

*Estonia v. Commission*: Missing the Forest for the Trees: The Court of First Instance Deals a Blow to the European Commission’s Efforts To Reduce Emissions

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I. OVERVIEW

The Republic of Estonia came under increasing pressure from the Commission of the European Union (Commission) to reduce its greenhouse gas (GHG) emissions.<sup>1</sup> Seeking to comply with its obligations under the European Union’s (EU) emissions treaty program in June 2006, Estonia submitted its National Allocation Plan (NAP) for the period 2008 to 2012 to the Commission of the European Communities (Commission).<sup>2</sup> After the Commission objected to several elements of Estonia’s proposed NAP, the two parties exchanged correspondence in an attempt to find common ground.<sup>3</sup> Estonia subsequently submitted a new version of its NAP in February 2007.<sup>4</sup>

In May of that year, the Commission issued its decision (contested decision) regarding Estonia’s NAP.<sup>5</sup> The contested decision asserted that Estonia’s NAP was incompatible with the country’s legal obligations and outlined several modifications that would bring the NAP into compliance.<sup>6</sup> The Commission deemed Estonia’s NAP incompatible with its legal obligations because, inter alia, Estonia proposed to distribute too many emission allowances and to allocate allowances to certain industries beyond their expected needs.<sup>7</sup> Accordingly, the contested decision called for Estonia to reduce the quantity of emission allowances

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1. Case T-263/07, *Estonia v. Comm’n*, para. 6 (Ct. First Instance, Sept. 23, 2009), [http://curia.europa.eu/jcms/jcms/j\\_6](http://curia.europa.eu/jcms/jcms/j_6) (search “Case No” for “T-263/07”; then follow “T-263/07 Judgment” hyperlink).

2. *Id.*

3. *Id.* para. 7.

4. *Id.*

5. *Id.* para. 8.

6. *Id.* para. 9.

7. *Id.*

by 47.8%.<sup>8</sup> Moreover, the contested decision stated that if Estonia adopted several specific amendments to its NAP, the Commission would withdraw its objections and permit Estonia to proceed with implementing its NAP.<sup>9</sup>

In July 2007, Estonia petitioned the Court of First Instance to annul the contested decision, alleging, among other things, that the Commission had exceeded its authority by imposing a cap on Estonia's emissions.<sup>10</sup> On September 23, 2009, the Court of First Instance annulled the contested decision concerning Estonia's NAP, *holding* that the Commission exceeded the limits of its power by imposing a specific ceiling on the total quantity of allowances permitted under Estonia's NAP. Case T-263/07, *Estonia v. Comm'n*, 2009 ECJ EUR-Lex LEXIS 803.

## II. BACKGROUND

The international community has largely reached agreement on the aggravating effects of carbon dioxide emissions on global warming.<sup>11</sup> Ample scientific evidence<sup>12</sup> has created an "overwhelming consensus among leading climate scientists" that current global warming has been chiefly caused by the emission of carbon dioxide and other greenhouse gasses (GHGs) produced by human activities.<sup>13</sup> In 1988, the United Nations Environment Program (UNEP) established the Intergovernmental Panel on Climate Change (IPCC),<sup>14</sup> which has since issued several reports explaining the root causes of rising world

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8. *Id.* para. 8.

9. *Id.* para. 9. One amendment would have reduced Estonia's total quantity of allowances in its NAP by approximately 11.6 million tons of CO<sub>2</sub>. *Id.*

10. *Id.* para. 10.

11. Global warming refers to the gradual increase in world temperatures caused by greenhouse gases that "remain in the atmosphere for many decades and trap heat from the sun in the same way as the glass of a greenhouse." Press Release, Eur. Comm'n, Climate Change and the EU's Response (Nov. 28, 2008), *available at* <http://europa.eu/rapid/pressReleasesAction.do?reference=MEMO/08/747&format=HTML&aged=0&language=EN&guiLanguage=en>.

12. *Id.* There has been an increase of 0.76°C in average global temperature since 1850 and a near doubling in the rate of sea level rise from 1993-2003. *Id.* Also, twelve of the warmest years ever recorded have occurred since 1995. *Id.*

13. *Id.* Greenhouse gases refers to "those gaseous constituents of the atmosphere, both natural and anthropogenic, that absorb and re-emit infrared radiation." United Nations Framework Convention on Climate Change art. 1, May 9, 1992, 1771 U.N.T.S. 107 [hereinafter UNFCCC].

14. See Intergovernmental Panel on Climate Change, Organizational Overview, *available at* <http://www.ipcc.ch/organization/organization.htm> (last visited Mar. 12, 2010).

temperatures.<sup>15</sup> Scientists have predicted that the emission of GHGs will continue to cause further increases in world temperatures unless substantial steps are taken to reduce the root causes of global warming.<sup>16</sup>

As a result of growing concern over global warming, the international community has begun to take increasingly authoritative steps to curb GHG emissions.<sup>17</sup> The first major international treaty addressing global warming, the United Nations Framework Convention on Climate Change (UNFCCC), adopted in 1992, established the objective of stabilizing the concentration of GHGs in the atmosphere at a level sufficient to prevent further climate change.<sup>18</sup> EU member states were obligated to comply with this treaty.<sup>19</sup> However, the UNFCCC itself lacked teeth because it was nonbinding and did not impose legal obligations on any nations, and it soon became apparent that achieving this immense goal would require additional mechanisms for organization and enforcement of the stated goals.<sup>20</sup>

In 1997, the UNFCCC adopted the Kyoto Protocol to correct for deficiencies in the previous treaty.<sup>21</sup> The purpose was to establish an association of member nations and bind them to make specific commitments to reduce emissions below individually tailored levels.<sup>22</sup> By ratifying the Kyoto Protocol, all Member States of the European Union became obligated to reduce their GHG emissions.<sup>23</sup> To meet their targets, Member States were permitted to take advantage of flexibility mechanisms endorsed by the Kyoto Protocol, the first and foremost being international emissions trading.<sup>24</sup>

In order to help EU Member States meet their commitments under the Kyoto Protocol, the Commission issued Directive 2003/87/EC (Directive), launching the Greenhouse Gas Emissions Trading Scheme (ETS) as a “market-based solution to provide incentives for curbing

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15. Annie Petsonk, *The Kyoto Protocol and the WTO: Integrating Greenhouse Gas Emissions Allowance Trading into the Global Marketplace*, 10 DUKE ENVTL. L. & POL'Y F. 185, 188-89 (2000).

16. *Id.*

17. *See* UNFCCC, *supra* note 13, art. 4.

18. *Id.* art. 2.

19. *Id.* art. 4.

20. Heather Shumaker, *The Economic Effects of the European Union Carbon Dioxide Emission Quota on the New Member States of the European Union: Can They Become Equal Economic Partners of the European Union While Complying With the 2008-2012 Quota?*, 17 PENN ST. ENVTL. L. REV. 99, 103 (2008).

21. Kyoto Protocol to the United Nations Framework on Climate Change, Dec. 10, 1997, 37 I.L.M. 22 [hereinafter Kyoto Protocol].

22. *Id.* art. 3.

23. Council Directive 03/87, 2003 O.J. (L275) 32 (EC) [hereinafter Directive 03/87].

24. Kyoto Protocol, *supra* note 21, art. 6.

[GHG] emissions.”<sup>25</sup> The goal of this program was “to promote reductions of [GHG] emissions in a cost-effective and economically efficient manner.”<sup>26</sup> The ETS established the largest carbon-trading system in the world,<sup>27</sup> and under this program the EU’s twenty-seven Member States were able to trade in carbon emissions by buying and selling allowances and credits.<sup>28</sup>

The ETS was designed to run in two phases, the first running through 2007 and the second running concurrently with the Kyoto Protocol’s first commitment period, from 2008 through 2012.<sup>29</sup> For each trading period under the ETS, the Directive required that each Member State develop a National Allocation Plan to meet general criteria outlined by the Directive.<sup>30</sup> The NAP includes the total quantity of carbon dioxide emission allowances that a Member State intends to allocate along with an account of how the Member State plans to distribute those allowances.<sup>31</sup> For instance, annex III of the Directive requires that the allowances allocated by Member States be consistent with their obligations under the Kyoto Protocol and that Member States strictly interpret and apply the criteria outlined within the annex.<sup>32</sup>

Both the nature of EU power relations and the language of the Directive itself established a scenario in which Member States and the Commission became negotiating partners obligated to reach a mutually acceptable agreement before an NAP could be enacted.<sup>33</sup> Although Member States have the liberty to design their own NAP, the Commission must approve each NAP before it is implemented.<sup>34</sup> The Directive provides that “[w]ithin three months of notification of a [NAP] . . . the Commission may reject that plan, or any aspect thereof, on the basis that it is incompatible with the criteria listed in Annex III.”<sup>35</sup> After reviewing a Member State’s proposed NAP, the Commission may offer

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25. Ved P. Nanda, Comment, *The European Union’s Multinational Carbon Trading Program*, 85 DENV. U. L. REV. 995, 995 (2008).

26. Directive 03/87, *supra* note 23, art. 1.

27. See Shumaker, *supra* note 20, at 105-06.

28. *Id.* at 106.

29. Nanda, *supra* note 25, at 1001.

30. Directive 03/87, *supra* note 23, art. 9.

31. *Id.*; see Cinnamon Carlarne, *Climate Change Policies an Ocean Apart: EU & US Climate Change Policies Compared*, 14 PENN ST. ENVTL. L. REV. 435, 464 (2006).

32. Directive 03/87, *supra* note 23, annex III. The plan must be based on the criteria listed in annex III. See Joseph Kruger & William A. Pizer, *The EU Emissions Trading Directive: Opportunities and Potential Pitfalls 10-11* (Resources for the Future, Discussion Paper No. 04-24, 2004), available at <http://www.rff.org/documents/RFF-DP-04-24.pdf>.

33. Directive 03/87, *supra* note 23, art. 9(3).

34. *Id.*

35. *Id.*

criticism, proposals, and recommendations, but a Member State may not implement its NAP unless “proposed amendments are accepted by the Commission.”<sup>36</sup> Additionally, the Commission retains the right to conditionally approve a Member State’s NAP, offering specific recommendations to be undertaken prior to implementation,<sup>37</sup> as occurred, for example, in the cases of the Czech Republic and Poland.<sup>38</sup> One area of ambiguity in the language of the Directive that was later debated was the Commission’s authority to issue specific conditions for approval of the NAP upon resubmission.<sup>39</sup>

The ETS program encountered many problems during Phase I, the chief one being that Member States overallocated emission allowances, distributing more allowances than were necessary, for example.<sup>40</sup> The result was that the value of allowances plummeted to such a degree that most emission allowances were practically worthless by the end of 2007.<sup>41</sup> Not only were emission allowances devalued generally, but the market system was prevented from working properly, with the effect of undermining efforts to reduce GHG emissions.<sup>42</sup> Some scholars attribute the ineffectiveness of Phase I to a lack of centralized authority coupled with freerider concerns among Member States, while other scholars point to overestimations of growth figures.<sup>43</sup> Alarmed by this problem, the Commission decided to exercise more oversight and control during the approval process in Phase II.<sup>44</sup> For example, the Commission worked with Member States to reduce individual caps by an average of 10.5% and only four NAPs were approved without any changes.<sup>45</sup>

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36. *Id.*

37. *Id.*; see Press Release, European Union, Questions and Answers on Emissions Trading and National Allocation Plans for 2008 to 2012 (Nov. 29, 2006), available at [http://ec.europa.eu/environment/climat/pdf/m06\\_452\\_en.pdf](http://ec.europa.eu/environment/climat/pdf/m06_452_en.pdf).

38. See Press Release, European Union, Emissions Trading: Commission Decides on Czech and Polish National Allocation Plans for 2008-2012 (Mar. 26, 2007), available at <http://europa.eu/rapid/pressReleasesAction.do?reference=IP/07/412>.

39. See Sharon Tomkins et al., *Litigating Global Warming: Likely Legal Challenges to Emerging Greenhouse Gas Cap-and-Trade Programs in the United States*, 39 ENVTL. L. REP. NEWS & ANALYSIS 10,389, 10,403 (2009).

40. *Id.* at 10,400.

41. *Id.* Another factor was that the ETS did not permit stakeholders to carry allowances into the next phase. This issue will be addressed in Phase III, from 2008 to 2012, by allowing stakeholders to “bank” excess allowances. *Id.* at 10,400 n.110.

42. See *id.* at 10,400.

43. *Id.*

44. *Id.*

45. *Id.*

Due in part to the Commission's efforts, analysts reported that the ETS succeeded in reducing emissions in 2008.<sup>46</sup> Despite the apparent success of the Commission's efforts, however, its assertion of centralized authority over the ETS program raised concerns among certain stakeholders and Member States with respect to the balance of power between the Member States and the Commission.<sup>47</sup> The Commission's new assertive approach diverged sharply from the previous decentralized power model implemented in Phase I of the ETS.<sup>48</sup> Under the Directive, although Member States retain the right to design their own NAPs, the Commission holds the authority to review and reject these NAPs.<sup>49</sup> The Commission's veto power can conflict with both the provisions of the EC Treaty limiting its authority and with provisions purporting to preserve the national autonomy of Member States.<sup>50</sup> For example, article 5 provides that "[t]he Community shall act within the limits of the powers conferred upon it."<sup>51</sup> Additionally, article 5 articulates the EU's principle of subsidiarity, which provides that Member States retain significant national sovereignty rights.<sup>52</sup> Specifically, "[i]n areas which do not fall within its exclusive competence, the [Commissioner] shall take action . . . only if and insofar as the objectives of the proposed action cannot be sufficiently achieved by the Member States."<sup>53</sup>

The EC Treaty also establishes that the authority of directives issued by the Commission is subject to limitations.<sup>54</sup> Article 249 provides that "[a] directive shall be binding, as to the result to be achieved, upon each Member State to which it is addressed, but shall leave to the national authorities the choice of form and methods."<sup>55</sup> Accordingly, Member States are required to choose the most appropriate means of ensuring the effectiveness of directives.<sup>56</sup> Finally, in a field in which the Commission shares authority with Member States, such as environmental regulation,

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46. See Analysts Credit EU ETS With Helping Cut Emissions (Feb. 18, 2009), <http://www.carbon-financeonline.com/index.cfm?section=europe&action=view&id=11857>.

According to a report by New Carbon Finance (NCF), the EU-ETS succeeded in reducing emissions in 2008, a decline of 3% from 2007. *Id.* The price of carbon was responsible for 40% of this reduction, while the recession was responsible for 30%. *Id.*

47. Tomkins et al., *supra* note 39, at 10,403.

48. See *id.*

49. Directive 03/87, *supra* note 23, art. 9(3).

50. Treaty Establishing the European Community art. 5, Nov. 10, 1997, 1997 O.J. (C 340) 173 [hereinafter EC Treaty].

51. *Id.*

52. *Id.*

53. *Id.*

54. *Id.* art. 249.

55. *Id.*

56. *Id.*

the Commission “has the burden of proving the extent to which the powers of the Member State and, therefore, its freedom of action, are limited.”<sup>57</sup>

Responding to the strict control asserted by the Commission over Phase II NAPs, several Member States and industries initiated litigation.<sup>58</sup> In these suits, Member States have alleged that the Commission “infringe[d] upon [their] sovereign rights to manage [their own] economy in violation of the EC Treaty.”<sup>59</sup> Other cases have involved challenges by Member States seeking to modify an NAP after it has gone into effect.<sup>60</sup> Overall only a few cases have been decided on the matter, partially due to the immense backlog in the European Court system, and partially due to the lack of disputes during Phase I.<sup>61</sup>

### III. THE COURT’S DECISION

In the noted case, the Court of First Instance declined to defer to the Commission’s efforts to centralize authority regarding emission allowance trading.<sup>62</sup> Instead, the court chose to preserve Estonia’s sphere of autonomy to make final decisions concerning its national energy policy.<sup>63</sup> The Court held that the Commission exceeded its authority in two ways: first, by imposing a specific ceiling on the quantity of emission allowances under Estonia’s NAP;<sup>64</sup> and second, by disregarding Estonia’s room for maneuver in implementing the NAP.<sup>65</sup>

The Court initiated its decision by discussing the distribution of authority between Member States and the Commission.<sup>66</sup> The Court grounded its interpretation of the Directive in foundational principles set forth in the EC Treaty.<sup>67</sup> First, the Court affirmed that it is “unequivocally clear” that Member States have the sole power to “draw up” their own NAPs.<sup>68</sup> Second, a Member State has the sole power to

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57. Case T-374/04, *Germany v. Comm’n*, 2007 E.C.R. II-04431, para. 79.

58. Tomkins et al., *supra* note 39, at 10,402. These suits were largely based on alleged violations of the EC Treaty. *Id.*

59. *Id.* at 10,403; *see, e.g.*, Case T-369/07, *Latvia v. Comm’n*, 2007 O.J. (C 269) 67.

60. Case T-347/04, 2007 E.C.R. II-04431, paras. 170-71 (annulling the Commission’s refusal to allow Germany to include measures for ex-post adjustment).

61. Tomkins et al., *supra* note 39, at 10,402.

62. Case T-263/07, *Estonia v. Comm’n*, para. 60 (Ct. First Instance, Sept. 23, 2009), [http://curia.europa.eu/jcms/jcms/j\\_6](http://curia.europa.eu/jcms/jcms/j_6) (search “Case No” for “T-263/07”; then follow “T-263/07 Judgment” hyperlink).

63. *Id.* para. 65.

64. *Id.* para. 60.

65. *Id.* para. 79.

66. *Id.* para. 50.

67. *Id.* para. 51.

68. *Id.* para. 53.

make final decisions “fixing the total quantity of allowances [that] it will allocate” and distributing these allowances to economic operators.<sup>69</sup> Moreover, in carrying out those powers, the Member State “has a certain room for [maneuver] in choosing the measures [that] it considers the most appropriate” to achieve the aims of the Directive.<sup>70</sup>

Next, the Court turned its attention to the manner in which the Commission exercised its powers in this case.<sup>71</sup> The Court outlined what actions fall legally within the Commission’s authority.<sup>72</sup> In carrying out its review of the NAP, the Commission is entitled to reject a proposed NAP, to state reasons for its rejection, and to raise specific criticisms.<sup>73</sup> Moreover, the Commission is entitled to “formulate [nonbinding] proposals or recommendations” seeking to negotiate modifications that would make the NAP compatible with the Directive.<sup>74</sup>

The Court outlined the Commission’s actions that constituted an overreach of authority.<sup>75</sup> First, the Court held that the Commission had “exceeded the limits of its power of review” by prohibiting the quantity of emission allowances set by Estonia’s NAP from exceeding a specific threshold level.<sup>76</sup> The Court found that a Member State alone has the power to fix the total quantity of allowances; thus, the Commission crossed a line when it imposed a specific cap.<sup>77</sup> The Court pointed out that the specific cap imposed by the Commission (12.71 million tons CO<sub>2</sub> per year) represented merely 52.2% of the total quantity of allowances that Estonia proposed to allocate in its NAP.<sup>78</sup> The Court conceded that Estonia retained the liberty to fix the total quantity of its allowances at any lower level, notwithstanding this cap.<sup>79</sup> But the Court deemed it “inconceivable” that Estonia would in fact choose to allocate at a level lower than the cap; thus, “in reality, the Commission has indirectly fixed the total quantity of allowances to be allocated in place of [Estonia].”<sup>80</sup> This result, the Court found, undermined the purpose of

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69. *Id.*

70. *Id.*

71. *Id.* para. 56.

72. *Id.* para. 54.

73. *Id.*

74. *Id.* para. 62.

75. *Id.* para. 64.

76. *Id.* para. 60.

77. *Id.* para. 64.

78. *Id.* para. 65.

79. *Id.* para. 66.

80. *Id.*



article 11(2) of the Directive, which provides that a Member State has the sole authority to decide the quantity of allowances to allocate.<sup>81</sup>

The Court concluded that the Commission disregarded Estonia's margin for maneuver by using its own preferred emission figures instead of restricting itself to reviewing Estonia's choice of emission figures.<sup>82</sup> The Court held that the Commission erred by rejecting Estonia's NAP on the grounds that Estonia's figures raised reliability concerns that could increase the risk of over-allocation.<sup>83</sup> The Court reasoned that the Commission's sole task was to review the legality of Estonia's NAP "while respecting the margin for [maneuver]" that Member States are entitled to while implementing the Directive.<sup>84</sup> Given that the margin for maneuver "necessarily implies that a Member State could validly choose different data as the starting-point for its forecasts,"<sup>85</sup> the Court reasoned that Estonia was deprived of "all" its margin for maneuver when the Commission ruled that only its own preferred data could be used in drawing up the NAP.<sup>86</sup>

Finally, the Court considered several other reasons put forward by the Commission to justify its rejection of Estonia's NAP.<sup>87</sup> First, the Court rejected the Commission's argument that a standardized approach to calculating emission figures was justified "in order to comply with the requirements of the equal treatment principle."<sup>88</sup> In rebuttal, the Court observed that reliance on that principle cannot alter the distribution of authority "laid down by the Directive between the Commission and the Member States."<sup>89</sup> In any case, the Commission can sufficiently comply with the equal treatment principle by analyzing each Member State's NAP "with the same degree of diligence."<sup>90</sup>

Second, the Court rejected the Commission's contention that article 9(3) of the Directive, which endows the Commission with review and rejection power, "would become devoid of purpose" if the Commission were not able to impose a cap.<sup>91</sup> In doing so, the Court relied primarily on the rationale that the ability to impose a ceiling was not necessary for

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81. *Id.* para. 65.

82. *Id.* para. 75.

83. *Id.*

84. *Id.*

85. *Id.*

86. *Id.*

87. *Id.* para. 87.

88. *Id.*

89. *Id.* para. 88.

90. *Id.* para. 89.

91. *Id.* para. 91.

the Commission to properly exercise its powers.<sup>92</sup> The Court then addressed the Commission's contention that strong judicial action was necessary in this type of dispute to avert a stalemate between the Commission and Member States.<sup>93</sup> The Court observed that its proper role was not to "resolve that potential problem in the context of the present dispute, in which it does not arise."<sup>94</sup>

Last, the Court rejected the Commission's policy-based argument that rendering the Commission unable to override the allocation plans of Member States has the effect of undermining the central purpose of the Directive,<sup>95</sup> namely reducing GHG emissions in order to comply with treaty obligations.<sup>96</sup> To begin, the Court conceded that the threat of global warming was quite severe and that the ETS represented the best currently available means of addressing this problem.<sup>97</sup> Even so, the EU is governed by the rule of law, which prevents the Commission from overriding the autonomy of Member States.<sup>98</sup> Therefore, assuming that annulling the contested decision would hinder the proper functioning of the ETS, the Court ruled that this finding would not be enough to justify an overreach of authority by the Commission.<sup>99</sup>

#### IV. ANALYSIS

In the noted case, the Court's policy goals appear to favor protecting the sovereignty of Member States.<sup>100</sup> This bias is suggested by the seemingly inconsistent way in which the Court treated similar arguments invoking the purposes of the Directive.<sup>101</sup>

On the one hand, the Court embraced policy arguments promoting decentralization of power.<sup>102</sup> For example, the Court embraced the

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92. *Id.* para. 92.

93. *Id.*

94. *Id.*

95. *Id.*

96. *Id.* para. 50.

97. *Id.* para. 49. Specifically, the Court observed:

It is undisputed between the parties, and is moreover apparent from the recitals and the general scheme of the Directive, that the reduction of greenhouse gas emissions in general, and the system for trading allowances established by the Directive in particular, are of primary importance in the context of the fight against global warming, which represents one of the greatest social, economic and environmental threats which the world currently faces.

*Id.*

98. *Id.* para. 50.

99. *Id.*

100. *Id.* para. 60.

101. *Id.*

102. *Id.* para. 65.

argument that article 11(2) of the Directive would be rendered “devoid of purpose” if the Commission were permitted to impose a specific cap on the quantity of emission allowances in Estonia’s NAP because article 11(2) empowers Member States to decide the total quantity of allowances to be allocated.<sup>103</sup> In the same ruling, the Court glossed over the freedom that Estonia retained to both fix the quantity of allowances anywhere below the ceiling level and to distribute these allowances as it wished to various stakeholders.<sup>104</sup>

On the other hand, the Court rejected several compelling policy-based arguments favoring centralization of power, acknowledging that the ETS would likely fail.<sup>105</sup> The Court rejected the Commission’s argument that article 9(3) of the Directive, which gives the Commission the power to review and reject NAPs, would “become devoid of purpose if [the Commission] were not able to adopt a decision fixing a ceiling for the total quantity of allowances which a Member State is entitled to allocate.”<sup>106</sup> The Court pointed to the Commission’s power to make specific criticisms and to formulate nonbinding recommendations.<sup>107</sup> However, this misses the point because the underlying purpose of the Directive is potentially put at risk by the overallocation of emission allowances by Member States.<sup>108</sup>

Next, the Court appears to have put major and minor purposes of the Directive on the same footing.<sup>109</sup> Although the Directive provides that Member States retain the power to design their NAPs,<sup>110</sup> the overarching purpose of the entire Directive is to create a functioning emissions trading system with the objective of reducing GHG emissions.<sup>111</sup> It would stand to reason that the overarching purpose of the Directive would trump the purpose of a minor provision of the Directive, if the two came into conflict.<sup>112</sup> However, the Court was unreceptive to the Commission’s argument that the goals of the Directive would be substantially frustrated if the Commission’s authority were curtailed.<sup>113</sup> In

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103. *Id.*

104. *Id.* para. 66.

105. *Id.* para. 92.

106. *Id.* para. 91.

107. *Id.* para. 62.

108. *Id.* para. 49.

109. *Id.* paras. 65, 91.

110. Directive 03/87, *supra* note 23, art. 11(2).

111. *Id.*

112. *Id.*

113. Case T-263/07, *Estonia*, para. 92.

addition, with the experience of Phase I in mind,<sup>114</sup> it seems shortsighted for the Court to disregard the argument that prohibiting the Commission from imposing a cap on emission allowances would undermine the functioning of the ETS.<sup>115</sup> The Court appeared to disregard the judiciary's role in preventing the overallocation of emission allowances from frustrating the purpose of the Directive.<sup>116</sup> Thus, the autonomy of Member States was prioritized over global environmental outcomes related to global warming.<sup>117</sup>

Although the Court freely acknowledged the dangers resulting from an overallocation of emission allowances, it defended its ruling on the grounds that judicial activism is not an appropriate solution to the impasse.<sup>118</sup> Indeed, after stating that "global warming . . . represents one of the greatest social, economic and environmental threats which the world currently faces," and conceding that "the reduction of [GHG] emissions in general and the system for trading allowances established by the Directive in particular, are of primary importance in the context of the fight against global warming," the Court declared that a strict interpretation of the Directive must trump these concerns.<sup>119</sup> Furthermore, the Court observed that, assuming the Commission was right in determining that annulling the contested decision would "have a negative impact on the proper functioning" of the ETS, this would not be enough to justify upholding the contested decision if the Commission had indeed overstepped its authority.<sup>120</sup> This reasoning appears to be grounded in the belief that the judiciary has a limited role in the policy-making process.<sup>121</sup>

Additionally, according to the Court, even if the potential problem of a "permanent stalemate" must be directly resolved, it would be "inconceivable" to favor the Commission over a Member State.<sup>122</sup> This reasoning appears to be grounded in the notion that it would be wrong for the Court to disrupt the balance of power between the Commission and Member States, which was carefully crafted by the legislature to foster an evenly balanced partnership.<sup>123</sup> This equal balance of power is

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114. In Phase I, the ETS was largely a failure because Member States overallocated emission allowances. Tomkins et al., *supra* note 39, at 10,400.

115. Case T-263/07, *Estonia*, para. 92.

116. *Id.*

117. *Id.*

118. *Id.*

119. *Id.* paras. 49-50.

120. *Id.* para. 50.

121. *Id.* para. 92.

122. *Id.*

123. *See id.*

embodied in the structure of the Directive, which grants the power to design the NAP to Member States and grants veto power to the Commission.<sup>124</sup> Accordingly, neither the Commission nor any Member State has the authority to dictate terms to the other.<sup>125</sup> Rather, both parties must reach an agreement before the Member State may proceed to implement its NAP.<sup>126</sup> This structure indicates that the drafters of the Directive intended to create an equal partnership between the Commission and Member States; therefore, it is not the Court's role to tip this balanced scale in favor of either side.<sup>127</sup>

In essence, this case encapsulates the conflict of interest between Estonia's narrow national interests and the EU's broader moral and legal responsibilities. The EU has clearly established the reduction of GHG emissions as one of its most vital goals.<sup>128</sup> One might assume that by virtue of both Estonia's membership in the EU and its role in the approval process as a negotiating partner entrusted with the power to design its NAP, Estonia would have the desire and interest to work toward meeting the EU's shared commitment to reduce GHG emissions.<sup>129</sup> In this vein, by calling it "inconceivable" that Estonia would make its best efforts to reduce emissions under the cap level, the Court appears to have delegitimized Estonia's role as a responsible member of the EU.<sup>130</sup>

Although the ideal paradigm to view the relationship between the EU and Member States is that of a partnership, where both parties work together to solve shared problems, the reality is that the relationship is often adversarial.<sup>131</sup> This is particularly true in the context of the EU's commitment to reduce GHG emissions because many developing countries have expressed fear that reducing GHG emissions will hamper economic growth.<sup>132</sup> Accordingly, perhaps it is unrealistic to expect Member States to do more than is strictly required to comply with their legal obligations under the Kyoto Protocol.<sup>133</sup>

In the context of emission reductions, a policy split has arisen between recently-joining Member States of the EU hailing from Eastern Europe, including Estonia, and well-established Member States.<sup>134</sup>

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124. *Id.*

125. *Id.*

126. *Id.*

127. *See id.*

128. *See* Directive 03/87, *supra* note 23.

129. *See, e.g.*, Shumaker, *supra* note 20, at 105.

130. *See* Case T-263/07, *Estonia*, para. 92.

131. Tomkins et al., *supra* note 39, at 10,402.

132. *Id.* at 10,400; Shumaker, *supra* note 20, at 112.

133. *See* Tomkins et al., *supra* note 39, at 10,402.

134. Shumaker, *supra* note 20, at 114.

Generally, these recently-joining Member States have developing economies, are more reliant on fossil fuels to run their economies, and are relatively poor compared with their Western European counterparts.<sup>135</sup> Therefore, due to its status as a developing country, Estonia may in fact have divergent interests from those of the larger EU body.<sup>136</sup> However, by seeking and gaining admission into the EU, all recently joining Member States must still consider their obligations under common EU goals.<sup>137</sup> Estonia voluntarily joined the EU and receives substantial benefits from this membership; thus, Estonia should sacrifice with the other EU Member States and should embrace the shared EU goals rather than cling to narrowly defined national interests.

The ruling in the noted case represents both a blow to the Commission's efforts to centralize authority and a potential setback to the Commission's near-term goals for reducing emissions.<sup>138</sup> The ETS in Phase I was largely a failure because Member States substantially overallocated emission allowances, leading to a crash in the market price.<sup>139</sup> Responding to this failure, the Commission sought to impose strict quotas for Phase II in order to prevent Member States from handing out more allowances to favored industries than was necessary to meet pollution targets.<sup>140</sup> In sum, the decision in the noted case undermined the Commission's efforts to create a functioning market for emissions trading by holding that the Commission may not impose a cap on the quantity of emission allowances allocated in NAPs.

In the short term, the Court's decision in the noted case may lead to an oversupply of emission allowances in the market, causing a depression in the market price for emission allowances. The result of this decision may be to hamper the EU's ability to create a viable market for emissions trading. Assuming this comes to pass, the EU will have a restricted ability to reduce its GHGs emissions in accordance with its commitments under the Kyoto Protocol.

On the upside, this market problem should be resolved in the long term. Member States have recently agreed to provide more centralized

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135. *Id.* These concerns were taken into account in the drafting of the Kyoto Protocol. Participating countries have widely divergent responsibilities for emission reductions. As a result, developing countries are asked to sacrifice less. Cameron Ferrey & Steven Ferrey, *Past Is Prologue: Recent Carbon Regulation Disputes in Europe Shape the U.S. Carbon Future*, 16 MO. ENVTL. L. & POL'Y REV. 650, 661 (2009).

136. Shumaker, *supra* note 20, at 112.

137. *Id.* at 105.

138. *Id.*

139. Tomkins et al., *supra* note 39, at 10,400.

140. *Id.*

authority.<sup>141</sup> Consequently, the Commission will have the right, after 2012, to decide on its own how many emission allowances will be allocated to each industry sector across the twenty-seven-nation trade bloc, effectively eliminating the current system of national allocations.<sup>142</sup> It is projected that the problem of determining which authority has the right to set emission levels will disappear in the next decade.<sup>143</sup> In sum, it appears that these conflicts will be resolved, no thanks to the Court of First Instance. In adhering to the letter of the law, the Court disregarded the spirit of the law to create an effective market for emissions trading with the goal of producing desired environmental outcomes. Accordingly, the Court missed the goal of the law by focusing on the technicalities.

#### V. CONCLUSION

The Decision in the noted case highlights the controversial issue of pollution permit trading. The noted case is significant because it represents a blow to the EU's efforts to reduce emissions. To this end, the issues raised may foreshadow some policy battles that could arise in the United States as policy makers begin to debate the merits of Cap and Trade Legislation.<sup>144</sup> In that respect, policy makers would be wise to study the successes and failures of the EU's efforts to implement an effective emissions trading system. Moreover, the noted case encapsulates several of the innate conflicts of interest involved in administering such a system, such as the problem of distributing power between a centralized authority and regional players. Finally, the noted case underscores a major pitfall of an emissions trading scheme whereby an oversupply of permits may undermine the market for emission allowances.

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141. Ferrey et al., *supra* note 135, at 685-86.

142. *Id.*

143. *See id.*

144. *See id.* at 686.

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