each Member State should develop a national allocation plan (NAP) stating the total quantity of allowances that it intends to allocate for that period and how it proposes to allocate them[8].

The Commission has the right to reject a national allocation plan within three months of notification by the relevant Member State on the basis that it is incompatible with the criteria listed in Annex III or with Article 10 of the directive[9].

* Sofia University "St. Kliment Ohridski".

1 OJ 2009 C 267/59.

2 OJ 2009 C 267/58.

** Editorial Hint: Article 10 and Annex III, Directive 2003/87/EC establishing a scheme for greenhouse gas emission allowance trading within the Community, OJ 2003 L 275/32.

3 Approved by Council Decision 2002/358/CE concerning the approval, on behalf of the European Community, of the Kyoto Protocol to the United Nations Framework Convention on Climate Change and the joint fulfillment of commitments thereunder, OJ 2002 L130 /1.

4 Approved on behalf of the Community by Council Decision 94/69/EC of 15 December 1993 concerning the conclusion of the United Nations Framework Convention on Climate Change, OJ 1994 L 33/11.

5 Directive 2003/87/EC establishing a scheme for greenhouse gas emission allowance trading within the Community, OJ 2003 L 275/32.

6 Directive 2003/87/EC, *supra* note 3, at calling 5.

7 See Directive 2004/101/EC, OJ 2004 L 338/18.

8 Directive 2003/87/EC, *supra* note 5, Article 9, para. 1.

9 Directive 2003/87/EC, *supra* note 5, Article 9, para. 3.

Both Estonia[10] and Poland[11] submitted[12] their national allocation plans for the period from 2008 to 2012. After an exchange of letters with the two Member States, the Commission concluded that several criteria in Annex III to the Directive had been infringed, thereby reducing the total annual quantity of emission allowances in the NAPs.

Both Estonia[13] and Poland[14] brought actions for the annulment of the decisions of the Commission before the Court of First Instance of the European Communities (CFI)[15].

Estonia brought five pleas in law – an excess of authority arising from infringements of Article 9(1) and (3) and Article 11(2) of Directive 2003/87/EC; manifest errors of assessment, infringement of Article 175 EC, infringement of the principle of sound administration; and inadequate statement of reasons[16].

Poland had two main pleas in law – illegal adoption of the contested decision after the expiry of the three-month period prescribed by Article 9(3) of Directive 2003/87/EC, and infringement of the duty to state reasons and of Article 9(1) and (3) of Directive 2003/87/EC[17].

The main argument of both Member States was in effect that the Commission had exceeded its authority under Article 9(1) and (3) and Article 11(2) of Directive 2003/87/EC. Estonia claimed that the drawing up of a national allocation plan for allowances falls within the competence of the Member States, and that the Commission must limit itself to reviewing whether that plan is compatible with the criteria set out in Annex III and in Article 10 of the Directive. Member States therefore have the right to decide which method they will adopt in setting up their plan for allocating allowances and which data and forecasts they will use in determining the emissions authorized for installations during the period fixed by that plan[18].

Poland maintained that the Commission has a limited role consisting exclusively of assessing the NAPs which have been notified to it, in the light of the criteria laid down by the Directive 2003/87/EC[19].

The Commission replied that it took the view that certain aspects of the NAPs did not comply with several criteria of Annex III of Directive 2003/87/EC. More specifically the Commission emphasised that Article 9(3) of Directive 2003/87/EC does not oblige the Commission to acquire the same method of analysis used by the Member State concerned and the data contained in the NAP which it examines. The Commission does not deny that Member States have a "*broad discretion*" in the implementation of their NAP after assessment by the Commission. However, in order to assess a NAP in the light of the criteria in Annex III and Article 10 of Directive 2003/87/EC, it should use the most objective and reliable data and, by virtue of the principle of equal treatment between the Member States, use a single method of economic analysis for all. This method might sometimes result in the use of data that is not entirely up to date[20].

The Commission also maintained that a correct assessment of an NAP on the basis of Article 9(3) of Directive 2003/87/EC, must enable a situation to be avoided in which surpluses of allowances build up, thereby risking a 'collapse in the market' as happened during the trading period from 2005 to 2007[21].

II. Judgments

In both cases the CFI annulled the contested decisions in full.

The CFI emphasized that the Commission's task was to verify the legality of the national allocation plan while respecting the "*margin for manoeuvre*"

10 Commission Decision of 4 May 2007 concerning the national allocation plan for the allocation of greenhouse gas emission allowances notified by the Republic of Estonia for the period from 2008 to 2012, pursuant to Directive 2003/87/EC of the European Parliament and of the Council of 13 October 2003 establishing a scheme for greenhouse gas emission allowance trading within the Community and amending Council Directive 96/61/EC.

11 Commission Decision of 26 March 2007 concerning the national allocation plan for the allocation of greenhouse gas emission allowances notified by Poland for the period from 2008 to 2012 in accordance with Directive 2003/87/EC of the European Parliament and of the Council of 13 October 2003 establishing a scheme for greenhouse gas emission allowance trading within the Community and amending Council Directive 96/61/EC.

12 On 30 June 2006, though the Commission claimed that the Estonian NAP was submitted on 7 July 2006.

13 Case T-263/07 Republic of Estonia v Commission of the European Communities, OJ 2009 C 267/59.

14 Case T-183/07 Republic of Poland v Commission of the European Communities, OJ 2009 C 267/58.

15 Now the General Court of the European Union. 16 Case T-263/07, *supra* note 11, at para. 35.

17 Case T-183/07, *supra* note 12, at paras. 25–26.

18 Case T-263/07, *supra* note 11, at para. 36.

19 Case T-183/07, *supra* note 12, at para. 59.

20 Case T-183/07, *supra* note 12, at para. 65.

21 Case T-183/07, *supra* note 12, at para. 64.

granted to the Member State in the implementation of Directive 2003/87/EC in the context of the drawing up of that plan. The existence of such a margin for manoeuvre necessarily implies that the Member State could validly choose different data as the starting-point for its forecasts.[22]

The CFI further reminded the universal application of the principle of subsidiarity enshrined in the second paragraph of Article 5 TEC[23], adding that the power of the Commission to review and reject NAPs is *"severely limited"*[24].

The CFI also made the observation that the public consultation, as provided for in Article 11(2) of Directive 2003/87 /EC, before the adoption of a final decision would be rendered devoid of purpose and the observations of the public would be purely theoretical if modifications of the NAP were limited to those envisaged by the Commission[25].

The CFI dismissed the claim that the annulment of a Commission decision (on the grounds that the Commission could not fix a ceiling for the total quantity of allowances to be allocated by reducing the amount proposed by the Member State) would risk a collapse of the greenhouse gas emissions trading market. The court went on further to say that, even if that argument were well founded, it could not justify maintaining such a decision in force in a community governed by the rule of law, since that act had been adopted in breach of the distribution of powers between the Member States and the Commission[26].

III. Comment

The key issue in both judgments is the so-called "*margin of manoeuvre*" of Member States for implementing Directive 2003/87/EC. The CFI has confirmed its view, expressed earlier in the case C-237/07 Janecek[27], that Member States have some discretion in determining specific measures and thresholds while implementing European environmental law.

This line of reasoning was supported in two earlier judgments on the NAPs – *United Kingdom v Commission*[28] and *Germany v Commission*[29]. In both judgments on the NAPs of Estonia and Poland the CFI has extensively made reference to the findings in these two older judgments.

Germany v Commission has in particular provided a sound clarification of the relationship between the Commission's right to review and the Member States' autonomy in composing the NAPs[30]. There the CFI maintained that the Commission was obliged to prove the actual infringement performed by a Member State of a standard set in Community law, by adopting a certain instrument of implementation[31].

However, in the new cases the CFI has gone even further, specifying that the principle of subsidiarity severely limits the power of the Commission to review the efficiency and adequacy of the measures implemented by Member States[32]. The CFI stated that the Commission has the burden of proving the extent to which the criteria set in European Union law limit the discretion of Member States[33].

However, in the months following the two annulments of the decisions of the Commission, a new series of administrative actions led to the *statu quo ante*. According to the Commission, the common understanding between the Commission, the Estonian[34] and the Polish[35] authorities of the judgment has been that, regardless of a possible appeal, the Commission will be issuing a new decision within three months of the judgments. Both Estonia and Poland indicated that amended national allocation plans would not be submitted beforehand. Then the

22 Case T-263/07, *supra* note 11, at para. 75.

23 Article 5 of the Treaty on the European Community – 2006 consolidated version, OJ 2006 C 321/38.

24 Case T-183/07, *supra* note 12, at para. 89.

25 Case T-183/07, *supra* note 12, at para. 116.

26 Case T-183/07, *supra* note 12, at para.129.

27 Case C-237/07 Janecek [2008] ECR I-6221, at para. 46.

28 Case T-178/05 United Kingdom v Commission [2005] ECR II-4807.

29 Case T-374/04 Germany v Commission [2007] ECR II-4431.

30 See also Van Zeben, Josephine, "The European Emissions Trading Scheme Case Law", *Amsterdam Center for Law & Economics Working Paper No. 12* (2009), at pp. 4–6 and Weishaar, Stefan, "Germany v. Commission: The ECJ on ex post adjustments under the EU ETS", *Review of European Community & International Environmental Law* (2008), Vol. 17, Issue 1, pp. 126 *et sqq.*

31 Case T-374/04, *supra* note 27, at p. 78.

32 Case T-183/07, *supra* note 12, at para. 89.

33 Case T-263/07, *supra* note 11, at para. 62.

34 Commission decision of 11 December 2009 concerning the national allocation plan for the allocation of greenhouse gas emission allowances notified by Estonia in accordance with Directive 2003/87/EC of the European Parliament and of the Council.

35 Commission decision of 11 December 2009 concerning the national allocation plan for the allocation of greenhouse gas emission allowances notified by Poland in accordance with Directive 2003/87/EC of the European Parliament and of the Council.

Commission reassessed the national allocation plans that were subject to the decisions annulled by the CFI.

The Commission again rejected the NAPs of Estonia and Poland. In both decisions[36] the Commission again uses the PRIMES model used in the annulled decisions to prove the overestimation of the need for allowances in the power sector and the industrial sectors, paying special attention to GDP forecasts and electricity demand forecasts.

The Commission also brought forward the question of compliance with Article 107 and 108 of the Treaty on the Functioning of the European Union[37] (previously Article 87 and 88 TEC[38]). The Commission believes that the allocation of allowances free of charge to certain activities confers a selective economic advantage to undertakings, and this has the potential to distort competition and affect trade between Member States. The Commission claims that non-compliance with criteria 1, 2 and 3 in Annex III to Directive 2003/87/EC fundamentally jeopardises the overall environmental objective of the Community scheme. The Commission considers that in such a case the environmental benefit of any aid included in the allowances may not be sufficient to outweigh the distortion of competition[39].

Additionally, appeals by the Commission against the CFI judgments are pending before the European Court of Justice[40]. The Commission considers that the CFI has interpreted too narrowly the powers of the Commission in the NAP assessment process[41].

This new development shows that the legal argument surrounding the NAPs of Estonia and Poland is not over yet. In the new decisions the Commission has, to a great extent, repeated its justification from the annulled decisions. It remains to be seen whether Estonia and Poland will bring actions for annulment of the new Commission decisions, or will directly submit new NAPs.

To complicate things further, there are four pending applications before the CFI for annulment of the Commission decisions rejecting the NAPs for 2008–2012 of Latvia[42], Lithuania[43], Romania[44] and Bulgaria[45].

The final outcome of the procedure for approving the NAPs is of great interest to all parties, since Directive 2003/87/EC in its present version[46] refers specifically to NAPs for the period 2008–2012 for calculating the quantity of allowances issued each year starting in 2013. The quantities must decrease by a linear factor of 1.74 % annually compared to the average annual total quantity in the NAPs for 2008–2012.

That is why it is essential that the European Commission should tightly coordinate its work on national allocation plans with Member States in order to evade such legal action wherever possible, and to conclude successfully the procedure for all NAPs for the period 2008–2012.

36 *Supra* notes 32 and 33.

37 Treaty on the Functioning of the European Union – consolidated version, OJ 2008 C 115/47.

38 Treaty on the European Community, *supra* note 21.

39 See the preambles of both decisions – s*upra* notes 32 and 33, at calling 16.

40 The appeals were brought forward on 3 December 2009.

41 Q&A in relation to the Commission's decision to appeal in Cases T-183/07 and T-263/07, MEX/09/1203, 3 December 2009.

42 Case T-369/07 Latvia v Commission, OJ 2007 C 269/66.

43 Case T-368/07 Lithuania v Commission, OJ 2007 C 283/35.

44 Case T-484/07 Romania v Commission, OJ 2008 C 51/57.

45 Case T-499/07 Bulgaria v Commission, OJ 2008 C 64/50.

46 See Directive 2009/29/EC, OJ 2009 L 140/63.