

The Decision from the Court of First Instance that Destroyed the European Union Emissions Trading Scheme

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I. INTRODUCTION

The Climate Summit in Copenhagen was another attempt by world powers to control the overwhelming problems concerning climate change. Commentators’ opinions vastly differed as to the success of the summit, with some claiming

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failure and others claiming a great victory.¹ One commentator described the city of Copenhagen during the Climate Summit as a “crime scene [], with the guilty men and women fleeing to the airport.”²

While the European Union came to the summit with the goal of drastically decreasing emissions to thirty percent below 1990 levels, an additional ten percent below the Kyoto Protocol requirements, the United States offered a mere four percent emissions decrease from 1990 levels.³ Several commentators believe the failure of the summit was due to President Obama’s refusal to sign the Kyoto Protocol or his unwillingness to decrease emissions below a four percent cut.⁴ These two factors, combined with President Obama leaving the city before the final vote, gave commentators plenty to discuss.⁵ However, critics should also consider the implications of the European Union’s overly ambitious goal of decreasing emissions by thirty percent.⁶

Member States of the European Union are already having difficulties meeting the requirements set forth in the Kyoto Protocol and the European Union’s Emissions Trading Scheme.⁷ The difficulties surrounding compliance with the Kyoto Protocol are so burdensome that they have led some commentators to question the meaning and benefits of accession to the European Union.⁸ Poland, for example, estimates that it will need to purchase emission allowances by 2013 in order to meet the emissions obligations of the European Union Emission’s Trading Scheme.⁹ Poland’s alternative to buying allowances is to purchase natural gas from Russia, a cleaner energy source that could help reduce Poland’s emission levels;¹⁰ however, Russia’s natural gas supply is not very reliable.¹¹

Poland’s inability to rely on a natural gas supply, and its fear of purchasing

1. Leigh Phillips, *EU Carbon Prices Fall Following Copenhagen Flop*, EUOBSERVER.COM, Dec. 12, 2009, <http://euobserver.com/9/29191>; Darren Samueloshn, *Obama Negotiates ‘Copenhagen Accord’ With Senate Climate Fight in Mind*, N.Y. TIMES, Dec. 21, 2009, available at <http://www.nytimes.com/cwire/2009/12/21/21climatewire-obama-negotiates-copenhagen-accord-with-senat-6121.html>.

2. John Vidal, Allegra Stratton & Suzanne Goldenberg, *Low Targets, Goals Dropped: Copenhagen Ends in Failure*, GUARDIAN (U.K.), Dec. 19, 2009, available at <http://www.guardian.co.uk/environment/2009/dec/18/copenhagen-deal>.

3. Phillips, *supra* note 1; Vidal, *supra* note 2.

4. Vidal, *supra* note 2 (commentators believed that the summit was a failure because “the so-called Copenhagen accord ‘recognises’ the scientific case for keeping temperature rises to no more than 2C but does not contain commitments to emissions reductions to achieve that goal.”).

5. *Id.*

6. Phillips, *supra* note 1.

7. UNFCCC, *National Greenhouse Gas Inventory Data for the Period 1990-2007*, U.N. Doc. FCCC/SBI/2009/12 (Oct. 21, 2009), available at <http://unfccc.int/resource/docs/2009/sbi/eng/12.pdf>.

8. CARBON TRUST, *EU ETS PHASE II ALLOCATION: IMPLICATIONS AND LESSONS 11* (2007), available at <http://www.carbontrust.co.uk/Publications/pages/publicationdetail.aspx?id=CTC715>.

9. Jan Cienski & Joshua Chaffin, *Uphill Struggle for Coal-Fired Poland*, FIN. TIMES (U.K.), Oct. 30, 2008, available at http://www.ft.com/cms/s/0/c47e7d6e-a6eb-11dd-95be-000077b07658.html?nclink_check=1.

10. *Id.*; Amy Littlefield, *Montana Revokes Permit for New Coal-Fired Power Plant*, L.A. TIMES, Aug. 7, 2009, available at <http://latimesblogs.latimes.com/greenspace/2009/08/coal-power-plant-natural-gas-.html>.

11. Littlefield, *supra* note 10.

emission allowances in the future, forced it to submit a national allocation plan that projected an increase in emissions from previous years.¹² The Commission of the European Communities (Commission) rejected the plan but gave Poland an ultimatum: consent to a decreased amount of emission allowances, in which case the plan would be accepted, or refuse the decreased amount of emission allowances and the plan would be rejected.¹³ The Commission's proposed amount of emission allowances was less than seventy-five percent of what Poland had requested.¹⁴

Poland refused the Commission's alternative; instead, Poland went to the Court of First Instance and requested an annulment of the Commission's decision to reject Poland's plan.¹⁵ Contrary to the expectations of commentators, the Court agreed with Poland, finding that the "Commission exceeded its power."¹⁶ The Commission's attempt to place strict guidelines on carbon polluters was too excessive for the Court, whose ruling could lead to an addition of more than 50 million tons of emission allowances plunging into the market.¹⁷

The Court's ruling caused a decrease in carbon trading prices¹⁸ and has illustrated that the Commission's power of review is much more limited than once thought.¹⁹ The ruling is also a victory for Eastern European States,²⁰ several of whom were considering action against the Commission themselves.²¹

The European Union Court of First Instance's decision to limit the Commission's power could very well be the judgment that destroys the European Union Emission's Trading Scheme. The purpose of this comment is to discuss the Court of First Instance's decision to limit the Commission's power, why that decision was incorrect, the effects of that ruling on the European Union, and potential measures to correct the European Union Emission's Trading Scheme.

Section II will provide background information on the United Nations Framework Convention on Climate Change, the Kyoto Protocol, the European

12. MINISTRY OF THE ENVIRONMENT, NATIONAL ALLOCATION PLAN FOR CO₂ EMISSION ALLOWANCES: 2005-2007 TRADING PERIOD (2004) (Pol.), *available at* <http://www.ieta.org/ieta/www/pages/getfile.php?docID=992> [hereinafter POLAND'S 2005-2007 NAP]; MINISTRY OF THE ENV'T, NATIONAL ALLOCATION PLAN FOR CO₂ EMISSION ALLOWANCES FOR 2008-2012 SETTLEMENT PERIOD (2006) (Pol.) [hereinafter POLAND'S 2008-2012 NAP] (on file with Pacific McGeorge Global Business and Development Law Journal).

13. Commission Decision of 26 Mar. 2007, 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 (regarding POLAND'S 2008-2012 NAP).

14. *Estonia, Poland Win Back Pollution Permits in EU Court*, EU BUSINESS, Sept. 23, 2009, *available at* <http://www.eubusiness.com/news-eu/climate-warming.16/>; Commission Decision of 26 Mar. 2007, *supra* note 13.

15. Case T-183/07, Republic of Pol. v Comm'n, 2009 E.C.R. 00, 2009 WL 3011634.

16. Carl Mortished, *European Carbon Trading Market Takes Hit*, THE TIMES ONLINE (U.K.), Sept. 24, 2009, *available at* <http://www.timesonline.co.uk/tol/news/world/europe/article6846674.ece>.

17. *Id.*

18. *Id.*

19. *Id.*

20. *Id.*

21. Biopact Team, *EU Emission Trading Scheme Faces Revolt in Eastern Europe*, THE BIOPACT (Belg.), Aug. 1, 2007, <http://news.mongabay.com/bioenergy/2007/08/eu-emission-trading-scheme-faces-revolt.html>.

Union Emission's Trading Scheme, and national allocation plans. Section III will discuss the *Poland v. Commission*, Court of First Instance case. Section IV will discuss the Commission's current authority, the effects of the Court's decision, the Commission's decision to appeal, and potential measures to correct the European Union Emission's Trading Scheme. Finally, section V will conclude by suggesting several actions that could be taken to ensure the integrity and survival of the European Union Emission's Trading Scheme.

II. BACKGROUND

A. *The United Nations Framework Convention on Climate Change*

In 1992, the United Nations Framework Convention on Climate Change (UNFCCC) was adopted and signed by 192 Parties.²² The UNFCCC was established with the objective of saving the climate system by stabilizing the greenhouse gas concentrations in the atmosphere.²³ The UNFCCC was a great step forward for climate change, but only "encouraged" nations to stabilize their greenhouse gas emissions;²⁴ however, that changed when the UNFCCC adopted the Kyoto Protocol (Protocol).

B. *The Kyoto Protocol*

The Protocol not only encouraged stabilization of greenhouse gas emissions, but "committed" industrialized nations to a plan of action.²⁵ The plan gave real substance to the objective of the UNFCCC by establishing solid emissions reduction targets. If the plan were implemented successfully, it would reduce overall greenhouse gas²⁶ emissions by at least five percent below 1990 levels by 2012²⁷ and would represent an overall decrease of about thirty percent of "business as usual" emissions.²⁸

22. U.N. Framework Convention on Climate Change [UNFCCC], *Parties to the Convention and Observer States*, http://unfccc.int/parties_and_observers/parties/items/2352.php (last visited Apr. 11, 2010); UNFCCC, *Introduction to the United Nations Framework Convention on Climate Change (UNFCCC) and its Kyoto Protocol*, http://unfccc.int/press/fact_sheets/items/4978.php (last visited Apr. 11, 2010).

23. United Nations Framework Convention on Climate Change art. 2, Jun. 20, 1992, S. TREATY DOC NO. 102-38, available at <http://unfccc.int/resource/docs/convkp/conveng.pdf>.

24. UNFCCC, *Kyoto Protocol*, http://unfccc.int/kyoto_protocol/items/2830.php (last visited Apr. 11, 2010) (discussing Kyoto Protocol).

25. *Id.*

26. Greenhouse gases include carbon dioxide, methane, nitrous oxide, hydrofluorocarbons, perfluorocarbons, and sulphur hexafluoride. Kyoto Protocol to the United Nations Framework Convention on Climate Change Annex A, Dec. 10, 1997, 37 I.L.M. 22 [hereinafter Kyoto Protocol].

27. Kyoto Protocol, *supra* note 26.

28. Brendan P. McGivern, *Introduction to Kyoto Protocol*, *supra* note 26, at n5.

The Protocol was adopted in 1997, after ten days of strenuous negotiations,²⁹ at the third session of the Conference of the Parties.³⁰ During the seventh session, the “Marrakesh Accords” established the detailed rules for implementation of the Protocol,³¹ which has been operational since it was entered into force in 2005.³² The Protocol established three flexible methods for the Parties to reach their emissions obligations: emissions trading, joint implementations, and clean development mechanisms.³³

At the time the Protocol was ratified, the European Union had fifteen members.³⁴ These fifteen Member States recognized that climate change was one of the most important matters affecting modern society and agreed that action must be taken.³⁵ As a result, they committed themselves above and beyond the emissions reduction requirements of the Protocol. The Member States agreed to set their reduction obligations of greenhouse gas emission levels at eight percent below 1990 levels by the 2008 to 2012 commitment period, compared to the five percent reduction required by the Protocol.³⁶ Although this commitment was more demanding than the Protocol’s requirements, it appeared to be an achievable goal, unlike their current thirty percent reduction goal.

To accomplish the European Union’s difficult task of reducing its emissions, the Member States agreed to initiate an “efficient European market in greenhouse gas emission allowances.”³⁷ This emissions market became known as the European Union Emissions Trading Scheme (EU ETS).³⁸

C. European Union Emissions Trading Scheme

The EU ETS originates from Directive 2003/87/EC,³⁹ which established an emissions market that allows trading of allowances amongst the European Member States.⁴⁰ Each allowance is the right to emit one ton of carbon dioxide equivalent during a specified period.⁴¹ The EU ETS is a mandatory cap-and-trade

29. *Id.*

30. *Id.* at n4.

31. United Nations Framework Convention on Climate Change, U.N. Doc. FCCC/CP/2001/13 (Jan. 21, 2002).

32. Kyoto Protocol, *supra* note 26, art. 3, § 2.

33. Kyoto Protocol, *supra* note 26.

34. EUROPA, *Climate Change*, http://ec.europa.eu/environment/climat/home_en.htm (last visited Apr. 11, 2010).

35. Council Directive 2003/87, 2003 O.J. (L 275) 32, ¶ 2 (EC), [hereinafter EU ETS Directive] (establishing a scheme for greenhouse gas emission allowance trading within the Community).

36. *Id.*

37. *Id.*, ¶ 5.

38. EUROPA, *Emissions Trading System*, http://ec.europa.eu/environment/climat/emission/index_en.htm (last visited Mar. 9, 2010).

39. EU ETS Directive, *supra* note 35.

40. *Id.*

41. *Id.*, art. 3(a) (defining an allowance as “an allowance to emit one tonne of carbon dioxide equivalent during a specified period”).

scheme for all Member States.⁴² The scheme permits Member States to trade allowances on an open market in order to satisfy their requirements under the Protocol.⁴³ The scheme also establishes an automatic penalty for non-compliance that varies depending upon which phase of the program is currently in operation.⁴⁴ The EU ETS operates in three phases: phase I ran from 2005 through 2007,⁴⁵ phase II runs from 2008 through 2012,⁴⁶ and phase III will run from 2013 to 2020.⁴⁷

Phase I was a pilot program designed to work out any problems and only allowed carbon dioxide trading.⁴⁸ The pilot program discovered one major problem: the Commission released more allowances than there were greenhouse gas pollutants being created by the industries.⁴⁹ The large supply of allowances saturated the emissions trading market.⁵⁰ When an economic market has more supply than demand, the end result is a collapse in market prices.⁵¹ In this case, the excess supply in allowances far exceeded Member States' demand, resulting in a collapse in market prices for emission allowances.⁵² The Commission corrected this problem for phase II by drastically reducing the amount of allowances given to the Member States;⁵³ however, this route resulted in unanticipated consequences with Poland and Estonia challenging the Commission's authority.⁵⁴

Phase II was designed to run simultaneously with the Kyoto Protocol and included additional greenhouse gas emissions.⁵⁵ Phase II also increased the

42. JANE ELLIS & DENNIS TIRPAK, ORGANISATION FOR ECONOMIC CO-OPERATION AND DEVELOPMENT, *Linking GHG EMISSION TRADING SYSTEMS AND MARKETS* (2006), available at <http://www.oecd.org/dataoecd/45/35/37672298.pdf>.

43. Kyoto Protocol, *supra* note 26, art. 17.

44. DALLAS BURTRAW, RECOMMENDATIONS FOR DESIGNING A GREENHOUSE CAP-AND-TRADE SYSTEM FOR CALIFORNIA: RECOMMENDATIONS OF THE MARKET ADVISORY COMMITTEE TO THE CALIFORNIA AIR RESOURCE BOARD 16 (2007), available at http://www.climatechange.ca.gov/events/2007-06-12_mac_meeting/2007-06-01_MAC_DRAFT_REPORT.PDF.

45. EU ETS Directive, *supra* note 35, art. 11.

46. *Id.*

47. Council Directive 2009/29, 2009 O.J. (L 140) 63 (EC), available at <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2009:140:0063:0087:EN:PDF>.

48. Robert N. Stavins, *A Meaningful U.S. Cap-and-Trade System to Address Climate Change*, 32 HARV. ENVTL. L. REV. 293, at 302 (2008).

49. Michael Lawton, *EU Court Threatens Cap-and-Trade System*, DEUTSCHE WELLE, Sept. 23, 2009, available at <http://www.dw-world.de/dw/article/0,,4717782,00.html>.

50. *Id.*

51. See INVESTOPEA.COM, ECONOMIC BASICS 7 (2006), <http://i.investopedia.com/inv/pdf/tutorials/economics.pdf>.

52. *EU Price Collapse Sparks Calls for Intervention*, CARBON FINANCE (U.K.), Mar. 6, 2009, available at <http://www.carbon-financeonline.com/index.cfm?section=lead&action=view&id=11903>.

53. See e.g., Lawton, *supra* note 49 (discussing the Commission's ruling ordering Poland and Estonia to submit a new a plan which would further reduce their potential emissions).

54. *Id.*

55. PEW CENTER ON GLOBAL CLIMATE CHANGE & PEW CENTER ON THE STATES, CLIMATE CHANGE 101: CAP AND TRADE 7 (2009), available at <http://www.pewclimate.org/docUploads/Climate101-CapTrade-Jan09.pdf> [hereinafter CLIMATE CHANGE 101: CAP AND TRADE].

automatic penalty for non-compliance from €40 per ton to €100 per ton.⁵⁶ The penalty increase will likely create a strong incentive to comply because an EU allowance is currently trading on the market for roughly €15 per ton.⁵⁷ Even with an expected increase in EU allowance market trading prices,⁵⁸ the outlandish penalty of €100 per ton will surely deter non-compliance.

Although the current penalty might be considered excessive, some believe the penalty is appropriate because phase II also initiates an ability to “bank” allowances.⁵⁹ Unlike phase I, where allowances “expired” at the end of the phase, allowances acquired during phase II are transferrable to phase III through a process called banking.⁶⁰ A Member State may bank any surplus allowances not used during phase II and use those allowances for phase III.⁶¹ Commentators believe that the ability to bank surplus allowances will result in a price increase towards the end of phase II.⁶² As Member States realize they will be short on allowances for phase III, analysts expect to see the price per allowance reach upwards of €100.⁶³ They predict this outcome because companies will attempt to build a supply of allowances after realizing they will be short for phase III.⁶⁴ This thought-process suggests that the €100 penalty fee might not be high enough.

Although each phase of the EU ETS differs, they all require Member States to submit a National Allocation Plan (NAP).⁶⁵ The NAPs for phase I were due one year before the initiation of the phase, and phase II plans were required to be prepared and published by June 2006.⁶⁶

D. National Allocation Plans

NAPs are essential to the EU ETS.⁶⁷ These plans determine the amount of emission allowances each Member State will be allocated.⁶⁸ Member States

56. BURTRAW, *supra* note 44; CLIMATE CHANGE 101: CAP AND TRADE, *supra* note 55; JOSEPH KRUGER & WILLIAM A. PIZER, THE EU EMISSIONS TRADING DIRECTIVE: OPPORTUNITIES AND POTENTIAL PITFALLS, RESOURCES FOR THE FUTURE 6 (2004), available at <http://www.rff.org/RFF/Documents/RFF-DP-04-24.pdf>.

57. BURTRAW, *supra* note 44; Laurence Peter, *EU Soft on Polluters, Greens Say*, BBC NEWS, July 22, 2009, available at <http://news.bbc.co.uk/2/hi/europe/8163571.stm>.

58. Michael Grubb, *Time to Act on Carbon Markets*, BBC NEWS, Apr. 15, 2009, available at <http://news.bbc.co.uk/2/hi/science/nature/8000156.stm>.

59. See Stephen Gardner, *EU ETS: The Winners and Losers of EU Carbon Trading*, CLIMATE CHANGE CORP: CLIMATE NEWS FOR BUSINESS, Sept. 22, 2008, <http://www.climatechangecorp.com/content.asp?ContentID=5654>; see also KRUGER & PIZER, *supra* note 56.

60. KRUGER & PIZER, *supra* note 56.

61. Andrzej Werkowski, *Polish Banking Rules: Uncertainties Remain*, EUETS.COM, Oct. 19, 2006, <http://www.euets.com/index.php?page=news&newsid=43&l=1>.

62. Gardner, *supra* note 59.

63. *Id.*

64. *See id.*

65. EU ETS Directive, *supra* note 35, art. 9.

66. Memorandum, Questions and Answers for Emissions Trading and National Allocation Plans for 2008 to 2012, at 2 (Nov. 29, 2006), available at http://ec.europa.eu/environment/climat/pdf/m06_452_en.pdf.

67. *See id.* at 1.

68. EU ETS Directive, *supra* note 35, Annex III.

develop a NAP for each trading period.⁶⁹ In each NAP, a Member State decides how many allowances will be granted to industries in its country for each year of the trading period.⁷⁰ The Member State also determines how many allowances each covered entity will receive.⁷¹

Upon completion of a Member State's NAP, it is submitted to the Commission.⁷² The Commission then evaluates the plan to determine if it is in compliance with the Directive.⁷³ The Commission's power to review a NAP is very limited⁷⁴ and the Commission may only reject a NAP if it is determined to be "incompatible" with Annex III or with Article 10.⁷⁵

The criteria set out in Annex III requires that the amount of allowances be consistent with the Kyoto Protocol emissions target,⁷⁶ that there be no discrimination between companies or sectors,⁷⁷ that the plan take into consideration comments from the public,⁷⁸ and that the plan contain information regarding technological potential to reduce emissions.⁷⁹ Additionally, Member States should not attempt to over-allocate allowances and should account for economic considerations.⁸⁰

The criteria set out in Article 10 requires Member States to assign a minimum of ninety-five percent of allowances to industries at no cost during phase I and ninety percent of allowances at no cost during phase II.⁸¹ The NAP may be rejected within three months from the time notification is received; however, if this time period lapses, the NAP "becomes definitive and enjoys a presumption of legality which permits the Member State to put it into effect."⁸²

The NAPs tend to create a great deal of problems and controversies.⁸³ In November 2006, the Commission evaluated the first ten NAPs for the EU ETS phase II.⁸⁴ In assessing the numbers, the Commission determined that, on aggregate, the projected emissions would result in a five percent increase over

69. John C. Dernbach & Seema Kakade, *Climate Change Law: An Introduction*, 29 ENERGY L. J. 1, 13-14 (2008).

70. *Id.*

71. *Id.*

72. EU ETS Directive, *supra* note 35, art. 9; Dernbach & Kakade, *supra* note 69.

73. EU ETS Directive, *supra* note 35, art. 9; Dernbach & Kakade, *supra* note 69.

74. Case T-183/07, Republic of Pol. v Comm'n, 2009 E.C.R. 00, 2009 WL 3011634, ¶ 36.

75. *Id.*, ¶ 36; EU ETS Directive, *supra* note 35, art. 9.

76. EU ETS Directive, *supra* note 35, Annex III ¶ 1.

77. *Id.*, Annex III ¶ 5.

78. *Id.*, Annex III ¶ 9.

79. *Id.*, Annex III ¶¶ 3, 8.

80. *Status of the EU ETS*, CLIMATE ACTION NETWORK EUROPE, Mar. 16, 2009, http://www.climnet.org/index.php?option=com_content&view=article&id=55&Itemid=67; Dernbach & Kakade, *supra* note 69; EU ETS Directive, *supra* note 35, Annex III.

81. EU ETS Directive, *supra* note 35, art. 10.

82. Case T-183/07, Republic of Pol. v Comm'n, 2009 E.C.R. 00, 2009 WL 3011634, ¶ 41.

83. See *Estonia, Poland Win Back Pollution Permits in EU Court*, *supra* note 14.

84. CARBON TRUST, *supra* note 8, at 6.

2005 levels.⁸⁵ Although this number represented a slight decrease below projected “business-as-usual” emission levels, the number also illustrated a failing emissions scheme that would likely not meet the Protocol targets, especially not the recently unveiled ambitious 30 percent reduction goal the EU considered imposing on itself.⁸⁶

The Commission had to address the discrepancies in numbers in order to preserve the integrity of the EU ETS.⁸⁷ First, the Commission claimed that the NAPs were in violation of the Directive and rejected all but the United Kingdom’s allocation plan, finding them to be incompatible with the criteria listed in Annex III.⁸⁸ Second, the Commission interpreted the Directive as granting the Commission the power to set total emission allocations that would be deemed acceptable.⁸⁹ These “acceptable” levels of emissions were determined by a simple numerical formula and applied to all NAPs.⁹⁰

The application of this formula was a drastic attempt to limit the amount of allowances given to Member States. Two Member States, Poland and Estonia, were especially affected by the formula’s adoption and received the worst of the Commission’s decision.⁹¹ Poland’s allowances were reduced by more than a quarter and Estonia lost nearly half of its allowances.⁹² The radical reduction in emissions for the two Member States will likely have a significant impact on Poland and Estonia’s economies, which are dependent on “old-fashioned coal plants.”⁹³

Although the Commission was forced to act in order to reach Protocol compliance, this was likely not the correct step.⁹⁴ Since the Commission applied the same numerical formula to all NAPs, one successful challenge to the Commission’s interpretation of the Directive could result in an opening of “floodgates” for all Member States to appeal.⁹⁵ Germany was the first Member State to threaten litigation against the Commission over the interpretation of the Directive, but it eventually withdrew its threat.⁹⁶ With Germany’s withdrawal, several other countries removed their legal challenges and it began to appear as if the Commission had successfully changed a five percent increase over 2005 emission levels to a five percent decrease below 2005 emission levels.⁹⁷

85. *Id.* at 6.

86. *See id.*

87. *See id.*

88. *Id.*

89. *See id.*

90. *Id.*

91. *See Estonia, Poland Win Back Pollution Permits in EU Court*, *supra* note 14.

92. *Id.*

93. *See Andrew Rettman, Poland Tries to Shed Image of EU Climate Villain*, EUOBSERVER.COM, Dec. 11, 2009, <http://euobserver.com/885/29140>.

94. *See CARBON TRUST*, *supra* note 8.

95. *Id.* at 6.

96. *Id.* at 6, 11.

97. *Id.*

However, this was not the case.⁹⁸

1. *Poland's National Allocation Plan*

The European Committee of the Polish Council of Ministers approved Poland's NAP in June 2006.⁹⁹ The plan discussed Poland's efforts to aid in the accomplishment of the objectives and requirements of the Directive by following an accepted methodology for preparing NAPs.¹⁰⁰ There are two main methods for preparing NAPs: "sectoral" and gross domestic product (GDP).¹⁰¹ Poland used the "sectoral" method.¹⁰²

Although Poland did not use the "GDP" method, it is important to explain.¹⁰³ This method is an analysis of the "GDP" of a Member State as a whole, and then by each sector's¹⁰⁴ GDP individually.¹⁰⁵ The next step is to forecast the expected increases in GDP.¹⁰⁶ The current GDP and the projected increase in GDP are used to determine emission allocations for the sectors.¹⁰⁷

The "sectoral" method consists of "defining the volume of emissions allowances for each sector to be allocated amongst the entities maintaining the installations."¹⁰⁸ This method, in essence, looks to the amount of emissions for each sector over the previous years and then allocates forecasted future emissions to those sectors pursuant to the objectives of the Directive.¹⁰⁹ Through use of the "sectoral" method, Poland determined that it needed 279.608285 million tons of emissions for the period of 2008-2012.¹¹⁰ Poland reached this conclusion by analyzing fourteen individual sectors and deciding the number of allowances allocated to each sector.¹¹¹

The Commission registered Poland's initial NAP in July 2006.¹¹² Poland and the Commission corresponded for a few months regarding the plan and

98. Case T-183/07, Republic of Pol. v Comm'n, 2009 E.C.R. 00, 2009 WL 3011634.

99. POLAND'S 2008-2012 NAP, *supra* note 12.

100. *Id.* at 8-10, 29-30.

101. See Pol. v. Comm'n, 2009 E.C.R. 00, ¶ 55.

102. POLAND'S 2008-2012 NAP, *supra* note 12, at 22.

103. Pol. v. Comm'n, 2009 E.C.R. 00, ¶ 55.

104. For the duration of POLAND'S 2008-2012 NAP, the word "sector" is referring to a distinct subset of a market/industry. For example, Poland's NAP sectors included: the utility power, combined heat and power plants, utility heating plants, refining industry, coking industry, iron and steel industry, cement industry, lime industry, paper industry, glass industry, ceramic industry, chemical industry, and sugar industry. POLAND'S 2008-2012 NAP, *supra* note 12, at 53.

105. See, e.g., MINISTRY OF ENVIRONMENT AND WATER MANAGEMENT, ROMANIAN NATIONAL ALLOCATION PLAN FOR THE PERIODS 2007 AND 2008-2012, 9-11 available at http://ec.europa.eu/environment/climat/pdf/nap_romania_final.pdf.

106. *Id.*

107. *Id.*

108. POLAND'S 2008-2012 NAP, *supra* note 12, at 22.

109. *Id.* at 22-23.

110. *Id.* at 52.

111. *Id.* at 52-69.

112. Commission Decision of 26 Mar. 2007, *supra* note 13, ¶ 1.

eventually, after Poland sent additional information in order to complete the plan, the Commission reduced the total amount of Poland's emissions by 76.132937 million tons.¹¹³ This reduction represented a decrease of more than twenty-five percent in emissions from what Poland had initially requested.¹¹⁴

Poland refused to accept the Commission's decision to reduce emissions; instead, Poland continued to fight for the right to emit greenhouse gas pollutants and attempted to regain the total amount of emissions requested.¹¹⁵ "Poland argued that, because of its power industry's dependence on Soviet-era coal, its NAP deserved special treatment when submitted to the Commission for approval."¹¹⁶ The Commission thought Poland was seeking leniency and "generous allocations" in an effort to compensate for Poland's low GDP.¹¹⁷ Accordingly, the Commission "insisted that all EU Members . . . abide by common rules and expectations."¹¹⁸ The Commission's lack of leniency brought both parties to the European Union Court of First Instance.¹¹⁹

III. POLAND V. COMMISSION¹²⁰

A. *Background*

Poland acquires approximately ninety-six percent of its electricity needs from coal-burning plants,¹²¹ an energy source that is the primary cause of climate change due to its high level of carbon dioxide emissions.¹²² Poland estimates it will need to purchase emission allowances by 2013 in order to meet the obligations of the EU ETS.¹²³ As stated above, the price on the market per allowance is currently approximately €15;¹²⁴ however, that number could jump to €100¹²⁵ by the end of phase II, right at the time Poland expects it will need to purchase allowances.¹²⁶ With Poland's future electricity costs expected to soar by ninety percent, purchasing emissions could be extremely detrimental to Poland's economy.¹²⁷

Poland's alternative is to purchase natural gas from Russia, a route that raises

113. *Id.*, ¶ 13.

114. POLAND'S 2008-2012 NAP, *supra* note 12; Commission Decision of 26 Mar. 2007, *supra* note 13.

115. Case T-183/07, Republic of Pol. v. Comm'n, 2009 E.C.R. 00, 2009 WL 3011634.

116. Mortished, *supra* note 16.

117. CARBON TRUST, *supra* note 8, at 11.

118. *Id.*

119. Pol. v. Comm'n, 2009 E.C.R. 00.

120. *Id.*

121. Cienski & Chaffin, *supra* note 9; Rettman, *supra* note 93.

122. *See* Littlefield, *supra* note 10.

123. Cienski & Chaffin, *supra* note 9.

124. BURTRAW, *supra* note 44; Peter, *supra* note 57.

125. Gardner, *supra* note 59.

126. Cienski & Chaffin, *supra* note 9.

127. *Id.*

its own set of concerns.¹²⁸ One commentator said that Russia has monopolistic control over the natural gas markets¹²⁹ because roughly one-quarter of the European Union's natural gas is being imported from Russia.¹³⁰ European fears over winter fuel shortages continue to grow as Russia's power over the natural gas markets becomes more apparent.¹³¹ These fears over fuel shortages have become a common part of life throughout Europe, and for good reason.¹³² In January 2009, Russia, once again,¹³³ dramatically stopped all natural gas exported to Europe, causing natural gas shortages¹³⁴ and heightening concerns across Europe.¹³⁵

Since Poland's access to natural gas is unreliable and the cost to purchase emission allowances will probably cause financial turmoil, its attempt to decrease emissions in order to comply with the EU ETS will likely be seen as unattainable.¹³⁶ Given that Poland's situation is similar to other Member States, it follows that the European Union as a whole might have difficulty reducing emissions by thirty percent below 1990 levels.¹³⁷ With Poland unable to rely on a guaranteed supply of natural gas and the looming concern of purchasing emission allowances in the future, Poland was forced to submit a national allocation plan that projected an increase in emissions from previous years.¹³⁸

In June 2006, Poland sent the Commission its NAP for the EU ETS phase II.¹³⁹ The plan included details regarding compliance with each of the listed

128. *Id.*

129. Megan K. Stack & Sebastian Rotella, *Flow of Russian Natural Gas to Europe Cut*, S.F. CHRONICLE, Jan. 7, 2009, at A2.

130. Stack & Rotella, *supra* note 129; see *Putin Seals New Turkey Gas Deal*, BBC NEWS, Aug. 6, 2009, available at <http://news.bbc.co.uk/1/hi/business/8186946.stm> (commentator discusses Russia's new pipeline deal that will flow natural gas from Russia to Europe through Turkey, a measure that will increase Russia's control).

131. Stack & Rotella, *supra* note 129; see Isabel Gorst & Geoff Dyer, *Pipeline Brings Asian Gas to China*, FIN. TIMES (U.K.), Dec. 14, 2009, available at <http://www.ft.com/cms/s/0/38fc5d14-e8d1-11de-a756-00144feab49a.html> (commentator discusses a deal between Turkey and the European Union crumbling because Turkey decided to sell the natural gas to China instead).

132. Stack & Rotella, *supra* note 129.

133. Gregory Feifer, *Russia Stops Natural Gas Sales to Ukraine*, NAT'L PUB. RADIO, Jan. 2, 2006, available at <http://www.npr.org/templates/story/story.php?storyId=5079105> (commentators discussing Russia cutting off natural gas supplies to Ukraine in 2005).

134. Stack & Rotella, *supra* note 129; Andrew E. Kramer, *Russia Cuts Off Gas Deliveries to Ukraine*, N.Y. TIMES, Jan. 1, 2009, available at <http://www.nytimes.com/2009/01/02/world/europe/02gazprom.html>.

135. Stack & Rotella, *supra* note 129; for an alternative view, see Owen Matthews, *So Long, Salad Days*, NEWSWEEK, Feb. 24, 2010, available at <http://www.newsweek.com/id/234060> (commentator recognizes Russia as the largest exporter of gas, but believes its status of "energy superpower" is fading because of drying reserves, other countries seeking alternative sources due to the unreliable flow and high costs, and investors in natural gas reserves are unwilling to work with Russia).

136. See Leigh Phillips, *Poland Attempts to Delay Europe's CO₂ Reduction Target*, EUOBSERVER.COM, Dec. 7, 2009, <http://euobserver.com/885/29111>.

137. *See id.*

138. POLAND'S 2005-2007 NAP, *supra* note 12, at 17; POLAND'S 2008-2012 NAP, *supra* note 12, at 15.

139. POLAND'S 2008-2012 NAP, *supra* note 12, at 2.

criteria set out in Annex III of the Directive.¹⁴⁰ According to the NAP, Poland intended to annually allocate 284.648332 million tons-equivalent of carbon dioxide to the industries covered by the Directive.¹⁴¹ The Commission replied in August 2006, stating that Poland's NAP was incomplete and "not compatible" with criteria numbers 2¹⁴² and 5¹⁴³ of Annex III of the Directive;¹⁴⁴ consequently, the Commission requested additional information. Poland eventually complied with the Commission's request in December 2006.¹⁴⁵

In March 2007, the Commission officially rejected Poland's NAP, indicating that the NAP "infringed" on several criteria listed in Annex III.¹⁴⁶ However, the Commission stated it would not make any further objections if Poland made several amendments to the NAP.¹⁴⁷ Among the requests, the Commission required Poland's total quantity of allowances be reduced by 76.132937 million tons per year,¹⁴⁸ thereby fixing Poland's maximum amount of emissions at 208.515395 million tons.¹⁴⁹

B. Plea I: "[I]llegal adoption of the contested decision after the expiry of the three-month period"

Poland argued that the Commission waived its right to reject the NAP, pursuant to Article 9(3),¹⁵⁰ because the three-month time period began to run upon the Commission's receipt of the incomplete NAP; hence, the three-month period expired before an official rejection.¹⁵¹ The Commission claimed that a "reasonable" interpretation of the Directive demonstrates that the three-month period should only begin to run upon notification of a "complete NAP."¹⁵² Under this reasonable interpretation, the Court should apply the three-month period to the date the amended NAP was registered; thus, the time period for rejecting the

140. *Id.* at 8.

141. Commission Decision of 26 Mar. 2007, *supra* note 13, ¶ 3.

142. EU ETS Directive, *supra* note 35, Annex III (criteria number 2 states in part that "[t]he total quantity of allowances to be allocated shall be consistent with assessments of actual and projected progress towards fulfilling the Member States' contributions to the Community's commitments . . .").

143. *Id.* (criteria number 5 states in part that "[t]he plan shall not discriminate between companies or sectors in such a way as to unduly favour certain undertakings or activities. . .").

144. Case T-183/07, Republic of Pol. v. Comm'n, 2009 E.C.R. 00, 2009 WL 3011634, ¶ 11.

145. *Id.*, ¶ 13.

146. *Id.*, ¶ 14; Commission Decision of 26 Mar. 2007, *supra* note 13.

147. Commission Decision of 26 Mar. 2007, *supra* note 13, art. 2 ("No objections shall be raised to the [NAP], provided that the following amendments to the [NAP] are made in a non-discriminatory manner and notified to the Commission as soon as possible, taking into account the time-scale necessary to carry out the national procedures without undue delay.").

148. *Id.*

149. *Id.*

150. EU ETS Directive, *supra* note 35, art. 9(3) (stating in part: "[w]ithin three months of notification of a national allocation plan by a Member State under paragraph 1, the Commission may reject that plan, or any aspect thereof, on the basis that it is incompatible with the criteria listed in Annex III or with Article 10).

151. Pol. v. Comm'n, 2009 E.C.R. 00, ¶¶ 27, 28, 29, 30.

152. *Id.*, ¶ 31.

NAP would not have expired.¹⁵³

The Court held that the three-month period to reject a NAP begins to run regardless of whether the plan is complete or not; otherwise, a Member State could continually postpone the Commission's decision.¹⁵⁴ The Court points out that Article 9(3) expressly states, "the starting-point of the three-month period is the notification of the NAP" and the Commission never denied receiving notification.¹⁵⁵ The Court clearly indicated that the Commission's three-month period to reject Poland's NAP began to run in June 2006,¹⁵⁶ however, the Court established an alternative reading to the three-month time period expiring.¹⁵⁷

The Court initially stated that when the time period expires, the NAP "becomes definitive and enjoys a presumption of legality which permits the Member State to put it into effect."¹⁵⁸ However, this presumption is different from what the Court later deemed to be a presumption of authorization of the NAP.¹⁵⁹ A presumption of authorization is a general acceptance of a NAP while a presumption of legality only allows the Member State to implement the NAP.¹⁶⁰ The difference between the two presumptions allows the Commission to adopt a decision to reject a NAP after the expiration period.¹⁶¹ Thus, when the Commission raises an objection or requests additional information regarding a NAP, the Court considers the three-month period to be suspended until the NAP is amended by the Member State.¹⁶² Consequently, Poland's first plea for illegal adoption of the contested decision after the expiry of the three-month period was dismissed.¹⁶³

C. Plea II: "Infringement of the duty to state reasons and of Article 9(1) and (3) of the Directive"

1. Adopting and Applying a Single Method of Economic Analysis

Poland accused the Commission of violating "Community law" and "principles[s] of cooperation" by deciding to use the "GDP method," rather than the "sectoral method."¹⁶⁴ The Commission applied the "GDP method" after giving no indication to the Member States of its plan to use this method until

153. *Id.*

154. *Id.*, ¶ 35.

155. *Id.*, ¶ 39.

156. *Id.*, ¶ 37.

157. *See* Pol. v. Comm'n, 2009 E.C.R. 00, ¶ 37.

158. *Id.*, ¶ 41.

159. *See id.*, ¶ 42.

160. *Id.*

161. *Id.*, ¶ 43.

162. *Id.*, ¶ 43.

163. Pol. v. Comm'n, 2009 E.C.R. 00, ¶ 47.

164. *Id.*, ¶¶ 55, 58.

October 2006.¹⁶⁵ By this point in time, it was too late.¹⁶⁶ Poland had already submitted its NAP using the “sectoral method” of economic analysis.¹⁶⁷ Poland stated that the Commission’s failure to provide Member States with notification for which method of economic analysis would be used in evaluating NAPs was the direct reason for Poland applying the incorrect method and therefore the Commission should not replace Poland’s method.¹⁶⁸

In response, the Commission argued that the “GDP” method for economic analysis is the “most accurate” and delivers the most “reliable estimates of GDP growth and carbon intensity improvement rates;” hence, the Commission’s decision to replace Poland’s “sectoral” method with the “GDP” method was justified by concerns of accuracy and reliability.¹⁶⁹ The Court disagreed and found that the Commission’s argument was not sufficient justification for replacing Poland’s “sectoral” method.¹⁷⁰

The Commission then argued that the “principle of equal treatment” between Member States should allow the Commission to apply a single method for assessing NAPs.¹⁷¹ If the Commission is not allowed to apply the same method to each Member State’s NAP, Member States’ emission reductions would likely vary and create an atmosphere of unfair treatment.¹⁷² Consequently, the Commission should be granted the power to use a single method of economic analysis. The Court disagreed with the Commission’s arguments, stating:

To allow the Commission to use a single method of assessing NAPs for all the Member States would amount to acknowledging it as having not only a veritable power of uniformisation in the context of implementing the allowance trading system, but also a central role in the drawing up of NAPs. Neither such a power of uniformisation nor such a central role were conferred on the Commission by the legislature in the Directive, in the context of its power of reviewing NAPs.¹⁷³

2. Fixing a Ceiling for Emission Allowances

Poland next accused the Commission of violating Article 9(3) of the Directive by setting a ceiling for the total quantity of allowances Poland could allocate.¹⁷⁴ Poland believed that the Commission exceeded its power of review by

165. *Id.*, ¶ 55.

166. *Id.*

167. *Id.*

168. *Id.*, ¶¶ 55, 58.

169. *Pol. v. Comm’n*, 2009 E.C.R. 00, ¶ 145.

170. *Id.*, ¶ 103.

171. *Id.*, ¶ 65.

172. *Id.*

173. *Id.*, ¶ 106.

174. *Id.*, ¶¶ 70, 99.

fixing a ceiling and essentially replacing Poland's NAP.¹⁷⁵ The Commission claimed that it did not replace the NAP but instead established a "maximum level for the total quantity of allowances to be allocated."¹⁷⁶ The Commission then attempted to justify the fixed limit on Poland's quantity of allowances by providing examples of other Member States' NAPs that were not rejected.¹⁷⁷ However, the examples only demonstrated that other Member States accepted the Commission's forced reduction of allowances, not that the reductions were authorized by the Directive.¹⁷⁸

The United Kingdom and Ireland, as amici, also stated that for an assessment of a NAP to be accurate and correct, it must take into consideration the potentially negative effects of an excess supply.¹⁷⁹ The Commission found an excess in supply within Poland's NAP.¹⁸⁰ Based on this finding, the Commission contended that it had the power to reduce a NAP's emissions in order to protect the Member States and the carbon market from the risk of a collapse in the market, similar to what happened during phase I.¹⁸¹

The Commission also contended that Poland's NAP was not in compliance with the Directive.¹⁸² The Commission acknowledged that it reduced Poland's NAP by 76.132937 million tons, but only after performing an analysis of Poland's NAP pursuant to criteria listed in Annex III of the Directive.¹⁸³ First, the Commission confirmed Poland's actual emissions for 2005; second, the Commission forecasted Poland's GDP growth for 2010; and, finally, the Commission analyzed the carbon intensity trends from 2005 to 2010.¹⁸⁴ Based on this analysis, the Commission concluded that Poland's NAP was in violation of the Directive and was therefore justified in reducing its emissions.¹⁸⁵

The Court disagreed with the Commission's arguments that it was not replacing Poland's NAP by fixing a ceiling for emissions.¹⁸⁶ Although the Commission has the authority to review and reject a NAP,¹⁸⁷ only a Member State has the power to decide the total quantity of allowances it will allocate.¹⁸⁸ The Court noted that prior case law¹⁸⁹ has clearly established that only the

175. See *Pol. v. Comm'n*, 2009 E.C.R. 00, ¶ 121.

176. *Id.*, ¶ 122.

177. *Id.*, ¶ 66.

178. See *id.*, ¶ 66.

179. *Id.*, ¶ 64.

180. See *Pol. v. Comm'n*, 2009 E.C.R. 00, ¶ 64.

181. *Id.*

182. *Id.*, ¶ 62.

183. *Id.*, ¶¶ 62-63.

184. *Id.*, ¶ 63.

185. See *id.*, ¶ 14.

186. *Id.*, ¶¶ 123, 125, 131.

187. *Pol. v. Comm'n*, 2009 E.C.R. 00, ¶ 124.

188. *Id.*, ¶¶ 126, 131.

189. Case C-503/07, *Saint-Gobain Glass Deutschland v. Comm'n*, 2008 E.C.R. I-2217, 2008 WL 1720518.

Member States may decide the total quantity of allowances to allocate.¹⁹⁰ Therefore, the Court held the “Commission exceeded the powers conferred upon it” by fixing a ceiling for Poland’s emissions.¹⁹¹

3. Replacing Data in National Allocation Plans

Poland next argued that the Commission violated Article 9(1) by substituting Poland’s data with the Commission’s own data “without relevant reasoning” and by using an “incoherent application of its own method of economic analysis,” thereby finding Poland’s data to be erroneous.¹⁹² Poland also accused the Commission of basing its conclusion only on the fact that the projected emissions stated in the plan were greater than emissions from previous years.¹⁹³

Poland stated that the Commission was not authorized to replace its data in the NAP.¹⁹⁴ Poland argued that the Commission had an “erroneous and unjustified interpretation . . . of its role in the process of assessing NAPs.”¹⁹⁵ Poland indicated that Annex III of the Directive¹⁹⁶ gave Member States the power to create their own method for economic analysis using data collected by that Member State.¹⁹⁷ The Member State could then use the compiled data for allocating allowances to the economic sectors.¹⁹⁸ Poland argued that the Commission should have independently assessed each individual sector using the same data Poland used in preparing its NAP.¹⁹⁹ Essentially, Poland argued that the Commission may only review and scrutinize data supplied by the Member State; thus, the Commission had no right “to replace the data in that Member State’s NAP with its own data” for the purpose of analyzing the economic method established by the Member State.²⁰⁰

In response, the Commission argued that the data it used in reviewing Poland’s NAP was within its power derived from the Directive because data assessment was a form of review and the Commission has been granted the power of review.²⁰¹ Poland claimed that the substitution of its data was in

190. Pol. v. Comm’n, 2009 E.C.R. 00, ¶ 126.

191. *Id.*, ¶ 123.

192. *Id.*, ¶¶ 48, 54.

193. *Id.*, ¶ 49; Commission Decision of 26 Mar. 2007, *supra* note 13 (stating that in 2005, Poland had verified emissions of about 203 million tons, but Poland’s NAP for phase II requested about 76 million additional tons).

194. Pol. v. Comm’n, 2009 E.C.R. 00, ¶ 54.

195. *Id.*, ¶ 52.

196. EU ETS Directive, *supra* note 35, Annex III (“Quantities of allowances to be allocated shall be consistent with the potential, including the technological potential, of activities covered by this scheme to reduce emissions. Member States may base their distribution of allowances on average emissions of greenhouse gases by product in each activity and achievable progress in each activity.”).

197. Pol. v. Comm’n, 2009 E.C.R. 00, ¶ 51.

198. *Id.*

199. *Id.*, ¶¶ 50-51.

200. *Id.*, ¶ 54.

201. *Id.*, ¶ 77.

violation of the Commission's power and that the Commission should not be allowed to change a NAP's data at its discretion.²⁰² The Court agreed with Poland, finding the Commission "misjudged the extent of its powers as defined in the Directive."²⁰³

The Court did recognize prior case law²⁰⁴ granting the Commission the power of "discretion" when carrying out "complex economic and ecological assessments"²⁰⁵ The Court stated that the Commission could develop its own method of assessing NAPs based on data that it collected.²⁰⁶ The Commission may then use the results from its method to compare the data contained in the Member State's NAP.²⁰⁷ It appears that, with this power of discretion, the Commission may create a method that requires "complex economic and ecological assessments" and that method could not be "challenged unless it would lead to a manifest error of assessment."²⁰⁸ However, the Court noted that this method cannot be used to set aside the Member State's own data.²⁰⁹ Although the Commission is granted the power to review the "choice of data" selected by the Member State,²¹⁰ the Commission may not "set aside the data in the NAP in question so as to replace them at the outset by data obtained from its own assessment method."²¹¹ Therefore, it appears that the Commission's power is limited to creating a method for comparison purposes, but not applying that method to all NAPs.²¹²

The Commission next questioned the accuracy of the data provided by Poland²¹³ and argued that Annex III and Article 10 of the Directive required use of the "most objective and reliable data"²¹⁴ Poland contested that some of the data had been used in a report to the UNFCCC that was previously examined and approved by the Commission.²¹⁵ Nevertheless, the Commission indicated that this fact did not give automatic "recognition" to the data.²¹⁶

Poland argued that the Commission failed to provide any proof that the data supplied by Poland was not reliable or incorrect under the circumstances, and that the Commission was required to make a "complete argument" explaining

202. *Id.*, ¶ 78.

203. *Pol. v. Comm'n*, 2009 E.C.R. 00, ¶ 100.

204. *Id.*, ¶ 89 (citing Case T-374/04, *F.R.G. v. Comm'n*, 2007 E.C.R. II-4431, 2007 WL 3274223).

205. *Id.*, ¶¶ 89, 102; *see F.R.G. v. Comm'n*, 2007 E.C.R. II-4431, ¶ 2. *But see Pol. v. Comm'n*, 2009 E.C.R. 00, ¶ 103.

206. *Pol. v. Comm'n*, 2009 E.C.R. 00, ¶ 102.

207. *Id.*

208. *Id.*

209. *Id.*, ¶ 103.

210. *Id.*, ¶ 101.

211. *Id.*, ¶ 103.

212. *Pol. v. Comm'n*, 2009 E.C.R. 00, ¶¶ 102-03.

213. *Id.*, ¶¶ 68-69.

214. *Id.*, ¶ 65.

215. *Id.*, ¶ 68.

216. *Id.*

how the data violated the Directive.²¹⁷ The Court agreed, finding that the Commission did not identify any of the “less reliable” data in Poland’s NAP²¹⁸ and failed to give any justification for why the data in the NAP was not reliable.²¹⁹ The Court also rejected the Commission’s claim that the data in Poland’s NAP was overestimated,²²⁰ finding the Commission’s only reasoning and basis for the allegation being that the contested NAP’s allowances were higher than Poland’s last trading period NAP.²²¹ The Court found the Commission’s decision to replace Poland’s NAP was based on a mere “hypothesis” and therefore incorrect.²²²

The Court concluded that the Commission’s decision to replace Poland’s method for economic analysis and the data Poland used in its NAP was without justification.²²³ The Court noted that Member States have “manoeuver”²²⁴ in developing their NAPs and the Commission may not interrupt with speculative allegations that lack sufficient reasoning.²²⁵ In sum, the Court of First Instance ruled that the Commission’s decision, regarding Poland’s NAP for the period 2008 to 2012, should be annulled.²²⁶

IV. DISCUSSION

A. *The Current Authority of the Commission*

The Court of First Instance acknowledged Poland’s allegation that the Commission had breached the “essential rules” of the Directive.²²⁷ The Court stated that the Commission’s power is “severely limited, both in substantive terms and in time.”²²⁸ The Directive gave the Commission the power to “review and reject NAPs,” but not to fix a ceiling for emissions.²²⁹ Inferring such a power is in violation of the Directive because Article 9 indicates that the Commission may reject a plan “on the basis that it is incompatible with the criteria listed in Annex III or with Article 10.”²³⁰ The Court also stated that “a Member State alone has the power . . . to draw up the NAP” and to fix the total quantity of

217. *Id.*, ¶¶ 50, 52.

218. *Pol. v. Comm’n*, 2009 E.C.R. 00, ¶¶ 146-48.

219. *Id.*, ¶ 145.

220. *Id.*, ¶ 146.

221. *See id.*, ¶¶ 144-46.

222. *Id.*, ¶ 146.

223. *Id.*, ¶ 153.

224. *Pol. v. Comm’n*, 2009 E.C.R. 00, ¶ 153 (“Manoeuver,” as the Court uses the word, is implied to mean discretion.)

225. *Id.*

226. *Id.*, Ruling Section, ¶ 1.

227. *Id.*, ¶ 73.

228. *Id.*, ¶ 36.

229. *Id.*, ¶ 89.

230. EU ETS Directive, *supra* note 35, art. 9(3).

allowances it will distribute.²³¹

Additionally, if the Commission rejects a NAP, it is required to give firm reasoning for that rejection.²³² For example, rejecting Poland's NAP on the basis that there were "doubts" as to the reliability of Poland's data was not sufficient reasoning to justify a rejection.²³³ Since the Commission is required to give firm reasoning for any rejection, it may not secretly set a fixed ceiling and continuously reject a NAP until that Member State's emissions are below the unknown ceiling.²³⁴ Essentially, the Commission will no longer be allowed to set a fixed ceiling or make suggestions on a set amount of emission allocations.

The Court also limited the Commission's power in the NAP process. The Commission may not change or alter the Member States' data that is used in assessing its final emission allocations. The Court also indicated that the Commission cannot choose a single method for economic analysis because such a decision was reserved for each Member State.²³⁵ Allowing the Commission to choose a single method for economic analysis would exceed the authority conferred upon it by the Directive, and would give the Commission a power of "uniformisation" and a "central role," both of which were not granted to the Commission by the Directive.²³⁶

B. The Effects of the Court of First Instance's Decision

The Court of First Instance's decision sent shockwaves throughout Europe. On the day of the decision, market emission prices declined four percent in value. One carbon trader stated the "decision was 'totally unexpected' and 'defies belief' ahead of United Nations-led climate talks set to take place in Copenhagen, Denmark in December."²³⁷

Although the Court's ruling was initially considered the downfall of the EU ETS, these early "end of the world" debates could be premature. Market emission prices increased by almost fourteen percent in the month following the ruling.²³⁸ This implies that the EU ETS has endured the Court's ruling and will survive. Emission market traders have stated that the "initial fears about a re-assessment

231. Press Release, Court of Justice of the European Union, Judgments of the Court of First Instance in Case T-183/07 and in Case T-263/07 (Sept. 23, 2009), available at http://curia.europa.eu/jcms/jcms/P_52446/ [hereinafter Press Release, Judgments of the Court of First Instance].

232. *Id.*

233. Press Release, Judgments of the Court of First Instance, *supra* note 231; see *Pol. v. Comm'n*, 2009 E.C.R. 00, ¶ 90 ("[T]he Commission must be regarded as entitled, when assessing an [sic] NAP, to make specific criticisms as to incompatibilities found . . .").

234. EU ETS Directive, *supra* note 35, art. 9(3).

235. *Pol. v. Comm'n*, 2009 E.C.R. 00, ¶¶ 105-06.

236. Press Release, Judgments of the Court of First Instance, *supra* note 231.

237. *Carbon Prices Fall Following Bearish Dance with Underlying Energy Complex, Court Ruling*, RENEWABLE ENERGY REPORT, Oct. 5, 2009, Issue 189, available at 2009 WLNR 20651232 [hereinafter *Bearish Dance*].

238. *EU Carbon Prices Rebound in October Thanks to Economic, Allowances News*, RENEWABLE ENERGY REPORT, Nov. 2, 2009, Issue 191, available at 2009 WLNR 23051035.

of Poland and Estonia's carbon allocations were overblown, and it was not certain that the outcome of the court's ruling would the [sic] lead the [Commission] to issue new [emission allowances]."²³⁹

However, other market traders are still worried about the potential impacts of the Court's decision on the EU ETS.²⁴⁰ They believe that the Commission is required, by the Court's ruling, to give Poland an additional 76.132937 million tons of allowances.²⁴¹ According to the market analysts and emission traders, these allowances would hit the market in mid-2010.²⁴² If true, the market would be flooded with excess emission allowances and would likely crash due to an over-supply.²⁴³ The outcome of a market crash would be similar to the result in phase I, which was exactly what the Commission was attempting to avoid. While there are apparent negative consequences to a market crash, a positive effect of the crash would be a rise in emissions compliance. Industries would be more likely to comply with emission guidelines because the cost per allowance on the market would probably be lower than the €100 penalty for non-compliance.

However, the *Poland v. Commission* decision only hurts the efforts of the Commission to reduce the European Union's emissions, and comes at a time when people were beginning to believe the emissions trading scheme might work.²⁴⁴ In 2009, there were positive signs that the emissions trading scheme was operating with success.²⁴⁵ Emissions among the industries covered²⁴⁶ dropped between four percent and six percent during 2008.²⁴⁷ The Court's ruling disrupts the Commission's ability to combat climate change and casts doubt in the minds of those who were beginning to believe in the program's success.²⁴⁸

C. The Commission's Decision to Appeal

Several commentators appear comforted by the Commission's decision to appeal the case, possibly because they believe the Court of First Instance's holding will never stand.²⁴⁹ The Commission's appeal claims that the Court of

239. *Id.*

240. *Bearish Dance*, *supra* note 237.

241. *Id.*; Commission Decision of 26 Mar. 2007, *supra* note 13, ¶ 1.

242. *Bearish Dance*, *supra* note 237.

243. *Id.*

244. James Kanter, *E.U. Carbon Trading System Shows Signs of Working*, N.Y. TIMES, Apr. 1, 2009, available at <http://www.nytimes.com/2009/04/02/business/global/02climate.html>.

245. See UNFCCC, *National Greenhouse Gas Inventory Data for the Period 1990-2007*, *supra* note 7; Alexandra Galin, *The European Emissions Trading Scheme is Now a Success*, GUARDIAN (U.K.), Nov. 17, 2009, available at <http://www.guardian.co.uk/environment/2009/nov/17/carbon-emissions-trading-reduction-markets>.

246. Industries covered pursuant to Annex I of the Directive include: energy activities, production and processing of ferrous metals, mineral industry, and a few other activities.

247. Kanter, *supra* note 244.

248. Mortished, *supra* note 16; Court Ruling Threatens EU Emissions Plan, CLEAN SKIES NEWS, Sept. 23, 2009, <http://www.cleanskies.com/articles/court-ruling-threatens-eu-emissions-plan>.

249. See Pete Harrison, *EU Appeals Ruling on Poland, Estonia Carbon Quotas*, REUTERS, Dec. 3, 2009,

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First Instance erroneously interpreted the Directive by limiting the Commission's powers in the NAP assessment process.²⁵⁰ The Commission believes that the Court of First Instance read the Directive too narrowly and that the Court failed to take into account the fundamental purpose of the EU ETS: reduction of greenhouse gas emissions.²⁵¹ The Commission also claims that equal treatment of Member States during the NAP assessment process is an essential part of the EU ETS and that the Court should have given more weight to this consideration rather than implying that equal treatment was an inconsequential aspect.²⁵²

The Commission's decision to appeal the case does not immediately resolve the current issues with the EU ETS, and an appeal does not automatically guarantee that the Court of First Instance's decision will be overruled.

D. Potential Measures to Correct the EU ETS

1. The Method for Economic Analysis

The Commission argued that all Member States must receive equal treatment with regards to assessing NAPs.²⁵³ It suggested that all NAPs should be assessed under the same method of economic analysis, but the Court held that the Commission cannot use a single method of assessing NAPs.²⁵⁴ The Court claimed that granting the Commission the power to implement a uniform NAP assessment process and the power to have a "central role in the drawing up of NAPs" would go beyond the legislative intent of the Directive.²⁵⁵

This author believes the Court of First Instance was incorrect in this ruling. The Court stated that Member States "unequivocally" have the power to draw up a NAP and have maneuver in choosing the method used to accomplish the goals of the Directive;²⁵⁶ however, this was an incorrect reading of the Directive. The Directive does not "unequivocally" give Member States the power to choose which method of economic analysis to apply in assessing its data. The sections referred to by the Court merely indicate that Member States shall decide the "total quantity of allowances it will allocate" and divide up those allowances

available at <http://www.reuters.com/article/idUSGEE5B21B0>.

250. Press Release, Commission Appeals Against Rulings in Polish and Estonian National Allocation Plan Cases (Sept. 23, 2009), *available at* http://ec.europa.eu/environment/climat/emission/pdf/nap_appeals.pdf [hereinafter Press Release, Commission Appeals]; Press Release, Questions and Answers in relation to the Commission's decision to appeal in Cases T-183/07 and T-263/07 (Sept. 23, 2009), *available at* http://ec.europa.eu/environment/climat/emission/pdf/qa_appeal_091203.pdf [hereinafter Press Release, Questions and Answers].

251. Press Release, Commission Appeals, *supra* note 250; Press Release, Questions and Answers, *supra* note 250.

252. Press Release, Commission Appeals, *supra* note 250; Press Release, Questions and Answers, *supra* note 250.

253. Case T-183/07, Republic of Pol. v Comm'n, 2009 E.C.R. 00, 2009 WL 3011634, ¶ 57.

254. *Id.*, ¶ 106.

255. *Id.*

256. *Id.*, ¶¶ 85, 88.

amongst the installations.²⁵⁷

The Court should interpret the intent of the Directive and the Commission's power more broadly. Article 14 of the Directive gives the Commission the power to "adopt guidelines for monitoring and reporting of emissions."²⁵⁸ Article 22 of the Directive grants the Commission the power to amend Annex III.²⁵⁹ Article 24 states that the Commission "may on its own initiative . . . adopt monitoring and reporting guidelines for emissions."²⁶⁰ These articles, along with several more, infer that the Commission has more power than what the Court found. The Commission should have the power to adopt a method for economic analysis and apply that method to all Member States.

Allocating more power to the Commission will not breach the separation of powers established in the Directive.²⁶¹ The Court stated that giving the Commission a central role in drawing up NAPs was not a power derived from the Directive.²⁶² This "central role" power would not amount to a breach of the separation of powers because Member States would still decide the total quantity of allowances it will allocate, a power specifically granted to Member States by Article 11(2) of the Directive.²⁶³ However, as mentioned above, there are several Articles in the Directive that imply a power to give guidance in completing NAPs and consequently a power to select a single method of analysis.

The Court states that the act of fixing a ceiling for allowances was a breach of the separation of powers.²⁶⁴ Conversely, the act of selecting a single method is entirely different than fixing a ceiling for allowances. A single method of analysis would give Member States guidance towards the accomplishment of the Directive's goals whereas fixing a ceiling is an act of complete control.

The Court also stated that it was "not for the Commission, by virtue of the principle of equal treatment between Member States, to select and apply a single method for assessing the NAPs." The Court's rationale here is incorrect. By allowing the Commission to choose and apply one method for economic analysis, the Member States will receive equal treatment by virtue of having every NAP drawn up in a uniform manner. Member States would still develop their own NAPs, stating the total quantity of allowances and how they propose to allocate those allowances. However, Member States would be required to prepare the data they collected in accordance with the method for economic analysis that was chosen by the Commission.

Although the adoption of a single method for economic analysis might not

257. EU ETS Directive, *supra* note 35, arts. 11(2), 9(1).

258. *Id.*, art. 14.

259. *Id.*, art. 22 (noting, however, that the Commission may not amend Annex III criteria (1), (5) and (7) for the period from 2008 to 2012).

260. *Id.*, art. 24(3).

261. *See id.*, arts. 9, 11.

262. Case T-183/07, Republic of Pol. v Comm'n, 2009 E.C.R. 00, 2009 WL 3011634, ¶ 106.

263. EU ETS Directive, *supra* note 35, art. 11(2).

264. Pol. v. Comm'n, 2009 E.C.R. 00, ¶ 129.

take into consideration the specific needs and concerns of each individual Member State, increasing the Commission's power to choose a single method is critical to the progression of the EU ETS. Without this power, the EU ETS might easily crumble and become an ineffective means for conquering climate change. By giving the Member States the power of maneuver, the Court has essentially granted Member States the ability to cheat the system. Member States may now choose their own method for economic analysis; with this power, each Member State will probably perform both analyses and then select the method that allocates the most allowances to them. Not only is this outcome not in the best interest of the Directive, but it is contrary to its intent, it conflicts with the legislative goals of decreasing emissions, and it is not supported by the powers granted to the Commission within the Directive itself; therefore, the Commission's power must be expanded.

2. *The Commission's Power to Fix Emissions*

One commentator stated that "the Commission needs the right to propose numbers in NAP negotiations with national governments, not just the right to reject or approve the country's own suggestions. Otherwise, it cannot safeguard the ultimate point of emissions trading - cutting emissions - or make sure all member states contribute to this goal."²⁶⁵ Although this author agrees, there are several considerations in determining whether the Commission should be granted the power to fix a ceiling for a Member State's emissions.

The Commission attempted to argue that, if they could not fix a ceiling for the amount of emission allowances to be allocated, there would be a serious risk of collapse in the emissions trading market.²⁶⁶ The Court failed to alleviate the concerns of a market crash when it responded that the Commission's argument could not "justify maintaining the contested decision in force" because that action would "breach [] the distribution of powers between the Member States and the Commission."²⁶⁷ The intent of the legislature appears to be in agreement.²⁶⁸

Although giving the Commission the power to set an emissions ceiling would be a breach of the separation of powers, the EU ETS needs some type of "bite." If the Commission had not violated the Directive by reducing Member States' emissions, the EU ETS would have seen a five percent increase over 2005 emission levels.²⁶⁹ The European Union would become a laughingstock, having drastically failed to meet the Protocol's requirements of eight percent below 1990 levels. With the European Union increasing the emission levels required by the

265. Isabel Save, *Commission Confirms Legal Battle Over NAPs*, ICIS CHEM. BUS., Dec. 14, 2009, available at 2009 WLNR 25250245.

266. *Pol. v. Comm'n*, 2009 E.C.R. 00, ¶ 129.

267. *Id.*

268. See EU ETS Directive, *supra* note 35.

269. See EU ETS Directive, *supra* note 35; CARBON TRUST, *supra* note 8.

Protocol from five percent to eight percent, and then its recent discussions at Copenhagen to increase to thirty percent below 1990 levels, a failure to reach specified levels would not help the European Union's reputation.

By giving the Commission the power to fix a ceiling for emissions, the Commission would effectively control the entire NAP process. This was clearly not the intent of the legislature because the Directive states, "Member States shall decide upon the total quantity of allowances it will allocate."²⁷⁰ Nevertheless, the Directive also says the emissions scheme should "promote reductions of greenhouse gas emissions in a cost-effective and *economically efficient* manner."²⁷¹ Additionally, the Directive indicates that the scheme should create "an efficient European market in greenhouse gas emission allowances, with the *least possible diminution of economic development* and employment."²⁷² Giving the Commission complete control over the NAP process would likely result in a successful emissions scheme, but at the cost of large economic diminution for Member States.

Poland's attempt to comply with the emission reduction requirements would likely result in carbon leakage. Carbon leakage occurs when companies and industries relocate to other countries in order to avoid paying excessive costs to pollute.²⁷³ Poland would not be able to alleviate the carbon leakage because its distribution of emission allowances would be limited to what the Commission approved.

Worst of all, the Commission released a report in December 2009, which determined "mining and agglomeration of hard coal"—a large industry in Poland—is "exposed to a significant risk of carbon leakage."²⁷⁴ Therefore, Poland could be hit hard if the Commission were granted the power to fix emission ceilings. Poland's industries would be faced with the dilemma of moving out of the country, paying excessive costs for allowances on the market, or receiving severe fines for lack of compliance. Generally, it is economically sensible to take the first option and move out of the country. That is why carbon leakage is considered one of the leading fears of cap-and-trade systems²⁷⁵ and is another valid reason for limiting the Commission's power to fix a ceiling for Member States' emissions.

Beyond the concerns of carbon leakage is Poland's inability to comply with such a low emissions ceiling. As one commentator stated, "coal is king in

270. EU ETS Directive, *supra* note 35, art. 11(2).

271. *Id.*, art. 1 (emphasis added).

272. *Id.*, ¶ 5 (emphasis added).

273. Danny Fortson, *Chemicals Boss Warns of Exodus*, SUNDAY TIMES (U.K.), Dec. 7, 2008, available at http://business.timesonline.co.uk/tol/business/industry_sectors/industrials/article5299219.ece.

274. Council Directive 2010/2, Annex, 2010 O.J. (L 001) (EC), available at <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2010:001:0010:0018:EN:PDF> (including a list of sectors and subsectors which are deemed to be exposed to a significant risk of carbon leakage).

275. Brooks V. Rice, *The "Triumph" of the Commons: An Analysis of Enforcement Problems and Solutions in the Western Climate Initiative*, 22 PAC. MCGEORGE GLOBAL BUS. & DEV. L.J. 401, 417 (2010).

Poland.”²⁷⁶ With an estimated 140 years’ worth of coal reserves and ninety-six percent of Poland’s electricity being coal-powered, the commentator’s statement appears to be a correct representation of Poland’s situation.²⁷⁷ Because coal is one of the highest polluting sources for power in the world,²⁷⁸ the Commission’s drastic reduction in emissions would likely force Poland to seek an alternative power supply. Poland’s alternative, as discussed above, is to acquire natural gas from Russia. An agreement to import natural gas from Russia would be accompanied by uncertainties with the flow of supply and price.

The Commission urged the Court to consider the “equal treatment” of Member States. In order to reach the goal of decreasing emissions pursuant to the Protocol, all Member States should have to contribute. Without giving the Commission more hands-on power to develop a single method for economic analysis or allowing the Commission to fix a ceiling for emissions, the Member States who are not “in the mood” to contribute to the Protocol’s goals would not be required to do anything. When a Member State fails to reduce emissions, regardless of whether the decision is based on a Member State not being “in the mood” or if the decision is legitimately forced by economic considerations, the rest of the Member States would be required to pick up the slack.

There is an apparent fundamental unfairness surrounding the lack of equal treatment. For example, a report that was released by the UNFCCC in October 2009 revealed the total aggregate emissions for the years 1990, 2000, and 2005 to 2007, for each Member State.²⁷⁹ The report showed that Poland’s 2007 emission levels were thirty percent *below* its 1990 levels while Spain’s emission levels were 53.5 percent *above* its 1990 levels.²⁸⁰ The report also indicated that the European Union Member States, as a whole, were only 4.3 percent below their 1990 levels.²⁸¹ This information correlates with the fact that Spain’s phase II NAP, for the period 2008-2012, was reduced by the Commission a mere 0.003 percent for an emissions total of 152.3 million tons.²⁸²

The UNFCCC report illustrates an unfair system that is in desperate need of a change. There are several Member States who have dramatically cut back on emission levels while many more have increased their emission levels. Member States, like Poland, are forced to cut emissions at the cost of economic diminution in order to help the European Union, as a whole, reach a reduced

276. *Coal-fired Poland in Fighting Mood Over EU Emissions Rules*, ENERGY DAILY, Jan. 21, 2008, http://www.energy-daily.com/reports/Coal-fired_Poland_in_fighting_mood_over_EU_emissions_rules_999.html.

277. *Id.*

278. See Littlefield, *supra* note 10.

279. UNFCCC, *National Greenhouse Gas Inventory Data for the Period 1990-2007*, *supra* note 7.

280. *Id.*

281. *Id.*

282. Commission Decision of 26 Feb. 26, 2007, Concerning the National Allocation Plan for the allocation of Greenhouse Gas Emission Allowances Notified by Spain in Accordance with Directive 2003/87/EC of the European Parliament and of the Council, *available at* http://ec.europa.eu/environment/climat/pdf/nap_spain_decision_en.pdf (regarding Spain’s NAP for 2008-2012).

aggregated level of emissions. Nevertheless, the reduced level of emissions might not even be attainable for the European Union.

The integrity of the EU ETS is dependent upon a system that will require Member States to reduce emission levels. It is clear that the Commission needs some type of “bite” in order to ensure a proper emissions reducing scheme. However, it is difficult to determine what that “bite” should be, but it is certain that the concerns of carbon leakage and fundamental fairness of equal treatment must be taken into consideration.

This author believes the Commission should not be granted the authority to fix a ceiling for emissions. This authority would give the Commission too much power and create a high potential for economic diminution amongst the Member States. Additionally, it is doubtful that any Member State would willingly concede absolute control to the Commission and allow it to determine ceilings for emissions, regardless of each Member States’ individual economy. With that said, a lesser degree of control would be an encouraging alternative to complete control over fixing emissions. A potentially acceptable degree of control could be the power to reduce a NAP’s emissions combined with several limitations on that power.

The Directive currently requires the Commission to give reasons for rejecting a NAP, but this is not enough. The Commission should be required to give an in-depth analysis for why the current emission levels are not within the objectives of the Directive and the Commission’s reasoning should be justified through an analysis of the Member State’s own data. The Commission’s analysis and reasoning should be reviewed under a type of strict scrutiny. The Commission should only be allowed to reduce a Member State’s emissions if the reduction is deemed entirely necessary and there are no other reasonable alternatives. This scrutiny might help control the Commission’s power but still afford the Commission a means to accomplish the Directive’s goals.

3. The Three-Month Rule

The three-month rule needs to be clarified. The Directive should be amended to account for the Court’s differentiating rules between the presumption of legality and presumption of authorization. It was clear that Poland was never going to win this plea; otherwise, Member States could continuously give the Commission incomplete NAPs with the hope that the time period would expire, thus ensuring the validity of the Member State’s NAP. Although the outcome was predictable, the Court still found a way of complicating the rule.

The Court determined that a presumption of legality permits the Member State to place the NAP into effect and a presumption of authorization is a general acceptance of the NAP’s validity. While the two rules are rather simple to understand, there is no need to apply both in the context of the three-month rule. The Directive should be amended to indicate only one three-month rule: the presumption of authorization. The presumption of legality should automatically apply when the old NAP expires. A Member State’s NAP should not become

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effective until the next trading period begins. This will reduce confusion and ensure that the three-month period only applies to the presumption of authorization.

V. CONCLUSION

Member States of the European Union need to revisit the Directive to accommodate for the recent developments brought to light in the Court of First Instance's ruling. First, Member States should amend the Directive to give the Commission the power to select a single method for economic analysis and apply that method to all Member States. This will ensure equal treatment of all Member States and the positive progression of the EU ETS. Second, Member States should amend the Directive to give the Commission more power when rejecting a national allocation plan. The Commission should not be authorized to fix a ceiling for emission allowances; however, the Commission should be granted the power to reduce a national allocation plan's emissions so long as it is reasonably justified through an analysis of the Member State's own data and in accordance with the objectives of the Directive. Third, the Member States should amend the Directive in order to clarify the three-month rule and approve only the presumption of authorization rule established by the Court of First Instance. This author believes that these three amendments will help ensure the integrity of the EU ETS by balancing the need for equal treatment between the Member States, the need to guarantee the separation of powers, and the need to reduce emissions.