Reports of Cases

OPINION OF ADVOCATE GENERAL
KOKOTT
delivered on 3 March 2016[1]

Case C-158/15

Elektriciteits Produktiemaatschappij Zuid-Nederland EPZ NV
v
Bestuur van de Nederlandse Emissieautoriteit
(Request for a preliminary ruling

from the Raad van State (Council of State, Netherlands))

(Environment law — Directive 2003/87/EC — Scheme for greenhouse gas emission allowance trading — Concept of 'installation' — Regulation (EU) No 601/2012 — Monitoring of greenhouse gas emissions — Fuel exported from the installation)

I – **Introduction**

1. The scheme for greenhouse gas emission allowance trading under Directive 2003/87/EC[2] is one of the European Union's most important instruments for combatting climate change. Under this scheme coal-fired power plants are obliged to acquire emissions rights or 'allowances' in order to release CO_2 during electricity generation. The request for a preliminary ruling relates to the question of whether this also includes the release of CO_2 that is caused by the self-heating of coal at a power plant's own coal storage site.

2. Any inclusion of these emissions would assume that the storage facility is part of the power plant installation within the meaning of Directive 2003/87. The applicable term 'installation' is not limited to that directive, but can be found in largely identical wording in the much more general Industrial Emissions Directive,[3] where it is of central importance. In the current proceedings the Court will be opining on this term for the first time. And although the interpretation of the definition from one directive does not necessarily have to be applied to other directives the present case nevertheless adopts the role of precedent.

3. Even if the storage facility were judged to form part of the power plant, the inclusion of the specific emissions would in any case be excluded if the coal lost as a result of the self-heating within the meaning of Article 27(2) of Regulation (EU) No 601/2012[4] were to be regarded as fuel exported from the installation.

1 — Original language: German.

2 — Directive 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), as amended by Regulation (EU) No 421/2014 amending Directive 2003/87/EC … in view of the implementation by 2020 of an international agreement applying a single global market-based measure to international aviation emissions (OJ 2014 L 129, p. 1).

3 — 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).

4 — Commission Regulation (EU) No 601/2012 of 21 June 2012 on the monitoring and reporting of greenhouse gas emissions pursuant to Directive 2003/87/EC of the European Parliament and of the Council (OJ 2012 L 181, p. 30).

II – **Legal framework**

A – *Directive 2003/87*

4. The scope of Directive 2003/87 is set out in Article 2(1):

‘This Directive shall apply to emissions from the activities listed in Annex I and greenhouse gases listed in Annex II.’

5. Of the definitions in Article 3 of Directive 2003/87, the following three should be given particular emphasis:

‘For the purposes of this Directive the following definitions shall apply:

(b) ‘emissions’ means the release of greenhouse gases into the atmosphere from sources in an installation …;

…

(e) “installation” means a stationary technical unit where one or more activities listed in Annex I are carried out and any other directly associated activities which have a technical connection with the activities carried out on that site and which could have an effect on emissions and pollution;

…

(t) “combustion” means any oxidation of fuels, regardless of the way in which the heat, electrical or mechanical energy produced by this process is used, and any other directly associated activities, including waste gas scrubbing;

…’

6. The obligation to surrender allowances for the emission of greenhouse gases is set out in Article 12(3) of Directive 2003/87/EC:

‘Member States shall ensure that, by 30 April each year, the operator of each installation surrenders a number of allowances, other than allowances issued under Chapter II, equal to the total emissions from that installation during the preceding calendar year as verified in accordance with Article 15, and that these are subsequently cancelled.’

7. The combustion of fuels in installations with a total rated thermal input exceeding 20 MW is one of the activities listed in Annex I of Directive 2003/87. The introduction to this annex specifies which combustion processes should be included:

‘3. When the total rated thermal input of an installation is calculated in order to decide upon its inclusion in the Community scheme, the rated thermal inputs of all technical units which are part of it, in which fuels are combusted within the installation, are added together. These units could include all types of boilers, burners, turbines, heaters, furnaces, incinerators, calciners, kilns, ovens, dryers, engines, fuel cells, chemical looping combustion units, flares, and thermal or catalytic post-combustion units. Units with a rated thermal input under 3 MW and units which use exclusively biomass shall not be taken into account for the purposes of this calculation …

…

5. When the capacity threshold of any activity in this Annex is found to be exceeded in an installation, all units in which fuels are combusted, other than units for the incineration of hazardous or municipal waste, shall be included in the greenhouse gas emission permit.'

B – *Regulation No 601/2012*

8. Article 1 of Regulation No 601/2012 contains rules for the monitoring and reporting of greenhouse gas emissions and activity data pursuant to Directive 2003/87 in the trading period of the Union emissions trading scheme commencing on 1 January 2013 and subsequent trading periods.

9. According to Article 5 of Regulation No 601/2012 monitoring should cover all processes:

'Monitoring and reporting for an installation shall cover all process and combustion emissions from all emission sources and source streams belonging to activities listed in Annex I to Directive 2003/87/EC and other relevant activities included pursuant to Article 24 of the Directive and of all greenhouse gases specified in relation to those activities while avoiding double-counting.

Operators and aircraft operators shall apply appropriate measures to prevent any data gaps within the reporting period.'

10. Article 20(1) of Regulation No 601/2012 defines the monitoring boundaries through the operator:

'An operator shall define the monitoring boundaries for each installation.

Within those boundaries, the operator shall include all relevant greenhouse gas emissions from all emission sources and source streams belonging to activities carried out at the installation and listed in Annex I to Directive 2003/87/EC, as well as from activities and greenhouse gases included by a Member State pursuant to Article 24 of Directive 2003/87/EC.

The operator shall also include emissions from regular operations and abnormal events including start-up and shut-down and emergency situations over the reporting period, with the exception of emissions from mobile machinery for transportation purposes.'

11. Article 21(1) of Regulation No 601/2012 deals with the choice of monitoring methodology:

'For the monitoring of the emissions of an installation, the operator shall choose to apply either a calculation-based methodology or a measurement-based methodology, subject to specific provisions of this Regulation.

A calculation-based methodology shall consist in determining emissions from source streams based on activity data obtained by means of measurement systems and additional parameters from laboratory analyses or default values. The calculation-based methodology may be implemented through the standard methodology set out in Article 24 or the mass balance methodology set out in Article 25.

…'

12. Article 27 of Regulation No 601/2012 regulates how an installation's consumption rates are to be calculated:

'(1) The operator shall determine the activity data of a source stream in one of the following ways:

(a) based on continual metering at the process which causes the emissions;

(b) based on aggregation of metering of quantities separately delivered taking into account relevant stock changes.

(2) For the purposes of point (b) of paragraph 1, the quantity of fuel or material processed during the reporting period shall be calculated as the quantity of fuel or material purchased during the reporting period, minus the quantity of fuel or material exported from the installation, plus the quantity of fuel or material in stock at the beginning of the reporting period, minus the quantity of fuel or material in stock at the end of the reporting period.

…'

III – **The facts of the case and the request for a preliminary ruling**

13. Elektriciteits Produktiemaatschappij Zuid-Nederland EPZ NV ('EPZ') operates a coal-fired power plant near Borssele, at the seaport and industrial estate of Vlissingen-Oost in the Netherlands province of Zeeland. The power plant currently has a capacity of 406 MW and uses on average 2 500 000 kilos of coal per day. The coal is delivered by ship to one of the harbours in the area. It is delivered to EPZ by a stevedoring company called OVET, the office of which is located near the harbour. OVET deposits the coal coming from the ship and destined for EPZ in two mobile hoppers and then takes it to EPZ's storage site, also known as the coal park.

14. The centre of the coal park is about 800 metres from the edge of the coal-fired power plant. The site on which the coal-fired power plant is situated is separated from the storage site by a public road. The coal is uploaded from the storage site by scraper loaders and deposited on a conveyor belt. That conveyor belt passes over the public road to the coal-fired power plant. There the coal is milled to a fine powder before being fed into the combustion installation.

15. EPZ can accommodate about two boatloads at the coal park. The coal may remain in storage for six months to a year before being used to fire the power plant.

16. EPZ comes within the scope of the Emissions Trading Scheme and must therefore surrender allowances for the emission of greenhouse gases. The number of allowances required depends on the quantity of coal delivered. However, EPZ is applying for permission to reduce this quantity by a fixed percentage.

17. The only matter still in contention here is whether the self-heating of the coal justifies a reduction. By this, it should be understood that some of the coal is lost during storage at the coal park due to combustion resulting from self-heating. The oxygen from the air in the free spaces between the stored coal reacts with the coal and generates heat, as a result of which some of the coal is lost. That process does cause CO_2 emissions, but is not part of the power plant's electricity generation.

18. The Netherlands Council of State is therefore requesting a preliminary ruling from the Court of Justice of the European Union on the following questions:

'(1) Does a situation such as the present, where the coal is stored in a coal park where CO_2 emissions occur as a result of self-heating, where the centre of the coal park is about 800 metres distant from the coal-fired power plant, where the two sites are separated from each other by a public road and where the coal is transported from the storage site to the power plant by means of a conveyor belt passing over the road, fall within the scope of the term "installation" as referred to in Article 3(e) of Directive 2003/87 …?

(2) Does "fuel exported from the installation", in Article 27(2) of [Regulation No 601/2012] refer to a situation such as the present, where coal is lost during storage in the coal park due to combustion resulting from of self-heating?'

19. EPZ, the Kingdom of the Netherlands and the Commission have submitted written observations. Since the Court considered itself sufficiently informed on the basis of those written submissions, the decision was taken not to hold a hearing pursuant to Article 76(2) of the Rules of Procedure.

IV – **Assessment**

20. Under Article 12(3) of Directive 2003/87 the operator must, by 30 April every year, surrender a number of allowances for every installation equal to the total emissions from that installation during the preceding calendar year, as verified under Article 15. Admittedly, it is not yet the surrender of allowances that is at issue in this case but merely verification under Article 15. However, the result of this verification is relevant to the quantity of allowances needed.

21. By the present request for a preliminary ruling the Council of State seeks to clarify whether CO_2 emissions resulting from self-heating where coal is stored in the storage facility of a coal-fired power plant must be covered by emissions allowances. Both questions are directed at whether, under the scheme in Directive 2003/87, the storage facility should be treated as part of the power-plant installation (see A below) and, where relevant, whether it is permissible not to include the fuel lost as a result of self-heating because it has been 'exported from the installation' (see B below).

A – *The term 'installation'*

22. Under Article 3(e) of Directive 2003/87, an installation is a stationary technical unit where one or more activities listed in Annex I are carried out and any other directly associated activities which have a technical connection with the activities carried out on that site and which could have an effect on emissions and pollution.

23. The combustion of fuels in installations with a total rated thermal input exceeding 20 MW is one of the activities listed in Annex I to Directive 2003/87. With a capacity of 406 MW EPZ's power plant therefore falls within the scheme under the directive.

24. While EPZ is insisting that the storage of coal is not an activity under Annex I to Directive 2003/87, the coal storage facility could nevertheless be part of the power-plant installation.

1. The definition of 'installation'

25. The definition of 'installation' in Article 3(e) of Directive 2003/87 is qualified by four elements. Namely, it refers firstly to a stationary technical unit where one or more activities listed in Annex I to the directive are carried out; secondly to any other directly associated activities which, thirdly, have a technical connection with the activities carried out on that site and which, fourthly, could have an effect on emissions and pollution.

26. There are indeed differences between the different language versions in relation to the question of whether the other activities directly associated with the main activity are carried out inside the technical unit or also outside it.[5] However, these differences are less significant than they appear.

5 — See Commission, Guidance on Interpretation of 'Installation' and 'Operator' for the Purposes of the IPPC Directive, Version 1, April 2007, p. 1.

27. This is because the term ‘technical unit’ is not defined and can therefore be interpreted with greater flexibility. As a result, it depends on the other features of the definition: the other activity’s direct association with the activity in the annex, the technical connection between the two activities and the effects on the environment.

28. These elements of the ‘installation’ definition cannot be interpreted restrictively as there would otherwise be a risk of excluding certain greenhouse gas emissions from the relevant installation and of removing them from the scheme under Directive 2003/87.

29. The storage of coal at a power-plant site with regard to its later combustion within the power plant is admittedly not listed in Annex I to Directive 2003/87. Yet it follows from the very definition of ‘installation’ that other activities are also to be attributed to the installation if they are directly associated with the main activity (combustion in this instance). Such a direct association exists in the case of the storage of coal which is the subject of this dispute as the stored fuel is essential to the operation of the power plant furnace.

30. This direct association is evidenced by the element of the technical connection. Such a connection should be assumed if the relevant activity is integrated into the same technical process as the main activity that opens up the application of Directive 2003/87. This is satisfied in the present case through the very existence of the conveyor belt to the power plant. The fact that the two parts of the installation are separated by a road and a certain distance is of secondary importance compared with this.

31. Ultimately, the CO_2 emissions from the self-heating show that the storage of coal can have an impact on emissions and on environmental pollution. Other pollution from the open-air storage of coal, in the form of fine powder for example, cannot be ruled out.

32. For that reason, a coal storage facility such as the one in the present dispute is part of the power plant installation.

2. Particular installation definitions

33. This conclusion is corroborated by the rather more specifically worded definitions of ‘installation’ in the area of waste incineration under Article 42(1) of the Industrial Emissions Directive and Article 3(8) of the ‘Seveso III’ Directive on the control of major-accident hazards involving dangerous substances. [6]

34. At waste incineration plants the storage of waste (the fuel in this case) is expressly defined as part of the relevant installation. Under the Seveso III Directive, also, installations include warehouses that are necessary for their operation.

35. Admittedly, these two definitions are oriented primarily towards the specific objectives of the relevant regulations but, like the definition in Directive 2003/87, their objective is to take full account of the relevant environmental effects they regulate. To that extent, both special definitions illustrate the fact that installations typically also include the respective storage required.

36. At the same time, the definition in the area of waste incineration is of particular interest because it focuses on incineration plants and the power plant is also an incineration plant. This definition shows that incineration plants frequently also have a fuel storage facility.

6 — Directive 2012/18/EU of the European Parliament and of the Council of 4 July 2012 (OJ 2012 L 197, p. 1).

3. The objectives of Directive 2003/87

37. EPZ nevertheless takes the view that, given the objectives of Directive 2003/87, a narrower interpretation of the term 'installation' is required. In this connection EPZ particularly emphasises the fact that the operator of a coal storage facility is unable to control or to prevent emissions due to self-heating.

38. This view is based on the idea that the market mechanism for trading in emissions allowances should ensure that operators of installations minimise as far as possible the CO_2 emissions arising in the course of their activities.

39. Even if one takes it for granted that the operator of a coal storage facility really cannot avoid self-heating, EPZ nevertheless fails to recognise that included in the market mechanism is a measure whereby certain activities will in some circumstances cease completely if they are no longer competitive due to the cost of their unavoidable emissions.

40. The objectives of Directive 2003/87 therefore similarly confirm the inclusion of the coal storage facility in the power plant installation.

4. Regulation No 601/2012

41. Although on initial impressions Regulation No 601/2012 appears not to give a clear answer to the question of the inclusion of the storage facility's emissions, ultimately it does not call this into question.

42. Article 20 of the regulation appears to open up the possibility of not including the storage facility. Under this provision the operator defines the monitoring boundaries for each installation. However, this provision cannot be understood as meaning that the operator of a coal-fired power plant may exclude the associated storage facility and hence not take it into account.

43. The power to define boundaries does not relate to the installation as such but to the monitoring thereof. A restriction on monitoring that fails to include certain emissions of an installation would, however, contradict the purpose of the monitoring. Specifically, under Article 5 of the regulation this should be complete and cover all process and combustion emissions from all emission sources and source streams belonging to activities listed in Annex I to Directive 2003/87. The self-heating of the coal in the storage facility is, however, similarly an emissions source belonging to the activity of the power plant and must therefore be covered by the monitoring.

5. Other forms of organising storage

44. In this connection EPZ is understandably requesting clarification as to whether, if the storage were organised differently, this would potentially rule out its inclusion as part of the power plant installation. Such a clarification is certainly not essential to the answering of the reference for a preliminary ruling. However, this could help the final clarification of the dispute between EPZ and the relevant entities in the Netherlands as to whether the storage facility should be included. For that reason, the Court should rule on this point.

45. The element of the *technical* connection shows that this may not depend on the commercial organisation of the activity, for example on whether it is outsourced. Rather, it depends much more on its integration into a technical process with the main activity that opens up the application of Directive 2003/87.

46. Accordingly, in recital 6 of the Industrial Emissions Directive and in Article 3(4) and Article 5(2) of that directive (which uses a virtually identical definition of 'installation'), the legislature has taken into account the possibility of different operators operating different parts of an installation.

47. This is also supported by the specific definitions of 'installation' in the area of waste incineration and on the control of major-accident hazards involving dangerous substances. They demonstrate that installations cannot be looked at in isolation but regularly include a technical process that needs to be assessed in its entirety.

48. Consequently, the choice of technical means to connect different parts of the installation may be of just as little relevance as long as these parts of the installation are connected within the same technical process. The conveyor belt used here is therefore only an example of a technical connection. Other more flexible connections, such as lorries, would also be conceivable.

49. In the assessment of such a technical process the distance between a fuel storage facility and the combustion site cannot be more than indicative. The further they are away from each other, the more unlikely it is that there is a direct technical connection. But a temporary storage facility that is operated solely in order to supply a particular power plant should be regarded as part of the power plant installation even if the distance between it and the installation is significant.

50. A similar approach should be adopted where other customers are supplied from the same storage facility. This would indicate that the storage facility is not part of the power plant installation. However, on condition that the main purpose of the storage facility remains to supply the power plant, the assumption that it is part of a single installation would continue to apply. This is also supported by Article 27(2) of Regulation No 601/2012, to be discussed below. That is because this regulation clearly assumes that fuel can be delivered from one installation to other customers.

51. It follows from this that, irrespective of how it is organised, it is virtually impossible to segregate the storage facility from the installation. Rather, the company would need structurally to separate the coal storage from the power plant to such a degree that any technical connection with the power plant is ruled out.

6. The answer to the first question

52. To conclude, the first question should therefore be answered to the effect that a coal-fired power plant and a coal storage facility supplying it in which CO_2 emissions occur as a result of self-heating must be treated as being the same installation within the meaning of Article 3(e) of Directive 2003/87 if the two are connected to each other as part of a common technical process for the operation of the power plant.

B – *Exportation from the installation*

53. By its second question the Council of State seeks clarification as to whether the coal combusted through self-heating should be ignored in the calculation of emissions because it has been exported from the installation.

54. This question is based on the procedure for calculating emissions which is set out in Article 27(2) of Regulation No 601/2012. Under this provision, the quantity of fuel or material processed is calculated as the quantity of fuel or material purchased during the reporting period, minus the quantity of fuel or material exported from the installation, plus the quantity of fuel or material in stock at the beginning of the reporting period, minus the quantity of fuel or material in stock at the end of the reporting period.

55. According to a Commission Guideline, the quantity exported from the installation includes fuel used for other installations or parts of the installation which are not included in the scheme under Directive 2003/87.[7] Hence fuel is exported from the installation where it is actually delivered to a different installation or is consumed for different activities that genuinely do not fall within the scheme.

56. Nevertheless, EPZ is of the opinion that the fuel lost as a result of self-heating is also exported from the installation. Here, it relies on the consideration that the storage facility as such is not covered by Directive 2003/87.

57. However, this consideration simply boils down to the suggestion that the construction of the term 'installation' needs to be revised in relation to the storage facility. For reasons already stated, the storage facility is, however, part of the power plant installation. Hence, when applying the rules governing the monitoring of installation emissions, it cannot again be excluded from the installation.

58. Rather, it should be found that the coal lost as a result of self-heating is not exported from the installation but is oxidised within the installation, that is to say, it is combusted within the meaning of Article 3(t) of Directive 2003/87. The self-heating is a consequence of the storage of fuel for combustion in the power plant and, therefore connected to the main purpose of the installation, which provides grounds for its inclusion within the scheme under Directive 2003/87.

59. Besides, any other interpretation of Article 27(2) of Regulation No 601/2012 would be at variance with the purpose of Article 5 of that regulation, which is to ensure the complete monitoring of all emission sources at the installation.

V – **Conclusion**

60. I propose that the Court should decide as follows:

(1) A coal-fired power plant and a coal storage facility supplying it, in which CO_2 is released as a result of self-heating, must be treated as being the same installation for the purposes of Article 3(e) of Directive 2003/87/EC establishing a scheme for greenhouse gas emission allowance trading within the Community, if the two are connected with each other as part of the same technical process for the operation of the power plant.

(2) Coal that is lost as a result of self-heating during storage in the storage facility of a power plant should not be regarded as 'fuel exported from the installation' within the meaning of Article 27(2) of Regulation (EU) No 601/2012 on the monitoring and reporting of greenhouse gas emissions pursuant to Directive 2003/87.

7 — 'The Monitoring and Reporting Regulation — General Guidance for installations. MRR Guidance document no. 1' of the European Commission of 16 July 2012, p. 60.