OPINION OF ADVOCATE GENERAL KOKOTT
delivered on 10 December 2009 [1]

I – Introduction

1. The Commission and the United Kingdom are in dispute as to whether a coal-fired power plant which generates electricity for the production of aluminium must observe the limit values in 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. [2] This concerns the emission of sulphur dioxide, nitrogen oxides and dust.

2. Specifically it must be determined whether electricity is a product of combustion, since the directive does not apply to large combustion plants which have direct use made of their products of combustion in a manufacturing process.

II – Legal context

3. Directive 2001/80 applies, as stated in 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).

4. Under the first sentence of Article 2(7), 'combustion plant' means any technical apparatus in which fuels are oxidised in order to use the heat thus generated.

1 — Original language: German.

2 — OJ 2001 L 309, p. 1, as amended by Council Directive 2006/105/EC of 20 November 2006 adapting Directives 73/239/EEC, 74/557/EEC and 2002/83/EC in the field of environment, by reason of the accession of Bulgaria and Romania (OJ 2006 L 363, p. 368).

5. The second to fourth sentences of Article 2(7) contain the following further provisions on the directive's scope:

'This Directive shall apply only to combustion plants designed for production of energy with the exception of those which make direct use of the products of combustion in manufacturing processes. In particular, this Directive shall not apply to the following combustion plants:

(a) plants in which the products of combustion are used for the direct heating, drying, or any other treatment of objects or materials e.g. reheating furnaces, furnaces for heat treatment;

(b) post-combustion plants i.e. any technical apparatus designed to purify the waste gases by combustion which is not operated as an independent combustion plant;

(c) facilities for the regeneration of catalytic cracking catalysts;

(d) facilities for the conversion of hydrogen sulphide into sulphur;

(e) reactors used in the chemical industry;

(f) coke battery furnaces;

(g) cowpers;

(h) any technical apparatus used in the propulsion of a vehicle, ship or aircraft;

(i) gas turbines used on offshore platforms;

(j) gas turbines licensed before 27 November 2002 or 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 without prejudice to Article 7(1) and Annex VIII(A) and (B).

Plants powered by diesel, petrol and gas engines shall not be covered by this Directive.'

III – Facts, procedure and forms of order sought

6. An aluminium producer has for some considerable time been operating a coal-fired power plant in Lynemouth on the east coast of England. The electricity generated is used almost entirely for the production of aluminium by molten-salt electrolysis (the Hall-Heroult process) in a neighbouring plant. Only approximately 9% of the electricity generated is fed into the national grid.

7. Since no later than the beginning of 2006 the United Kingdom has no longer been applying Directive 2001/80 to this power plant. The Commission, on the other hand, takes the view that the power plant is subject to the directive's requirements. It informed the United Kingdom of this by a letter of formal notice dated 29 June 2007 calling upon it to submit its observations. The United Kingdom did not relinquish its position in its response of 31 August 2007. The Commission therefore issued a reasoned opinion on 23 October 2007, in which it set a final period of two months for its objections to be met.

8. As the United Kingdom adhered to its stance in its response of 21 December 2007, the Commission brought the present action on 25 July 2008. It claims that the Court should:

— declare that, by refusing to apply 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 to the Lynemouth power plant, the United Kingdom has failed to fulfil its obligations under that directive;

— order the United Kingdom of Great Britain and Northern Ireland to bear the costs.

9. The United Kingdom contends that the Court should dismiss the action and award costs against the Commission.

IV – Appraisal

10. The Lynemouth power plant must comply with the limit values for existing plants if it is covered by the directive. It is a combustion plant the rated thermal input of which is greater than 50 MW, for the purposes of Article 1 and the first sentence of Article 2(7) of Directive 2001/80.

11. The second sentence of Article 2(7) of Directive 2001/80 further requires, however, in order for the directive to apply, that the power plant be a combustion plant designed for production of energy but that *direct use not be made of the products of combustion in manufacturing processes*. Whilst the power plant serves to produce energy, the parties are in dispute, however, as to whether direct use is made of its products of combustion in the manufacture of aluminium.

A – *The concept of product of combustion*

12. The term 'product of combustion' (*produit de combustion*, *Verbrennungsprodukt*) can be interpreted in different ways. Looked at in purely material terms, the products of combustion would be the flue gases, ash and other residues. It is nevertheless natural also to regard the heat arising on combustion as a product of combustion since, under the first sentence of Article 2(7) of Directive 2001/80, the distinguishing feature of a combustion plant is that fuels are oxidised in order to use the heat thus generated.

13. The only product of the power plant that is used in the aluminium smelter is the electricity. In the molten-salt electrolysis, it is passed through hot molten salts in order to transform the aluminium oxide contained in them into aluminium. This use is direct. The issue, therefore, is whether the electricity generated in the power plant is a product of combustion.

14. Electricity is neither a material product of combustion nor heat. The method of its generation is that the heat arising on combustion produces steam which powers a generator. Only by means of this generator is the

electricity produced. To cover electricity, the term 'product of combustion' would therefore have to be interpreted so broadly that it also encompasses products that are attributable to combustion indirectly only. However, that would probably not reflect normal linguistic usage.

B – *The second sentence of Article 2(7) of Directive 2001/80 as an exception*

15. The fact that the concept of product of combustion determines the extent of an exception to a general rule also militates against a broad interpretation of that concept. Exceptions are to be interpreted strictly [3] so that general rules are not undermined. Classification as an exception results from the following considerations.

16. The first sentence of Article 2(7) of Directive 2001/80 defines a combustion plant as technical apparatus in which fuels are oxidised in order to use the heat thus generated. Such plants are to be subject to the limit values set if they exceed the threshold under Article 1, that is to say a rated thermal input of 50 megawatts, and, in accordance with the second sentence of Article 2(7), they serve to produce energy.

17. This general rule implements the directive's aims, that is to say, reduction of the emission by large combustion plants of sulphur dioxide and nitrogen oxides (recitals 2 to 6 in the preamble) and of dust (recital 10). This reflects the overall aim of European environmental policy, laid down in Articles 2 EC and 174 EC (now, after amendment, Article 3(3) TEU and Article 191 TFEU; see also the preamble to the TEU), of promoting a high degree of environmental protection and the improvement of the quality of the environment. The greater the number of plants that must observe the limit values, the more strongly those aims are promoted.

18. Contrary to the United Kingdom's view, the remaining provisions of Article 2(7) do not contain a more precise definition of the concept of a combustion plant, but contain limitations. The provisions exclude plants

3 — See Case C-476/01 *Kapper* [2004] ECR I-5205, paragraph 72; Case C-60/05 *WWF Italia and Others* [2006] ECR I-5083, paragraph 34; Case C-36/05 *Commission* v *Spain* [2006] ECR I-10313, paragraph 31; Case C-342/05 *Commission* v *Finland* [2007] ECR I-4713, paragraph 25; Joined Cases C-14/06 and C-295/06 *Parliament* v *Commission* [2008] ECR I-1649, paragraph 71; and Case C-192/08 *TeliaSonera Finland* [2009] ECR I-10717, paragraph 40.

although they are likewise combustion plants. This is expressly recorded in the wording of the second sentence of Article 2(7) of Directive 2001/80, since according to that provision the directive is applicable to plants for the production of energy with the *exception* of those which make direct use of the products of combustion in manufacturing processes.

C – *The aims of the exceptions*

19. Nor can any aims of the provisions be discerned that would require the concept of product of combustion, contrary to general linguistic usage, to be interpreted broadly, as the United Kingdom suggests.

20. The exception for the direct use of products of combustion in manufacturing processes dates back to the original version of Article 2(7), in Directive 88/609/EEC [4] which was replaced by Directive 2001/80. In the original version, the Council had, without the further provision of grounds, supplemented the Commission proposal [5] with a similar exception and with exceptions for certain types of plant which are today laid down in subparagraphs (a) to (g). Directive 2001/80 also does not indicate any aims of the exceptions that might assist interpretation.

21. According to the Commission, the exceptions are based on the fact that flue gases arising from combustion are contaminated by pollutants as a result of the direct use of products of combustion in manufacturing processes. The Commission proceeds on the basis that, in the event of direct use, these flue gases come into contact with other materials and are therefore polluted to a greater extent than in the case of combustion operations in isolation. It states that the limit values in Directive 2001/80 are, however, geared to combustion operations in isolation.

22. This consideration would exclude electricity since its use for the manufacture of products has no effects at all on the power plant's emissions. The electricity could also be fed into the national grid without different emissions arising.

4 — 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).

5 — Proposal for a Council Directive on the limitation of emissions of pollutants into the air from large combustion plants (OJ 1984 C 49, p. 1). The subsequent Commission amendments are reproduced at OJ 1985 C 76, p. 6.

23. The Commission's theory nevertheless presupposes that only the flue gases are products of combustion. It is not effective, on the other hand, if the heat generated is also a product of combustion and direct use is made of it without the flue gases being polluted with other substances. According to the Commission too, however, heat is a product of combustion. Therefore, the Commission's view is contradictory.

24. According to the United Kingdom, the exceptions are the result of weighing up the costs of applying the limit values and their environmental benefits. That view may be true of the types of plant expressly specified in Article 2(7)(a) to (j) of Directive 2001/80, as it is possible to assess the cost and benefit of specific limit values in relation to individual types of plant.

25. The abstractly worded exception in the second sentence of Article 2(7) of Directive 2001/80, on the other hand, cannot be founded on a weighing up of costs and benefits. The costs or benefits that would be associated with applying the limit values to plants which do not serve to produce energy or which make direct use of products of combustion in manufacturing processes are not foreseeable.

26. It would be conceivable though that the second sentence of Article 2(7) of Directive 2001/80 is intended to favour manufacturing processes which are dependent upon the use of large combustion plants. The products of such processes can be placed at a disadvantage in international competition through additional costs caused by stricter limit values.

27. This idea applies to the present combination of a power plant with an aluminium smelter. The United Kingdom submits that continued aluminium production would be placed at risk if the power plant were made subject to the directive.

28. The second sentence of Article 2(7) of Directive 2001/80 clearly indicates, however, that an exception is to be allowed only where there is a particularly close link between the manufacturing process and the combustion operation: *direct* use of the products of combustion in a manufacturing operation is required.

29. The link is strongest if use only of the direct products of combustion, that is to say

heat and reaction products arising from combustion, can be considered. If, on the other hand, the category of usable products is extended to indirect products of combustion such as electricity, the link between manufacturing processes and combustion is loosened.

30. The fact that electricity can be carried over fairly long distances and can therefore come from various sources militates against such a loosening. It can be generated without using a large combustion plant, for example through hydroelectric power or nuclear energy. Directly used heat, on the other hand, must be produced nearby and can therefore typically come only from certain locally available sources. These are regularly large combustion plants.

31. The Commission correctly emphasises in this context that an unjustified competitive advantage within Europe would be conferred on aluminium production in Lynemouth if the coal-fired power plant did not have to observe Directive 2001/80. European competitors obtain their electricity from the general grid and therefore bear the costs of observing the limit values in the generation of electricity.

32. The power plant would also be unjustifiably favoured vis-à-vis other electricity-generating companies since roughly 9% of production is delivered to the national grid.

33. The exception under the second sentence of Article 2(7) of Directive 2001/80 should therefore not be extended to cover a coal-fired power plant the electricity from which is essentially intended for a neighbouring aluminium smelter.

D – *The scheme of the exceptions*

34. Contrary to the United Kingdom's view, the exception for cowpers in subparagraph (g) of the third sentence of Article 2(7) of Directive 2001/80 also does not lead to a different interpretation of the second sentence.

35. The United Kingdom considers the exceptions for specific types of plant in the third sentence of Article 2(7) of Directive 2001/80 to be examples of the application of the abstract rule in the second sentence. According to the third sentence, the directive is

not to apply *in particular* to the types of plant listed in subparagraphs (a) to (j). However, in the current version the words 'in particular' cannot be regarded as referring to the second sentence, since the types of plant in subparagraphs (h) to (j) do not display a cogent connection with the manufacturing processes expressly presupposed in the second sentence.

36. The United Kingdom therefore invokes the original version of Article 2(7) in Directive 88/609. This line of argument is questionable if only because the provisions of Directive 2001/80 are at issue here. However, it is also not convincing when the old law is looked at in isolation.

37. Article 2(7) of Directive 88/609 contained, together with the abstract exception, only what are now subparagraphs (a) to (g), which do display a connection with manufacturing processes. In the United Kingdom's submission, the final type of plant expressly specified at that time, cowpers, which now form subparagraph (g), shows that the concept of product of combustion is to be construed broadly and also encompasses indirect products of combustion such as electricity.

38. Cowpers transfer the heat of a combustion process to air which is then fed into a blast furnace as a component in the production of iron. The heat is derived from heated flue gases from combustion and is transferred to the air via bricks that are used as heat accumulators.

39. Contrary to the United Kingdom's view, this exception does not modify the concept of product of combustion. It concerns the use of a direct product of combustion, namely heat. [6]

40. It is however the case that cowpers do not constitute an example of the application of the abstract exception under the second sentence of Article 2(7) of Directive 2001/80. The product of combustion, heat, is made use of not directly but indirectly after transfer from the flue gases to two other media, bricks and air. The exception for cowpers is therefore an indication that, even in the version in

6 — See point 12 above.

Directive 88/609, the specific exceptions under Article 2(7) did not give concrete expression to the abstract exception but are founded on a weighing up of the costs and benefits of certain applications of the directive. [7] The further exceptions added by Directive 2001/80, which clearly can no longer be comprehended under the second sentence, confirm this approach.

41. The Commission proposal for a directive of the European Parliament and of the Council on industrial emissions (integrated pollution prevention and control) [8] which is currently under discussion, and which seeks to merge various directives including Directive 2001/80, continues further along this path. In contrast to the specific exceptions under subparagraphs (a) to (j) of the third sentence of Article 2(7) of Directive 2001/80, the abstract exception under the second sentence appears no longer to be included. [9] Instead, the Council is proposing other exceptions. [10] A specific exception for plants such as the Lynemouth power plant is, however, not envisaged.

E – *Conclusion*

42. To sum up, it must therefore be stated that the use of electricity to produce aluminium does not constitute a direct use of products of combustion in a manufacturing process. Accordingly, the limit values in Directive 2001/80 should be applied to Lynemouth power plant and the action should be upheld.

V – Costs

43. Under Article 69(2) of the Rules of Procedure, the unsuccessful party is to be ordered to pay the costs if they have been applied for in the successful party's pleadings.

7 — The weighing up for cowpers might rest on the fact that they regularly burn blast furnace gas and therefore save energy. That gas is already polluted so that, despite cleaning using the best available technique, the limit values for the use of gaseous fuel are not achieved. Under Annex VI to Directive 2001/80, 200 to 300 mg/Nm3 is laid down for nitrogen oxides (NOx), but up to 350 mg/Nm3 arise using the best available technique. ('Best Available Techniques Reference Document on the Production of Iron and Steel' (December 2001, pp. vii and 212, http://eippcb.jrc.es/reference/_download.cfm?twg=isp&file=isp_bref_1201.pdf); the Commission drew up this document in cooperation with experts of the Member States on the basis of Council Directive 96/61/EC of 24 September 1996 concerning integrated pollution prevention and control (OJ 1996 L 257, p. 26), which has been codified by Directive 2008/1/EC of the European Parliament and of the Council of 15 January 2008 concerning integrated pollution prevention and control (OJ 2008 L 24, p. 8)).

8 — COM(2007) 844 final.

9 — See Article 3(19) and the second paragraph of Article 31 of the Commission proposal and Article 28 of the Council common position (Council document 11962/09 of 16 November 2009).

10 — See the draft statement of reasons for the common position (Council document 11962/09 ADD 1 of 16 November 2009, p. 8).

VI – Conclusion

44. I therefore suggest that the Court:

(1) declare that, by refusing to apply 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 to the Lynemouth power plant, the United Kingdom has failed to fulfil its obligations under that directive;

(2) order the United Kingdom to bear the costs of the proceedings.