

6. Is the risk of serious difficulties, which operates as a basis for limiting the retroactive effect [of declaring void] an unfair term, an autonomous concept of EU law that must be interpreted uniformly throughout the Member States?
7. If so, what criteria must be taken into account?
8. At all events, is it compatible with Articles 6 and 7 of Council Directive 93/13/EEC of 5 April 2013 for the risk of serious difficulties to be assessed by taking account solely of the risk which may arise for the seller or supplier, or must account also be taken of the loss caused to a consumer by the failure to reimburse in full the sums paid under the 'floor clause'?
9. In accordance with Articles 6 and 7 of Council Directive 93/13/EEC of 5 April 2013, in an individual action brought by a consumer must the risk of serious difficulties with implications for the economic public order be assessed having regard solely to the financial effects of that specific action, or having regard to the financial effects of the potential bringing of individual actions by a large number of consumers?

(¹) OJ 1993 L 95, p. 29.

Action brought on 4 January 2016 — Republic of Poland v European Parliament and Council of the European Union

(Case C-5/16)

(2016/C 098/30)

Language of the case: Polish

Parties

Applicant: Republic of Poland (represented by: B. Majczyna, acting as Agent)

Defendants: European Parliament, Council of the European Union

Form of order sought

- annul Decision (EU) 2015/1814 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; (¹)
- order the European Parliament and the Council of the European Union to pay the costs.

Pleas in law and main arguments

The Republic of Poland seeks the annulment of Decision (EU) 2015/1814 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, and an order that the European Parliament and the Council of the European Union pay the costs.

The declared aim of the contested decision is to tackle the structural imbalances between the supply of greenhouse gas emission allowances on the EU market and the demand for them, imbalances which result in emission allowances not reaching prices on the market that accord with the expectations of the EU legislature. The fundamental means of attaining that aim is the establishment of a market stability reserve (MSR) mechanism, which is to consist in reducing the number of emission allowances available on the market by placing them in the reserve if there is a significant surplus of emission allowances on the market and specified conditions are met and, on the other hand, if the number of emission allowances available on the market falls below 400 million, in increasing the auction volumes of emission allowances.

The Republic of Poland puts forward the following pleas against the contested decision.

First, a plea of infringement of Article 192(1) TFEU, in conjunction with Article 192(2)(c) TFEU, by the adoption of the contested decision in accordance with the ordinary legislative procedure, despite the fact that that decision is a measure significantly affecting a Member State's choice between different energy sources and the general structure of its energy supply.

In the opinion of the Republic of Poland, the contested decision will significantly affect the choice of energy sources and the general structure of energy supply in Poland. In accordance with Article 192(2)(c) TFEU, such a decision must therefore be adopted by the Council unanimously in a special legislative procedure.

Secondly, a plea of infringement of the principle of sincere cooperation and of infringement of the powers of the European 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.

In accordance with the conclusions of the European Council of 2014, the main EU instrument for achieving the targeted level of emission reductions was to be a well-functioning, reformed emissions trading system (EU ETS) with an instrument to stabilise the market in line with the Commission proposal, which specified the year 2021 as being when the market stability reserve mechanism would come into effect. The adoption in the contested decision of the year 2019 as when the market stability reserve mechanism would come into effect was contrary to what was established by the European Council in 2014.

Thirdly, a plea of infringement of the principle of legal certainty and of the principle of the protection of legitimate expectations by the adoption of measures which interfere with the emission allowance trading system during the trading period and in particular in the final years of that period.

By the contested decision, 900 million allowances withdrawn from the market in 2014-16 — which were to return to the market in 2019-20 — are placed directly in the stability reserve, which means that ultimately they will not return to the market. The pool of allowances that is available to market participants in the current trading period is consequently lower than was expected. Market participants had a legitimate expectation that the temporarily withdrawn allowances would return again to the market between 2019 and 2020 and based their business plans on that. The principles of operation of the system, such as the rules defining the number of emission allowances available, should not be subject to change during the trading period, which sets the temporal perspective for the planning of various activities by the undertakings participating in the system. Those principles constitute fundamental premisses which determine the undertakings' investment activity.

Fourthly, a plea of infringement of the principle of proportionality by the adoption of measures which lead to the achievement of higher emission reduction targets than those resulting from the European Union's international commitments and than required to attain the aim of Directive 2003/87/EC.

As a result of the adoption of the contested decision, the European Union will achieve targets higher than currently proposed at international level in the context of the second period of the Kyoto Protocol, agreed in December 2012 in Doha.

Fifthly, a plea of infringement of the obligation to carry out an appropriate analysis of the effect of the contested decision on individual Member States and of infringement of the obligation to present an adequate assessment of the effects that adoption of the contested decision will have on the emission allowance trading market.

(¹) OJ 2015 L 264, p. 1.