Reports of Cases

JUDGMENT OF THE COURT (Sixth Chamber)

9 June 2016*

(Reference for a preliminary ruling — Atmospheric pollution — Scheme for greenhouse gas emission allowance trading — Directive 2003/87/EC — Concept of 'installation' — Inclusion of the fuel storage site — Regulation (EU) No 601/2012 — Concept of 'fuel exported from the installation')

In Case C-158/15,

REQUEST for a preliminary ruling under Article 267 TFEU from the Raad van State (Council of State, Netherlands), made by decision of 1 April 2015, received at the Court on 3 April 2015, in the proceedings

Elektriciteits Produktiemaatschappij Zuid-Nederland EPZ NV

v

Bestuur van de Nederlandse Emissieautoriteit,

THE COURT (Sixth Chamber),

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

Advocate General: J. Kokott,

Registrar: A. Calot Escobar,

having regard to the written procedure,

after considering the observations submitted on behalf of:

— Elektriciteits Produktiemaatschappij Zuid-Nederland EPZ NV, by V.M.Y. van 't Lam and T. Kortmann, advocaten,

— the Netherlands Government, by M. de Ree and M. Bulterman, acting as Agents,

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

after hearing the Opinion of the Advocate General at the sitting on 3 March 2016,

gives the following

* Language of the case: Dutch.

Judgment

1 This request for a preliminary ruling concerns the interpretation of Article 3(e) 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), as amended by Decision No 1359/2013/EU of the European Parliament and of the Council of 17 December 2013 (OJ 2013 L 343, p. 1), ('Directive 2003/87') and of Article 27(2) of 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 (OJ 2012 L 181, p. 30), as amended by Commission Regulation (EU) No 206/2014 of 4 March 2014 (OJ 2014 L 65, p. 27), ('Regulation No 601/2012').

2 The request has been made in proceedings between Elektriciteits Produktiemaatschappij Zuid-Nederland EPZ NV ('EPZ') and the Bestuur van de Nederlandse Emissieautoriteit (administration of the Netherlands emissions authority; 'the NEa') concerning the inclusion of greenhouse gas emissions resulting from the self-heating of coal while in storage.

Legal context

EU law

Directive 2003/87

3 Recital 11 of Directive 2003/87 states:

'Member States should ensure that the operators of certain specified activities hold a greenhouse gas emissions permit and that they monitor and report their emissions of greenhouse gases specified in relation to those activities.'

4 Article 2 of that directive, entitled 'Scope', provides in paragraph 1:

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

5 Article 3 of that directive, headed 'Definitions', provides:

'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 Article 12 of Directive 2003/87, headed ‘Transfer, surrender and cancellation of allowances’, provides in paragraph 3:

‘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 Annex I to Directive 2003/87 lists the categories of activities to which the directive applies and covers inter alia, in point 6, the combustion of fuels in installations with a total rated thermal input exceeding 20 MW, except in installations for the incineration of hazardous or municipal waste. Point 5 of that annex stipulates, moreover, that, when the capacity threshold of any activity in that 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, are to be included in the greenhouse gas emission permit.

Regulation No 601/2012

8 Recital 1 of Regulation No 601/2012 states:

‘The complete, consistent, transparent and accurate monitoring and reporting of greenhouse gas emissions, in accordance with the harmonised requirements laid down in this Regulation, are fundamental for the effective operation of the greenhouse gas emission allowance trading scheme established pursuant to [Directive 2003/87]. ...’

9 Recital 5 of that regulation is worded as follows:

‘The monitoring plan, setting out detailed, complete and transparent documentation concerning the methodology of a specific installation or aircraft operator should be a core element of the system established by this Regulation. Regular updates of the plan should be required, both to respond to the verifier’s findings and on the basis of the operator’s or aircraft operator’s own initiative. ...’

10 Article 2 of Regulation No 601/2012, entitled ‘Scope’, provides:

‘This Regulation shall apply to the monitoring and reporting of greenhouse gas emissions specified in relation to the activities listed in Annex I to [Directive 2003/87] and activity data from stationary installations …

It shall apply to emissions and activity data occurring from 1 January 2013.’

11 Article 3 of that regulation, headed ‘Definitions’, provides:

‘For the purposes of this Regulation, the following definitions apply:

...

5. “emission source” means a separately identifiable part of an installation or a process within an installation, from which relevant greenhouse gases are emitted ...

...

11. “combustion emissions” means greenhouse gas emissions occurring during the exothermic reaction of a fuel with oxygen;

…’

12 Article 5 of that regulation, entitled ‘Completeness’, provides:

‘Monitoring and reporting shall 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] and other relevant activities included pursuant to Article 24 of that 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.’

13 Article 11 of Regulation No 601/2012, entitled ‘General obligation’, provides, in paragraph 1:

‘Each operator or aircraft operator shall monitor greenhouse gas emissions, based on a monitoring plan approved by the competent authority in accordance with Article 12, taking into account the nature and functioning of the installation ... to which it applies.

...’

14 Article 20 of that regulation, headed ‘Monitoring boundaries’, provides in paragraph 1:

‘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], as well as from activities and greenhouse gases included by a Member State pursuant to Article 24 of [Directive 2003/87].

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.’

15 Article 21 of Regulation No 601/2012, entitled ‘Choice of the monitoring methodology’, provides, in paragraph 1:

‘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. ...

...’

16 Article 27 of that regulation, entitled 'Determination of activity data', provides:

'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.

...'

Netherlands law

17 According to Article 2.2(1) of the Wet milieubeheer (Law on environmental management), the tasks provided for in Regulation No 601/2012 are entrusted to the NEa.

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

18 EPZ operates a coal-fired power plant in the Netherlands, which commenced operations in 1987. That power plant has a capacity of 406 MW and uses on average 2 500 tonnes of coal per day.

19 The coal is delivered to a storage site, situated approximately 800 metres from the power plant, which is separated from it by a public road. It is kept between six months and a year on that site before being transported to the power plant on a conveyor belt to be milled to a fine powder, after which it is fed into the combustion installation.

20 While designing the monitoring plan for the installation operated by EPZ for the third trading period between 2013 and 2020, the NEa took the view that the coal lost as a result of its self-heating during the storage period could not be regarded as fuel exported from that installation within the meaning of Article 27(2) of Regulation No 601/2012.

21 By decision of 8 November 2013, the NEa consequently refused to approve the modification of that monitoring plan sought by EPZ, and subsequently, by decision of 23 April 2014, rejected as unfounded the objection to that first decision lodged by that company.

22 EPZ lodged an appeal with the Raad van State (Council of State), seeking to have that latter decision annulled.

23 In those circumstances, the Raad van State (Council of State) decided to stay the proceedings and to refer the following questions to the Court for a preliminary ruling:

'(1) Does a situation such as the present, where 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 meters distant from the edge of 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) By "fuel exported from the installation", does Article 27(2) of [Regulation No 601/2012] mean circumstances such as those in the present case, where the coal is lost during storage in the coal park due to combustion as a result of self-heating?'

Consideration of the questions referred

The first question

24 By its first question, the referring court essentially asks whether a fuel storage site of a coal-fired power plant such as that at issue in the main proceedings and as described by the referring court constitutes an 'installation' within the meaning of Article 3(e) of Directive 2003/87, taking into account in particular the fact that it is situated approximately 800 metres from that power plant, which is separated from it by a public road, and that the fuel is transported from that site to the power plant by means of a conveyor belt which crosses that public road.

25 It should be recalled that Article 3(e) of Directive 2003/87 defines an installation for the purposes of that directive as a stationary technical unit where one or more activities listed in Annex I to that directive 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.

26 Moreover, that annex covers, inter alia, the combustion of fuels in installations with a total rated thermal input exceeding 20 MW, with the exception of installations for the incineration of hazardous or municipal waste.

27 In the case in the main proceedings, it is common ground that, since EPZ's coal-fired power plant has a total rated thermal input exceeding 20 MW, that installation's coal-combustion activity is covered by Annex I to Directive 2003/87.

28 By contrast, with regard to the storage activity, even if it is assumed that the process of natural self-heating of the coal intended for that power plant, during the storage of that fuel, could be regarded as a combustion of fuels as referred to in Annex I to that directive, it is not apparent from the file before the Court that the thermal input of the storage site at issue in the main proceedings exceeds the threshold of 20 MW set by Annex I to that directive. That site cannot, therefore, be regarded as a stationary technical unit within the meaning of Article 3(e) of Directive 2003/87.

29 Consequently, the coal storage site at issue in the main proceedings is part of an installation within the meaning of Article 3(e) of Directive 2003/87 only if the coal storage activity fulfils the criteria laid down by that provision for activities other than those mentioned in Annex I to that directive. Such will be the case if that activity is directly associated with the combustion activity of the power plant, if it has a technical connection with the activities carried out on the site of that power plant and if it could have an effect on emissions and pollution.

30 In that respect, it is necessary to point out, first, that the fact that the coal is essential to the functioning of the power plant is in itself sufficient for the view to be taken that the storage is directly associated with that plant's activity. That direct association is, moreover, evidenced by the existence of a technical connection between the two activities. As the Advocate General proposes in point 30 of her Opinion, such a connection should be assumed if the relevant activity is integrated into the same technical process as the power plant's combustion activity.

31 Such a connection exists in any event, for a coal storage site such as that at issue in the main proceedings, by reason of the very fact of the practical organisation of that site and the presence of a conveyor belt located between the coal park and the power plant.

32 The other facts mentioned by the referring court, namely that the storage site and the power plant are situated approximately 800 metres from each other and are separated, moreover, by a public road, are of no relevance in that regard.

33 Second, it should also be pointed out that it is apparent from the order for reference that the coal storage activity at issue in the main proceedings emits, by a natural self-heating process, greenhouse gases, with the result that that activity could have an effect on emissions and pollution within the meaning of Article 3(e) of Directive 2003/87.

34 In view of the foregoing, the answer to the first question is that a fuel storage site of a coal-fired power plant such as that at issue in the main proceedings and as described by the referring court is part of an 'installation' within the meaning of Article 3(e) of Directive 2003/87.

The second question

35 By its second question, the referring court essentially asks whether the first subparagraph of Article 27(2) of Regulation No 601/2012 must be interpreted as meaning that coal lost as a result of the process by which it naturally self-heats while in storage on a site that is part of an installation within the meaning of Article 3(e) of Directive 2003/87 must be regarded as coal exported from that installation.

36 It is apparent from the order for reference that, in order to monitor the emissions from the installation which it operates, EPZ chose to apply the monitoring method based on the calculation described in Article 27(1)(b) of Regulation No 601/2012.

37 In that case, first of all, Article 27(1)(b) of Regulation No 601/2012 allows the operator to determine the activity data of a source stream based on aggregation of metering of quantities separately delivered, taking into account relevant stock changes.

38 The first subparagraph of Article 27(2) of Regulation No 601/2012 provides, next, that, in order to determine the activity data of a source stream in accordance with the method set out in Article 27(1)(b), it is necessary, inter alia, to deduct the quantity of fuel exported from the installation from the quantity of fuel purchased during the reporting period.

39 Both the wording of that provision, which incorporates the concept of 'export' rather than that of 'loss', and the objective pursued by Regulation No 601/2012 of ensuring complete monitoring and reporting which cover, as Article 5 of that regulation makes clear, all process and combustion emissions from all emission sources and source streams belonging to activities listed in Annex I to Directive 2003/87 and of all greenhouse gases specified in relation to those activities, while avoiding double-counting, justify the conclusion that the loss of fuel such as that at issue in the main proceedings is not to be regarded as coal exported from the installation within the meaning of the first subparagraph of Article 27(2) of that regulation.

40 It follows from all of the foregoing considerations that the answer to the second question is that the first subparagraph of Article 27(2) of Regulation No 601/2012 must be interpreted as meaning that coal lost as a result of the process by which it naturally self-heats while in storage on a site that is part of an installation within the meaning of Article 3(e) of Directive 2003/87 cannot be regarded as coal exported from that installation.

Costs

41 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:

1. **A fuel storage site of a coal-fired power plant such as that at issue in the main proceedings and as described by the referring court is part of an 'installation' within the meaning of Article 3(e) 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 Directive 96/61/EC, as amended by Decision No 1359/2013/EU of the European Parliament and of the Council of 17 December 2013.**

2. **The first subparagraph of Article 27(2) of Commission Regulation (EU) No 601/2012 of 21 June 2012 on the monitoring and reporting of greenhouse gas emissions pursuant to Directive 2003/87, as amended by Commission Regulation (EU) No 206/2014 of 4 March 2014, must be interpreted as meaning that coal lost as a result of the process by which it naturally self-heats while in storage on a site that is part of an installation within the meaning of Article 3(e) of Directive 2003/87 cannot be regarded as coal exported from that installation.**

[Signatures]