2 of 3 DOCUMENTS

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Judgment of the Court (Grand Chamber) of 16 December 2008. Soci[#233]t[#233] Arcelor Atlantique et Lorraine and Others v Premier ministre, Ministre de l'[#201]cologie et du D[#233]veloppement durable and Ministre de l'[#201]conomie, des Finances et de l'Industrie. Reference for a preliminary ruling: Conseil d'[#201]tat - France. Environment - Integrated pollution prevention and control - Greenhouse gas emission allowance trading scheme - Directive 2003/87/EC - Scope - Installations in the steel sector included - Installations in the chemical and non-ferrous metal sectors excluded - Principle of equal treatment. Case C-127/07.

Court of Justice of the European Communities

European Court reports 2008 Page 00000

2008 ECJ EUR-Lex LEXIS 1981

March 5, 2007

December 16, 2008

TYPE: [*1] Judgment

SUBJECT: Environment

PROCEDURE: Reference for a preliminary ruling

DISPOSITION: On those grounds, the Court (Grand Chamber) hereby rules:

Consideration 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, as amended by Directive 2004/101/EC of the European Parliament and of the Council of 27 October 2004, from the point of view of the principle of equal treatment has disclosed nothing to affect its validity in so far as it makes the greenhouse gas emission allowance trading scheme applicable to the steel sector without including the chemical and non-ferrous metal sectors in its scope.

LANGUAGE: French;

INTRODUCTION: In Case C-127/07,

REFERENCE for a preliminary ruling under Article 234 EC from the Conseil d'[#201]tat (France), made by decision of 8 February 2007, received at the Court on 5 March 2007, in the proceedings

Soci[#233]t[#233] Arcelor Atlantique et Lorraine and Others

v

Premier ministre,

Ministre de l'[#201]cologie et du D[#233]veloppement durable,

Ministre de l'[#201]conomie, [*2] des Finances et de l'Industrie,

THE COURT (Grand Chamber),

composed of V. Skouris, President, P. Jann, C.W.A. Timmermans, A. Rosas, K. Lenaerts, M. Ile[#353]i[#269], A. [#211] Caoimh and T. von Danwitz (Rapporteur), Presidents of Chambers, G. Arestis, A. Borg Barthet, J. Malenovsk[#253], U. L[#245]hmus and E. Levits, Judges,

Advocate General: M. Poiares Maduro,

Registrar: M.-A. Gaudissart, Head of Unit,

having regard to the written procedure and further to the hearing on 11 March 2008,

after considering the observations submitted on behalf of:

- Soci[#233]t[#233] Arcelor Atlantique et Lorraine and Others, by W. Deselaers, Rechtsanwalt, and P. Ligni[#232]res, avocat,

- the French Government, by G. de Bergues, L. Butel and S. Gasri, acting as Agents,

- the European Parliament, by L. Visaggio and I. Anagnostopoulou, acting as Agents,

- the Council of the European Union, by P. Plaza Garc[#237]a, K. Michoel and E. Karlsson, acting as Agents,

- the Commission of the European Communities, by J.-B. Laignelot and U. W[#246]lker, acting as Agents,

after hearing the Opinion of the Advocate General at the sitting on 21 May 2008,

gives [*3] the following

Judgment

JUDGMENT-BY: von Danwitz

JUDGMENT: 1. This reference for a preliminary ruling concerns the validity 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 Directive 2004/101/EC of the European Parliament and of the Council of 27 October 2004 (OJ 2004 L 338, p. 18) ('Directive 2003/87').

2. The reference was made by the French Conseil d'[#201]tat (Council of State) in the course of proceedings between Soci[#233]t[#233] Arcelor Atlantique et Lorraine and Others and the Premier ministre (Prime Minister), the Ministre de l'[#201]cologie et du D[#233]veloppement durable (Minister for Ecology and Sustainable Development) and the Ministre de l'[#201]conomie, des Finances et de l'Industrie (Minister for the Economy, Finance and Industry) concerning the implementation of Directive 2003/87 in the French legal order.

Legal context

International law

3. The United Nations Framework Convention on Climate Change ('the Framework [*4] Convention') was adopted in New York on 9 May 1992, with the ultimate objective of stabilising greenhouse gas concentrations in the atmosphere at a level that would prevent dangerous anthropogenic interference with the climate system. On 11 December 1997 the parties to the Framework Convention adopted, pursuant to the convention, the Kyoto Protocol to the United Nations

Framework Convention on Climate Change ('the Kyoto Protocol'), which entered into force on 16 February 2005.

4. The objective of the Kyoto Protocol is to reduce overall emissions of six greenhouse gases, including carbon dioxide (CO 2), by at least 5% below 1990 levels in the period 2008 to 2012. The parties included in Annex I to the Framework Convention have committed themselves to ensuring that their greenhouse gas emissions do not exceed the percentages assigned them by the Kyoto Protocol; the parties can fulfil their obligations jointly. The overall commitment entered into by the European Community and its Member States under the Kyoto Protocol relates to a total reduction of greenhouse gas emissions by 8% compared with their 1990 levels during the period of commitment mentioned above.

Community [*5] law

5. The Council of the European Union approved on behalf of the Community, first, the Framework Convention, by Decision 94/69/EC of 15 December 1993 concerning the conclusion of the United Nations Framework Convention on Climate Change (OJ 1994 L 33, p. 11), and, second, the Kyoto Protocol, by 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). In accordance with the first paragraph of Article 2 of the latter decision, the Community and its Member States are to fulfil their overall commitment under the Kyoto Protocol jointly.

6. Since the Commission of the European Communities considered that greenhouse gas emission allowance trading would, together with other measures, be an integral and major part of the Community's strategy in fighting against climate change, it presented on 8 March 2000 a Green Paper on greenhouse gas emissions trading within the European Union (COM(2000) 87 final; 'the Green Paper').

7. On the basis of Article 175(1) EC, the [*6] Commission presented on 23 October 2001 a proposal for a directive of the European Parliament and of the Council establishing a scheme for greenhouse gas emission allowance trading within the Community and amending Council Directive 96/61/EC (COM(2001) 581 final; 'the Commission Proposal'), which led to the adoption of Directive 2003/87.

8. As stated in recital 5 in its preamble, that directive aims to make an effective contribution to fulfilling the commitments of the Community and its Member States under the Kyoto Protocol to reduce anthropogenic greenhouse gas emissions, in accordance with Decision 2002/358, through an efficient European market in greenhouse gas emission allowances ('allowances'), with the least possible diminution of economic development and employment.

9. According to recital 23 in the preamble to that directive, allowance trading should 'form part of a comprehensive and coherent package of policies and measures implemented at Member State and Community level'. As stated in recital 25, '[p]olicies and measures should be implemented at Member State and Community level across all sectors of the European Union economy, [*7] and not only within the industry and energy sectors, in order to generate substantial emissions reductions'.

10. Article 1 of Directive 2003/87 defines its subject-matter as follows:

'This Directive establishes a scheme for -- allowance trading within the Community -- in order to promote reductions of greenhouse gas emissions in a cost-effective and economically efficient manner.'

11. Directive 2003/87 applies, in accordance with Article 2(1), to emissions from the activities listed in Annex I and to the six greenhouse gases listed in Annex II, one of which is CO 2 . Annex I refers to certain activities in the sectors of energy, the processing and production of ferrous metals, and the mineral industry, and also to the activities of industrial plants for the production of pulp and for the production of paper and board, in so far as they emit CO 2 .

12. Article 4 of Directive 2003/87 states:

'Member States shall ensure that, from 1 January 2005, no installation undertakes any activity listed in Annex I resulting in emissions specified in relation to that activity unless its operator holds a permit issued by a competent authority in accordance [*8] with Articles 5 and 6 --'

13. Under the first subparagraph of Article 6(1) of Directive 2003/87, the competent authority is to issue a permit to emit greenhouse gases from all or part of an installation if it is satisfied that the operator is capable of monitoring and reporting emissions of those gases. Under Article 6(2), the permit is to contain inter alia 'an obligation to surrender allowances equal to the total emissions of the installation in each calendar year, as verified in accordance with Article 15, within four months following the end of that year'.

14. The total quantity of allowances for operators of the installations referred to in Directive 2003/87 is, under Article 9 of the directive, to be allocated on the basis of a national plan for the allocation of allowances developed by each Member State in accordance with the criteria listed in Annex III to the directive.

15. Under Article 10 of the directive, Member States must allocate free of charge, for the three-year period beginning 1 January 2005, at least 95% and, for the five-year period beginning 1 January 2008, at least 90% of the allowances. In accordance with Article 12(1) of the directive, [*9] allowances are transferable and can be traded between persons within the Community and, under certain conditions, between persons within the Community and persons in non-member countries.

16. Under Article 16(3) of Directive 2003/87:

'Member States shall ensure that any operator who does not surrender sufficient allowances by 30 April of each year to cover its emissions during the preceding year shall be held liable for the payment of an excess emissions penalty. The excess emissions penalty shall be EUR 100 for each tonne of [CO 2] equivalent emitted by that installation for which the operator has not surrendered allowances. Payment of the excess emissions penalty shall not release the operator from the obligation to surrender an amount of allowances equal to those excess emissions when surrendering allowances in relation to the following calendar year.'

17. Directive 2003/87 also provides, in Article 30(2), that the Commission is to draw up a report by 30 June 2006, accompanied by proposals as appropriate, on the application of the directive, considering inter alia 'how and whether Annex I should be amended to include other relevant sectors, inter [*10] alia the chemicals, aluminium and transport sectors, activities and emissions of other greenhouse gases listed in Annex II, with a view to -- improving the economic efficiency of the scheme'.

18. To that end, the Commission on 13 November 2006 submitted a communication to the Council, the European Parliament, the European Economic and Social Committee and the Committee of the Regions on building a global carbon market (COM(2006) 676 final). On 20 December 2006 it presented a proposal for a directive of the European Parliament and of the Council amending Directive 2003/87 so as to include aviation activities in the scheme for greenhouse gas emission allowance trading within the Community (COM(2006) 818 final). In addition, by a proposal for a directive of the European Parliament and of the Council amending Directive 2003/87 so as to improve and extend the greenhouse gas emission allowance trading system of the Community (COM(2008) 16 final), dated 23 January 2008, the Commission intends inter alia to extend the scope of Directive 2003/87 by including new gases and new categories of activities such as the production and processing of non-ferrous metals, the production of aluminium [*11] and the chemical industry.

National law

19. Directive 2003/87 was transposed into French law by Ordonnance n o 2004-330 portant cr[#233]ation d'un syst[#232]me d'[#233]change de quotas d'[#233]mission de gaz [#224] effet de serre (Regulation No 2004-330 establishing a scheme for greenhouse gas emission allowance trading) of 15 April 2004 (JORF, 17 April 2004, p. 7089), which introduced inter alia Articles L.229-5 to L.229-19 of the Code de l'environnement (Code of the Environment). The detailed rules for the application of those articles were laid down by Decree No 2004-832 of 19 August 2004 (JORF, 21 August 2004, p. 14979), amended by Decree No 2005-189 of 25 February 2005 (JORF, 26 February 2005, p. 3498) ('Decree No 2004-832'). The annex to Decree No 2004-832 simply reproduced Annex I to Directive 2003/87.

The main proceedings and the reference for a preliminary ruling

20. The applicants in the main proceedings are undertakings in the steel sector. They requested the competent French authorities to repeal Article 1 of Decree No 2004-832 in so far as it made the decree applicable to installations in the

steel sector. As their requests [*12] remained unanswered, they brought an action before the Conseil d'[#201]tat for judicial review of the implied decisions rejecting those requests, asking for those authorities to be ordered to effect the repeal in question. In support of their application, they relied on breach of several constitutional principles, such as the right to property, the freedom to carry on a business, and the principle of equal treatment.

21. The Conseil d'[#201]tat rejected the pleas in law put forward by the applicants in the main proceedings, with the exception of the plea of breach of the constitutional principle of equal treatment as a result of the different treatment of comparable situations. On that point, it observed in its order for reference that the plastics and aluminium industries emitted greenhouse gases identical to those whose emission Directive 2003/87 aimed to restrict, and that those industries produced materials which could be substituted in part for those produced by the steel industry, with which they were therefore in competition. It considered that, even if the decision not immediately to include the plastics and aluminium industries in the allowance trading scheme [*13] had been taken because of their relative share of total emissions of greenhouse gases and the need to ensure that comprehensive legislation was implemented gradually, the issue of whether the different treatment of the industries concerned was objectively justified raised a real problem.

22. In the light of those considerations, the Conseil d'[#201]tat decided to stay the proceedings and refer the following question to the Court for a preliminary ruling:

'[Is Directive 2003/87 valid] in the light of the principle of equal treatment, in so far as it makes the -- allowance trading scheme applicable to installations in the steel sector without including in its scope the aluminium and plastics industries[?]'

The question referred for a preliminary ruling

23. The general principle of equal treatment, as a general principle of Community law, requires that comparable situations must not be treated differently and different situations must not be treated in the same way unless such treatment is objectively justified (see, inter alia, Case 106/83 Sermide [1984] ECR 4209, paragraph 28; Joined Cases C-133/93, C-300/93 and C-362/93 Crispoltoni and Others [*14] [1994] ECR I-4863, paragraphs 50 and 51; and Case C-313/04 Franz Egenberger [2006] ECR I-6331, paragraph 33).

24. Since it takes the view that the steel, plastics and aluminium sectors are in a comparable situation, the national court wishes to know whether, by excluding the plastics and aluminium sectors from the scope of Directive 2003/87, the Community legislature breached that principle with respect to the steel sector. The reference for a preliminary ruling therefore relates solely to the question whether the Community legislature breached that principle by applying unjustifiable different treatment to comparable situations.

Different treatment of comparable situations

25. A breach of the principle of equal treatment as a result of different treatment presumes that the situations concerned are comparable, having regard to all the elements which characterise them.

26. The elements which characterise different situations, and hence their comparability, must in particular be determined and assessed in the light of the subject-matter and purpose of the Community act which makes the distinction in question. The principles and objectives of the field to which [*15] the act relates must also be taken into account (see, to that effect, Case 6/71 Rheinm[#252]hlen D[#252]sseldorf [1971] ECR 823, paragraph 14; Joined Cases 117/76 and 16/77 Ruckdeschel and Others [1977] ECR 1753, paragraph 8; Case C-280/93 Germany v Council [1994] ECR I-4973, paragraph 74; and Joined Cases C-364/95 and C-365/95 T. Port [1998] ECR I-1023, paragraph 83).

27. In the present case, the validity of Directive 2003/87 must be assessed with respect to the inclusion of the steel sector in the scope of the directive and the exclusion from its scope of the chemical and non-ferrous metal sectors, to which, according to the written observations submitted to the Court, the plastics and aluminium sectors respectively belong.

28. Under Article 1 of Directive 2003/87, the aim of the directive is to establish a Community scheme for allowance trading. According to points 4.2 and 4.3 of the Green Paper, the Community's intention was to introduce, by the directive, such a system at the level of companies, thus referring to economic activities.

29. According to recital 5 in the preamble to Directive 2003/87, its objective is to establish that scheme in order to [*16] contribute to fulfilling the commitments of the Community and its Member States under the Kyoto Protocol, which aims to reduce greenhouse gas emissions in the atmosphere to a level that prevents dangerous anthropogenic interference with the climate system, with the ultimate objective of protection of the environment.

30. Community policy on the environment, to which the legislative act at issue in the main proceedings relates, and one of whose principal objectives is the protection of the environment, aims, in accordance with Article 174(2) EC, at a high level of protection and is based in particular on the precautionary principle, the principle that preventive action should be taken, and the polluter-pays principle (see Case C-157/96 National Farmers' Union and Others [1998] ECR I-2211, paragraph 64, and Joined Cases C-14/06 and C-295/06 Parliament and Denmark v Commission [2008] ECR I-0000, paragraph 75 and the case-law cited).

31. While the ultimate objective of the allowance trading scheme is the protection of the environment by means of a reduction of greenhouse gas emissions, the scheme does not of itself reduce those emissions but encourages and promotes the [*17] pursuit of the lowest cost of achieving a given amount of emissions reductions, as appears inter alia from point 3 of the Green Paper and point 2 of the statement of reasons in the Commission Proposal. The benefit for the environment depends on the stringency of the total quantity of allowances allocated, which represents the overall limit on emissions allowed by the scheme.

32. It also appears that the economic logic of the allowance trading scheme consists in ensuring that the reductions of greenhouse gas emissions required to achieve a predetermined environmental outcome take place at the lowest cost. By allowing the allowances that have been allocated to be sold, the scheme is intended to encourage a participant in the scheme to emit quantities of greenhouse gases that are less than the allowances originally allocated him, in order to sell the surplus to another participant who has emitted more than his allowance.

33. So, for the allowance trading scheme to function properly, there must be a supply and demand for allowances on the part of the participants in the scheme, which also means that the potential for reduction of emissions attributable to the activities covered [*18] by the scheme may vary, even considerably. Moreover, according to the Green Paper, the wider the scope of the system, the greater will be the variation in the costs of compliance of individual undertakings, and the greater the potential for lowering costs overall.

34. It follows that, in relation to the subject-matter of Directive 2003/87, the objectives of that directive referred to in paragraph 29 above, and the principles on which Community policy on the environment is based, the different sources of greenhouse gas emissions relating to economic activities are in principle in a comparable situation, since all emissions of greenhouse gases are liable to contribute to dangerous interference with the climate system and all sectors of the economy which emit such gases can contribute to the functioning of the allowance trading scheme.

35. Furthermore, it should be pointed out, first, that recital 25 in the preamble to Directive 2003/87 states that policies and measures should be implemented across all sectors of the economy of the Union in order to generate substantial emissions reductions and, second, that Article 30 of Directive 2003/87 provides that a review is to be carried [*19] out with a view to including other sectors in the scope of the directive.

36. It follows that, as regards the comparability of the sectors in question from the point of view of Directive 2003/87, the possible existence of competition between those sectors cannot constitute a decisive criterion, as the Advocate General observes in point 43 of his Opinion.

37. Nor, contrary to the arguments of the institutions which have submitted observations to the Court, is the quantity of CO 2 emitted by each sector essential for assessing their comparability, in view in particular of the objectives of Directive 2003/87 and the functioning of the allowance trading scheme, as described in paragraphs 31 to 33 above.

38. The steel, chemical and non-ferrous metal sectors are therefore, for the purposes of examining the validity of Directive 2003/87 from the point of view of the principle of equal treatment, in a comparable position while being treated differently.

Disadvantage as a result of the different treatment of comparable situations

39. According to the case-law, for the Community legislature to be accused of breaching the principle of equal treatment, it must have treated [*20] comparable situations differently, thereby subjecting some persons to disadvantages as opposed to others (see Joined Cases 17/61 and 20/61 Kl[#246]ckner-Werke and Hoesch v High Authority [1962] ECR 325, 345; Case 250/83 Finsider v Commission [1985] ECR 131, paragraph 8; and Case C-462/99 Connect Austria [2003] ECR I-5197, paragraph 115).

40. The Parliament, the Council and the Commission submit that the inclusion of the steel sector in the scope of Directive 2003/87 does not place that sector in an unfavourable position compared with the chemical and non-ferrous metal sectors, since the latter must in theory comply with the objectives laid down by the relevant international agreements by means that are economically less advantageous. According to those institutions, implementation of the commitments to reduce greenhouse gas emissions cannot be limited to applying the allowance trading scheme. That scheme supplements the measures taken by the Member States as regards the activities and sectors temporarily excluded from the scope of Directive 2003/87.

41. That argument cannot succeed.

42. The subjection of certain sectors, and hence of the applicants in the main [*21] proceedings, to the Community scheme of allowance trading involves for the undertakings concerned, first, an obligation to hold a permit to emit greenhouse gases and, second, an obligation to surrender allowances equal to the total emissions of their installations during a specified period, on pain of financial penalties. If the emissions from an installation exceed the quantities allocated to the operator concerned under a national allowance allocation plan, the operator is obliged to obtain additional allowances by means of the allowance trading scheme.

43. By contrast, there are no such legal obligations, aimed at the reduction of greenhouse gas emissions, at Community level for operators of installations not covered by Annex I to Directive 2003/87. Consequently, the inclusion of an economic activity in the scope of Directive 2003/87 creates a disadvantage for the operators concerned in relation to those carrying on activities not so included.

44. Even if, as the Commission submits, being subject to such a scheme does not necessarily and systematically entail unfavourable economic consequences, the existence of a disadvantage cannot be denied for that reason alone, since [*22] the disadvantage to be taken into account from the point of view of the principle of equal treatment may also be such as to affect the legal situation of the person concerned by a difference in treatment.

45. Moreover, as the Advocate General observes in point 41 of his Opinion, contrary to the submissions of the institutions which have submitted observations to the Court, the disadvantage suffered by operators of installations in the sectors subject to Directive 2003/87 cannot be offset by national measures not determined by Community law.

Justification for different treatment

46. The principle of equal treatment will not, however, be infringed if the different treatment of the steel sector on the one hand and the chemical and non-ferrous metal sectors on the other is justified.

47. A difference in treatment is justified if it is based on an objective and reasonable criterion, that is, if the difference relates to a legally permitted aim pursued by the legislation in question, and it is proportionate to the aim pursued by the treatment (see, to that effect, Case 114/76 Bela-M[#252]hle Bergmann [1977] ECR 1211, paragraph 7; Case 245/81 Edeka Zentrale [1982] [*23] ECR 2745, paragraphs 11 and 13; Case C-122/95 Germany v Council [1998] ECR I-973, paragraphs 68 and 71; and Case C-535/03 Unitymark and North Sea Fishermen's Organisation [2006] ECR I-2689, paragraphs 53, 63, 68 and 71).

48. Since a Community legislative act is concerned, it is for the Community legislature to demonstrate the existence of objective criteria put forward as justification and to provide the Court with the necessary information for it to verify that those criteria do exist (see, to that effect, Joined Cases 124/76 and 20/77 Moulins et Huileries de Pont-[#224]-Mousson and Providence agricole de la Champagne [1977] ECR 1795, paragraph 22, and Case C-122/95 Germany v Council , paragraph 71).

Observations submitted to the Court

49. The Parliament, the Council and the Commission point to the novelty of the allowance trading scheme established by Directive 2003/87 and its complexity both at political and economic level and as regards the necessary legislation. The scheme is in an initial stage. The review provided for in Article 30 of the directive, which is currently being discussed, is based not only on the progress made in monitoring greenhouse gas [*24] emissions but also on the experience gained in that first stage of implementation.

50. Thus the Community legislature thought it appropriate to include in the initial scope of Directive 2003/87 only CO 2 , which accounted for over 80% of greenhouse gas emissions in the Community, and a relatively limited number of economic sectors which made a significant contribution to overall emissions of that greenhouse gas. The scope of Directive 2003/87 thus determined currently covers approximately 10 000 installations, representing nearly half of CO 2 emissions at Community level and therefore substantial specific sources of emissions of that gas.

51. The criteria for choosing whether or not to include certain sectors in the scope of Directive 2003/87 should therefore be assessed in the light of those considerations.

52. One of the objective criteria that were decisive for determining the scope of Directive 2003/87 was the level of direct CO 2 emissions of a sector. Referring to a report entitled 'Economic Evaluation of Sectoral Emission Reduction Objectives for Climate Change. Top-down Analysis of Greenhouse Gas Emission Reduction Possibilities in the EU. Final Report, [*25] March 2001', written by P. Capros, N. Kouvaritakis and L. Mantzos, the Parliament, the Council and the Commission observe that CO 2 emissions in 1990 were 174.8 million tonnes for the steel sector, 26.2 million tonnes for the chemical sector and 16.2 million tonnes for the non-ferrous metal sector.

53. As to the chemical sector, those institutions further submit that the large number of installations in that sector, of the order of 34 000, would have considerably increased the administrative complexity of the allowance trading scheme in its initial stage. Administrative feasibility is also a legitimate criterion for assessing the appropriateness of legislative action.

54. Moreover, at least in the initial stage, any difference in treatment is proportionate, and the Community legislature did not exceed its wide discretion as regards the determination of the scope of the allowance trading scheme it established. From its beginning, that scheme included the largest emitters of CO 2 who, with a comparatively limited number of fixed installations, were the best suited to start that scheme.

55. The applicants in the main proceedings submit, referring to statistics from [*26] the European Pollutant Emission Register for 2001, that the chemical sector emits a much greater amount of CO 2 than that mentioned by the Parliament, the Council and the Commission. Moreover, the inclusion in the scope of Directive 2003/87 of chemical undertakings emitting quantities of CO 2 above a certain threshold would not have created administrative problems, since nearly 59% of total CO 2 emissions of the chemical sector came from only 96 installations.

56. As regards the aluminium sector, its exclusion from the scope of Directive 2003/87 was not objectively justified by the Community legislature. The quantity of direct emissions could not justify excluding that sector. The report referred to by the institutions which have submitted observations to the Court itself shows that that sector emits 16.2 million tonnes of CO 2 while the pulp and paper sector, which is included in the scope of Directive 2003/87, emits only 10.6 million tonnes of CO 2 .

Findings of the Court

57. The Court acknowledges that in the exercise of the powers conferred on it the Community legislature has a broad discretion where its action involves political, economic and social choices and [*27] where it is called on to undertake complex assessments and evaluations (see Case C-344/04 IATA and ELFAA [2006] ECR I-403, paragraph 80). In addition, where it is called on to restructure or establish a complex system, it is entitled to have recourse to a step-by-step approach (see, to that effect, Case 37/83 Rewe-Zentrale [1984] ECR 1229, paragraph 20; Case C-63/89 Assurances du cr[#233]dit v Council and Commission [1991] ECR I-1799, paragraph 11; and Case C-233/94 Germany v Parliament and Council [1997] ECR I-2405, paragraph 43) and to proceed in the light of the experience gained.

58. However, even where it has such a discretion, the Community legislature is obliged to base its choice on objective criteria appropriate to the aim pursued by the legislation in question (see, to that effect, Case 106/81 Kind v EEC [1982] ECR 2885, paragraphs 22 and 23, and Sermide , paragraph 28), taking into account all the facts and the technical and scientific data available at the time of adoption of the act in question (see, to that effect, Case C-284/95 Safety Hi-Tech [1998] ECR I-4301, paragraph 51).

59. When exercising its discretion, the Community legislature must, in [*28] addition to the principal objective of protecting the environment, fully take into account all the interests involved (see, concerning measures relating to agriculture, Joined Cases C-96/03 and C-97/03 Tempelman and van Schaijk [2005] ECR I-1895, paragraph 48, and Case C-504/04 Agrarproduktion Staebelow [2006] ECR I-679, paragraph 37). In examining the burdens associated with various possible measures, it must be considered that, even if the importance of the objectives pursued is such as to justify even substantial negative economic consequences for certain operators (see, to that effect, Case C-331/88 Fedesa and Others [1990] ECR I-4023, paragraphs 15 to 17, and Case C-86/03 Greece v Commission [2005] ECR I-10979, paragraph 96), the Community legislature's exercise of its discretion must not produce results that are manifestly less appropriate than those that would be produced by other measures that were also suitable for those objectives.

60. In the present case, it is common ground, first, that the allowance trading scheme introduced by Directive 2003/87 is a novel and complex scheme whose implementation and functioning could have been disturbed by the involvement [*29] of too great a number of participants, and, second, that the original definition of the scope of the directive was dictated by the objective of attaining the critical mass of participants necessary for the scheme to be set up.

61. In view of the novelty and complexity of the scheme, the original definition of the scope of Directive 2003/87 and the step-by-step approach taken, based in particular on the experience gained during the first stage of its implementation, in order not to disturb the establishment of the system were within the discretion enjoyed by the Community legislature.

62. It should be observed here that, while the legislature could lawfully make use of such a step-by-step approach for the introduction of the allowance trading scheme, it is obliged, in particular in view of the objectives of Directive 2003/87 and of Community policy in the field of the environment, to review the measures adopted, inter alia as regards the sectors covered by Directive 2003/87, at reasonable intervals, as is moreover provided for in Article 30 of the directive.

63. However, as the Advocate General notes inter alia in point 48 of his Opinion, the Community legislature' [*30] s discretion as regards a step-by-step approach could not, in the light of the principl e of equal treatment, dispense it from having recourse, for determining the sectors it thought suitable for inclusion in the scope of Directive 2003/87 from the outset, to objective criteria based on the technical and scientific information available at the time of adoption of the directive.

64. As regards, first, the chemical sector, it may be seen from the history of Directive 2003/87 that that sector has an especially large number of installations, of the order of 34 000, not only in terms of the emissions they produce but also in relation to the number of installations currently included in the scope of the directive, which is of the order of 10 000.

65. The inclusion of that sector in the scope of Directive 2003/87 would therefore have made the management of the allowance trading scheme more difficult and increased the administrative burden, so that the possibility that the functioning of the scheme would have been disturbed at the time of its implementation as a result of that inclusion cannot be excluded. Moreover, the Community legislature was able to take the view that the advantages [*31] of excluding the whole sector at the start of the implementation of the allowance trading scheme outweighed the advantages of including it for attaining the objective of Directive 2003/87. It follows that the Community legislature has shown to the requisite legal standard that it made use of objective criteria to exclude the entire chemical sector from the scope of Directive 2003/87 in the first stage of implementation of the allowance trading scheme.

66. The argument of the applicants in the main proceedings that the inclusion in the scope of Directive 2003/87 of undertakings in that sector emitting a quantity of CO 2 above a certain threshold would not have caused administrative problems cannot call into question the above assessment.

67. The statistics they refer to concern data on 'facilities', as is apparent from Article 1 of Commission Decision

2000/479/EC of 17 July 2000 on the implementation of a European pollutant emission register (EPER) according to Article 15 of Council Directive 96/61/EC concerning integrated pollution prevention and control (IPPC) (OJ 2000 L 192, p. 36). A facility within the meaning of that decision does not constitute an installation [*32] within the meaning of Directive 2003/87, since, according to the definitions in Annex A4 to that decision, such a facility is an '[i]ndustrial complex with one or more installations on the same site, where one operator carries out one or more Annex I activities'. The data relied on by the applicants in the main proceedings thus refer only to facilities, the number of installations not being stated.

68. Consequently, the data produced by the applicants in the main proceedings in support of their abovementioned argument do not enable the Court to verify the assertion that a small number of installations in the chemical sector were responsible for a large part of the total CO 2 emissions of the sector, so that the Community legislature should have included it in part in the scope of Directive 2003/87.

69. In the light of the foregoing and having regard to the step-by-step approach on which Directive 2003/87 is based, in the first stage of implementation of the allowance trading scheme, the difference in treatment between the chemical sector and the steel sector may be regarded as justified.

70. As regards, second, the non-ferrous metal sector, it appears from [*33] the scientific report mentioned in paragraph 52 above, which, according to the observations of the Parliament, the Council and the Commission, the Community legislature made use of in drafting and adopting Directive 2003/87, that direct emissions from that sector amounted to 16.2 million tonnes of CO 2 in 1990, while the steel sector emitted 174.8 million tonnes of CO 2 .

71. In view of its intention of defining the scope of Directive 2003/87 in such a way as not to upset the administrative feasibility of the allowance trading scheme in its initial stage by involving too many participants, the Community legislature was not required to have recourse solely to the method of introducing, for each sector of the economy that emitted CO 2 , a threshold for emissions in order to attain its objective. Thus, in circumstances such as those in which Directive 2003/87 was adopted, it could when introducing the scheme legitimately delimit its scope by means of a sectoral approach without exceeding the bounds of its discretion.

72. The difference in the levels of direct emissions between the two sectors concerned is so substantial that the different treatment of those sectors may, in the [*34] first stage of implementation of the allowance trading scheme and in view of the step-by-step approach on which Directive 2003/87 is based, be regarded as justified without there having been any need for the Community legislature to take into consideration the indirect emissions attributable to the various sectors.

73. Accordingly, the Community legislature did not infringe the principle of equal treatment by treating comparable situations differently when it excluded the chemical and non-ferrous metal sectors from the scope of Directive 2003/87.

74. In the light of all the above considerations, the answer to the national court's question must be that consideration of Directive 2003/87 from the point of view of the principle of equal treatment has disclosed nothing to affect its validity in so far as it makes the greenhouse gas emission allowance trading scheme applicable to the steel sector without including the chemical and non-ferrous metal sectors in its scope.

Costs

75. 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 [*35] in submitting observations to the Court, other than the costs of those parties, are not recoverable.

DOC-NUMBER: 62007J0127 607J0127

TREATY-CITED: European Economic Community

CROSS-REF: 61961J0017

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LOAD DATE: November 19, 2009