Reports of Cases

JUDGMENT OF THE COURT (Sixth Chamber)

12 April 2018 *

(Reference for a preliminary ruling — Environment — Directive 2003/87/EC — Scheme for greenhouse gas emission allowance trading — Objectives — Free allocation of allowances — National legislation making transferred and unused allowances subject to taxation)

In Case C-302/17,

REQUEST for a preliminary ruling under Article 267 TFEU from the Krajský súd v Bratislave (Regional Court, Bratislava, Slovakia), made by decision of 15 February 2017, received at the Court on 24 May 2017, in the proceedings

PPC Power a.s.

v

Finančné riaditeľstvo Slovenskej republiky,

Daňový úrad pre vybrané daňové subjekty,

THE COURT (Sixth Chamber),

composed of C.G. Fernlund, President of the Chamber, J.-C. Bonichot and E. Regan (Rapporteur), Judges,

Advocate General: H. Saugmandsgaard Øe,

Registrar: A. Calot Escobar,

having regard to the written procedure,

after considering the observations submitted on behalf of:

– PPC Power a.s., by M. Škubla, advokát,

– the Slovak Government, by M. Kianička, acting as Agent,

– the European Commission, by J.-F. Brakeland, A. Tokár and A.C. Becker, acting as Agents,

having decided, after hearing the Advocate General, to proceed to judgment without an Opinion,

gives the following

* Language of the case: Slovak.

Judgment

1 This request for a preliminary ruling concerns the interpretation of Article 1 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 PPC Power a.s. and the Daňový úrad pre vybrané daňové subjekty (Tax administration for certain taxpayers, Slovakia; 'the DU') concerning the advance payment of tax on greenhouse gas emission allowances allocated free of charge which have not been used or have been transferred.

Legal context

EU law

3 Recitals 5 and 20 of Directive 2003/87 state:

'(5) The Community and its Member States have agreed to fulfil their commitments to reduce anthropogenic greenhouse gases emissions under the Kyoto Protocol jointly, in accordance with [Council Decision 2002/358/EC of 25 April 2002 concerning the approval, on behalf of the European Community, of the Kyoto Protocol to the United Nations Framework Convention on Climate Change and the joint fulfilment of commitments thereunder (OJ 2002 L 130, p. 1)]. 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.

…

(20) This directive will encourage the use of more energy-efficient technologies, including combined heat and power technology, producing less emissions per unit of output, while the future directive of the European Parliament and of the Council on the promotion of cogeneration based on useful heat demand in the internal energy market will specifically promote combined heat and power technology.'

4 Article 1 of that directive, entitled 'Subject matter', provides:

'This directive establishes a scheme for greenhouse gas emission allowance trading within the Community (hereinafter referred to as the "Community scheme") in order to promote reductions of greenhouse gas emissions in a cost-effective and economically efficient manner.'

5 Article 3 of that directive, entitled 'Definitions', provides, in point (f):

'"operator" means any person who operates or controls an installation or, where this is provided for in national legislation, to whom decisive economic power over the technical functioning of the installation has been delegated.'

6 Article 10 of that directive, entitled 'Method of allocation', provides:

'For the three-year period beginning 1 January 2005 Member States shall allocate at least 95% of the allowances free of charge. For the five-year period beginning 1 January 2008, Member States shall allocate at least 90% of the allowances free of charge.'

Slovak law

7 Law No 548/2010 amended Law No 595/2003 on income tax by introducing a new wealth tax on emission allowances allocated free of charge to a taxpayer on an account in the register of emission allowances for 2011 and 2012.

8 Law No 548/2010 introduced Article 51b, entitled 'Tax on emission allowances', which provided:

'(1) For the purposes of the tax on emission allowances:

(a) "taxable persons" are the participants in a trading scheme that carry out activities pursuant to the relevant provisions or that have been such participants for only a part of the relevant calendar year;

(b) "registered emission allowances" are greenhouse gas allowances allocated free of charge to and registered to a taxable person under the relevant provisions in the relevant calendar year, including emission allowances acquired from another taxable person as a result of the purchase of an undertaking or part of an undertaking, a non-cash contribution in the form of an undertaking or part of an undertaking, or a merger or division of an undertaking or cooperative, which the receiving taxable person has acquired free of charge under the relevant provisions in the relevant calendar year;

(c) "used emission allowances" are the certified emission reduction units (CERs) surrendered, in accordance with the relevant provisions, by the taxable person, from the greenhouse gas allowances allocated to that taxable person, in the relevant calendar year;

(d) "transferred emission allowances" are greenhouse gas emission allowances transferred, in accordance with the relevant provisions, by a taxable person in the relevant calendar year from the emission allowances registered in that calendar year, with the exception of emission allowances transferred to another taxable person as a result of the sale of an undertaking or part of an undertaking, a non-cash contribution in the form of an undertaking or part of an undertaking, or a merger or division of an undertaking or cooperative; the transfer of emission allowances as a security for emission allowances registered to a taxable person that is a debtor, or their transfer back to a taxpayer who is a creditor, shall not be regarded as the transfer of emission allowances if that transfer has been made between the same persons, for the same sums and in the same units by, at the latest, the date of the surrender of the allowances to the registry administrator in accordance with the relevant provisions, in the relevant calendar year;

(e) "unused emission allowances in the relevant calendar year" are the emission allowances registered in that calendar year less the emission allowances used in that calendar year, less the savings in allowances calculated in accordance with the relevant provisions and less the emission allowances transferred in the calendar year concerned; emission allowances registered in the relevant calendar year that have been transferred to another taxable person as a result of the sale of an undertaking or part of an undertaking, a non-cash contribution in the form of an undertaking or part of an undertaking, or a merger or division of an undertaking or cooperative shall not be regarded as unused emission allowances.

(2) Emission allowances registered in 2011 and 2012 shall be subject to the tax on emission allowances.

(3) The tax base for the tax on emission allowances shall be determined as the sum of the multiple of the emission allowances transferred in each calendar month and the average market price of emission allowances in the calendar month preceding the month in which the transfer is made and of the multiple of any unused allowances and the average market price of emission allowances in the relevant calendar year.

…

(5) The rate of the tax on emission allowances shall be 80% of the tax base of the tax … calculated in accordance with paragraphs 3 and 4.

…

(8) For the year 2011, taxable persons shall, by 30 June 2011 and by 31 December 2011, pay half-yearly advances of the tax on emission allowances each in the sum of one half of the anticipated tax. Taxable persons shall calculate each tax advance by applying the rate of the tax referred to in paragraph 5 to the amount calculated as the multiple of the average market price of emission allowances in 2010 and the registered emission allowances for 2011 less the actual allowances used in 2010 and any savings of emission allowances calculated in accordance with the relevant provisions.

(9) For the year 2012, taxable persons shall, by 30 June 2012 and by 31 December 2012, pay half-yearly advances of the tax on emission allowances each in the sum of one half of the liability to the tax on emission allowances as stated in the declaration of revenue for 2011.

…

(12) The average prices of emission allowances for individual months and calendar years shall be published by the [Ministry of Finance of the Slovak Republic] on its website.'

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

9 The Slovak Republic introduced into its legal order a tax on emission allowances with effect from 1 January 2011. The basis of this tax was either the value of emission allowances transferred, namely allowances credited to taxpayers and subsequently transferred by them, or the value of unused allowances, namely allowances that were not surrendered to cover actual emissions. The values of emission allowances, both transferred and unused, were established in accordance with the average market price of emission allowances. The tax was levied for the years 2011 and 2012 at a rate of 80%.

10 The tax was payable for the following year, but during the year in question, two advance payments were due and calculated on the basis of the estimated amount of the taxes.

11 That taxation was abolished on 30 June 2012.

12 PPC Power requested the DU to set at zero the amount of the advance payment of tax payable for 2011. In support of its application, the applicant in the main proceedings claimed that the tax authority was bound not to apply the national legislation because of the non-conformity of that legislation with EU law.

13 The DU rejected that application and set the amount of the advance payment of tax due from PPC Power for the first half of 2011 at EUR 300 000. PPC Power has made this payment, while applying for repayment thereof on the ground that the taxation of emission allowances is contrary to EU law. The DU refused the application for repayment.

14 The Finančné riaditeľstvo Slovenskej republiky (Directorate of Tax Administration of the Slovak Republic), subsequently dismissed the appeal brought by the applicant in the main proceedings against the DU's rejection decision. By a second decision the DU ordered PPC Power to make an advance payment of tax in the amount of EUR 300 000 in respect of the second half of 2011.

15 The applicant in the main proceedings therefore brought two actions before the Krajský súd v Bratislave (Regional Court, Bratislava, Slovakia), contesting, on the one hand, the decision of the Slovak Republic tax administration rejecting its application for repayment of the advance payment of tax for the first half of 2011 and, on the other, the decision of the DU, setting the amount of advance payment of tax due in respect of the second half of 2011.

16 In those circumstances, the Krajský súd v Bratislave (Regional Court, Bratislava) decided to stay the proceedings and refer the following question to the Court for a preliminary ruling:

'Are the aims of, and the principles underlying Directive 2003/87 … — and more specifically (i) the objective of reducing emissions by means of technological developments (Article 1 and recitals 2 and 20 of [Directive 2003/87]), (ii) the objectives of maintaining economic development, preserving the integrity of the internal market and maintaining competition (recitals 5 and 7), (iii) the objective of ensuring financially and economically advantageous conditions for reducing emissions (Article 1), the principle of legal certainty for operators within the meaning of Article 3(f), inasmuch as operators are entitled, in accordance with Article 9 [of Directive 2003/87], to rely on the fact that national allocation plans are to remain unchanged during the 18 months before the beginning of the relevant period (that is to say, for the period 2008 to 2012, from 30 June 2006 at the latest), (iv) the requirement that emission allowances must be allocated free of charge (Article 10), (v) the right of the persons referred to in the second subparagraph of Article 13(3) [of Directive 2003/87] to be issued with replacement allowances for those with which they have been issued and which the Member States have … cancelled in accordance with the first subparagraph of Article 13(3) [of Directive 2003/87] — to be interpreted as precluding the national legislation of a Member State which imposes on operators, within the meaning of Article 3(f) of [Directive 2003/87], that are subject to tax in the territory of the Member State concerned, an obligation to pay a special tax (i) the legal basis of which is that the issue of emission allowances (in the case of non-use or sale) is taxed regardless of whether or not the operator derives a profit, (ii) where the emission allowances were allocated to the operator on the basis of the national allocation plan submitted by the Member State to the European Commission for the period 2008 to 2012 in accordance with Article 9 of [Directive 2003/87] (that is to say, notified to the Commission and the Member States under Article 9(1) of [Directive 2003/87] and not rejected by the Commission in accordance with Article 9(3) of [Directive 2003/87]) and which, in accordance with Article 10 of [Directive 2003/87], provides that, for the five-year period beginning on 1 January 2008, 100% of the emission allowances are to be allocated free of charge, (iii) where the rate of this tax is 80% of the emission allowance tax base, which is determined as being the sum of the multiplication of the emission allowances transferred (sold) in each calendar month and the average market price of allowances in the calendar month preceding the month in which the transfer takes place and of the multiplication of unused allowances and the average market price of allowances for the calendar year concerned and (iv) where the average market prices are calculated as the simple arithmetic mean of the prices of the last trade on a stock exchange (that is to say, where the tax is not based on the price at which the emission allowances were actually sold)?'

Consideration of the question referred

17 By its question, the referring court asks, in essence, whether Directive 2003/87 must be interpreted as precluding national legislation, such as that at issue in the main proceedings, which taxes, at 80% of their value, greenhouse gas emission allowances allocated free of charge which have been sold or not used by the undertakings subject to the greenhouse gas emission trading scheme.

18 As is clear from Article 1 of Directive 2003/87, that directive establishes a Community scheme for greenhouse gas emission allowance trading in order to promote reductions of greenhouse gas emissions in a cost-effective and economically efficient manner.

19 In addition, in accordance with Article 10 of Directive 2003/87, for the five-year period beginning 1 January 2008, Member States are to allocate at least 90% of the allowances free of charge.

20 The allocation of emission allowances of greenhouse gas free of charge is a transitional measure intended to prevent undertakings from losing competitiveness as a result of the scheme for emission allowance trading (see, to that effect, judgment of 17 October 2013, *Iberdrola and Others*, C-566/11, C-567/11, C-580/11, C-591/11, C-620/11 and C-640/11, EU:C:2013:660, paragraph 45).

21 It is true that no provision of Directive 2003/87 expressly restricts the right of Member States to adopt measures which may affect the economic implications of using such allowances (see, to that effect, judgments of 17 October 2013, *Iberdrola and Others*, C-566/11, C-567/11, C-580/11, C-591/11, C-620/11 and C-640/11, EU:C:2013:660, paragraph 28, and of 26 February 2015, *ŠKO-Energo*, C-43/14, EU:C:2015:120, paragraph 19).

22 The Court has thus held that Member States are free, as a rule, to determine the manner in which the value of the emission allowances allocated free of charge to producers is to be passed on to consumers (judgments of 17 October 2013, *Iberdrola and Others*, C-566/11, C-567/11, C-580/11, C-591/11, C-620/11 and C-640/11, EU:C:2013:660, paragraph 29, and of 26 February 2015, *ŠKO-Energo*, C-43/14, EU:C:2015:120, paragraph 20).

23 Nevertheless, the adoption of such measures may not undermine the objectives pursued by Directive 2003/87 (see judgments of 17 October 2013, *Iberdrola and Others*, C-566/11, C-567/11, C-580/11, C-591/11, C-620/11 and C-640/11, EU:C:2013:660, paragraph 30, and of 26 February 2015, *ŠKO-Energo*, C-43/14, EU:C:2015:120, paragraph 21).

24 In that regard, it must be pointed out that, in order to achieve its objective of reducing greenhouse gas emissions in a cost-effective and economically efficient manner, Directive 2003/87 relies on the economic value of allowances to encourage companies to reduce their emissions and, to that end, introduces a system of emission allowance trading. Undertakings can thus use the emission allowances allocated to them, or sell them, on the basis of their market value and the profits which they could thus obtain from them (see, to that effect, judgment of 17 October 2013, *Iberdrola and Others*, C-566/11, C-567/11, C-580/11, C-591/11, C-620/11 and C-640/11, EU:C:2013:660, paragraphs 47, 49 and 55).

25 It is therefore necessary for the proper functioning of that system that a levy taken by a Member State from the economic value of those emission allowances should not diminish the incentive to reduce greenhouse gas emissions to the point of removing it entirely (see, to that effect, judgment of 17 October 2013, *Iberdrola and Others*, C-566/11, C-567/11, C-580/11, C-591/11, C-620/11 and C-640/11, EU:C:2013:660, paragraph 58).

26 It is apparent from the documents before the Court that the Slovak tax at issue in the main proceedings affects up to 80% of the value of the greenhouse gas emission allowances allocated free of charge which have not been used or have been sold.

27 By eliminating virtually all of the economic value of emission allowances, the tax amounts to a negation of the incentive mechanisms underpinning the emission allowance trading system and, consequently, to the removal of the incentives intended to promote the reduction of greenhouse gas emissions. Thus deprived of 80% of the economic value of the emission allowances, undertakings lose almost all incentive to invest in measures to reduce their emissions which enable them to derive profit from the sale of their unused allowances.

28 Thus, it must be held that that tax has the effect of neutralising the principle of the greenhouse gas emission allowances allocated free of charge provided for in Article 10 of Directive 2003/87, and of undermining the objectives pursued by that directive.

29 Accordingly, the answer to the question referred is that Directive 2003/87 must be interpreted as precluding national legislation, such as that at issue in the main proceedings, which taxes, at 80% of their value, greenhouse gas emission allowances allocated free of charge which have been sold or not used by the undertakings subject to the greenhouse gas emission trading scheme.

Costs

30 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 (Sixth 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 must be interpreted as precluding national legislation, such as that at issue in the main proceedings, which taxes, at 80% of their value, greenhouse gas emission allowances allocated free of charge which have been sold or not used by the undertakings subject to the greenhouse gas emission trading scheme.

[Signatures]