Reports of Cases

JUDGMENT OF THE COURT (Second Chamber)

29 April 2015 *

(Reference for a preliminary ruling — Environment — Directive 2003/87/EC — Greenhouse gas emission allowance trading scheme in the European Union — Determination of the extent of the obligation to surrender allowances — Penalties — Article 16(1) and (3))

In Case C-148/14,

REQUEST for a preliminary ruling under Article 267 TFEU from the Bundesverwaltungsgericht (Germany), made by decision of 20 February 2014, received at the Court on 31 March 2014, in the proceedings

Bundesrepublik Deutschland

v

Nordzucker AG,

intervening party:

Vertreter des Bundesinteresses beim Bundesverwaltungsgericht,

THE COURT (Second Chamber),

composed of R. Silva de Lapuerta, President of the Chamber, J.-C. Bonichot (Rapporteur), A. Arabadjiev, J.L. da Cruz Vilaça and C. Lycourgos, Judges,

Advocate General: N. Wahl,

Registrar: A. Calot Escobar,

having regard to the written procedure,

after considering the observations submitted on behalf of:

— Bundesrepublik Deutschland, by G. Buchholz, Rechtsanwalt,

— Nordzucker AG, by I. Zenke and M.-Y. Vollmer, Rechtsanwältinnen,

— the German Government, by T. Henze and K. Petersen, acting as Agents,

— the Czech Government, by M. Smolek and S. Šindelková, acting as Agents,

* Language of the case: German.

— the Netherlands Government, by M. de Ree and M. Bulterman, acting as Agents,

— the United Kingdom Government, by J. Beeko, acting as Agent, and R. Palmer, Barrister,

— the European Commission, by E. White and C. Hermes, acting as Agents,

after hearing the Opinion of the Advocate General at the sitting on 5 February 2015,

gives the following

Judgment

1 This request for a preliminary ruling concerns the interpretation of Article 16(3) and (4) 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 2004 L 275, p. 32), as amended by Directive 2004/101/EC of the European Parliament and of the Council of 27 October 2004 (OJ 2004 L 338, p. 18; 'Directive 2003/87').

2 The request has been made in proceedings between Bundesrepublik Deutschland, represented by the Deutsche Emissionshandelsstelle im Umweltbundesamt (German Emissions Trading Authority at the Federal Environment Agency) ('the Emissionshandelsstelle') and Nordzucker AG ('Nordzucker') concerning a decision imposing a penalty of EUR 106 920 on the latter for infringement of its obligation to surrender sufficient greenhouse gas emission allowances to cover its emissions during the preceding year.

Legal context

EU law

3 Article 6(2) of Directive 2003/87 is worded as follows:

'Greenhouse gas emissions permits shall contain the following:

…

(e) an obligation to surrender allowances equal to the total emissions of the installation in each calendar year, as verified in accordance with Article 15, within four months following the end of that year.'

4 Article 12 of that directive, headed 'Transfer, surrender and cancellation of allowances', provides in paragraph (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.'

5 Article 14 of that directive provides:

‘(1) The Commission shall adopt guidelines for monitoring and reporting of emissions resulting from the activities listed in Annex I of greenhouse gases specified in relation to those activities, in accordance with the procedure referred to in Article 23(2), by 30 September 2003. The guidelines shall be based on the principles for monitoring and reporting set out in Annex IV.

(2) Member States shall ensure that emissions are monitored in accordance with the guidelines.

(3) Member States shall ensure that each operator of an installation reports the emissions from that installation during each calendar year to the competent authority after the end of that year in accordance with the guidelines.’

6 Article 15 of Directive 2003/87 provides:

‘Member States shall ensure that the reports submitted by operators pursuant to Article 14(3) are verified in accordance with the criteria set out in Annex V, and that the competent authority is informed thereof.

Member States shall ensure that an operator whose report has not been verified as satisfactory in accordance with the criteria set out in Annex V by 31 March each year for emissions during the preceding year cannot make further transfers of allowances until a report from that operator has been verified as satisfactory.’

7 Article 16 of that directive, headed ‘Penalties’, provides:

‘(1) Member States shall lay down the rules on penalties applicable to infringements of the national provisions adopted pursuant to this Directive and shall take all measures necessary to ensure that such rules are implemented. The penalties provided for must be effective, proportionate and dissuasive. …

(2) Member States shall ensure publication of the names of operators who are in breach of requirements to surrender sufficient allowances under Article 12(3).

(3) Member States shall ensure that any operator who does not surrender sufficient allowances by 30 April of each year to cover its emissions during the preceding year shall be held liable for the payment of an excess emissions penalty. The excess emissions penalty shall be EUR 100 for each tonne of carbon dioxide equivalent emitted by that installation for which the operator has not surrendered allowances. Payment of the excess emissions penalty shall not release the operator from the obligation to surrender an amount of allowances equal to those excess emissions when surrendering allowances in relation to the following calendar year.

(4) During the three-year period beginning 1 January 2005, Member States shall apply a lower excess emissions penalty of EUR 40 …’

8 Article 23(2) of Directive 2003/87 is worded as follows:

‘Where reference is made to this paragraph, Articles 5 and 7 of Decision 1999/468/EC shall apply, having regard to the provisions of Article 8 thereof.

…’

9 Commission Decision 2004/156/EC of 29 January 2004 establishing guidelines for the monitoring and reporting of greenhouse gas emissions pursuant to Directive 2003/87/EC of the European Parliament and of the Council (OJ 2004 L 59, p. 1) ('the guidelines'), provides in the fifth and sixth subparagraphs of point 7.4:

'At the end of the verification process, the verifier shall make a judgment with respect to whether the emissions report contains any material misstatement. If the verifier concludes that the emissions report does not contain any material misstatement, the operator can submit the emissions report to the competent authority in accordance with Article 14(3) of [Directive 2003/87]. If the verifier concludes that the emissions report contains a material misstatement, the operator's report has not been verified as satisfactory. In accordance with Article 15 of [Directive 2003/87], Member States shall ensure that an operator whose report has not been verified as satisfactory by 31 March each year for emissions during the preceding year cannot make further transfers of allowances until a report from that operator has been verified as satisfactory. Member States shall lay down applicable penalties in accordance with Article 16 of [Directive 2003/87].

The total emissions figure for an installation in an emissions report that has been verified as satisfactory shall be used by the competent authority to check whether a sufficient number of allowances have been surrendered by the operator in respect of that same installation.'

German law

10 In Germany, Directive 2003/87 was transposed by the Law on greenhouse gas emission allowance trading (Gesetz über den Handel mit Berechtigungen zur Emission von Treibhausgasen), of 8 July 2004 (BGBl I, p. 1578; 'the TEHG').

11 Paragraph 5(1) and (3) of the TEHG provides:

'(1) The operator responsible shall, from 1 January 2005, monitor the emissions caused by its activities in a calendar year … and shall report them to the competent authority … by 1 March of the following year. …

(3) Prior to submission, the emissions report specified in subparagraph (1) must be verified in accordance with Annex 3 to the present Law by a verifier accredited by the competent authority. …'

12 Paragraph 6(1) of the TEHG is worded as follows:

'The operator responsible shall, by 30 April of each year, beginning in 2006, surrender to the competent authority a number of allowances equal to the quantity of emissions resulting from its activities in the preceding calendar year.'

13 Paragraph 18 of the TEHG, headed 'Enforcement of the obligation to surrender allowances', provides in subparagraphs (1) and (3) thereof:

(1) If the operator responsible fails to comply with its obligation under Paragraph 6(1), for each tonne of carbon dioxide equivalent emitted for which the operator responsible has not surrendered any allowances, the competent authority shall assess the operator as liable to make payment of EUR 100, EUR 40 in the first allocation period. Liability to make payment may be waived if the operator responsible was unable to comply with its obligation under Paragraph 6(1) by reason of force majeure.

…

(3) The operator responsible shall remain subject to the obligation to surrender the missing allowances … by 30 April of the following year. ...'

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

14 It is indicated in the order for reference that Nordzucker operated, until March 2008, a sugar refinery. That installation included a steam generator used, in part, for drying sugar beet pulp slices. Dried and pressed, the latter were sold as livestock feed.

15 According to a letter of the Bundesministerium für Umwelt (the Federal Ministry for the Environment) of 17 June 2004, sent to the Verein der Zuckerindustrie (the German Sugar Industry Association), the drying facilities required for the operation of sugar industry installations are not subject to the greenhouse gas emission allowance trading scheme. On the other hand, where a boilerhouse, designed for the generation of steam or electricity, is used as part of an ancillary installation, which is connected to an installation for the production or refining of sugar, the boilerhouse is, in principle, subject to that system.

16 In 2006 Nordzucker produced its greenhouse gas emissions report for 2005, indicating, with respect to its steam generator, a quantity of 40 288 tonnes of carbon dioxide, excluding emissions attributable to the drying of sugar beet pulp slices which amounted to 2 673 tonnes of carbon dioxide. After validation of that report by a verifier, Nordzucker surrendered, within the time-limit laid down by the TEHG, a number of allowances equal to the total quantity of emissions stated in its report. After the expiry of that time-limit, the Emissionshandelstelle found irregularities in Nordzucker's report in relation to the attribution of various fuel streams. As a result, Nordzucker corrected its report by including the emissions attributable to the drying of sugar beet pulp slices and surrendered, on 24 April 2007, 2 673 additional greenhouse gas emission allowances.

17 By decision of 7 December 2007, the Emissionshandelsstelle imposed, in accordance with Paragraph 18 of the TEHG, a penalty of EUR 106 920 on Nordzucker for being in breach of the obligation to surrender sufficient greenhouse gas emission allowances to cover the emissions of the preceding year.

18 An action having been brought before it by Nordzucker, the Verwaltungsgericht Berlin (the Administrative Court, Berlin) annulled the decision imposing the penalty. The appeal brought by the Emissionhandelsstelle was dismissed by the Oberverwaltungsgericht Berlin-Brandenburg (Higher Administrative Court, Berlin-Brandenburg). According to that court's judgment, Nordzucker did not infringe its obligation to surrender allowances since the extent of that obligation was determined by the number of allowances stated in the verified report. Since the Emissionshandelsstelle considers that the obligation to surrender cannot be limited by an operators' verified report, it brought an action before the Bundesverwaltungsgericht (the Federal Administrative Court) to have that judgment set aside.

19 It is apparent from the explanations of the Bundesverwaltungsgericht that the provisions of the TEHG allow a ruling in the case before it in favour of either of the parties. That court states, however, that it considers that the principle of proportionality, guaranteed both under German law and EU law, must preclude an operator who surrenders a number of allowances equal to the emissions stated in its verified report from being subject to a penalty such as that provided for under Article 16(3) of Directive 2003/87. Although it is a simple matter to respect the time-limit for surrender, it is considerably more difficult to avoid errors arising in reports that have been verified.

20 Furthermore, the referring court considers that it is apparent from a combined reading of Article 16(2) and (3) of the directive that the obligation to surrender concerns a number of allowances equal to the total emissions of an installation, as verified by an independent verifier, in accordance with Article 15

of Directive 2003/87. Thus, the operator of an installation producing greenhouse gas emissions must surrender the number of allowances which is stated in its report to the competent authorities on condition that that report has been approved as being satisfactory by the verifier.

21 That interpretation is compatible with the guidelines since it follows from point 7.4 thereof that 'the total emissions figure for an installation in an emissions report that has been verified as satisfactory shall be used by the competent authority to check whether a sufficient number of allowances has been surrendered by the operator in respect of that same installation'.

22 In those circumstances, the Bundesverwaltungsgericht decided to stay the proceedings and to refer the following question to the Court for a preliminary ruling:

'Must Article 16(3) and (4) of Directive 2003/87 be interpreted as meaning that the excess emissions penalty must also be applied where, by 30 April of a given year, an operator surrendered a number of allowances equal to the total emissions stated in its report on emissions from the installation for the preceding year and that report was verified as satisfactory by the verifier, but where the competent national authority established after 30 April that the verified emissions report had contained errors by understating the total quantity of emissions, the report was duly corrected and the operator surrendered the additional allowances before expiry of the new time-limit?'

The application for reopening of the oral procedure

23 Following the delivery of the Opinion of the Advocate General, the German Government, by a document lodged at the Court Registry on 20 February 2015, applied for the oral procedure to be reopened. In support of that application, the German Government claims, in essence, that the Opinion of the Advocate General contains errors of fact.

24 It should be observed that the Court may at any moment, having heard the Advocate General, order the reopening of the oral procedure under Article 83 of its Rules of Procedure if, inter alia, it considers that it lacks sufficient information or where the case must be decided on the basis of an argument which has not been debated between the parties or the interested persons referred to in Article 23 of the Statute of the Court of Justice of the European Union (judgment in *Commerz Nederland*, C-242/13, EU:C:2014:2224, paragraph 26).

25 That is not the situation here. In common with the other intervening parties, the German Government set out in its written observations submitted during the written part of the procedure its assessment of the facts of the dispute. Accordingly, the Court considers, after hearing the Advocate General, that it has before it all the necessary information to give judgment.

26 In the light of the foregoing, the Court considers that there is no need to reopen the oral part of the procedure.

Consideration of the question referred for a preliminary ruling

27 By its question, the referring court asks, in essence, whether Article 16(3) of Directive 2003/87 must be interpreted as meaning that it applies to an operator who surrenders a number of greenhouse gas emission allowances equal to the emissions for the preceding year as reported and verified in accordance with Article 15 of that directive, where it is established, following an additional verification carried out by the competent national authority after the expiry of the time-limit for surrender, that those emissions were understated and that, as a result, an insufficient number of allowances was surrendered.

28 The overall structure of Directive 2003/87 is based on the strict accounting of the issue, holding, transfer and cancellation of greenhouse gas emission allowances, the framework for which is provided for by Article 19 thereof and requires the establishment of a system of standardised registries by means of a separate Commission regulation. 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, with the ultimate objective of protection of the environment. In addition, the EU legislature wished, by itself introducing a predefined penalty, to shield the allowance trading scheme from distortions of competition resulting from market manipulations (judgment in *Billerud Karlsborg and Billerud Skärblacka*, C-203/12, EU:C:2013:664, paragraph 27).

29 As the Advocate General stated in point 29 of his Opinion, one of the pillars on which the scheme established by Directive 2003/87 is built is the obligation on operators to surrender by 30 April of the current year, in order to have them cancelled, a number of greenhouse gas emission allowances equal to their emissions during the preceding calendar year.

30 That obligation must be applied particularly strictly. Stated as a mandatory element of the greenhouse gas emissions permit by Article 6(2)(e) of Directive 2003/87, and worded unambiguously in Article 12(3) of that directive, that obligation is the only one to which Directive 2003/87 itself attaches, under Article 16(3) thereof, a specific penalty, whereas the penalty for any other conduct contrary to its provisions is, under Article 16(1) thereof, left to the discretion of the Member States (see, to that effect, judgment in *Billerud Karlsborg and Billerud Skärblacka*, C-203/12, EU:C:2013:664, paragraph 25).

31 As follows from Article 14(3) of Directive 2003/87, that obligation to surrender is based on the reports that the operators of an installation draw up, following the rules set out in the guidelines. In accordance with the requirement for strict accounting of the allowances issued, and pursuant to Articles 6(2)(e) and 12(3) of that directive, those reports, before being submitted to the competent national authorities, are subject to a verification process provided for in, inter alia, Article 15 of that directive.

32 It follows from Article 15, read in conjunction with Annex V to Directive 2003/87, that the verification of emissions reports is an essential condition for the surrender of allowances. An operator whose report has not been verified and declared to be satisfactory may not transfer allowances until a report produced by him is declared to be satisfactory.

33 That verification, for the purpose of validation of the emissions report, is carried out, under point 12 of Annex V, by a verifier who is 'independent of the operator, [who carries] out his activities in a sound and professional manner'. In the words of the fifth subparagraph of point 7.4 of the guidelines, where, at the end of the verification process, the verifier 'concludes that the emissions report contains a material misstatement, the verification of the report submitted by the operator shall be judged to be unsatisfactory'. It is only where that report 'does not contain any material misstatement' that 'the operator can submit the report to the competent authority in accordance with Article 14(3) of Directive [2003/87]'.

34 It must be noted that Directive 2003/87 does not provide for other control mechanisms and does not make the surrender of allowances subject to any condition other than the emissions report being found to be satisfactory. Moreover, the guidelines confirm, in the sixth subparagraph of point 7.4 thereof, that 'the total emissions figure for an installation in an emissions report shall be used by the competent authority to check whether a sufficient number of allowances have been surrendered by the operator'.

35 It follows that the lump-sum penalty provided for in Article 16(3) of Directive 2003/87 must be imposed on operators who do not comply with that obligation, either because they do not surrender any allowances, or because the number of allowances surrendered is less than the emissions stated in the emissions report.

36 Having said that, by the question referred for a preliminary ruling, the referring court seeks to ascertain whether that provision requires the lump-sum penalty also to be imposed on an operator where a national authority itself finds, by its own verifications and after the expiry of the surrender time-limit, an irregularity.

37 In that regard, it follows from the provisions of Directive 2003/87 as a whole that that directive does not preclude the competent authorities of the Member States from carrying out additional controls or verifications, such as those carried out by the Emissionshandelsstelle after the surrender of allowances by Nordzucker. To the extent that such verifications may reveal irregularities or attempted fraud, they contribute to the correct functioning of the allowance trading scheme. However, where, in that context, a Member State authority finds that the amount of emissions for the previous year, as stated in an operator's verified report, was understated and that, as a result, an insufficient number of allowances was surrendered, that cannot lead to the application of the penalty provided for in Article 16(3) of Directive 2003/87.

38 As the Advocate General stated in point 34 of his Opinion, that directive cannot be interpreted as requiring a penalty to be automatically imposed for breach of an obligation which it does not clearly specify. As is apparent in particular from paragraph 34 of this judgment, Articles 6(2)(e) and 12(3) of Directive 2003/87, and the sixth subparagraph of point 7.4 of the guidelines define clearly and unambiguously the concrete requirements stemming from the obligation to surrender. Accordingly, the Court must hold that the application of Article 16(3) of that directive must be limited solely to infringements of that obligation.

39 That finding is confirmed by the structure of Article 16 of Directive 2003/87 which includes, as stated in paragraph 30 of this judgment, two different systems of penalties, provided for respectively, first, in Article 16(3) thereof, and secondly, in Article 16(1) thereof. Under the second provision, Member States are required to make provision for 'effective, proportionate and dissuasive' penalties, applicable 'to infringements of the national provisions adopted pursuant to this Directive', and to take all measures necessary to ensure that they are implemented. In other words, it is for the Member States to determine the penalties which may be imposed on an operator who, although fulfilling the obligation to surrender for the purposes of Directive 2003/87, fails in addition to respect other requirements inherent in the functioning of the greenhouse gas emission allowance trading scheme. That is notably the case where an emissions report has been produced in disregard of the technical rules provided for by Directive 2003/87 and elaborated by the guidelines, or where such a report does not include all the emissions subject to that scheme.

40 In the light of the foregoing, it must be held that, contrary to what is claimed by the German Government, the fact that the penalty provided for in Article 16(3) of Directive 2003/87 is not applicable does not mean that an operator who produces an incorrect emissions report is able to escape penalty if the verifier failed to discover the irregularities committed.

41 The interpretation of the scope of Article 16(3) of Directive 2003/87 stated in paragraph 38 of this judgment is also necessary having regard to the principle of proportionality.

42 In the light of the considerations resulting, in particular, from paragraphs 29 to 34 of this judgment, it should be noted that an operator, such as Nordzucker in the main proceedings, which submits to the competent authorities an emissions report verified by an independent expert who judged it to be satisfactory, may proceed, under Articles 6(2)(e) and 12(3) of Directive 2003/87, to surrender a number of allowances equal to the emissions of its installation in the previous calendar year, as

verified. Thus, that directive allows an operator, in order to fulfil its obligation to surrender within the meaning of those provisions, to rely on the fact that its report has been validated by an independent verifier.

43 It is true that an operator cannot exclude the possibility that, after the surrender of greenhouse gas emission allowances, the competent authorities of a Member State may find, during their own additional controls, that its emissions report contains an irregularity which affects the number of allowances to be surrendered. However, the automatic application of the lump-sum penalty provided for in Article 16(3) of Directive 2003/87 is disproportionate since, subject to the qualification of acting in good faith, an operator cannot foresee the result of such additional monitoring with sufficient certainty.

44 On the other hand, the penalties which the Member States are required to provide under Article 16(1) of Directive 2003/87 constitute an appropriate instrument in such a situation in so far as, in accordance with the wording of that provision, those penalties must be proportionate to the infringement committed. That means, inter alia, that it is for the competent national authorities to have regard to all the considerations of fact or law specific to each case in order to determine whether a penalty must be imposed on an operator and, where appropriate, which penalty. That assessment requires, in particular, that the behaviour of the operator be taken into account, as well as its good faith or its fraudulent intentions.

45 In the light of all the foregoing, the answer to the question referred is that Article 16(3) of Directive 2003/87 must be interpreted as meaning that it does not apply to an operator who surrenders a number of greenhouse gas emission allowances equal to the emissions for the preceding year as reported and verified in accordance with Article 15 of that directive, where it is established, following an additional verification carried out by the competent national authority after the expiry of the time-limit for surrender, that those emissions were understated, so that the number of allowances surrendered is insufficient. It is for the Member States to determine the penalties which may be imposed in such a situation, in accordance with Article 16(1) of Directive 2003/87.

Costs

46 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 (Second Chamber) hereby rules:

Article 16(3) 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, as amended by Directive 2004/101/EC of the European Parliament and of the Council of 27 October 2004, must be interpreted as meaning that it does not apply to an operator who surrenders a number of greenhouse gas emission allowances equal to the emissions for the preceding year as reported and verified in accordance with Article 15 of that directive, where it is established, following an additional verification carried out by the competent national authority after the expiry of the time-limit for surrender, that those emissions were understated, so that the number of allowances surrendered is insufficient.

It is for the Member States to determine the penalties which may be imposed in such a situation, in accordance with Article 16(1) of Directive 2003/87, as amended by Directive 2004/101.

[Signatures]