Reports of Cases

OPINION OF ADVOCATE GENERAL
MENGOZZI
delivered on 30 November 2017 [1]

Case C-5/16

Republic of Poland
v
European Parliament,

Council of the European Union

(Action for annulment — Decision (EU) 2015/1814 — Determination of legal basis — Taking into account the effects of the measure — Article 192(1) TFEU — Article 192(2)(c) TFEU — Notion of 'significant effect' on a Member State's choice between different energy sources — Notion of 'significant effect' on the general structure of a Member State's energy supply — Principle of sincere cooperation — Article 15 TEU — Powers of the European Council — Principles of legal certainty and protection of legitimate expectations — Principle of proportionality — Impact assessment)

Introduction

1. By its application, the Republic of Poland asks the Court to annul Decision (EU) 2015/1814 of the European Parliament and of the Council of 6 October 2015 concerning the establishment and operation of a market stability reserve for the Union greenhouse gas emission trading scheme and amending Directive 2003/87/EC ('the contested decision'). [2]

2. 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 [3] was adopted on the basis of Article 175(1) EC in order to contribute to fulfilling the international commitments to reduce the anthropogenic greenhouse gas emissions of the European Union and its Member States more effectively. It was substantially amended by Directive 2009/29/EC of the European Parliament and of the Council of 23 April 2009. [4]

3. The greenhouse gas emissions trading scheme (ETS) has been in operation since 1 January 2005 and covers 45% of EU greenhouse gas emissions. Directive 2003/87 originally identified three allowance trading periods: 2005-2007, 2008-2012 and 2013-2020. While Directive 2003/87 mentions that the Union is committed to achieving an 8% reduction in emissions of greenhouse gases by 2008 to 2012

1 Original language: French.

2 OJ 2015 L 264, p. 1.

3 OJ 2003 L 275, p. 32. Unless otherwise stated, whenever I make reference to Directive 2003/87 in this Opinion, I am referring to the original, unamended version of that directive.

4 OJ 2009 L 140, p. 63.

compared to 1990 levels,[5] Directive 2009/29 refers to the commitment made by the European Council to reduce the overall greenhouse gas emissions of the Union 'by at least 20% below 1990 levels by 2020, and by 30% provided that other developed countries commit themselves to comparable emission reductions'.[6]

4. Although action was taken in the form of a number of decisions to supplement or amend the rules governing the operation of the ETS,[7] the state of the carbon market remained a cause for concern because of a large surplus of allowances available on that market, which resulted in a large imbalance between supply and demand. This situation, which would persist if the EU legislature failed to act according to the Report from the Commission to the European Parliament and the Council on the state of the carbon market ('the 2012 Commission report'),[8] prompted the legislature to act by adopting the contested decision.

Legal framework

5. The contested decision was adopted on 6 October 2015 on the basis of Article 192(1) TFEU. Article 1 concerns the market stability reserve (MSR) which it seeks to establish. It reads as follows:

'1. A [MSR] shall be established in 2018 and the placing of allowances in the reserve shall operate from 1 January 2019.

2. The quantity of 900 million allowances deducted from auctioning volumes during the period 2014-2016, as determined in Regulation (EU) No 176/2014 pursuant to Article 10(4) of Directive [2003/87], shall not be added to the volumes to be auctioned in 2019 and 2020 but shall instead be placed in the reserve.

3. Allowances not allocated to installations pursuant to Article 10a(7) of Directive [2003/87] and allowances not allocated to installations because of the application of Article 10a(19) and (20) of that Directive shall be placed in the reserve in 2020. The Commission shall review Directive [2003/87] in relation to those unallocated allowances and, if appropriate, submit a proposal to the European Parliament and to the Council.

…

5. Each year, a number of allowances equal to 12% of the total number of allowances in circulation … shall be deducted from the volume of allowances to be auctioned by the Member States under Article 10(2) of Directive [2003/87] and shall be placed in the reserve over a period of 12 months beginning on 1 September of that year, unless the number of allowances to be placed in the reserve would be less than 100 million. …

…

5 See in particular recital 2 of Directive 2003/87.

6 Recital 3 of Directive 2009/29.

7 See Commission Regulation (EU) No 1031/2010 of 12 November 2010 on the timing, administration and other aspects of auctioning of greenhouse gas emission allowances pursuant to Directive 2003/87 (OJ 2010 L 302, p. 1), Decision No 377/2013/EU of the European Parliament and of the Council of 24 April 2013 derogating temporarily from Directive 2003/87 (OJ 2013 L 113, p. 1) and Commission Regulation (EU) No 176/2014 of 25 February 2014 amending Regulation No 1031/2010 in particular to determine the volumes of greenhouse gas emission allowances to be auctioned in 2013-20 (OJ 2014 L 56, p. 11).

8 COM(2012) 652 final of 14 November 2012.

6. In any year, if the total number of allowances in circulation is less than 400 million, 100 million allowances shall be released from the reserve and added to the volume of allowances to be auctioned by the Member States under Article 10(2) of Directive [2003/87]. Where fewer than 100 million allowances are in the reserve, all allowances in the reserve shall be released under this paragraph.

…'

Forms of order sought and procedure before the Court

6. The Republic of Poland claims that the Court should annul the contested decision and order the European Parliament and the Council of the European Union to pay the costs.

7. The Parliament and the Council each claim that the Court should dismiss the action and order the Republic of Poland to pay the costs.

8. On 1 June 2016, the Kingdom of Denmark, the Federal Republic of Germany,[9] the Kingdom of Spain, the French Republic and the European Commission were granted leave to intervene in support of the form of order sought by the Parliament and the Council. On the same date, the Kingdom of Sweden was granted leave to intervene in support of the form of order sought by the Council.

9. The Republic of Poland, the Parliament, the Council, the Kingdom of Spain, the French Republic and the Commission presented oral argument at the hearing before the Court, which was held on 11 July 2017.

The action

10. The Republic of Poland raises five pleas in law in seeking the annulment of the contested decision. The first plea in law alleges an infringement of Article 192(2)(c) TFEU on the ground that the contested decision was adopted in accordance with the ordinary legislative procedure despite the fact that it significantly affects a Member State's choice between different energy sources and the general structure of its energy supply. The second plea in law alleges an infringement of the principle of sincere cooperation and an infringement of the powers of the Council defined in Article 15 TEU by the adoption of measures contrary to the conclusions of the European Council of 23 and 24 October 2014. The third plea in law alleges an infringement of the principle of legal certainty and the principle of protection of legitimate expectations by the adoption of measures which interfere with the greenhouse gas emission allowance trading scheme throughout the trading period. The fourth plea in law alleges an infringement of the principle of proportionality by the adoption of measures which result in higher emissions reduction targets being achieved than those stemming from the EU's international commitments and set by Directive 2003/87. The fifth plea in law alleges an infringement of the obligation to carry out an appropriate assessment of the impact of the contested decision on the different Member States and an infringement of the obligation to present an adequate assessment of the impact of its implementation on the emission allowance market.

9 In the end the Federal Republic of Germany did not lodge a statement in intervention or make submissions during the oral phase of these proceedings.

Analysis

The first plea in law alleging an infringement of Article 192(2)(c) TFEU

Arguments of the parties

11. In essence, the Republic of Poland notes the wording of Article 192(2)(c) TFEU and infers from it that the contested decision should have been adopted on that basis and that the special legislative procedure should therefore have been used. Under that provision, legal measures which have fundamental importance for the Member States are to be adopted by the Council acting unanimously, thereby giving those States a right of veto which was not available to the Republic of Poland. The applicant asserts that the contested decision significantly affects its choice between different energy sources and the general structure of its energy supply. It states that, according to the Court's case-law on the determination of the legal basis and on the basis of the wording of Article 192(2)(c) TFEU, it is the effect of the contested decision that should be examined in determining whether it has the correct legal basis. In order for a significant effect to be established, and even though the Treaty does not clarify this notion, the applicant maintains that account should be taken of the overall energy context in a Member State. The Republic of Poland submits that it is reliant on a high level of fossil fuels, that 83% of its electricity comes from coal and lignite and that it holds substantial coal reserves, which afford it the prospect of producing at low cost and thus guarantee its economic competitiveness and the availability of energy for its citizens. Starting from the premise that the price of allowances directly influences the choice of production technology for future investments, the Republic of Poland asserts that the price of allowances has an impact on the development of the national electricity production structure. By the year 2035, the Republic of Poland envisages the creation of more gas-fired power stations whereas, in the absence of a market stability reserve, investments would be directed at highly efficient coal-fired power stations. The establishment of the reserve therefore significantly affects demand for fuels, leading to increased use of natural gas, which must be imported, thereby affecting the applicant's energy security. The Commission itself has acknowledged that the increase in the price of allowances was intended to encourage fuel switching and to discourage investments in coal-fired power stations.[10]

12. The defendants, supported by the interveners, essentially maintain the following position. The Court's settled case-law with regard to the determination of the legal basis focuses on the aim and the content of the measure and, if the measure pursues a twofold aim, the legal basis should reflect only its main component. The Court's case-law has never affirmed the obligation to take into account the effects of the measure, which, in the view of the Kingdom of Spain, raises difficulties because the legal basis can be properly assessed only once the measure has entered into force. The defendants and the interveners rely on the Opinion of Advocate General Kokott in *Commission* v *Latvia*.[11] They also assert that Article 192(2) TFEU is designed as a derogation and that, as such, it should be interpreted strictly. If the special legislative procedure is used too often, it becomes more difficult to achieve the EU's environmental objectives. In addition, those parties infer from the wording of the contested decision that, for the purposes of determining the objectives pursued, it should be read together with Directive 2003/87, as the MSR is intended to correct a structural imbalance in the ETS. The ETS itself is technologically neutral and the lack of direct impact on the Member States' energy mix is also reflected in the legal bases of Directives 2003/87 and 2009/29, which have never been challenged. Similarly, the introduction of the MSR maintains the neutrality of the ETS and does not have a significant effect on the Member States' choice. The long-term effect of the MSR is only to smooth out volatility in the price of allowances and not to pursue a systematic price increase. Furthermore,

10 The applicant refers in particular to the Commission Staff Working Document 'Impact assessment accompanying the document Proposal for a Decision of the European Parliament and of the Council concerning the establishment and operation of a market stability reserve for the Union greenhouse gas emission trading scheme and amending Directive 2003/87/EC' ('the impact assessment') (SWD/2014/017 final, p. 53).

11 Judgment of 3 October 2013, *Commission* v *Latvia* (C-267/11 P, EU:C:2013:624, paragraph 58).

the impact assessment mentions this objective of long-term price stabilisation. The stabilising effect is also ensured by a two-way logic, as the MSR can address a rash fall in the volume of available allowances and an unreasonable rise in availability. In any event, the price increase always leaves the choice with Member States and operators. If the MSR does have an impact on the Member States' energy mix, it is therefore only in a secondary manner. The MSR does not affect a Member State's choice between different sources or alter its source of supply. Moreover, the MSR does not set individual reduction targets for Member States. According to the defendants and the interveners, the effects of the MSR mentioned by the Republic of Poland are merely speculation or conjecture, in particular given that it is very difficult to make forecasts in this area. The Republic of Poland paints a somewhat biased picture of the MSR's effects, first, by portraying them only as a price increase, when the mechanism also permits allowance prices to be reduced, and, second, by failing to take into consideration the fact that the scope of the ETS is broader than just the energy sector and that, in any event, production costs are determined by a variety of factors and not only by the price of allowances.

13. The Republic of Poland contends that, while it does not dispute the legal basis of Directive 2003/87, this does not mean that Article 192(1) TFEU is the appropriate legal basis for the contested decision, as that decision must be examined autonomously and independently of the directive in order to determine its correct legal basis and previous legislative practice is unimportant when the legal basis of a measure is reviewed. The applicant notes that, in any event, the legal basis of Directive 2009/29 has not been examined by the Court. Without contesting the case-law relied on by the defendants and the interveners, the applicant asserts that the Court has already examined the effects of a measure when examining its legal basis [12] precisely because the determination of the effects is an objective factor which can be taken into consideration. Moreover, the applicant reiterates its argument regarding the impact assessment which, in its view, confirms that the MSR influences the energy mix. A number of other scientific studies or publications also conclude that the price of allowances will increase because of the introduction of the MSR. Since there are differences with regard to the interpretation of the impact assessment, the Republic of Poland relies on the 'Study on the influence of the market stability reserve mechanism on the structure of Poland's energy mix' produced by the Krajowy Ośrodek Bilansowania i Zarzadzania Emisjami (National Centre for Emissions Management, Poland) ('the KOBiZE study'), [13] according to which the Republic of Poland's energy mix is significantly affected by the implementation of the contested decision. The applicant asserts that the proportion of combustion emissions in the country's total emissions was 83.8% in 2014 and concludes that, even though the scope of the ETS is broader, the MSR did mainly affect this sector.

14. The Republic of Poland argues in response to the interveners that the distinction between Article 192(2) TFEU and Article 194 TFEU should still be relevant, the former coming under the Union's environment policy and latter under the Union's energy policy. The applicant states that in the impact assessment the Commission itself acknowledged that the objective pursued by the MSR is to shift Member States to renewable energy. It also submits that Directive 2003/87 excludes the electricity sector from the free allocation scheme. Since there is a purchase obligation, the impact of an increase in the price of allowances is greater for this sector where the actors are forced to look for other sources, thereby altering the energy mix. The Republic of Poland thus disputes the argument regarding the neutrality of the MSR in terms of structure of the energy mix. Lastly, the applicant, disagreeing with the KOBiZE study, responds to the criticisms made, stating that the effects are assessed up to 2030, that there can be no objection to the modelling tool used and that it is objectively justified to limit the study to Poland.

12 The applicant refers to the judgments of 23 February 1999, *Parliament* v *Council* (C-42/97, EU:C:1999:81), and of 12 December 2002, *Commission* v *Council* (C-281/01, EU:C:2002:761), and the Opinion of Advocate General Kokott in *Commission* v *Latvia* (C-267/11 P, EU:C:2013:46).

13 See Annex C1 of the reply of the Republic of Poland.

15. At the rejoinder stage, the defendants note the applicant's failure to question the traditional case-law on the determination of the legal basis and assert that, if the effects of a measure could be examined, it would be only in the context of an examination of the aim and the content of the measure, but not in the context of a separate or autonomous analysis. The MSR does not have the effect of altering the original level of ambition of the ETS, but is merely an ancillary measure for it which is perfectly integrated with the ETS. They also challenge the relevance and the conclusions of the KOBiZE study because it was produced after the adoption of the contested decision, because it includes only a partial analysis of the alleged short-term effects of the MSR, and only in Poland, and, lastly, because it is based on an incorrect premise and uses a wrong methodology. In the alternative, the defendants doubt that the effect on the general structure of the applicant's energy supply is 'significant', as is required by Article 192(2)(c) TFEU.

Analysis

– The determination of the applicable test

16. According to the Court's settled case-law — on which there is no dispute between the parties — in the context of the organisation of the powers of the Union, 'the choice of a legal basis for a measure must rest on objective factors which are amenable to judicial review. Those factors include in particular the aim and the content of the measure. … If examination of a … measure reveals that it pursues a twofold purpose or that it has a twofold component and if one of these is identifiable as the main or predominant purpose or component, whereas the other is merely incidental, the measure must be founded on a single legal basis, namely that required by the main or predominant purpose or component'. [14]

17. Although the Court mentions the aim and the content of the measure as factors which must 'in particular' guide the assessment of the legal basis — a wording which seems to leave room for other criteria — it must be stated that it has always confined itself to those two. In addition, the effects of a measure are not necessarily entirely the same as the assessment of the objective which it pursues. Lastly, and as has rightly been pointed out by the Kingdom of Spain in particular, the inclusion in the test which must be conducted by the EU judicature to examine the appropriateness of the legal basis of a measure of an assessment of its expected effects would be tantamount to asking the EU legislature to indulge in the divinatory arts. That is why in this analysis I will focus on examining the aim and the content of the contested decision in order to determine whether the EU legislature could legitimately base its action on Article 192(1) TFEU. [15]

– The aim and the content of the contested decision

18. I must say from the outset that I share the view taken by the Republic of Poland that, despite an obvious kinship, the analysis of the legal basis of the contested decision must be conducted autonomously from the analysis of the legal basis of Directive 2003/87 or Directive 2009/29 which amended it, with the result that no definitive conclusion can be drawn, for the purposes of the present proceedings, from any failure by the applicant to take action in respect of those two directives.

14 See, among many others, judgments of 30 January 2001, *Spain* v *Council* (C-36/98, EU:C:2001:64, paragraphs 58 and 59); of 6 September 2012, *Parliament* v *Council* (C-490/10, EU:C:2012:525, paragraphs 44 and 45); and of 11 June 2014, *Commission* v *Council* (C-377/12, EU:C:2014:1903, paragraph 34).

15 The Opinion of Advocate General Kokott in *Commission* v *Latvia* (C-267/11 P, EU:C:2013:46), in particular point 58 thereof, on which the parties rely, does not seem to have carried out an examination other than of the aim and the content of the measure. That point merely states, with regard to the legal basis of Directive 2003/87, that '[t]he Commission was not … permitted … to interpret or apply Directive 2003/87 in such a way that *the primary result* of the application of the directive would be that it had a significant effect on a Member State's choice between different energy sources and the general structure of its energy supply. By contrast, its legal basis would not be called into question if such an effect, even where it is significant, were *only a secondary component or aim*, a kind of side-effect of the directive' (italics added).

19. As regards the aim of the contested decision, it is clearly closely linked to that pursued by Directive 2003/87, in respect of which the Court has ruled that, '[w]hile the ultimate objective of the [ETS] is the protection of the environment by means of a reduction of greenhouse gas emissions, *the scheme does not of itself reduce those emissions* but encourages and promotes the pursuit of the lowest cost of achieving a given amount of emissions reductions … The benefit for the environment depends on the stringency of the total quantity of allowances allocated, which represents the overall limit on emissions allowed by the scheme. It also appears that the economic logic of the [ETS] consists in ensuring that the reductions of greenhouse gas emissions required to achieve a predetermined environmental outcome take place at the lowest cost. By allowing the allowances that have been allocated to be sold, the scheme is intended to encourage a participant in the scheme to emit quantities of greenhouse gases that are less than the allowances originally allocated him, in order to sell the surplus to another participant who has emitted more than his allowance. So, for the [ETS] to function properly, there must be a supply and demand for allowances on the part of the participants in the scheme, which also means that the potential for reduction of emissions attributable to the activities covered by the scheme may vary, even considerably. Moreover, … the wider the scope of the system, the greater will be the variation in the costs of compliance of individual undertakings, and the greater the potential for lowering costs overall'. [16]

20. It is also clear from case-law that 'although the principal objective of [Directive 2003/87] is to reduce greenhouse gas emissions substantially', that objective must be attained in compliance with a series of sub-objectives, such as 'the safeguarding of economic development and employment and the preservation of the integrity of the internal market and of conditions of competition'. [17]

21. In its preamble the contested decision recalls the objective pursued by Directive 2003/87, which is 'to promote reductions of greenhouse gas emissions in a cost-effective and economically efficient manner'. [18]

22. According to the conclusions of the European Council of 23 and 24 October 2014 on the 2030 climate and energy policy framework [19] and in order to achieve the binding EU target of an at least 40% domestic reduction in greenhouse gas emissions by the year 2030 compared to 1990, the European Council called for the ETS to be made more cost-effective by reforming it, that is to say by providing it with 'an instrument to stabilise the market'. [20] The 2012 Commission report had previously given a somewhat lukewarm assessment of the operation of the ETS as the scheme was characterised by a surplus of 955 million allowances. [21] In addition, the increase in the supply of allowances combined with low demand, as a result of which the price of allowances fell. The 2012 report estimated that as a consequence of the implementation of phase 3 of the ETS the surplus could be well over 1.5 billion allowances. From the year 2014 onwards, a 'structural surplus' [22] of 2 billion allowances during phase 3 was forecast. The excessive availability and low cost of allowances clearly jeopardised the incentive effect that the introduction of an operational ETS was intended to have. Consequently, the contested decision was adopted to respond to this 'structural imbalance' [23] which had been identified in 2012. The main objective — if not the sole objective — pursued by the decision is to 'tackle structural supply-demand imbalances', as is stated in recital 8.

16 Judgment of 16 December 2008, *Arcelor Atlantique et Lorraine and Others* (C-127/07, EU:C:2008:728, paragraphs 31 to 33). See also judgment of 17 October 2013, *Billerud Karlsborg and Billerud Skärblacka* (C-203/12, EU:C:2013:664, paragraph 26).

17 See judgment of 22 June 2016, *DK Recycling und Roheisen* v *Commission* (C-540/14 P, EU:C:2016:469, paragraph 49 and the case-law cited).

18 Recital 1 of the contested decision.

19 EUCO/69/14 of 24 December 2014.

20 Paragraph 2.3 of the conclusions of the European Council, reiterated in recital 2 of the contested decision.

21 See page 5 of the 2012 Commission report.

22 See page 6 of the 2012 Commission report.

23 See page 7 of the 2012 Commission report.

23. As regards the content of the contested decision, it simply illustrates that the MSR acts as an instrument for placing allowances from 1 January 2019,[24] as is shown, in particular, by the fact that 900 million allowances deducted from auctioning between 2014 and 2016 will not be added to those to be auctioned in 2019 and 2020 but will be placed in the reserve.[25] The objective of initially reducing the endemic surplus in the ETS is also pursued by providing for 12% of the total number of allowances in circulation to be placed in the reserve each year, with that 12% being deducted from the total volume of allowances to be auctioned.[26] In the first year of the MSR's operation, 8% of the total number of allowances in circulation will be placed in the reserve between 1 January and 1 September of that year.[27] The stabilising effect of the MSR is ensured by the fact that, in addition to the possibility of placing allowances in the reserve, the contested decision also provides that the reserve can be activated if there is a deficit of allowances on the market. Article 1(6) of the contested decision thus provides that, below a certain threshold — 400 million — allowances placed in reserve can be reinjected into the market. Lastly, Article 3 of the contested decision gives the Commission the task of monitoring the implementation of the MSR and its possible effects on competitiveness and of regularly reviewing the functioning of the reserve.

– Conclusion on the legal basis of the contested decision

24. It is thus clear both from the objective and from the content of the contested decision that the decision was designed to be an instrument to respond to the various threats preventing the ETS from 'delivering the necessary investment signal to reduce CO_2 emissions in a cost-efficient manner and from being a driver of low-carbon innovation contributing to economic growth and jobs'.[28] The MSR must stabilise the market and provision is made for mechanisms to combat both surpluses and deficits of allowances. At no point does the contested decision make a direct reference to any formation of the price of allowances. In so far as the MSR is designed as nothing more and nothing less than as a complement or a correction to the ETS, without altering its original goal, the EU legislature was therefore entitled to base its measure on Article 192(1) TFEU. In other words, the contested decision merely follows the path originally taken by Directive 2003/87, seeking to promote reductions of greenhouse gases in a cost-effective and economically efficient manner, thereby preserving, protecting and improving the environment.[29]

25. Under Article 192(2)(c) TFEU, the special legislative procedure must be used for the adoption of 'measures significantly affecting a Member State's choice between different energy sources and the general structure of its energy supply'. As I have just shown, it cannot be inferred from the content of the contested decision or from the objective pursued by it that, in adopting the contested decision, the EU legislature sought to bring about a significant change in the general structure of the applicant's energy supply or directly to affect its choice between different energy sources. As a derogation, Article 192(2)(c) TFEU is to be interpreted strictly, especially since an efficient modern environment policy cannot ignore energy questions. I share the fears expressed by the defendants and the interveners that the applicant's proposed interpretation of Article 192(2)(c) TFEU and the conclusions which it draws from that interpretation for the examination of the legal basis of the contested decision would effectively block any legislative initiative by recognising a right of veto for Member States, as the Union would adopt measures inviting them only to rationalise their CO_2-consuming activities. Furthermore, such an interpretation would doom the ETS to failure as it would prevent the EU legislature from correcting its structural deficiencies. In addition, although I would point out that the goal of introducing the MSR is not to form the price of allowances but simply to ensure the efficiency

24 Article 1(1) of the contested decision.

25 Article 1(2) of the contested decision.

26 Article 1(5) of the contested decision.

27 See also Article 1(5) of the contested decision.

28 Recital 4 of the contested decision.

29 In the words of the first indent of Article 191(1) TFEU.

of the ETS, in any event, an operator's choice of a certain energy source or production technology cannot depend on that price alone, which does not in itself define the production costs, which are determined by a variety of factors. Even with the introduction of the MSR, the choice of technology still remains in the hands of operators and is not dictated by the European Union. Lastly, I will not dwell further on the discussion regarding the conclusions drawn from the KOBiZE study because the study was conducted after the adoption of the contested decision.

26. For all the above reasons, the first plea in law must be rejected as unfounded.

The second plea in law alleging an infringement of the powers of the European Council defined in Article 15 TEU and an infringement of the obligation of sincere cooperation

Arguments of the parties

27. The Republic of Poland asserts, in essence, that the conclusions of the European Council of 23 and 24 October 2014[30] fixed the date for the implementation of the MSR at 2021. By bringing that date forward to 2019, the Parliament and the Council infringed the powers of the European Council as defined in Article 15 TEU and breached the principle of sincere cooperation.

28. With regard to the alleged infringement of the powers of the European Council, the applicant recalls the principle of conferral, on which the institutional functioning of the Union is based, and the content of Article 15 TEU and concludes that in the abovementioned conclusions the European Council made clear the political intention to fix the start of the operation of the MSR at 2021. The decision to implement the MSR in 2019 imposed undue burdens on undertakings operating in carbon-intensive sectors; by fixing the introduction of the MSR at 2021, the European Council intended specifically to protect market participants. The failure to respect this wish constitutes an infringement of the European Council's power to define political directions for the implementation of new EU legislation to reduce greenhouse gas emissions. This change in the date for implementation of the MSR also infringes the principle of sincere cooperation as the contested decision contains an essential element which is contrary to the conclusions of the European Council. The Parliament and the Council did not act in good faith in the light of the explicit position expressed by certain Member States pointing out the contradiction between the contested decision and all the agreements previously reached.[31]

29. In essence, the defendants and the interveners contest the applicant's reading of the conclusions of the European Council. In their view, the European Council did not take any position on the date for implementation of the MSR, as the reference to the date of 2021 concerns another subject. There is therefore no contradiction between the conclusions and the contested decision. Even if the European Council could be considered to have made reference in its conclusions to the Commission proposal which, at the time the conclusions were adopted, envisaged 2021 for the introduction of the MSR, the defendants and the interveners all assert that it would exceed the powers of the European Council to recognise that it is thus able to freeze a legislative measure, thereby depriving both the Parliament and the Council of their rights and powers in the legislative deliberation process. In view of the legal character of the conclusions of the European Council, a plea in law alleging the inconsistency of a legislative measure with those conclusions cannot be upheld.

30 See footnote 19 of this Opinion.

31 The applicant refers to a statement made by itself, the Republic of Bulgaria, the Republic of Croatia, Hungary and Romania at a meeting of the Environment Council held on 18 September 2015.

Analysis

30. Paragraph 2.3 of the conclusions of the European Council of 23 and 24 October 2014 contains the following statement: 'a well-functioning, reformed [ETS] with an instrument to stabilise the market in line with the Commission proposal will be the main European instrument to achieve this target; the annual factor to reduce the cap on the maximum permitted emissions will be changed from 1.74% to 2.2% from 2021 onwards'.

31. It is clear from the wording of paragraph 2.3 that the explicit reference to 2021 contained therein is not directed at the date for implementation of the instrument to stabilise the market but at the date on which the annual reduction factor will be changed. The European Council did not therefore fix a date for the entry into force of the MSR.

32. The applicant nevertheless relies on the fact that the European Council stated that the ETS was to be accompanied by an instrument to stabilise the market 'in line with the Commission proposal'.[32] When the European Council made this statement, the proposal provided that the MSR would enter into force in 2021.[33]

33. In this regard, I will simply recall that Article 15(1) TEU defines the European Council's task as being to 'provide the Union with the necessary impetus for its development and … define the general political directions and priorities thereof. It shall not exercise legislative functions'.[34] It thus seems that interpreting the reference made to the Commission proposal as an instruction from the European Council not to introduce the MSR until 2021 would effectively reduce the Parliament and the Council merely to rubber-stamping the conclusions of the European Council and give the European Council the power to interfere in the legislative sphere. The European Council cannot therefore be considered, by that reference, to have expressed a political intention, which became a normative intention, to implement the Commission proposal as it stood in October 2014, thereby depriving the Parliament and the Council of their rights and powers in the legislative deliberation process. The same holds for the statement by certain Member States mentioned by the Republic of Poland, which cannot be regarded as a position taken by the European Council on the date for implementation of the MSR or be binding on the legislature.

34. Ultimately, it is in fact the applicant's position that runs counter to Article 15(1) TEU and the principle of conferral enshrined in Article 13(2) TEU and no complaint can be made against the Parliament and the Council in respect of an infringement of the obligation of sincere cooperation. Consequently, the second plea in law cannot be upheld and must be rejected as unfounded.

The third plea in law alleging an infringement of the principles of legal certainty and protection of legitimate expectations

Arguments of the parties

35. The Republic of Poland asserts, in essence, that the adoption of the contested decision, which provides for the implementation of the MSR throughout the duration of a trading period defined by Directive 2003/87, affects the predictability of the ETS. The legitimate expectations of undertakings were therefore infringed by the drastic limitation of the number of allowances introduced during a trading period. After recalling the Court's traditional case-law on legal certainty and protection of

32 See paragraph 2.3 of the conclusions of the European Council of 23 and 24 October 2014.

33 See Proposal for a decision of the European Parliament and of the Council concerning the establishment and operation of a [MSR] for the Union greenhouse gas [ETS] and amending Directive 2003/87 (COM(2014)20 final of 22 January 2014).

34 At the most it can act, where the treaty so provides, to attempt to unblock the legislative process; see, in particular, Article 48, Article 82(3), Article 86(1) and Article 87(3) TFEU.

legitimate expectations, the applicant submits that placing surplus allowances in the MSR up to the year 2019 affects the economic activities of operators, constitutes an unexpected change in the conditions for the exercise of those activities during a trading period and is therefore contrary to the two abovementioned principles. Whilst the applicant acknowledges that those principles are not absolute and may be subject to limitations, it considers that the conditions under which the principles may be limited are not met in this case. In addition, the legitimate expectations of operators are founded on Regulation No 176/2014. Whereas the January 2014 Commission proposal on the establishment of the MSR envisaged that the MSR would begin to operate in 2021, Regulation No 176/2014, adopted the following month, stated that the volume of allowances, originally reduced for the period 2014-2016, was to be increased in the period 2019-2020.[35] Thus, a prudent and circumspect operator could not have predicted the adoption of a decision which prevented 900 million allowances being placed in circulation in a period for which Regulation No 176/2014 had only just decided that the volume of allowances would be increased. Lastly, the entry into force of the MSR from the year 2019 results in an increase in costs and therefore in the financial burden. In this context, the Court has shown itself to be particularly vigilant with regard to observance of the principles of legal certainty and protection of legitimate expectations. In its reply, the applicant asserts that the establishment of trading periods by Directive 2003/87 not only pursues an administrative purpose but above all permits undertakings to define their strategy specifically in the light of the quantity of allowances available for the period in question. Lastly, the Republic of Poland adds that the contested decision did not amend the fifth subparagraph of Article 10(2) of Regulation No 1031/2010, as amended by Regulation No 176/2014 ('Regulation No 1031/2010') so that EU law now provides for both the placing of allowances in the MSR from the year 2019 — in the words of the contested decision — and auctioning of the frozen allowances in 2019-2020 — in the words of Regulation No 1031/2010. This contradiction, apart from revealing the real intention of the EU legislature to fix the start date for the MSR in the year 2021, breaches the principle of legal certainty.

36. The defendants and the interveners maintain, in essence, that the Republic of Poland does not really contest the clarity and predictability of the rules laid down in the contested decision, with the result that its third plea in law can be considered mainly to concern an alleged infringement of legitimate expectations. They state, in essence, that the Court allows the legislature a broad discretion in technically complex areas. Furthermore, they challenge the argument that the trading periods defined by Directive 2003/87 are periods during which no changes can be made by the EU legislature, relying on provisions of that directive under which the rules governing the operation of the ETS may be adjusted, if necessary during a trading period. Moreover, a trading period is purely administrative in character. In addition, the 2012 Commission report and the specific measures adopted to maintain a well-functioning ETS all indicate the dysfunction of the ETS to economic operators and those operators could therefore logically anticipate that the ETS would be modified in order to ensure that it was efficient. No legitimate expectation can be founded on Regulation No 176/2014 which, in any event, is merely an implementing measure that is not binding on the legislature itself. Similarly, the Commission proposal under which the MSR was to start to operate in 2021 could not form the basis for legitimate expectations, first, because it was accompanied by an impact assessment envisaging several options and, second, because it was merely a preparatory act which would inevitably evolve over the legislative deliberation process. The defendants and the interveners also underline the two-way character of the MSR, stating that placing allowances in the reserve does not mean that those allowances are nullified, with the result that the contested decision does not entail the radical consequences described by the applicant in terms of the number of allowances available. Furthermore, the ETS has never guaranteed the price of allowances to operators as it is merely a quantitative instrument based in part on the auctioning principle. Lastly, they dispute the conclusions drawn by the applicant regarding a possible conflict between the contested decision and Regulation No 1031/2010, since the contested decision is a legislative measure adopted after that regulation.

35 See Article 1 of Regulation No 176/2014.

Analysis

37. According to the Court's settled case-law, the principle of legal certainty requires inter alia that rules of law be clear and precise and predictable in their effect, especially where they may have negative consequences on individuals and undertakings.[36] However, that principle does not require that there be no legislative amendment.[37]

38. It is apparent from the documents before the Court that the Republic of Poland does not dispute that the rules laid down in the contested decision are clear and precise. As regards their predictability, I note, together with all the defendants and interveners, that the decision was adopted on 6 October 2015, whilst providing that the reserve would be established in 2018, to be operational — that is to say, to receive allowances — from 1 January 2019.[38] In those circumstances, no breach of the principle of legal certainty can be established.

39. With regard to protection of legitimate expectations, the Court has ruled that this principle, which is part of the legal order of the European Union and is the *corollary* of the principle of legal certainty, may be invoked as against European Union rules only to the extent that the European Union itself has previously created a situation which can give rise to a legitimate expectation. That principle extends to any trader in a situation in which an EU institution has caused him to entertain expectations which are justified and a person may not plead breach of the principle unless he has been given precise assurances by the authorities. In addition, if a prudent and circumspect trader could have foreseen that the adoption of an EU measure is likely to affect his interests, he cannot plead that principle if the measure is adopted. Furthermore, while the principle of protection of legitimate expectations is one of the fundamental principles of the European Union, traders are not justified in having a legitimate expectation that an existing situation which is capable of being altered by the EU institutions in the exercise of their discretionary power will be maintained.[39] In other words, those operators cannot place reliance on there being no legislative amendment whatever.[40]

40. The Court has also ruled that 'the [ETS] introduced by Directive 2003/87 is a novel and complex scheme'.[41] In adopting Directive 2003/87, the EU legislature availed itself of the broad discretion which it is traditionally allowed where its action involves political, economic and social choices and where it is called on to establish a complex system, in which case it is entitled to have recourse to a step-by-step approach and to proceed in the light of the experience gained.[42] The Court has held that in this context the legislature is obliged to review the measures adopted at reasonable intervals.[43] By doing so, it has clearly opened the way, if necessary, to a change in the operation of the ETS, as the Union's legislative power could be exercised correctly only if there were a regular review of the efficiency of the complex and novel scheme established by Directive 2003/87.

41. The complaint alleging an infringement of the principle of protection of legitimate expectations must therefore be examined in the light of these clarifications made in case-law.

36 See, among many others, judgment of 11 June 2015, *Berlington Hungary and Others* (C-98/14, EU:C:2015:386, paragraph 77 and the case-law cited).

37 See judgment of 11 June 2015, *Berlington Hungary and Others* (C-98/14, EU:C:2015:386, paragraph 79).

38 See Article 1 of the contested decision.

39 See, among many others, judgment of 15 July 2004, *Di Lenardo and Dilexport* (C-37/02 and C-38/02, EU:C:2004:443, paragraph 70), and order of 4 July 2013, *Menidzherski biznes reshenia* (C-572/11, not published, EU:C:2013:456, paragraph 29).

40 Judgment of 11 June 2015, *Berlington Hungary and Others* (C-98/14, EU:C:2015:386, paragraph 78 and the case-law cited).

41 Judgment of 16 December 2008, *Arcelor Atlantique et Lorraine and Others* (C-127/07, EU:C:2008:728, paragraph 60). With regard to the complexity of the area of action, see also judgment of 17 October 2013, *Billerud Karlsborg and Billerud Skärblacka* (C-203/12, EU:C:2013:664, paragraph 36).

42 See judgment of 16 December 2008, *Arcelor Atlantique et Lorraine and Others* (C-127/07, EU:C:2008:728, paragraph 57).

43 See judgment of 16 December 2008, *Arcelor Atlantique et Lorraine and Others* (C-127/07, EU:C:2008:728, paragraph 62).

42. First, the applicant claims in this regard that the principles governing the operation of the ETS cannot be modified during a trading period and that the modification made with the adoption of the contested decision resulted in an infringement of the legitimate expectations which operators had placed in Directive 2003/87 as amended by Directive 2009/29. Even if the applicant is able to rely on legitimate expectations in respect of economic operators affected by the contested decision, it must nevertheless be stated that Directive 2003/87 does not provide for any limitation of the kind invoked. On the contrary, in such a changing and unpredictable area, the EU legislature was well aware of the need to review the rules governing the operation of this novel and complex scheme. Recital 22 of Directive 2003/87 specifically provides that it 'should be reviewed in the light of developments in that context and to take into account experience in its implementation'. Article 10(5) of Directive 2003/87 as amended by Directive 2009/29 gives the Commission the task of monitoring the functioning of the EU carbon market. Article 29 of the amended directive explicitly mentions the case of the market not functioning properly, which is to be established by the Commission in a report submitted to the Parliament and the Council, which may, if appropriate, include proposals for improvement. Thus, no guarantee has been given, either on the adoption of Directive 2003/87 or on the adoption of Directive 2009/29, which amended it, that the operation of the ETS as originally described would be set in stone or could be modified only at the end of a period, as seems to be confirmed, moreover, by Article 9 of Directive 2003/87 as amended by Directive 2009/29, which starts the linear annual decrease of allowances 'from the mid-point of the period from 2008 to 2012'. [44]

43. Second, the Republic of Poland puts forward the argument that the legitimate expectations of operators on the carbon market were founded on Regulation No 176/2014 and on the Commission proposal, [45] under which the MSR would not come into operation until 2021. The Commission proposal constitutes a preparatory act which is by definition not final and which could not cause operators to entertain expectations which are justified and on the basis of which no precise assurances could be provided in accordance with the case-law mentioned in point 39 of this Opinion. As regards Regulation No 176/2014, aside from the fact that it is a perfect example of the ETS being modified during a period [46] and although it actually provided that the volume of allowances to be auctioned would be increased by 300 million in 2019 then by 600 million in 2020, it should be borne in mind that it was adopted within the framework of the implementing power held by the Commission in this area and that it could not be construed as a guarantee that any legislative intervention would not render its content inoperative.

44. I will conclude the analysis of this third plea in law with a few general remarks. Because the ETS is a quantitative instrument, it does not give the operators concerned the right to purchase or sell allowances at a certain price. In addition, the number of allowances available for a trading period must be distinguished from the number of allowances available for a purchaser during that period, which will depend on a variety of factors. Without denying that changing the volume of allowances can have an impact on the strategies developed by 'consumers' of those allowances, those strategies are not determined on the basis of 'volume' alone. In any event, I would point out that the MSR is an instrument which essentially allows allowances to be placed in reserve, not abolished. To accept that legitimate expectations were infringed in this instance would, as the Commission notes, effectively

44 It should also be noted that the linear factor is itself subject to modification; see Article 9 of Directive 2003/87 as amended by Directive 2009/29.

45 See footnote 33 of this Opinion.

46 The title of Regulation No 176/2014 makes reference to the period 2013-2020, while the body of the regulation mentions the 2014-2020 period (see recital 3 of Regulation No 176/2014) then 2014-2016 (see Article 1 of Regulation No 176/2014). If the relevant period is 2013-2020, it must be stated that Regulation No 176/2014, which entered into force immediately (see recital 7 and Article 2 of Regulation No 176/2014), was adopted during that period in order to amend the rules governing its operation.

establish a right to the continued existence of the endemic imbalance that characterised the ETS in a context where it was well known and could not be ignored by the operators concerned, on account of a number of works on the subject [47] but also because, to some extent, it benefitted those operators in particular.

45. I therefore consider that the third plea in law must be rejected as unfounded.

The fourth and fifth pleas in law alleging respectively an infringement of the principle of proportionality and an infringement of the obligation to carry out an appropriate analysis of the impact of the contested decision

Arguments of the parties

– The fourth plea in law

46. In essence, in the fourth plea in law, the Republic of Poland complains that the contested decision infringes the principle of proportionality on the ground that it leads to higher emissions reduction targets being achieved than those stemming from the EU's international commitments and set by Directive 2003/87. According to the applicant, if the contested decision seeks to safeguard consistency and the smooth operation of the ETS, this is to help the ETS to achieve its own objectives. However, the introduction of the MSR under the conditions defined in the contested decision does not seem to be an essential measure for achieving the target of a 20% reduction in emissions by 2020, as set in particular by the Doha Amendment and Directive 2003/87 as amended by Directive 2009/29. The burden imposed on entities is excessive in relation to the objective pursued, with the result that the contested decision does not satisfy the criterion of necessity and infringes the principle of proportionality. The number of allowances in circulation for the second commitment period under the Kyoto Protocol, that is to say, the period 2013-2020, was determined having regard to the reduction target to be achieved so that the decrease in the number of allowances under the contested decision, which is not therefore neutral from this point of view, calls for operators on the carbon market to make additional effort which is not necessary for achieving the objective pursued. The fact that the MSR permits allowances placed temporarily in the reserve to be put back on the market cannot hide the fact that it is unlikely that such allowances will be placed on the market by 2020. In addition, the fact that the legislature could have opted for a more onerous scheme does not necessarily mean that the contested decision is consistent with the principle of proportionality.

47. The defendants and the interveners assert, in essence, that the objective by the yardstick of which observance of the principle of proportionality must be examined is not the objective described by the applicant. That objective cannot be reduced solely to a 20% decrease in emissions by the year 2020. On the contrary, it is clear from the provisions of the contested decision, read in conjunction with the provisions of Directive 2003/87 and Directive 2009/29, that the original objective was to enable the ETS to operate correctly without any limitation in time. Consequently, the objective actually pursued is to ensure the smooth operation of the ETS in the long term. Furthermore, that objective is pursued through the contested decision, which was adopted in a context where the dysfunction of the ETS was well known, with a surplus of more than 2 billion allowances. The EU legislature did not have recourse to more onerous measures, such as the cancellation of allowances or the implementation of the MSR before the year 2019. The applicant has not shown that operators on the carbon market would face

47 I am thinking in particular of the 2012 Commission report, the various amendments made to Directive 2003/87 by the legislature itself and the more specific action taken by the Commission within the scope of its implementing power.

unreasonable prices after allowances were placed in the MSR. The choices made by the EU legislature and enshrined in the contested decision thus fall within the broad discretion which it is traditionally allowed in areas requiring complex assessments and do not go beyond what is necessary in order to attain the objective pursued.

– *The fifth plea in law*

48. In the fifth plea in law, the Republic of Poland alleges, in essence, that the Commission, which drafted the proposal for a decision, and the defendant institutions, which adopted the contested decision, failed properly to carry out an impact assessment. The impact assessment annexed to the Commission proposal focused subjectively on the positive aspects of that proposal, overlooking aspects relating to the decline in competitiveness, the increase in production costs, the increase in the cost of network heating and electricity and costs for consumers, and job losses in sectors using non-renewable energies. The Commission and/or the defendant institutions should also have examined the specific consequences of such a proposal for each Member State and its impact on the allowance market. They should have provided a specific and quantified analysis of, in particular, the upward trend in the price of allowances, the price of electricity and the price of energy. Lastly, none of those institutions analysed the impact of an early implementation of the MSR from the year 2019 or of the threshold values ultimately adopted. No public consultation was held on the final version of the contested decision. Such an attitude on the part of the institutions runs counter to the Interinstitutional Agreement on Better Regulation [48] and the Better Regulation Guidelines. [49] In its reply, the applicant alleges that the Parliament and the Council failed to publicise their legislative work adequately and to hold open public consultations during the legislative procedure.

49. The defendants and the interveners claim, in essence, that the applicant's argument put forward in the fifth plea in law must be seen as a corollary of the assessment in respect of the principle of proportionality. There is no procedural requirement to conduct an impact assessment on which the lawfulness of a measure depends. The legislature is required only to show that it acted in full knowledge of all the basic facts needed for its decision-making and the judicial review is also limited to manifest error in this instance. These parties assert that the impact assessment was not the only source of information for the EU legislature during the procedure for the adoption of the contested decision and that the various points which were not studied, in the view of the applicant (namely, the early implementation of the MSR in relation to the date proposed by the Commission and the setting of threshold values) were, in contrast, the subject of discussions and consultations, which were public where necessary. Lastly, in accordance with case-law, the EU legislature cannot be criticised for not taking into account the particular situation of a Member State.

Analysis

50. The obligation to carry out an impact assessment does not constitute a ground on which the lawfulness of a measure can be assessed. In this regard, the only requirement is that the institutions show the factors taken into consideration, on which the legitimate exercise of their discretion depends, while the legislature must be able to assess all the relevant factors and circumstances of the situation the act adopted was intended to regulate. [50] The Court has regularly included in its

48 OJ 2003 C 321, p. 1. The applicant also relies on the Interinstitutional Agreement on impact assessment in law-making (Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions: Better regulation for better results — An EU agenda, COM(2015) 215 final).

49 Commission Staff Working Document 'Better Regulation Guidelines' (SWD(2015) 111 final of 19 May 2015).

50 See judgment of 7 September 2006, *Spain* v *Council* (C-310/04, EU:C:2006:521, paragraph 122).

assessment of proportionality the complaints raised in connection with absence, deficiency or inconsistency of an impact assessment, thereby making it a kind of corollary of the proportionality test. I propose also following this approach here and I will therefore deal with the last two pleas in law raised in the application together.

51. With regard to the fifth plea in law, the Republic of Poland alleges, first, that the Commission carried out a subjective and incomplete impact assessment and, second, that the Parliament and the Council did not analyse the consequences of the measures that they were preparing to adopt, which differed from the proposals whose impact had been assessed by the Commission.

52. I would first note that the Court has already held that the impact assessment accompanying a proposed legislative measure 'is not binding on either the Parliament or the Council … Consequently, the EU legislature remains free to adopt measures other than those which were the subject of that impact assessment. Therefore, the mere fact that it adopted a different and, as the case may be, more onerous measure than the measures envisaged by the Commission in the impact assessment [by the Commission] is not such as to demonstrate that it manifestly exceeded the limits of what was necessary in order to achieve the stated objective'.[51] In addition, during the legislative process, the institutions must have taken account of the available evidence and the opinions of the interested parties.[52]

53. The impact assessment cannot therefore be required to examine exhaustively all the effects of the proposed measure. In any event, it is clear from the impact assessment criticised by the applicant that it envisaged the potential impact of the different options set out in the proposal on the formation of the price of allowances, on EU competitiveness, on costs for energy-intensive sectors and predictable social impacts.[53] Having regard to the Court's case-law, the impact assessment seems to have allowed the EU legislature to take note of the critical issues behind each of the options envisaged.

54. In addition, it is clear from the documents before the Court that, in addition to the 2012 Commission report and the January 2014 impact assessment, a meeting of experts organised by the Commission was held on 25 June 2014, a number of delegations to the Council submitted their own assessments of the effects of the different options presented by the Commission in its impact assessment at meetings of the Working Party on the Environment,[54] a discussion between certain operators and national experts was held on 8 September 2014 and the Parliament organised a workshop on 5 November 2014. Most of these meetings were the subject of a summary report, available online, or a public information notice. In addition, according to the information available to the Court, matters relating to the setting of thresholds or the start date for the MSR were discussed. The institutions which adopted the contested decision therefore seem to have shown satisfactorily that in adopting the decision they actually exercised their discretion, which presupposes the taking into consideration of all the relevant factors and circumstances of the situation the decision was intended to regulate.[55] I would note, lastly, that the Parliament, the Council or the Commission cannot be criticised for not taking into account the applicant's alleged particular situation with regard to the carbon market. The Court has already rejected a similar argument on the ground that the measure in question 'has an impact in all Member States and requires that a balance between the different interests involved is ensured, taking account of the objectives of that [measure]. Therefore, the attempt to strike such a balance, taking into account not the particular situation of a single Member State, but that of all EU Member States, cannot be regarded as being contrary to the principle of proportionality'.[56]

51 Judgment of 4 May 2016, *Pillbox 38* (C-477/14, EU:C:2016:324, paragraph 65 and the case-law cited).

52 Judgment of 4 May 2016, *Pillbox 38* (C-477/14, EU:C:2016:324, paragraph 66).

53 See paragraphs 7.2, 7.4, 7.4.1, 7.4.2 and 7.5 of the impact assessment.

54 The study conducted by the UK representation was published.

55 See, by analogy, judgment of 7 September 2006, *Spain* v *Council* (C-310/04, EU:C:2006:521, paragraph 122).

56 Judgment of 18 June 2015, *Estonia* v *Parliament and Council* (C-508/13, EU:C:2015:403, paragraph 39).

55. As regards the complaint alleging an infringement of the principle of proportionality, it should be noted that that principle 'is one of the general principles of European Union law and requires that measures implemented through European Union law provisions be appropriate for attaining the legitimate objectives pursued by the legislation at issue and must not go beyond what is necessary to achieve them'.[57] The Court has also held that, '[w]ith regard to judicial review of those conditions, however, the European Union legislature must be allowed a broad discretion when it is asked to intervene in an area which entails political, economic and social choices on its part, and in which it is called upon to undertake complex assessments. In its judicial review of the exercise of such powers, the Court cannot substitute its own assessment for that of the European Union legislature. It could, at most, find fault with its legislative choice only if it appeared manifestly incorrect or if the resultant disadvantages for certain economic operators were wholly disproportionate to the advantages otherwise offered'.[58] It has further recognised that 'the introduction of an EU-wide scheme for accounting and trading of carbon dioxide equivalent emission allowances was a legislative choice which translated a political orientation in a context of urgency in addressing serious environmental concerns … That legislative choice was, moreover, based on highly complex and lengthily debated economic and technical considerations … In order to contribute towards the fulfilment of their commitments by the European Union and its Member States under the Kyoto Protocol, the European Union legislature was thus led to consider itself the future, uncertain effects of its action'.[59] As I stated above,[60] the Court has already had occasion to affirm the complexity of the ETS.

56. It therefore seems that the Court could find fault with the disproportionality of the contested decision only if the EU legislature made a manifest error. However, that is not the case here. Once the objective actually pursued has been identified — which has already been done, to a large extent, in the analysis of the first plea in law — I will establish that the contested decision appears to be an appropriate measure for attaining that objective, which does not go beyond what is necessary and does not subject the economic operators concerned to disadvantages disproportionate to the advantages of the decision.

57. As regards the objective pursued, the applicant has focused its arguments on an incorrect analysis. It is very simplistic to claim that the contested decision has no aim other than to ensure that the EU achieves the emissions reduction targets set by international commitments and, in particular, the target fixed for the year 2020. The EU has never hidden its intention to go further than the internationally set targets, as is clearly expressed in Directive 2009/29 in particular.[61] In any event, the objective pursued by the legislature and identified in determining the legal basis for the measure in question may not be different from the objective on the basis of which the examination of observance of the principle of proportionality must be conducted. I would therefore reiterate[62] that, in my view, the contested decision was conceived as a means to stabilise the carbon market which is known to have a surplus of allowances and as an instrument to respond to the various threats preventing the ETS from operating in an efficient manner in the long term.[63]

58. In the light of that objective, and taking into account the data available to the institutions at the time when they took action, I cannot identify any manifest error of assessment, which is the only ground for finding fault.

57 Judgment of 17 October 2013, *Billerud Karlsborg and Billerud Skärblacka* (C-203/12, EU:C:2013:664, paragraph 34 and the case-law cited).

58 Judgment of 17 October 2013, *Billerud Karlsborg and Billerud Skärblacka* (C-203/12, EU:C:2013:664, paragraph 35 and the case-law cited).

59 Judgment of 17 October 2013, *Billerud Karlsborg and Billerud Skärblacka* (C-203/12, EU:C:2013:664, paragraph 36).

60 See point 40 of this Opinion.

61 See, in particular, recitals 4 to 6 of Directive 2009/29. The European Council considers that the reduction targets set internationally may be exceeded; see its conclusions of 23 and 24 October 2014, cited in point 22 of this Opinion.

62 See point 19 et seq. of this Opinion.

63 See again recital 5 of the contested decision.

59. The 2012 Commission report [64] had highlighted the structural imbalance affecting the ETS which necessitated legislative intervention to restore its proper functioning. As I have explained, that legislative intervention resulted in the establishment of a reserve in which surplus allowances will be placed temporarily while the allowance market regains its balance. In the event that this balance is jeopardised not by a surplus of allowances but by a deficit of allowances, the reserve will release onto the market the allowances which have been temporarily placed in it. Such a mechanism therefore proves to be perfectly appropriate for the objective pursued of reducing the volatility of the allowance market. It should also be noted that the withdrawal of allowances is temporary and that the MSR will not start to operate until 2019. The legislature thus allowed operators more than three years to make preparations.

60. Accordingly, the legislative choice made by the legislature does not appear to be manifestly incorrect. Furthermore, the Republic of Poland has not demonstrated that the resultant disadvantages for certain economic operators were disproportionate to the advantages otherwise offered in accordance with the abovementioned case-law [65] because, first, there is no direct link between the MSR and the formation of the price of allowances and, second, the main objective — it should be recalled — is to stabilise the price of allowances.

61. For these reasons, the fourth and fifth pleas in law should be rejected as unfounded.

Conclusions of the analysis

62. Having concluded that all the pleas in law raised by the applicant should be rejected, I suggest that the Court dismiss the action in its entirety.

Costs

63. Under Article 138(1) of the Rules of Procedure of the Court of Justice, 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 Parliament and the Council have applied for costs, the Republic of Poland must be ordered to pay the costs incurred by those two institutions.

64. Furthermore, under Article 140(1) of the Rules of Procedure, the Kingdom of Denmark, the Kingdom of Spain, the French Republic, the Kingdom of Sweden and the Commission, as interveners, must bear their own costs.

Conclusion

65. In the light of the foregoing considerations, I propose that the Court:

(1) dismiss the action;

(2) order the Republic of Poland to pay the costs incurred by the European Parliament and the Council of the European Union;

(3) order the Kingdom of Denmark, the Kingdom of Spain, the French Republic, the Kingdom of Sweden and the European Commission to bear their own costs.

64 See point 22 of this Opinion.

65 See point 55 of this Opinion.