Reports of Cases

JUDGMENT OF THE COURT (Second Chamber)

17 October 2013 *

(Directive 2003/87/EC — Scheme for greenhouse gas emission allowance trading — Penalty for excess emissions — Concept of excess emission — Equated with infringement of the obligation to surrender, within the time periods prescribed by the directive, a sufficient number of allowances to cover the emissions from the previous year — No exculpatory cause in the event of actual holding of non-surrendered allowances, unless force majeure — No possibility of varying the amount of the penalty — Proportionality)

In Case C-203/12,

REQUEST for a preliminary ruling from the Högsta domstolen (Sweden), made by decision of 24 April 2012, received at the Court on 30 April 2012, in the proceedings

Billerud Karlsborg AB

Billerud Skärblacka AB

v

Naturvårdsverket,

THE COURT (Second Chamber),

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

Advocate General: P. Mengozzi,

Registrar: A. Calot Escobar,

having regard to the written procedure,

after considering the observations submitted on behalf of:

— Billerud Karlsborg AB and Billerud Skärblacka AB, by E. Wernberg and O. Gentele, advokater,

— Naturvårdsverket, by R. Janson and U. Gunnesby, advokater,

— the Greek Government, by V. Kyriazopoulos and M. Vergou, acting as Agents,

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

* Language of the case: Swedish.

after hearing the Opinion of the Advocate General at the sitting on 16 May 2013,

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 2003 L 275, p. 32).

2 The request has been made in proceedings between Billerud Karlsborg AB and Billerud Skärblacka AB ('the Billerud companies') and the Naturvårdsverket (Swedish environmental protection agency), which imposed penalties on those companies for having failed to surrender in time the carbon dioxide equivalent allowances equal to their actual emissions in 2006.

Legal context

European Union law

Directive 2003/87

3 Recitals 5 to 7 in the preamble to Directive 2003/87 state:

'(5) The Community and its Member States have agreed to fulfil their commitments to reduce anthropogenic greenhouse gas emissions under the Kyoto Protocol jointly … This Directive aims to contribute to fulfilling the commitments of the European Community and its Member States more effectively, through an efficient European market in greenhouse gas emission allowances, with the least possible diminution of economic development and employment.

(6) Council Decision 93/389/EEC of 24 June 1993 for a monitoring mechanism of Community CO_2 and other greenhouse gas emissions [OJ 1993 L 167, p. 31], established a mechanism for monitoring greenhouse gas emissions and evaluating progress towards meeting commitments in respect of these emissions. This mechanism will assist Member States in determining the total quantity of allowances to allocate.

(7) Community provisions relating to allocation of allowances by the Member States are necessary to contribute to preserving the integrity of the internal market and to avoid distortions of competition.'

4 Article 4 of Directive 2003/87 is worded as follows:

'Member States shall ensure that, from 1 January 2005, no installation undertakes any activity listed in Annex I resulting in emissions specified in relation to that activity unless its operator holds a permit …'.

5 Under Article 6(2) of the same directive:

'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, ... within four months following the end of that year.'

6 Article 10 of Directive 2003/87 lays down the principle of free allocation of at least 95% of the allowances between 1 January 2005 and 1 January 2008, then 90% from 1 January 2008 to 1 January 2013.

7 Article 11(4) of the directive provides:

'The competent authority shall issue a proportion of the total quantity of allowances each year … by 28 February of that year …'

8 Article 12 of that directive, relating to transfers, surrenders and cancellations of allowances, reads as follows 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 … and that these are subsequently cancelled.'

9 Failure to comply with that obligation will result in a penalty, in addition to the publication of the name of the offending operators as provided for under Article 16(2) of Directive 2003/87, as provided for in Article 16(3) and (4):

'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 for each tonne of carbon dioxide equivalent emitted by that installation for which the operator has not surrendered allowances. …'

10 Article 16(1) of Directive 2003/87 provides:

'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. …'

11 Article 19 of that directive provides that Community registries are to be kept:

'1. 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. …

…

3. In order to implement this Directive, the Commission shall adopt a Regulation … for a standardised and secured system of registries in the form of standardised electronic databases containing common data elements to track the issue, holding, transfer and cancellation of allowances, to provide for public access and confidentiality as appropriate and to ensure that there are no transfers which are incompatible with the obligations resulting from the Kyoto Protocol.'

Regulation No 2216/2004

12 Article 52 of Commission Regulation (EC) No 2216/2004 of 21 December 2004 for a standardised and secured system of registries pursuant to Directive 2003/87 and Decision No 280/2004/EC of the European Parliament and of the Council (OJ 2004 L 386 p. 1), entitled 'Surrender of allowances', provides:

'An operator shall surrender allowances for an installation by requesting or, where provided in Member State legislation, be deemed to have requested, the registry administrator to:

(a) transfer a specified number of allowances for a specified year from the relevant operator holding account into the Party holding account of that registry;

(b) enter the number of transferred allowances into the section of the surrendered allowance table designated for that installation for that year.

…'

Swedish law

13 European Union law has been implemented through Law No 1199 of 2004 on emission allowance trading (Lag om handel med utsläppsrätter, 2004:1199) ('Law on emission allowance trading') and regulations 2004:8 on allowance registries.

14 Chapter 6, Paragraph 1 of Law on emission allowance trading provides:

'For each installation, the operator shall surrender a number of allowances equal to the total emissions from that installation. … That surrender shall be effected to the authority responsible for administering the registry by 30 April and relate to the emissions from the preceding calendar year.'

15 Chapter 8, Paragraph 6 of that law provides:

'Any operator who has not surrendered sufficient allowances under Chapter 6, paragraph 1, shall be liable to pay the State a penalty for the excess emissions. For the period 2005-2007, the penalty shall amount to a sum equivalent to EUR 40 for each tonne of carbon dioxide emitted by the installation for which the operator has not surrendered allowances. For subsequent periods, that amount shall be EUR 100. The value in Swedish Crowns shall be determined on the basis of the value of the Euro on 1 May of the year in which the surrender is to take place.'

16 Chapter 8, Paragraph 7 of the same law provides:

'An operator who has paid a penalty for excess emissions in accordance with paragraph 6 shall not be released from his obligation under Chapter 6, paragraph 1, to surrender to the authority responsible for administering the registry the allowances equal to those excess emissions when surrendering allowances in relation to the following calendar year.'

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

17 As at 30 April 2007, the Billerud companies, companies governed by Swedish law holding carbon dioxide emission allowances, had not surrendered the allowances equal to their emissions for 2006 (10 828 and 42 433 tonnes respectively).

18 Consequently, the Naturvårdsverket imposed the penalty provided for by Law No 2004:1109 implementing Directive 2003/87, in the amount of SEK 3 959 366 for one company and SEK 15 516 051 for the other (EUR 433 120 and EUR 1 697 320).

19 In support of their challenge to those penalties before the national court, the Billerud companies stated that, as at 30 April 2007, they had sufficient emission allowances in their holding accounts to cover their total emissions for 2006. They argued that this proved that they had not intended to circumvent their obligations, and that the alleged failure to surrender their allowances on time was due to internal administrative breakdown. This line of argument was unsuccessful at first instance.

20 The Billerud companies appealed against that judgment before the Högsta domstolen (Supreme Court), which decided to stay the proceedings and to refer the following questions to the Court of Justice for a preliminary ruling:

‘1. Does Article 16(3) and (4) of Directive 2003/87 … mean that an operator who has not surrendered a sufficient number of emission allowances by 30 April must pay a penalty regardless of the cause of the omission, for example, where, although the operator had a sufficient number of emission allowances on 30 April, as a result of an oversight, an administrative error or a technical problem it did not surrender them then?

2. If Question 1 is answered in the affirmative, does Article 16(3) and (4) of Directive 2003/87 mean that the penalty will or may be waived or reduced for example in the circumstances described in Question 1?’

Consideration of the questions referred

Consideration of the first question

21 The referring court asks, in essence, whether Article 16(3) and (4) of Directive 2003/87 must be interpreted as allowing a certain degree of tolerance in the imposition of a penalty for excess emissions in respect of operators who, although not having surrendered their carbon dioxide equivalent allowances for the preceding year by 30 April of the current year, nevertheless on that date have the sufficient number of allowances.

22 That question amounts to asking whether the concept of punishable ‘excess emissions’ must be construed as concerning excessively polluting conduct per se, in which case the penalty would be payable only by operators who do not have the sufficient number of allowances on 30 April of each year, or whether it instead consists solely in the failure to surrender the allowances equal to the emissions for the preceding year by 30 April, irrespective of the reason for the non-surrender or the number of allowances actually held by the operators concerned.

23 The first possibility, advocated by the Billerud companies, is based on a literal interpretation of the expression ‘excess emissions’ in Article 16(3) and (4) of Directive 2003/87, according to which the actual possession, on 30 April of the current year, of a sufficient number of allowances to cover the emissions for the preceding year proves that there is no particular harm to the environment which by itself is grounds for sanctions under European Union law by virtue of the ‘polluter pays’ principle as laid down in Article 191(2) TFEU.

24 That argument is, however, unconvincing.

25 It follows from the very letter of Directive 2003/87 that the obligation to surrender allowances equal to the emissions for the preceding year by 30 April of the current year in order to have them cancelled applies with particular force. Referred to obligatorily in the greenhouse gas emissions permit under Article 6(2)(e) and formulated unequivocally in Article 12(3), that obligation is the only one for which Directive 2003/87 itself provides for a specific sanction, whereas the sanction for any other conduct contrary to its provisions is, under Article 16, left to the discretion of the Member States. The key role of the allowance surrender process in the scheme of the directive is also apparent from the fact that being ordered to pay the penalty does not release the operator from the obligation to surrender the corresponding allowances during the surrender process the following year. The only flexibility allowed under Directive 2003/87 with respect to the penalty concerns its level, which is lowered from EUR 100 to EUR 40 for the 'learning' period for the scheme, that is to say, 2005 - 2007.

26 Furthermore, it should be borne in mind that while the ultimate objective of the allowance trading scheme is the protection of the environment by means of a reduction in greenhouse gas emissions, the scheme does not of itself reduce those emissions but encourages and promotes the pursuit of the lowest cost of achieving a given amount of emissions reductions. The benefit for the environment depends on the stringency of the total quantity of allowances allocated, which represents the overall limit on emissions allowed by the scheme (Case C-127/07 *Arcelor Atlantique and Lorraine and Others* [2008] ECR I-9895, paragraph 31).

27 The overall scheme of the directive is thus 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 and requires the establishment of a system of standardised registries through 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 system, with the ultimate objective of protection of the environment (see *Arcelor Atlantique and Lorraine and Others*, paragraph 29). As observed by the Commission, in introducing itself a predefined penalty, the Community legislature wished to shield the allowance trading scheme from distortions of competition resulting from market manipulations.

28 In that regard the Billerud companies' argument to the effect that they cannot be blamed for excessively environmentally harmful conduct must be rejected. Article 16(3) and (4) of the directive has as its object and effect to penalise not 'polluters' generally, but rather those operators whose number of emissions for the preceding year exceeds, as at 30 April of the current year, the number of allowances listed in the section of the surrendered allowance table designated for their installations for that year in the centralised registry of the Member State to which they report under Article 52 of Regulation No 2216/2004. This – and not the emissions which are per se excessive - is how the concept of 'excess emissions' is to be construed.

29 Such an interpretation is corroborated, firstly, by the fact that under Article 11(4) of the directive, a proportion of the total quantity of allowances for the current year is issued to operators by 28 February of that year, two months before the date on which operators are required to surrender their allowances for the preceding year and, secondly, by the near-totality of allowances allocated free of charge for 2006 pursuant to Article 10 of the directive.

30 It follows from all the foregoing that the obligation imposed by Directive 2003/87 must be regarded not as a mere obligation to hold the allowances covering the emissions for the preceding year on 30 April of the current year, but as an obligation to surrender those allowances by 30 April in order to have them cancelled in the Community registry, which is intended to ensure that an accurate accounting record is kept of the allowances.

31 Even in the absence of specific provisions, however, recognition of circumstances constituting *force majeure* presupposes that the external cause relied on by individuals has consequences which are inexorable and inevitable to the point of making it objectively impossible for the persons concerned to comply with their obligations (see, inter alia, Joined Cases 154/78, 205/78, 206/78, 226/78 to 228/78, 263/78 and 264/78, 39, 31/79, 83/79 and 85/79 *Ferriera Valsabbia and Others* v *Commission* [1980] ECR 907, paragraph 140). Consequently, it is for the referring court to determine whether the Billerud companies, despite all due care having been exercised in order to comply with time limits, were faced with unusual and unforeseeable circumstances which were beyond their control (see Case C-99/12 *Eurofit* [2013] ECR, paragraph 31) and went beyond mere internal breakdown.

32 The answer to the first question is accordingly that Article 16(3) and (4) of Directive 2003/87 must be interpreted as precluding operators who have not surrendered, by 30 April of the current year, the carbon dioxide equivalent allowances equal to their emissions for the preceding year, from avoiding the imposition of a penalty for the excess emissions for which it provides, even where they hold a sufficient number of allowances on that date.

Consideration of the second question

33 By its second question, the referring court asks, in essence, whether Article 16(3) and (4) of Directive 2003/87 must be interpreted as meaning that it may be varied by a national court on the basis of the principle of proportionality.

34 It should be borne in mind in that regard that the principle of proportionality is one of the general principles of European Union law and requires that measures implemented through European Union law provisions be appropriate for attaining the legitimate objectives pursued by the legislation at issue and must not go beyond what is necessary to achieve them (Case C-58/08 *Vodafone and Others* [2010] ECR I-4999, paragraph 51, and the case-law cited).

35 With regard to judicial review of those conditions, however, the European Union legislature must be allowed a broad discretion when it is asked to intervene in an area which entails political, economic and social choices on its part, and in which it is called upon to undertake complex assessments. In its judicial review of the exercise of such powers, the Court cannot substitute its own assessment for that of the European Union legislature. It could, at most, find fault with its legislative choice only if it appeared manifestly incorrect or if the resultant disadvantages for certain economic operators were wholly disproportionate to the advantages otherwise offered (see, inter alia, Case C-84/94 *United Kingdom* v *Council* [1996] ECR I-5755, paragraph 58; Case C-233/94 *Germany* v *Parliament and Council* [1997] ECR I-2405, paragraph 56; and Case C-210/03 *Swedish Match* [2004] ECR I-11893, paragraph 48).

36 It is clear that the introduction of an EU-wide scheme for accounting and trading of carbon dioxide equivalent emission allowances was a legislative choice which translated a political orientation in a context of urgency in addressing serious environmental concerns, as evidenced by the Conclusions of the Council of the European Union of 8 March 2001, referred to in recital 1 in the preamble to Directive 2003/87. That legislative choice was, moreover, based on highly complex and lengthily debated economic and technical considerations, set out in Green Paper COM(2000) 87 of 8 March 2000. In order to contribute towards the fulfilment of their commitments by the European Union and its Member States under the Kyoto Protocol, the European Union legislature was thus led to consider itself the future, uncertain effects of its action (see, by analogy, *Germany* v *Parliament and Council*, paragraph 55).

37 In addition, it should be recalled that the proportionality of a European Union measure cannot depend on retrospective assessment of its efficacy. Where, as in the present case, the European Union legislature has to assess the future effects of legislation to be enacted although those effects cannot be

accurately foreseen, its assessment is open to criticism only if it appears manifestly incorrect in the light of the information available to it at the time of the adoption of the legislation in question (see, to that effect, Case C-189/01 *Jippes and Others* [2001] ECR I-5689, paragraph 84 and the case-law cited).

38 Examined in the light of the principles referred to in paragraphs 34 to 37 above, the penalty for excess emissions provided for by Directive 2003/87 cannot be considered to be contrary to the principle of proportionality on the ground that there is no possibility for the amount to be varied by a national court.

39 Firstly, the European Union legislature viewed the surrender obligation provided for in Article 12(3) of the directive and the lump sum penalty enforcing that obligation provided for in Article 16(3) and (4), without any flexibility other than a transitional lowering of the amount, as necessary in the pursuit of the legitimate objective of establishing an efficient carbon dioxide equivalent allowance trading scheme, in order to prevent certain operators or market intermediaries from being tempted to circumvent or manipulate the scheme by speculating abusively on prices, quantities, time limits or complex financial products which tend to come about in any market. As evidenced inter alia by point 17 of the explanatory memorandum for the proposal for a directive (COM(2001) 581 final) of 23 October 2001, tabled by the Commission, the relatively high level of the penalty is justified by the need to have infringements of the obligation to surrender a sufficient number of allowances treated in a stringent and consistent manner throughout the European Union. That need was, moreover, particularly acute during the phase in which an entirely new EU-wide scheme was being launched.

40 It also follows from the directive that operators have four months in which to prepare to surrender the allowances from the preceding year, which gives them a reasonable amount of time in which to comply with their surrender obligation. It is, moreover, apparent from the *travaux préparatoires* for the directive that the Council extended the time limit initially granted to undertakings, since the Commission's proposal referred to a deadline of 31 March. Secondly, the deadline of 30 April is later than that on which the Member States are required to allocate a proportion of their allowances for the current year, fixed at 28 February – and 95% of the allowances were allocated free of charge for the period from 2005 to 2008. Lastly, as stated in paragraphs 22 and 27 of this judgment, in the light of the of accurate accounting of the EU-wide allowances on which the proper functioning of the scheme established by the directive depends, a penalty of EUR 40 per tonne of carbon dioxide equivalent allowances not surrendered as at 30 April (value corresponding to double the price of that tonne estimated at that time on the futures market for polluting rights) does not carry drawbacks which are incommensurate with the advantages to be gained by the European Union's fulfilment of its commitments under the Kyoto Protocol.

41 Furthermore, the Member States remain free to introduce mechanisms for warnings, reminders and advance surrender to allow good-faith operators to be fully informed of their surrender obligation and not to run any risk of penalties. As evidenced by the information submitted to the Court, certain national legislative schemes provide for such precautions and entrust the competent authorities with the task of accompanying operators in their steps through the scheme for greenhouse gas emission allowance trading.

42 Consequently, the answer to the second question is that Article 16(3) and (4) of Directive 2003/87 must be interpreted as meaning that the amount of the lump sum penalty provided for therein may not be varied by a national court on the basis of the principle of proportionality.

Costs

43 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:

1. **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 must be interpreted as precluding operators who have not surrendered, by 30 April of the current year, the carbon dioxide equivalent allowances equal to their emissions for the preceding year, from avoiding the imposition of a penalty for the excess emissions for which it provides, even where they hold a sufficient number of allowances on that date.**

2. **Article 16(3) and (4) of Directive 2003/87 must be interpreted as meaning that the amount of the lump sum penalty provided for therein may not be varied by a national court on the basis of the principle of proportionality.**

[Signatures]