OPINION OF ADVOCATE GENERAL
Wahl
delivered on 5 February 2015 (1)

Case C-148/14

Bundesrepublik Deutschland
v
Nordzucker AG

(Request for a preliminary ruling
from the Bundesverwaltungsgericht (Germany))

(Environment — Scheme for greenhouse gas emission allowance trading — Article 16(1) and (3) of Directive 2003/87/EC — Monitoring and reporting of emissions — Verification of the reports submitted by operators — Penalties — Proportionality)

1. Directive 2003/87/EC (2) is one of the key legal instruments by means of which the European Union and its Member States aim to fulfil their commitments, under the Kyoto Protocol, to reducing anthropogenic greenhouse gas emissions. The Directive is intended to contribute to that aim by establishing an efficient European market in greenhouse gas emission allowances, with the least possible diminution of economic development and employment. (3)

2. The present request for a preliminary ruling, referred by the German Bundesverwaltungsgericht (Federal Administrative Court), invites the Court to clarify what penalties should, where appropriate, be imposed upon operators which, by 30 April of a given year, surrendered a number of allowances that was verified in accordance with Article 15 of the Directive as being equal to their emissions during the preceding year, but that, following subsequent checks by the competent national authority, was found to be insufficient to cover all those emissions.

3. In essence, the referring court wishes to know whether such conduct should be, as the case may be, subject to national penalties, in accordance with Article 16(1) of the Directive, or subject to the automatic penalty provided for in Article 16(3) of that directive.

4. In the following, I will explain the reasons why I am of the view that the first approach is the correct one.

I – Legal framework

A – *EU law*

5. At the material time, (4) Article 6 of the Directive ('Conditions for and contents of the greenhouse gas emissions permits') provided:

'1. The competent authority shall issue a greenhouse gas emissions permit granting authorisation 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.

…

2. Greenhouse gas emissions permits shall contain the following:

…

(e) 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.'

6. Under Article 12(3) of the Directive:

'Member States shall ensure that, by 30 April each year at the latest, the operator of each installation surrenders a number of allowances 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. Article 15 of the Directive ('Verification') provided, so far as is relevant for present purposes:

'Member States shall ensure that the reports submitted by operators pursuant to Article 14(3) are verified in accordance with the criteria set out in Annex V, and that the competent authority is informed thereof.

…'

8. Pursuant to Article 16 of the Directive ('Penalties'):

'1. Member States shall lay down the rules on penalties applicable to infringements of the national provisions adopted pursuant to this Directive and shall take all measures necessary to ensure that such rules are implemented. The penalties provided for must be effective, proportionate and dissuasive. …

2. Member States shall ensure publication of the names of operators who are in breach of requirements to surrender sufficient allowances under Article 12(3).

3. 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 carbon dioxide 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.

…'

B – *National law*

9. The relevant provisions of German law are set out in the Gesetz über den Handel mit Berechtigungen zur Emission von Treibhausgasen (Law on greenhouse gas emission allowance trading, 'the TEHG') of 8 July 2004. (5)

10. Paragraph 4 of the TEHG ('Emissions permit') provides:

‘(1) The release of greenhouse gases as a result of an activity specified in the present law shall require a permit.

…

(5) The permit shall state the following information and requirements:

…

5. an obligation to surrender allowances in accordance with Paragraph 6.

…

(8) If the operator responsible fails to comply with the obligations laid down in Paragraph 5, measures provided for under Paragraphs 17 and 18 of the present law shall take priority over measures provided for in Paragraph 17 of the Federal Law on emissions [Bundes-Immissionsschutzgesetz]. Paragraphs 20 and 21 of the Federal Law on emissions shall not apply in relation to any infringement of obligations under Paragraph 5. If the operator responsible fails to comply with the obligations under Paragraph 6(1), the provisions of the present Law alone shall apply.’

11. According to Paragraph 6 of the TEHG (‘Allowances’):

‘(1) The operator responsible shall, by 30 April of each year, for the first time in 2006, surrender to the competent authority a number of allowances corresponding to the quantity of emissions caused by its activities in the preceding calendar year.

…’

12. Part 5 of the TEHG concerns penalties. Paragraph 18 of that law provides:

‘(1) If the operator responsible fails to comply with its obligation under Paragraph 6(1), for each tonne of carbon dioxide equivalent emitted for which the operator responsible has not surrendered any allowances, the competent authority shall assess the operator as liable to make payment of EUR 100, and in the first allocation period EUR 40. Liability to make payment may be waived if the operator responsible was unable to comply with its duty under Paragraph 6(1) on grounds of *force majeure*.

(2) Where the operator responsible has failed properly to report on the emissions caused by its activities, the competent authority shall estimate the emissions caused by its activities in the previous calendar year. The estimate shall constitute the basis, not open to challenge, for the obligation laid down in Paragraph 6(1). No estimate shall be made if, in the context of the hearing concerning the liability to make payment specified in subparagraph (1), the operator responsible duly complies with its reporting duty.

(3) The operator responsible shall remain subject to the obligation to surrender the missing allowances, in the cases covered by subparagraph (2) in accordance with the estimate, by 30 April of the following year. ...’

II – Facts, procedure and the question referred

13. Prior to its closure in March 2008, Nordzucker AG (‘Nordzucker’) operated a sugar refinery. The plant included a steam generator as well as a drying facility for the thermal drying of sugar beet pulp.

14. Following the introduction of the emissions trading scheme and acting in response to a request by the Verein der Zuckerindustrie (the German Sugar Industry Association), the Bundesministerium für Umwelt, Naturschutz, Bau und Reaktorsicherheit (the Federal Ministry for the Environment, Nature

Conservation, Building and Nuclear Safety ('the Ministry')) informed that association by letter of 17 June 2004 that drying facilities, being necessary facilities in sugar industry operations, were not subject to compulsory emissions trading. By contrast, a boiler operated for steam and power generation ancillary to a related unit for the production or refining of sugar was subject to compulsory emissions trading where the rated thermal input of the installation exceeded the minimum threshold.

15. Nordzucker produced an emissions report for 2005. The report stated that the steam generator had resulted in emissions totalling 40 288 tonnes of carbon dioxide. This quantity did not include the emissions resulting from the steam generation necessary to operate the drying facility. An expert verified the report, held it to be satisfactory and approved the entry of the emissions as stated in the register. On 16 March 2006, the report was sent to the Deutsche Emissionshandelsstelle (German Emissions Trading Authority, 'the Emissionshandelsstelle') via the competent Land authority. By 30 April 2006, Nordzucker had surrendered to the Emissionshandelsstelle a number of emission allowances corresponding to the emissions figure stated in the report.

16. Subsequently, the Emissionshandelsstelle examined the emissions report and requested Nordzucker to revise it, inter alia, by taking account of the emissions attributable to the drying facilities. Nordzucker explained that, on the basis of the letter from the Ministry, it had taken the view that drying facilities were not subject to compulsory emissions trading and that, for that reason, there was no requirement to report the emissions attributable to a steam generator used for the operation of such a facility. Nordzucker did, however, revise its emissions report as requested by the Emissionshandelsstelle. As a result, Nordzucker reported total emissions of 42 961 tonnes of carbon dioxide, and on 24 April 2007 surrendered allowances for a further 2 673 tonnes.

17. By decision of 7 December 2007, the German authorities declared Nordzucker liable, pursuant to the first sentence of Paragraph 18(1) of the TEHG, to a penalty in the amount of EUR 106 920. An administrative appeal against that decision was rejected by decision of 14 April 2009.

18. Nordzucker challenged that decision before the Verwaltungsgericht (Administrative Court), which, by judgment of 11 June 2010, annulled the impugned decision. By judgment of 20 October 2011, the Oberverwaltungsgericht (Higher Administrative Court) dismissed the appeal lodged by the German authorities against the judgment handed down at first instance. Subsequently, the German authorities challenged the judgment of the Oberverwaltungsgericht before the Bundesverwaltungsgericht.

19. Entertaining doubts as to the interpretation of Article 16 of the Directive, the Bundesverwaltungsgericht decided to stay the proceedings and to refer the following question for a preliminary ruling:

'Must Article 16(3) and (4) of [Directive 2003/87] be interpreted as meaning that the excess emissions penalty must also be applied where, by 30 April of a given year, an operator surrendered a number of allowances corresponding to the total emissions stated in its report on emissions from the installation for the preceding year and that report was verified by an expert, but where the competent national authority established after 30 April that the verified emissions report had contained errors by understating the total quantity of emissions, the report was duly corrected and the operator surrendered the additional allowances by the new deadline set for surrender?'

20. Written observations in the present proceedings have been submitted by Nordzucker, the Emissionshandelstelle, the German, Czech, Netherlands and UK Governments, as well as by the Commission. The Court decided to proceed without a hearing.

III – Analysis

21. By its question, the referring court essentially seeks guidance as to whether the penalty provided for in Article 16(3) of the Directive is to apply to an operator which, by 30 April of a given year, surrendered a number of allowances that was equal to its emissions during the preceding year as verified in accordance

with Article 15 of the Directive, but that, following a subsequent check by the competent national authority, turned out to be insufficient to cover all the operator's emissions during the preceding year.

22. In its detailed order for reference, the Bundesverwaltungsgericht explains that two different approaches are possible and that it sees compelling arguments for both. However, that court considers, mainly on the basis of the wording of the relevant provisions of the directive, and taking into account the principle of proportionality, that the answer to the question referred should be in the negative.

23. Those two approaches have also been discussed by the parties which have submitted observations in these proceedings. On the one hand, Nordzucker, the Czech, Netherlands and UK Governments, as well as the Commission, argue in substance that Article 16(3) of the Directive should be interpreted restrictively. That provision would accordingly not be regarded as applicable in the situation described by the referring court.

24. On the other hand, the German Government and the Emissionshandelsstelle propose that the Court answer the question referred in the affirmative. In their view, parallels can be drawn between the situation in the case before the referring court and that examined by the Court in *Billerud Karlsborg and Billerud Skärblacka*. (6) In that case, the Court confirmed that the penalty provided for in Article 16(3) of the Directive applied automatically with respect to operators who, by 30 April of a given year, have not surrendered a sufficient number of allowances, and clarified that the amount of that penalty cannot be varied by a national court.

25. As I will now go on to explain, I am of the opinion that, despite the somewhat ambiguous wording of Article 16(3) of the Directive, a systematic and teleological reading of that provision supports the arguments put forward by Nordzucker, the Czech, Netherlands and UK Governments, and by the Commission. Although I understand the preoccupations behind the interpretation of that provision argued for by the German Government and the Emissionshandelsstelle, I do not believe that, in the final analysis, those concerns are well founded. Likewise, I do not read the judgment in *Billerud Karlsborg and Billerud Skärblacka* as supporting the position adopted by those parties.

26. At the outset, it must be acknowledged that the text of Article 16(3) of the Directive is not without ambiguity regarding the nature of the obligation to be performed on pain of the penalty provided for therein. In fact, that provision requires Member States to impose an excess emissions penalty on 'any operator who does not surrender sufficient allowances by 30 April of each year to cover its emissions during the preceding year'.

27. As the referring court correctly points out, neither interpretation proposed is, *prima facie*, incompatible with the wording of Article 16(3) of the Directive. Accordingly, that provision can be taken to refer to the emissions generated during the preceding year, as verified under Article 15 of that directive, or, alternatively, to all emissions generated during the preceding year, as established in a final report, possibly after further controls by the competent national authorities.

28. However, when Article 16(3) of the Directive is read in its proper context, it becomes clear, in my view, that the former interpretation is the correct one.

29. It must be emphasised, in the first place, that one of the pillars on which the system established by the Directive is built is the obligation for operators to surrender a number of allowances equal to their total emissions during the preceding calendar year. It is up to each operator to report its emissions to the competent authorities in accordance with the rules and principles set out in the *ad hoc* guidelines adopted by the Commission (7) (Article 14(3) of the Directive).

30. Yet, given the importance of this exercise, and the financial advantage potentially accruing to operators if they underreport their emissions, the EU legislature has decided that the reports transmitted by the operators cannot be relied upon automatically by the authorities but must first undergo a specific verification process. Pursuant to the first indent of Article 15 of the Directive, and Annex V thereto, the

verifier must be ‘independent of the operator, carry out its activities in a sound and objective professional manner’, and be qualified for the task. He must consider the reports submitted by the operators and the monitoring systems during the preceding year, with a view — in particular — to verifying their ‘reliability, credibility and accuracy’.

31. This verification constitutes a key procedural step. If a report is not verified as satisfactory, the process comes to a halt. The operator cannot make further transfers of allowances until that report is verified as satisfactory (Article 15, second indent). If, conversely, the verification gives a positive result, the operator has, as mentioned above, until 30 April of the same year, to surrender the allowances equal to the total emissions generated. Indeed, Articles 6(2)(e) and 12(3) of the Directive expressly state that the obligation to surrender allowances relates to those corresponding to the emissions ‘as verified in accordance with Article 15’.

32. The Directive does not, at least not explicitly, provide for any subsequent check or verification of the number of allowances already verified pursuant to Article 15. Nor is there a provision requiring the surrender of additional quotas after 30 April, should the national authorities determine that — for whatever reason — those allowances do not cover the total emissions.

33. Clearly, the Directive cannot be interpreted as precluding further checks by the competent authorities or the possibility for an operator to surrender additional allowances after April 30 in order to fulfil its obligation to surrender a sufficient number of emission allowances. On the contrary, it seems to me that national provisions allowing either possibility would only strengthen the system established by the Directive.

34. However, the penalty provided for in Article 16(3) of the Directive cannot but relate to failure to fulfil the obligation which that provision expressly imposes upon the operator: that of surrendering, by April 30, the number of allowances due, as verified by an expert. It would be counterintuitive to interpret the Directive as requiring a penalty to be automatically imposed for breach of an obligation which it does not clearly specify.

35. The fact that it is the number of allowances, as verified under Article 15, which is central to the functioning of the system established by the Directive is also confirmed by the Guidelines published pursuant to Article 14(1) of the Directive. (8) Point 7.4 of the Guidelines states: ‘The total emissions figure for an installation in an emissions report that *has been verified as satisfactory* shall be used by the competent authority to check whether a sufficient number of allowances have been surrendered by the operator in respect of that same installation.’ (9)

36. This reading seems to be borne out by the *travaux préparatoires* for the Directive. Point 17 of the Explanatory Memorandum accompanying the proposal for a directive presented by the Commission on 23 October 2001 states that ‘[c]ases involving breaches of the obligation to surrender sufficient allowances to cover *verified* emissions are to be dealt with in a stringent and consistent manner throughout the European [Union]. This would be attained by the imposition of a financial penalty …’. (10)

37. Interestingly, Article 16(2) of the Directive, which concerns the publication of the names of operators in breach of the requirement to surrender sufficient allowances, explicitly referred in its original version, as applicable to the facts of the case, to the obligation ‘under Article 12(3)’ of the Directive. (11) Clearly, one might argue that, to the extent that paragraphs 2 and 3 of Article 16 of the Directive were, and still are, drafted differently, they concern a different breach. In fact, the German Government and the Emissionshandelsstelle contend, in substance, that Article 16(3) of the Directive is wider in scope than Article 16(2).

38. However, that reading is not borne out by the *travaux préparatoires*. Rather, the different wording of the two paragraphs is explained by the fact that, in the proposal initially submitted by the Commission, paragraph 2 of Article 16 of the Directive was meant to apply to all infringements of national legislation adopted to implement the Directive, whereas paragraph 3 was meant to penalise failure to surrender

sufficient allowances. Yet, the Parliament considered — and the Commission accepted — that a name-and-shame scheme was disproportionate in the case of many forms of infringement of the Directive, including those which concerned national implementing measures, and should accordingly be limited to those instances where operators failed to surrender a sufficient number of allowances. (12)

39. The legislative history of the Directive seems thus to indicate that the difference in the wording of the two paragraphs did not reflect a decision on the part of the EU legislature to draw a distinction between the types of infringement respectively covered.

40. Further confirmation of that interpretation is to be found in the judgment in *Billerud Karlsborg and Billerud Skärblacka*, in which the Court stated that the obligation to surrender a number of allowances equal to the total emissions during the preceding calendar year as verified in accordance with Article 15, provided for in Articles 6(2)(e) and 12(3) of the Directive, is '*the only one* for which Directive 2003/87 itself provides for a specific sanction, whereas the sanction for any other conduct contrary to its provisions is, under Article 16, left to the discretion of the Member States'. (13)

41. A different reading of Article 16(3) of the Directive would, moreover, pose a problem regarding the proportionality of the penalty set out in that provision.

42. Indeed, in *Billerud Karlsborg and Billerud Skärblacka*, the Court also held that the fixed and automatic penalty provided for in Article 16(3) of the Directive was proportionate, one of the reasons being that operators are in a position to know the exact number of allowances to surrender (by virtue of the verification under Article 15), and are allowed a reasonable period in which to comply with that obligation. Obviously, a prudent operator would not delay the fulfilment of its obligation until the last moment. For those reasons, the Court did not consider that, by virtue of the principle of proportionality, national courts should be able to modify the amount of the penalty provided for in Article 16(3) of the Directive, even in the event that the operators' failure might arguably be due to 'internal administrative breakdown'. (14)

43. However, the present case appears — on the basis of the information that can be gleaned from the order for reference — rather different from the above. Indeed, Nordzucker claims that its error was due to the fact that the company relied on a letter from the Ministry explaining that one type of installation that Nordzucker operated (the drying facilities) was not covered by the emissions trading scheme. Furthermore, the report was also duly verified by an independent expert in accordance with Article 15 of the Directive. Not until afterwards — that is to say, after 30 April — did the German authorities inform Nordzucker that the number of allowances surrendered was insufficient to the extent that the emissions produced by the drying facilities also had to be taken into account for the purposes of the Directive.

44. To the extent that Nordzucker's conduct ought to be subject to any sanction at all — a matter for the national court to verify — at the very least, Nordzucker was unable, before 30 April, to know with sufficient certainty the total number of allowances to be surrendered. The automatic imposition of a hefty fine in such circumstances could thus raise serious issues of proportionality.

45. According to the German Government and the Emissionshandelsstelle, it would instead be disproportionate to apply that sanction to any infringement whatsoever of the obligation laid down in Articles 6(2)(e) and 12(3) of the Directive, whereas operators which may have led the expert verifying the report into error (for example, by communicating misleading data or by other fraudulent behaviour) would escape the sanction.

46. I disagree. The fact that the penalty provided for in Article 16(3) of the Directive does not apply does not mean that no sanction whatsoever can be imposed upon those operators. Indeed, Article 16(1) of the Directive states that Member States must lay down the rules on penalties applicable to infringements of the national provisions adopted pursuant to the Directive, and that those penalties must be '*effective, proportionate and dissuasive*.' (15)

47. It is thus for the national authorities to lay down penalties which may be imposed upon operators which, despite complying with the obligation set out in Articles 6(2)(e) and 12(3) of the Directive, commit other types of infringement which hamper the correct functioning of the emissions trading scheme established by the Directive. Those penalties need, on the one hand, to be effective and dissuasive: this means, in my view, that fraudulent conduct such as that referred to by the German Government and the Emissionshandelsstelle may (and should) be subject to severe penalties. On the other hand, those penalties need to be proportionate: this implies that situations such as that in which Nordzucker finds itself must be subject to an assessment in which all the relevant factual circumstances are taken into account for the purposes of deciding on the *an debeatur* and *quantum debeatur* of the sanction (such as the good faith of a company, whether the company was led into error by the authorities themselves, and so on).

48. I therefore conclude that the type of failure committed by Nordzucker is not caught by Article 16(3) of the Directive but falls, as the case may be, within the scope of Article 16(1) of that directive.

IV – Conclusion

49. In the light of the foregoing, I propose that the Court answer the question referred for a preliminary ruling by the Bundesverwaltungsgericht as follows:

The penalty provided for in Article 16(3) 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 is not to apply to an operator which, by 30 April of a given year, surrendered a number of allowances that was equal to its emissions during the preceding year as verified in accordance with Article 15 of the directive, but that, following a subsequent check by the competent national authority, was held to be insufficient to cover all the operator's emissions during the preceding year. It is for the Member States to lay down the rules on penalties applicable, where appropriate, to such types of infringement. The penalties provided for must be effective, proportionate and dissuasive.

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1 – Original language: English.

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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 ('the Directive') (OJ 2003 L 275, p. 32).

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3 – See recitals 3 to 5 in the preamble to the Directive.

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4 – The Directive has, in the meantime, been amended several times. However, it appears that none of the subsequent amendments is of any relevance for the purposes of the present proceedings.

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5 – BGBl. I, p. 1578.

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6 – C-203/12, EU:C:2013:664.

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7 – Commission Decision 2004/156/EC of 29 January 2004 establishing guidelines for the monitoring and reporting of greenhouse gas emissions pursuant to Directive 2003/87/EC of the European Parliament and of the Council (OJ 2004 L 59, p. 1) ('the Guidelines').

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8 – Ibid.

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9 – Emphasis added. In this context, it should be stressed that the Guidelines have been adopted not as an act of soft law but, as mentioned in footnote 6, by means of a Commission Decision, thus in the form of an act having legal effects.

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10 – COM(2001) 581 final. Emphasis added.

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11 – In its current version, Article 16(2) of the Directive refers to the 'requirements to surrender sufficient allowances *under this Directive*' (emphasis added). This amendment was made by Directive 2008/101/EC of the European Parliament and of the Council of 19 November 2008 amending Directive 2003/87/EC so as to include aviation activities in the scheme for greenhouse gas emission allowance trading within the Community (OJ 2009 L 8, p. 3) which extended the emissions trading scheme to aviation activities. The amendment was meant to reflect the enlarged scope of the Directive. However, as was correctly pointed out by the UK Government, the amendment to Article 16(2) of the Directive made no difference with regard to the obligations placed on operators of installations.

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12 – See European Parliament, Report on the proposal for a European Parliament and Council Directive establishing a scheme for greenhouse gas emission allowance trading within the Community and amending Council Directive 96/61/EC (FINAL A5-0303/2002), p. 28.

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13 – See judgment in *Billerud Karlsborg and Billerud Skärblacka*, EU:C:2013:664, paragraph 25 (emphasis added).

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14 – See ibid., paragraphs 19, and 33 to 42.

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15 – Emphasis added.