Reports of Cases

JUDGMENT OF THE COURT (Fifth Chamber)

8 March 2017**

(Reference for a preliminary ruling — Environment — Scheme for greenhouse gas emissions allowance trading in the European Union — Directive 2003/87/EC — Article 3(a) — Articles 11 and 12 — Cessation of activities of an installation — Surrender of unused allowances — Period from and including 2008 to 2012 — No compensation — Broad logic of the greenhouse gas emissions allowance trading scheme)

In Case C-321/15,

REQUEST for a preliminary ruling under Article 267 TFEU from the Cour constitutionnelle (Luxembourg), made by decision of 19 June 2015, received at the Court on 29 June 2015, in the proceedings

ArcelorMittal Rodange et Schifflange SA

v

State of the Grand Duchy of Luxembourg,

THE COURT (Fifth Chamber),

composed of J.L. da Cruz Vilaça (Rapporteur), President of the Chamber, M. Berger, A. Borg Barthet, E. Levits and F. Biltgen, Judges,

Advocate General: M. Campos Sánchez-Bordona,

Registrar: A. Calot Escobar,

having regard to the written procedure,

after considering the observations submitted on behalf of:

— ArcelorMittal Rodange et Schifflange SA, by G. Loesch, avocat,

— the Luxembourg Government, by D. Holderer, acting as Agent, assisted by P. Kinsch, avocat,

— the European Commission, by E. White, A. Buchet and K. Mifsud-Bonnici, acting as Agents,

after hearing the Opinion of the Advocate General at the sitting on 5 July 2016,

gives the following

* Language of the case: French

Judgment

1 This request for a preliminary ruling concerns the interpretation of Directive 2003/87/EC of the European Parliament and of the Council of 13 October 2003 establishing a scheme for greenhouse gas emission allowance trading within the Community and amending Council Directive 96/61/EC (OJ 2003 L 275, p. 32), as amended by Regulation (EC) No 219/2009 of the European Parliament and of the Council of 11 March 2009 (OJ 2009 L 87, p. 109) ('Directive 2003/87').

2 The request has been made in proceedings between ArcelorMittal Rodange et Schifflange SA ('ArcelorMittal') and the État du Grand-Duché de Luxembourg (State of the Grand Duchy of Luxembourg) concerning the legality of the decision of the Minister with responsibility for Sustainable Development and Infrastructure requiring that company to surrender, without compensation, 80 922 unused greenhouse gas emissions allowances.

Legal context

European Union law

3 Article 1 of Directive 2003/87 provides that the directive 'establishes a scheme for greenhouse gas emission allowance trading within the Community … in order to promote reductions of greenhouse gas emissions in a cost-effective and economically efficient manner'.

4 Article 3(a) of that directive defines the emission 'allowance' as being 'an allowance to emit one tonne of carbon dioxide equivalent during a specified period, which shall be valid only for the purposes of meeting the requirements of this Directive and shall be transferable in accordance with the provisions of this Directive'.

5 Article 7 of that directive provides as follows:

'The operator shall inform the competent authority of any changes planned in the nature or functioning, or an extension, of the installation which may require updating of the greenhouse gas emissions permit. Where appropriate, the competent authority shall update the permit. Where there is a change in the identity of the installation's operator, the competent authority shall update the permit to include the name and address of the new operator.'

6 Article 9 of Directive 2003/87 provides for the development, by each Member State, of a national allocation plan ('the NAP'). Specifically, paragraphs 1 and 3 of that provision provide as follows:

'1. For each period referred to in Article 11(1) and (2), each Member State shall develop a national plan stating the total quantity of allowances that it intends to allocate for that period and how it proposes to allocate them. The plan shall be based on objective and transparent criteria, including those listed in Annex III, taking due account of comments from the public. The Commission shall, without prejudice to the [EC] Treaty, by 31 December 2003 at the latest develop guidance on the implementation of the criteria listed in Annex III.

…

3. Within three months of notification of a [NAP] by a Member State under paragraph 1, the Commission may reject that [NAP], or any aspect thereof, on the basis that it is incompatible with the criteria listed in Annex III or with Article 10. The Member State shall only take a decision under Article 11(1) or (2) if proposed amendments are accepted by the Commission. Reasons shall be given for any rejection decision by the Commission.'

7 Article 11(2) and (4) of Directive 2003/87 provides as follows:

‘2. For the five-year period beginning 1 January 2008, and for each subsequent five-year period, each Member State shall decide upon the total quantity of allowances it will allocate for that period and initiate the process for the allocation of those allowances to the operator of each installation. This decision shall be taken at least 12 months before the beginning of the relevant period and be based on the Member State’s [NAP] developed pursuant to Article 9 and in accordance with Article 10, taking due account of comments from the public.

…

4. The competent authority shall issue a proportion of the total quantity of allowances each year of the period referred to in paragraph 1 or 2, by 28 February of that year.’

8 Article 12(1) and (3) of that directive provides as follows:

‘1. Member States shall ensure that allowances can be transferred between:

(a) persons within the Community;

…

3. Member States shall ensure that, by 30 April each year at the latest, the operator of each installation surrenders a number of allowances equal to the total emissions from that installation during the preceding calendar year as verified in accordance with Article 15, and that these are subsequently cancelled.’

9 Article 13(1) of that directive provides as follows:

‘Allowances shall be valid for emissions during the period referred to in Article 11(1) or (2) for which they are issued.’

10 Article 19(1) of Directive 2003/87 states as follows:

‘Member States shall provide for the establishment and maintenance of a registry in order to ensure the accurate accounting of the issue, holding, transfer and cancellation of allowances. Member States may maintain their registries in a consolidated system, together with one or more other Member States.’

Luxembourg law

11 Article 16 of the Constitution provides as follows:

‘No one shall be deprived of his possessions except in the public interest and in return for fair compensation, in accordance with the law.’

12 Directive 2003/87 was transposed into Luxembourg law by the loi du 23 décembre 2004, établissant un système d'échange de quotas d'émission de gaz à effet de serre (Law of 23 December 2004 establishing a scheme for greenhouse gas emission allowance trading) ('the Law of 2004') (*Mémorial* A 2004, p. 3792). Article 12(2) and (4) of that Law provides as follows:

'2. For the five-year period beginning on 1 January 2008, and for each subsequent five-year period, the Minister shall decide upon the total quantity of allowances to be allocated for that period and initiate the process for the allocation of those allowances to the operator of each installation. The Minister shall do so at least 12 months before the beginning of the period concerned, on the basis of the national allocation plan drawn up in accordance with Article 10.

…

4. The Minister shall issue a proportion of the total quantity of allowances each year of the period referred to in paragraph 1 or 2, by 28 February of the year in question at the latest.'

13 Article 13(6) of that Law provides as follows:

'Any full or partial cessation of the operations of an installation must immediately be notified to the Minister. The Minister shall decide on the full or partial surrender of unused allowances.'

14 Pursuant to Article 9 of Directive 2003/87, the Grand Duchy of Luxembourg developed its NAP for the period from and including 2008 to 2012. That NAP was approved by the Commission by decisions of 29 November 2006 and 13 July 2007. On page 7 of the NAP, it is in essence stipulated that, in the event of the dismantling or closure of an installation, the allowances will not be issued for the following year.

The dispute in the main proceedings and the question referred for a preliminary ruling

15 As is apparent from the file before the Court, the Minister of the Environment allocated ArcelorMittal a total quantity of 405 365 emissions allowances for the period from and including 2008 to 2012. So far as the year 2012 is concerned, on 22 February 2012 that minister issued ArcelorMittal with 81 073 allowances, to be entered in the national registry, in respect of that company's Schifflange (Luxembourg) installation.

16 By a letter of 23 April 2012, ArcelorMittal requested that Minister to cease environmental monitoring, on the grounds that the activities of that installation had been suspended since the end of 2011 for an indefinite period.

17 By a decree of 6 June 2013, the Minister with responsibility for Sustainable Development and Infrastructure, first, reduced the total emissions allowances allocated to that company in respect of the period from and including 2008 to 2012 and, secondly, requested the surrender without compensation of 80 922 emissions allowances ('the allowances in dispute'). The reason for that measure, adopted, inter alia, on the basis of Article 13(6) of the Law of 2004, was ArcelorMittal's declaration as to the suspension, as of the end of 2011, of activities at its installation in Schifflange.

18 On 8 July 2013, ArcelorMittal brought an application for administrative review against the decree of 6 June 2013, that application being dismissed by a decision of 24 September 2013. That company brought an action against that latter decision before the tribunal administratif (administrative court) (Luxembourg) which, by a judgment of 17 December 2014, decided to submit a reference to the Cour constitutionelle (Constitutional Court) (Luxembourg) for a preliminary ruling concerning the compatibility of Article 13(6) of the Law of 2004 with Article 16 of the Constitution. According to the tribunal administratif (administrative court), surrender without compensation of the allowances in

dispute was effectively tantamount to an illegal expropriation, given that the allowances in dispute had been issued and entered in the national registry and, therefore, they had become part of ArcelorMittal's property. The Cour constitutionelle (Constitutional Court), for its part, raises the issue of the compatibility of Article 13(6) of the Law of 2004 with Directive 2003/87, inasmuch as that provision could be contrary to the broad logic of the scheme established by that directive.

19 In those circumstances, the Cour constitutionnelle decided to stay the proceedings and to refer the following question to the Court for a preliminary ruling:

'Is Article 13(6) of the [Law of 2004] establishing a scheme for greenhouse gas emission allowance trading, in so far as it allows the competent minister to order the surrender, without full or partial compensation of allowances issued in accordance with Article 12(2) and (4) of that law, but not used, compatible with Directive [2003/87], and more particularly with the broad logic of the emissions trading scheme provided for by that directive, that question encompassing the issue of the legal validity of the surrender of allowances which have been issued but not used, and, if that question is answered in the affirmative, of their classification, as well as that of the possible classification of such allowances as property?'

Consideration of the question referred

20 By its question, the referring court asks, in essence, whether Directive 2003/87 must be interpreted as precluding a national provision which allows the competent authorities to require the surrender without compensation of emissions allowances which have been issued but were not used by an operator.

21 That court also asks whether the allowances in dispute may be classified as emissions allowances within the meaning of Directive 2003/87 and, if so, what the legal nature is of those allowances.

22 So far as concerns the first part of the question referred, it must be noted at the outset that there is an economic logic underlying the allowance trading scheme established by Directive 2003/87, which encourages a participant in that scheme to emit quantities of greenhouse gases that are less than the allowances originally allocated him, in order to sell the surplus to another participant who has emitted more than his allowance (see, to that effect, judgment of 16 December 2008, *Arcelor Atlantique et Lorraine and Others*, C-127/07, EU:C:2008:728, paragraph 32).

23 It must subsequently be noted that Article 19(1) of Directive 2003/87 requires the creation of a system of national registries, in order to ensure the 'accurate accounting' of the transactions carried out using the emissions allowances.

24 The Court has held in this connection that the overall scheme of Directive 2003/87 is based on the strict accounting of the issue, holding, transfer and cancellation of allowances, the framework for which is provided for by Article 19 thereof. That accurate accounting is inherent in the very purpose of the directive, consisting in the establishment of a Community scheme for greenhouse gas emission allowance trading, which aims to reduce greenhouse gas emissions in the atmosphere to a level that prevents dangerous anthropogenic interference with the climate system, with the ultimate objective of protection of the environment (judgment of 17 October 2013, *Billerud Karlsborg and Billerud Skärblacka*, C-203/12, EU:C:2013:664, paragraph 27).

25 Furthermore, as the Advocate General observed in point 65 of his Opinion, the requirement as to the accuracy of the quantity and circumstances of emissions allowances reflects the European Union legislature's ambition of improving the way the market operates by preventing distortions which are caused by any uncertainty as to whether allowances are valid. Moreover, in addition to the purely economic interest in maintaining the reliability of the market, that requirement as to accuracy enables

the purpose served by the market to be achieved, namely combating pollution. The correlation between actual emissions and those authorised by emissions allowances is, therefore, an essential priority of the system as a whole.

26 To that effect, under Article 7 of Directive 2003/87, operators of an installation must inform the competent authorities of any changes planned in the use of the installation which may require updating of the greenhouse gas emissions permit.

27 Lastly, it is important to point out that in setting out their NAPs, the Member States have a certain margin for manoeuvre (see, to that effect, judgment of 29 March 2012, *Commission* v *Estonia*, C-505/09 P, EU:C:2012:179, paragraphs 51 to 53). At the end of the procedure under Article 9 of Directive 2003/87, an NAP enjoys a presumption of legality, since, after the three-month time limit laid down in Article 9(3) has expired, it is regarded as definitive where the Commission makes no observations, so that the Member State concerned may adopt it (judgment of 3 October 2013, *Commission* v *Latvia*, C-267/11 P, EU:C:2013:624, paragraph 46).

28 In the present case, it is apparent from the order for reference that the Minister with responsibility for Sustainable Development and Infrastructure, by the decree of 6 June 2013, required the surrender without compensation of the allowances at issue.

29 According to the Luxembourg Government and the Commission, the surrender concerned was intended to remedy an irregular situation. The allowances in dispute had been issued to ArcelorMittal only because that company had failed to inform the competent authorities, prior to the date on which the allowances were due to be issued, of the suspension for an indefinite period of the activities of its installation in Schifflange. Accordingly, ArcelorMittal, they submit, failed to comply with the notification obligation set out in Article 13(6) of the Law of 2004. Moreover, the requirement laid down in the Luxembourg NAP that, in the event of the dismantling or closure of an installation, the allowances were not to be issued for the following year, had not been satisfied.

30 As the Advocate General observed in point 69 of his Opinion, the obligation laid down in Article 13(6) of the Law of 2004 constitutes the transposition of that in Article 7 of Directive 2003/87. Furthermore, the requirement laid down in the Luxembourg NAP, according to which the emissions allowances are not issued in the event of the closure of an installation, is intended to meet the same criteria, as to the strict accounting of emissions and the accuracy of the quantity and circumstances of emissions allowances, as set out in paragraphs 24 and 25 above.

31 It is for the referring court to ascertain whether in the present case ArcelorMittal actually suspended activities at its installation in Schifflange as of November 2011 and whether that suspension could be classified as a cessation of activities for the purposes of Article 13(6) of the Law of 2004.

32 If that is the case, Directive 2003/87 does not preclude the competent authority from adopting, in circumstances such as those at issue in the main proceedings, a decision ordering the surrender without compensation of the emissions allowances. Where an installation has ceased its activities at a date prior to that of the allocation of emissions allowances, those allowances clearly cannot be used in order to account for greenhouse gas emissions which can no longer be produced by that installation.

33 In those circumstances, the failure to surrender the allowances in dispute would undermine the requirements as to strict accounting, accuracy and correlation between actual emissions and those authorised, as set out in paragraphs 23 to 25 above. As the Advocate General essentially observed in point 78 of his Opinion, the situation whereby the improperly-allocated allowances are surrendered is a situation concerning the enforcement of the rules governing the operation of the scheme provided for by Directive 2003/87, in order to prevent the distortion of the market in emissions allowances and indirectly facilitate the objective of environmental protection which that market serves.

34 That finding cannot be called into question by the argument put forward by ArcelorMittal, according to which the only situation in which Directive 2003/87 advocates the surrender of allowances is that provided for in Article 12(3) of that directive.

35 It should be observed in this connection that Article 12(3) of Directive 2003/87 concerns the surrender of allowances 'equal to the total emissions [from an installation] during the preceding calendar year'. It is thus apparent from the actual wording of that provision that it refers to the allowances necessary to account for the greenhouse gas emissions produced by an installation during the previous year. Were it to be ascertained that the Schifflange installation had ceased its activities at a date prior to that when the allowances in dispute were issued, such use could not have taken place so far as those allowances are concerned.

36 Accordingly, Directive 2003/87 must be interpreted as not precluding national legislation which allows the competent authority to require the surrender, without full or partial compensation, of unused emissions allowances which have been improperly issued to an operator, as a result of the failure by the latter to comply with the obligation to inform the competent authority in due time of the cessation of the operation of an installation.

37 That finding is not called into question by ArcelorMittal's argument seeking to show that such national legislation does not comply with Article 17 of the Charter of Fundamental Rights of the European Union. It is important to note that, if the allowances in dispute were improperly allocated to ArcelorMittal, having regard to the requirements as to accurate accounting upon which the scheme established by Directive 2003/87 is based, it would not be permissible for those allowances to be validly established in law as emissions allowances within the meaning of Directive 2003/87.

38 Thus, the surrender of those allowances would not mean the expropriation of an asset which already formed an integral part of the operator's property, but simply the withdrawal of the act allocating the allowances, on account of the failure to comply with the conditions laid down in Directive 2003/87.

39 Accordingly, the answer to the second part of the question referred is that the allowances issued after an operator has ceased the activities performed in the installation to which those allowances relate, without informing the competent authority beforehand, cannot be classified as emissions 'allowances' within the meaning of Article 3(a) of Directive 2003/87.

40 In the light of all of the foregoing considerations, the answer to the question referred must be as follows:

— Directive 2003/87 must be interpreted as not precluding national legislation which allows the competent authority to require the surrender, without full or partial compensation, of unused allowances which have been improperly issued to an operator, as a result of the failure by the latter to comply with the obligation to inform the competent authority in due time of the cessation of the operation of an installation,

— the allowances issued after an operator has ceased the activities performed in the installation to which those allowances relate, without informing the competent authority beforehand, cannot be classified as emissions 'allowances' within the meaning of Article 3(a) of Directive 2003/87.

Costs

41 Since these proceedings are, for the parties to the main proceedings, a step in the action pending before the national court, the decision on costs is a matter for that court. Costs incurred in submitting observations to the Court, other than the costs of those parties, are not recoverable.

On those grounds, the Court (Fifth Chamber) hereby rules:

Directive 2003/87/EC of the European Parliament and of the Council of 13 October 2003 establishing a scheme for greenhouse gas emission allowance trading within the Community and amending Council Directive 96/61/EC, as amended by Regulation (EC) No 219/2009 of the European Parliament and of the Council of 11 March 2009, must be interpreted as not precluding national legislation which allows the competent authority to require the surrender, without full or partial compensation, of unused allowances which have been improperly issued to an operator, as a result of the failure by the latter to comply with the obligation to inform the competent authority in due time of the cessation of the operation of an installation.

The allowances issued after an operator has ceased the activities performed in the installation to which those allowances relate, without informing the competent authority beforehand, cannot be classified as emissions 'allowances' within the meaning of Article 3(a) of Directive 2003/87, as amended by Regulation No 219/2009.

[Signatures]