Reports of Cases

JUDGMENT OF THE COURT (Seventh Chamber)

21 September 2016*

(Failure of a Member State to fulfil obligations — Directive 2001/80/EC — Article 4(3) — Annex VI, Part A — Limitation of emissions of certain pollutants into the air from large combustion plants — Application — Aberthaw Power Station)

In Case C-304/15,

ACTION for failure to fulfil obligations under Article 258 TFEU, brought on 19 June 2015, in the proceedings

European Commission, represented by K. Mifsud-Bonnici and S. Petrova, acting as Agents, with an address for service in Luxembourg,

applicant,

v

United Kingdom of Great Britain and Northern Ireland, represented by J. Kraehling and L. Christie, acting as Agents, and by G. Facenna QC,

defendant,

THE COURT (Seventh Chamber),

composed of C. Toader (Rapporteur), President of the Chamber, A. Rosas and E. Jarašiūnas, Judges,

Advocate General: M. Bobek,

Registrar: M. Aleksejev, Administrator,

having regard to the written procedure and further to the hearing on 21 April 2016,

after hearing the Opinion of the Advocate General at the sitting on 28 June 2016,

gives the following

Judgment

1 By its application, the European Commission asks the Court to declare that, by not correctly applying to the Aberthaw Power Station (United Kingdom; 'Aberthaw PS') Directive 2001/80/EC of the European Parliament and of the Council of 23 October 2001 on the limitation of emissions of certain

* Language of the case: English.

pollutants into the air from large combustion plants (OJ 2001 L 309, p. 1), the United Kingdom of Great Britain and Northern Ireland failed to fulfil its obligations under Article 4(3) of that directive read in conjunction with Part A of Annex VI thereto.

Legal context

EU law

2 Directive 2001/80, which replaced Council Directive 88/609/EEC of 24 November 1988 on the limitation of emissions of certain pollutants into the air from large combustion plants (OJ 1988 L 336, p. 1) has, as from 1 January 2016, been repealed and replaced by Directive 2010/75/EU of the European Parliament and of the Council of 24 November 2010 on industrial emissions (integrated pollution prevention and control) (OJ 2010 L 334, p. 17). Directive 2001/80 applied, according to its Article 1, 'to combustion plants, the rated thermal input of which is equal to or greater than 50 MW, irrespective of the type of fuel used (solid, liquid or gaseous)'.

3 Recitals 4 to 6 of that directive stated:

'(4) The Commission has published a Communication on a Community strategy to combat acidification in which the revision of Directive [88/609] was identified as being an integral component of that strategy with the long term aim of reducing emissions of sulphur dioxide and nitrogen oxides sufficiently to bring depositions and concentrations down to levels below the critical loads and levels.

(5) In accordance with the principle of subsidiarity as set out in Article 5 of the Treaty, the objective of reducing acidifying emissions from large combustion plants cannot be sufficiently achieved by the Member States acting individually and unconcerted action offers no guarantee of achieving the desired objective; in view of the need to reduce acidifying emissions across the Community, it is more effective to take action at Community level.

(6) Existing large combustion plants are significant contributors to emissions of sulphur dioxide and nitrogen oxides in the Community and it is necessary to reduce these emissions. It is therefore necessary to adapt the approach to the different characteristics of the large combustion plant sector in the Member States.'

4 Article 4 of that directive provided:

'1. Without prejudice to Article 17 Member States shall take appropriate measures to ensure that all licences for the construction or, in the absence of such a procedure, for the operation of new plants which in the view of the competent authority are the subject of a full request for a licence before 27 November 2002, provided that the plant is put into operation no later than 27 November 2003 contain conditions relating to compliance with the emission limit values laid down in part A of Annexes III to VII in respect of sulphur dioxide, nitrogen oxides and dust.

…

3. Without prejudice to [Council Directive 96/61/EC of 24 September 1996 concerning integrated pollution prevention and control (OJ 1996 L 257, p. 26)] and Council Directive 96/62/EC of 27 September 1996 on ambient air quality assessment and management [OJ 1996 L 296, p. 55], Member States shall, by 1 January 2008 at the latest, achieve significant emission reductions by:

(a) taking appropriate measures to ensure that all licences for the operation of existing plants contain conditions relating to compliance with the emission limit values established for new plants referred to in paragraph 1; or

(b) ensuring that existing plants are subject to the national emission reduction plan referred to in paragraph 6;

and, where appropriate, applying Articles 5, 7 and 8.

…'

5 Article 14 of that directive stated:

'1. In the event of continuous measurements, the emission limit values set out in part A of Annexes III to VII shall be regarded as having been complied with if the evaluation of the results indicates, for operating hours within a calendar year, that:

(a) none of the calendar monthly mean values exceeds the emission limit values; and

(b) in the case of:

…

(ii) nitrogen oxides: 95% of all the 48 hourly mean values do not exceed 110% of the emission limit values.

…'

6 Part A of Annex VI to Directive 2001/80 set out, in a table, the emission limit values for nitrogen oxides to be applied to existing plants, pursuant to Article 4(3) of that directive, for the various fuel types. For solid fuels used in a plant with a capacity over 500 MW, the limit value was fixed at 500 mg of nitrogen oxides per standard cubic metre (mg/Nm^3).

7 With regard further to solid fuels, that table however contained a reference to a footnote (3) ('Note (3)') which was worded as follows:

'Until 1 January 2018 in the case of plants that in the 12-month period ending on 1 January 2001 operated on, and continue to operate on, solid fuels whose volatile content is less than 10%, 1 200 mg/Nm^3 shall apply.'

8 Pursuant to the first subparagraph of Article 30(2) of Directive 2010/75, point 4 of Part 1 of Annex V to that directive sets the emission limit values for nitrogen oxides for plants using solid fuel. From 1 January 2016 that value is reduced to 200 mg/Nm^3.

Pre-litigation procedure

9 On 29 May 2012 the Commission launched an 'EU Pilot' inquiry on the compatibility of certain large combustion plants, and in particular of Aberthaw PS, with the requirements of Directive 2001/80. According to the information sent to the Commission, that plant benefited, on the basis of Note (3),

from an emission limit value for nitrogen oxides, namely 1 200 mg/Nm^3, that was less strict than the value normally applicable to a plant of that type using solid fuel, namely 500 mg/Nm^3, in accordance with the table set out in Part A of Annex VI to that directive. According to the Commission, in order to benefit from that derogation, Note (3) required the fuel used to have a volatile matter content ('VMC') of less than 10%. The Commission therefore questioned the United Kingdom about the VMC of the solid fuel used in Aberthaw PS during the years 2009 to 2011.

10 The United Kingdom responded that, in its view, the emission limit value for nitrogen oxides applicable to Aberthaw PS was 1 200 mg/Nm^3 and that that emission limit value should, for example, be considered to be complied with if 95% of the mean values recorded over a 48-hour period did not exceed 1 320 mg/Nm^3.

11 On 20 September 2012 the Commission submitted additional questions to the United Kingdom with a view to assessing whether Aberthaw PS satisfied the conditions of Note (3) as regards VMC. In response, the United Kingdom specified that the mean VMC of the coal used in that plant for the years between 2008 and 2011 was 12.81%, 11.75%, 12.89% and 11.39% respectively. Therefore, according to that information, that coal had an average VMC lower than 10% only on two occasions during the years 2008 to 2010, and on five occasions during 2011.

12 Since the fuels used by Aberthaw PS from 2008 to 2011 inclusive did not satisfy the condition set out in Note (3) as regards VMC, the Commission took the view that that plant had never qualified for the derogation provided for in Note (3) and that the emission limit value of 500 mg/Nm^3 for nitrogen oxides should have been applied to it as from 1 January 2008.

13 On 21 June 2013 the Commission sent a letter of formal notice to the United Kingdom, complaining that it had failed to fulfil its obligation, as from 1 January 2008, to comply with Article 4(3) of Directive 2001/80 read in conjunction with Note (3), by failing to achieve, with respect to the Aberthaw PS, the emission limit value for nitrogen oxides of 500 mg/Nm^3 applicable to that plant until 1 January 2016.

14 In response to that letter of formal notice, the United Kingdom stated that it was of the view that the derogation provided for in Note (3) was specifically inserted into Directive 2001/80 to cover the situation of Aberthaw PS, and consequently that the derogation should be interpreted flexibly, so as to mean that it is not subject to the condition that the plant concerned operated exclusively on solid fuel with a VMC of less than 10%. The United Kingdom also argued that there was no direct correlation between the volatility of the fuel burnt by that plant and the level of nitrogen oxides that it emitted.

15 The Commission was not satisfied with the United Kingdom's response, and sent a reasoned opinion to that Member State on 16 October 2014, pursuant to the first paragraph of Article 258 TFEU.

16 In that reasoned opinion, the Commission reiterated its argument that Note (3) derogated from the normal limit values set for a plant the size of Aberthaw PS and that that plant exceeded the emission limit value for nitrogen oxides applicable under Article 4(1) and (3) of Directive 2001/80, read in conjunction with Note (3).

17 The Commission also rejected the interpretation of Note (3) as meaning that it did not require that the plant at issue use exclusively solid fuels with a VMC not in excess of 10% on average, measured on an annual basis. Even if that content was not explicitly stated as an average annual value in Directive 2001/80, such an interpretation is consistent with the spirit of that directive, since Article 14(1) thereof states that the emission limit values set out in Part A of Annexes III to VII to that directive are measured over a calendar year.

18 In its response of 17 December 2014, the United Kingdom, basing its arguments on the *travaux préparatoires* relating to Directive 2001/80, reiterated the view that Aberthaw PS was compliant with Directive 2001/80 and that the derogation provided for in Note (3) specifically covered that plant. Moreover, the United Kingdom specified that Aberthaw PS would continue to receive investment to improve its performance.

19 Since the Commission was not satisfied with the response provided by the United Kingdom, it decided, on 19 June 2015, to bring the present action.

The action

Arguments of the parties

20 The Commission takes the view that, since Aberthaw PS fails to satisfy the criteria set out in Note (3), it cannot benefit from the derogation provided for in that note. Consequently, that plant should emit nitrogen oxides in compliance with the standard limit value of 500 mg/Nm^3. However, the value stated in the operating licence of that plant at the time the present action was brought was 1 050 mg/Nm^3, and accordingly the action should be upheld.

21 In support of that submission, the Commission argues, first, that the wording of Note (3) is clear. That provision applied only to plants which actually burned solid fuel with a VMC of less than 10%. Note (3) does not refer to plants 'capable of' operating on such fuel or refer to any *de minimis* fuel limits for application. The criterion of a VMC of 10% was inserted in order to set a threshold aimed at restricting the opportunities for power stations to derogate.

22 Second, the possibility that the derogation contained in Note (3) might have specifically been aimed at Aberthaw PS is irrelevant, since the subjective intention of particular actors within the legislative process is not a valid criterion of interpretation.

23 Third, even if a calculation method based on a monthly average rather than an annual average were adopted, Aberthaw PS still does not satisfy the criteria applicable to that derogation.

24 The United Kingdom takes the view that the interpretation of Note (3) put forward by the Commission is both contrary to the wording of that note and to the intention of the EU legislature, and consequently the present action should be dismissed.

25 First, according to the United Kingdom, Aberthaw PS has at all times operated on a fuel based predominantly on anthracitic coal with a VMC of between 6% and 15%, including a substantial proportion of coal with a VMC of less than 10%. However, it has never operated exclusively on coal with a VMC of less than 10% or on a blend which, on average, had a VMC of less than 10%. Significant practical and safety considerations preclude such a method of operation.

26 Next, the United Kingdom disputes the interpretation suggested by the Commission that, in order to benefit from the derogation provided for by Note (3), a plant must operate exclusively on a solid fuel with a VMC of less than 10%, measured on the basis of an annual average. Such an interpretation inserts additional requirements into that derogation, making the conditions for reliance on it more restrictive. Note (3) did not contain the adverbs 'only' or 'exclusively'. If the EU legislature had wanted to restrict the benefit of Note (3) to only those plants using coal with a VMC of less than 10%, the wording of that note would have explicitly reflected that intention. Furthermore, according to the United Kingdom, where Directive 2001/80 provides for the use of an average value, it specifies so explicitly.

27 The United Kingdom therefore argues that Note (3) is intended to apply to plants which operate on coal a substantial proportion of which has a VMC of less than 10%.

28 Further, the interpretation of Note (3) suggested by the Commission does not take into account the fact that the derogation contained in that note was negotiated and inserted into Directive 2001/80 during the legislative process specifically to cover the situation of Aberthaw PS.

29 Finally, the safe operating specification for the blended coal used at Aberthaw PS was set at a minimum VMC of 9%. To comply with the limits stemming from the Commission's interpretation of Note (3), the operator of that plant would have to use only solid fuels that allow for an extremely narrow VMC range between 9% and 9.9%. Taking account of the set of parameters which are to be taken into consideration in the blend of those fuels, such as moisture content, ash, sulphur, chlorine, calorific value, hardness, and size range, that would be neither realistic nor practicable for a plant of that size. In particular, that operator would not be able either to source or to precisely and reliably test the large amount of coal that Aberthaw PS uses in order to ensure that the overall VMC remains precisely between 9% and 9.9%.

30 Moreover, the interpretation of Note (3) suggested by the Commission also serves no environmental purpose. The higher emissions of nitrogen oxides by Aberthaw PS were a function of the boiler design and the higher temperatures needed to maintain combustion of low VMC anthracitic coal. Those emissions are not significantly affected by the VMC of the fuel blend, therefore the content would not decrease significantly if that plant were to be required not to use coal with an overall VMC of 11-12% as a fuel, as it currently does, but rather, and assuming that were practically possible, coal with a VMC of 9.5%. On the contrary, burning coal with a lower VMC would give rise to higher emissions of nitrogen oxides.

Findings of the Court

31 As is apparent from recitals 4 to 6 thereof, Directive 2001/80 seeks to combat acidification by reducing emissions of sulphur dioxide and nitrogen oxides, to which large combustion plants are significant contributors.

32 In that regard, Annexes III to VII to that directive provide a number of limitations. More specifically, Part A of Annex VI to that directive sets out, for various fuel types, the emission limit values for nitrogen oxides applicable to existing plants in accordance with Article 4(3) of that directive. Thus, for solid fuels used in a plant with a capacity over 500 MW, the limit value is fixed at 500mg/Nm^3.

33 Note (3) however provides that 'until 1 January 2018 in the case of plants that in the 12 month period ending on 1 January 2001 operated on, and continue to operate on, solid fuels whose volatile content is less than 10%, 1 200 mg/Nm^3 shall apply'.

34 In the present case, the Commission criticises the United Kingdom for not satisfying, with regard to Aberthaw PS, the conditions governing qualification for the derogation in that footnote and, consequently, for not adhering to the default emission limit value for nitrogen oxides of 500mg/Nm^3.

35 The United Kingdom and the Commission disagree in particular as to the period to be used as a reference for compiling the data to verify that the plants concerned respect the emission levels for nitrogen oxides.

36 In that regard, it should be noted that although the second part of the sentence within the wording of Note (3) does not define that reference period, the first part of that provision expressly contains the phrase 'in the case of plants that [operated] in the 12 month period ending on 1 January 2001'.

37 It follows from this, as stated by the Advocate General in point 29 of his Opinion, that, by analogy, Note (3) must be interpreted as meaning that the reference period for compiling the data to verify that the plants concerned continue to operate in conformity with the provisions of Directive 2001/80 is identical to that permitting a determination whether a plant did or did not qualify for the derogation contained in that footnote, namely one year.

38 However, whether the VMC is calculated on an annual or monthly basis, the United Kingdom does not deny that Aberthaw PS never satisfied the criterion concerning the fuels which must be used by a plant covered by Note (3), as it is interpreted by the Commission.

39 In that regard, the United Kingdom argues that that interpretation, according to which, in order to qualify for the derogation provided for in Note (3), a plant must use only those fuels with an average VMC lower than 10%, calculated over the course of a year, is incorrect, given that the adverb 'exclusively' does not feature in the wording of that note.

40 That argument must be rejected.

41 According to the Court's settled case-law, it is necessary, in order to ascertain the meaning and scope of a provision, to interpret it by taking into account the wording of the provision and the objective pursued by the legislation in question (see, to that effect, judgment of 16 July 2015, *A*, C-184/14, EU:C:2015:479, paragraph 32 and the case-law cited).

42 As regards the wording of Note (3), the note provides that, in order to qualify for the derogation provided for in that note, the plant concerned must 'operate on solid fuels whose volatile content is less than 10%'.

43 In that regard, contrary to the United Kingdom's submissions, the fact that that wording does not contain the adverbs 'only' or 'exclusively' does not allow the inference that, in order to qualify for the derogatory scheme established by that note, the presence in the fuel used by a plant of either a 'significant amount' or of a 'certain amount' of solid fuels with a VMC lower than 10% would be sufficient. As the Advocate General stated in point 24 et seq. of his Opinion, no legal argument is capable of supporting the interpretation of Note (3) put forward by the United Kingdom.

44 As suggested by the Advocate General in points 27 to 30 of his Opinion, Note (3) must be interpreted as meaning that the 10% threshold to which it refers indicates that the coal used by a plant must have an average VMC of less than 10%.

45 Such an interpretation is supported by the context of Note (3) and by the objective of Directive 2001/80.

46 In the first place, as regards the context of that provision, it should be recalled that that provision makes it possible to apply, to plants that satisfy the prescribed conditions, an emission limit value for nitrogen oxides that is higher than the general emission limit value of 500mg/Nm^3 referred to in Part A of Annex VI to Directive 2001/80.

47 Note (3) constitutes a derogation from the general rule provided for under Part A of Annex VI and must therefore, in accordance with the Court's established case-law, be interpreted strictly (see, by analogy, judgment of 10 September 2015, *Nannoka Vulcanus Industries*, C-81/14, EU:C:2015:575, paragraph 73 and the case-law cited).

48 In the second place, as regards the objective of Directive 2001/80, as the Commission submitted and as the Advocate General stated in point 38 of his Opinion, the development of EU legislation which preceded that directive, such as Directive 88/609, reveals that the level of the thresholds set out in

provisions such as Note (3) serve above all to restrict, so far as possible, the number of plants capable of qualifying for such a derogation, which, in itself, helps to ensure the attainment of the objectives of Directive 2001/80, as recalled in paragraph 34 above.

49 Moreover, the United Kingdom's argument that the 10% VMC threshold for solid fuel used does not make it possible to achieve the environmental objective of Directive 2001/80, since it does not significantly affect the emissions of nitrogen oxides, must be rejected. As is clear from the preceding paragraph, Note (3) contributes to that environmental objective by restricting the number of plants capable of qualifying for the exemption provided for in that note.

50 Furthermore, first, the United Kingdom's argument set out in paragraph 28 of this judgment must be rejected, since, even if it was established that the derogation provided for in Note (3) was negotiated to include a plant such as Aberthaw PS, that plant must nonetheless meet the criteria set out by that provision in order to qualify for, and to continue to qualify for, that derogation.

51 Second, it is necessary to reject the United Kingdom's argument that it is not possible, for safety reasons, to apply the 10% threshold at issue. In that regard, it is apparent from the United Kingdom's observations that the blend used in Aberthaw PS has a VMC that can vary between 6% and 15%. It is therefore undisputed that the coal used as fuel in that plant can have an average VMC of less than 10%.

52 Third, the United Kingdom's argument that it is principally due to economic constraints that arrangements have not been made to improve the environmental performance of that plant and to comply with the requirements of Note (3) must be rejected. It is clear from the Court's case-law that the United Kingdom cannot validly invoke, in the present case, reasons of a purely economic nature in order to dispute the failure of which it is accused (see, to that effect, judgments of 9 December 2007, *Commission* v *France*, C-265/95, EU:C:1997:595, paragraph 62, and of 21 January 2016, *Commission* v *Cyprus*, C-515/14, EU:C:2016:30, paragraph 53).

53 In those circumstances, it must be held that by failing correctly to apply Directive 2001/80 to Aberthaw PS, the United Kingdom has failed to fulfil its obligations under Article 4(3) of that directive, read in conjunction with Part A of Annex VI thereto.

Costs

54 Under Article 138(1) of the Rules of Procedure of the Court, the unsuccessful party is to be ordered to pay the costs if they have been applied for in the pleadings of the successful party. Since the Commission has applied for costs and the United Kingdom has been unsuccessful, the United Kingdom must be ordered to pay the costs.

On those grounds, the Court (Seventh Chamber) hereby:

1. **Declares that, by failing correctly to apply to Aberthaw Power Station (United Kingdom) Directive 2001/80/EC of the European Parliament and of the Council of 23 October 2001 on the limitation of emissions of certain pollutants into the air from large combustion plants, the United Kingdom of Great Britain and Northern Ireland failed to fulfil its obligations under Article 4(3) of that directive, read in conjunction with Part A of Annex VI thereto;**

2. **Orders the United Kingdom of Great Britain and Northern Ireland to pay the costs.**

[Signatures]