Reports of Cases

ORDER OF THE COURT (Sixth Chamber)

17 December 2015*

(Reference for a preliminary ruling — Directive 2003/87/EC — Scheme for greenhouse gas emission allowance trading — Excess emissions penalty — Proportionality)

In Case C-580/14,

REQUEST for a preliminary ruling under Article 267 TFEU from the Verwaltungsgericht Berlin (Administrative Court, Berlin, Germany), made by decision of 21 November 2014, received at the Court on 16 December 2014, in the proceedings

Sandra Bitter, as insolvency administrator of Ziegelwerk Höxter GmbH,

v

Bundesrepublik Deutschland,

THE COURT (Sixth Chamber),

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

Advocate General: P. Mengozzi,

Registrar: A. Calot Escobar,

having regard to the written procedure,

after considering the observations submitted on behalf of:

— the Bundesrepublik Deutschland, by G. Buchholz, Rechtsanwalt,

— the German Government, by T. Henze and K. Petersen, acting as Agents

— the European Parliament, by P. Schonard and A. Tamás, acting as Agents,

— the Council of the European Union, by M. Simm and N. Rouam, acting as Agents,

— the European Commission, by E. White and A.C. Becker, acting as Agents,

having decided, after hearing the Advocate General, to give a decision by reasoned order, in accordance with Article 99 of the Rules of Procedure of the Court,

* Language of the case: German.

makes the following

Order

1 This request for a preliminary ruling concerns the validity of the second sentence of 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 (OJ 2003 L 275, p. 32), as amended by Directive 2009/29/EC of the European Parliament and of Council of 23 April 2009 (OJ 2009 L 140, p. 63; 'Directive 2003/87').

2 The request has been made in proceedings between Mrs Bitter, in her capacity as insolvency administrator of Ziegelwerk Höxter GmbH ('Ziegelwerk Höxter') and the Bundesrepublik Deutschland (the Federal Republic of Germany) concerning a penalty imposed by the latter on Ziegelwerk Höxter for failure to fulfil its obligations of reporting and surrendering its carbon dioxide equivalent allowances in relation to 2011.

Legal context

EU law

3 Recital 2 of Directive 2003/87 is worded as follows:

'The Sixth Community Environment Action Programme established by Decision No 1600/2002/EC of the European Parliament and of the Council [of 22 July 2002 laying down the Sixth Community Environment Action Programme (OJ 2002 L 242, p. 1)] identifies climate change as a priority for action and provides for the establishment of a Community-wide emissions trading scheme by 2005. That Programme recognises that the Community is committed to achieving an 8% reduction in emissions of greenhouse gases by 2008 to 2012 compared to 1990 levels, and that, in the longer-term, global emissions of greenhouse gases will need to be reduced by approximately 70% compared to 1990 levels.'

4 Recital 4 of that directive states as follows:

'Once it enters into force, the Kyoto Protocol, which was approved by Decision 2002/358/EC of the Council 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.)], will commit the Community and its Member States to reducing their aggregate anthropogenic emissions of greenhouse gases listed in Annex A to the Protocol by 8% compared to 1990 levels in the period 2008 to 2012.'

5 Article 12(3) of that directive provides:

'Member States shall ensure that, by 30 April each year at the latest, 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.'

6 Article 16(3) of Directive 2003/87 reads as follows:

'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.'

7 Article 16(4) of Directive 2003/87 in its original version provided:

'During the three-year period beginning 1 January 2005, Member States shall apply a lower excess emissions penalty of EUR 40 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.'

German law

8 Directive 2003/87 was transposed by the Law on Greenhouse Gas Emissions Trading (Gesetz über den Handel mit Berechtigungen zur Emission von Treibhausgasen) of 8 July 2004 (BGBl. I, p. 1578; 'Law on emissions trading').

9 Paragraph 6(1) of the Law on emissions trading states:

'The operator responsible shall, by 30 April of each year, beginning in 2006, surrender to the competent authority a number of allowances equal to the quantity of emissions resulting from its activities in the preceding calendar year.'

10 Paragraph 18 of the Law on emissions trading, entitled 'Enforcement of the Obligation to Surrender Allowances' provides, in subparagraphs (1) to (3):

'(1) Where the responsible person fails to comply with his obligation under Article 6(1), the competent authority shall impose, for every tonne of carbon dioxide equivalent emitted with respect to which the responsible person has failed to surrender allowances, a financial penalty of EUR 100, or of EUR 40 during the first allocation period. A financial penalty may not be imposed where the responsible person is unable to comply with his obligation under Article 6(1) as a result of *force majeure*.

(2) Insofar as the responsible person fails to properly report emissions caused by his activity, the competent authority shall estimate the emissions caused by the activity in the preceding year. The estimate is an irrebuttable basis for the obligation under Article 6(1). The estimate shall not apply where the responsible person complies with his obligation to report in the context of the hearing relating to the notice of assessment.

(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 ... '

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

11 Ziegelwerk Höxter is a company established in Germany which, until September 2011, operated an installation releasing greenhouse gasses. By an order of 1 November 2011, the Amtsgericht Paderborn (District Court, Paderborn, Germany) opened insolvency proceedings in respect of that company.

12 In the context of those proceedings, Mrs Bitter, a lawyer, was appointed as insolvency administrator. In that capacity, the German authorities considered her to be the operator of the installation and thus responsible for compliance with the obligations applicable to that installation under the Law on emissions trading.

13 On that basis, the authorities requested that she produce the emissions report for 2011 and surrender the allowances relating to that year.

14 Mrs Bitter considered that, since Ziegelwerk Höxter had already ceased its business activity before the opening of the insolvency procedure in September 2011, that company was no longer obliged to either report or surrender its carbon dioxide equivalent emission allowances for 2011, its contingent liabilities were solely to be registered as claims in insolvency.

15 According to the order of reference, by email of 20 September 2012, a former representative of the company indicated to the German authorities that 3 324 tonnes of carbon dioxide had been emitted by that company in 2011.

16 By a decision of 20 March 2013, the authorities estimated that the non-surrendered emissions of that company for 2011 amounted to 3 323 tonnes of carbon dioxide and imposed a fine on it of EUR 332 300, pursuant to Paragraph 18 of the Law on emissions trading, which transposes Article 16(3) of Directive 2003/87.

17 Mrs Bitter challenged that decision before the Verwaltungsgericht Berlin (Administrative Court, Berlin), which examined whether the level of the fine provided for in that provision was consistent with the principle of proportionality.

18 The Verwaltungsgericht Berlin (Administrative Court, Berlin) considers in particular that, given that the Court has already held that a fine of EUR 40 per tonne of carbon dioxide equivalent emitted for which the operator has not surrendered allowances, provided for under Article 16(4) of Directive 2003/87 in its original version, during the first trading period between 2005 and 2007, is consistent with the principle of proportionality (see judgment in *Billerud Karlsborg and Billerud Skärblacka*, C-203/12, EU:C:2013:664), such may not be the case with a fine of EUR 100 per tonne of carbon dioxide equivalent emitted for which the operator has not surrendered allowances, provided for under Article 16(3) of Directive 2003/87, beginning in 2008, taking into account, in addition, the fall in the price of greenhouse gas emission allowances since December 2006.

19 The referring court points out, in that regard, that the principle of proportionality requires that measures adopted by EU institutions do not exceed the limits of what is appropriate and necessary in order to attain the objectives legitimately pursued by the legislation in question and that when there is a choice between several appropriate measures, recourse must be had to the least onerous and the disadvantages caused must not be disproportionate to the aims pursued. It refers, in that regard, to the judgment in *Agrarproduktion Staebelow* (C-504/04, EU:C:2006:30, paragraphs 35 and 40).

20 In those circumstances, the Verwaltungsgericht Berlin (Administrative Court, Berlin) decided to stay the proceedings and to refer the following question to the Court of Justice for a preliminary ruling:

‘Does the second sentence of Article 16(3) of Directive 2003/87, according to which the excess emissions penalty shall be EUR 100 for each tonne of carbon dioxide equivalent emitted for which the operator or aircraft operator has not surrendered allowances, infringe the principle of proportionality?’

Consideration of the question referred

21 Pursuant to Article 99 of the Rules of Procedure, where the answer to a question referred to the Court for a preliminary ruling may be clearly deduced from existing case-law, the Court may at any time, on a proposal from the Judge-Rapporteur and after hearing the Advocate General, give its decision by reasoned order.

22 It is appropriate to apply that provision in the present case.

23 By its question, the referring court questions the validity of the second sentence of Article 16(3) of Directive 2003/87, particularly in the light of the principle of proportionality.

24 The Court points out, as a preliminary point, that the principle of proportionality, which is one of the general principles of EU law, requires that measures implemented through EU law provisions be appropriate for attaining the legitimate objectives pursued by the legislation at issue and must not go beyond what is necessary to achieve them (see judgements in *Vodafone and Others*, C-58/08, EU:C:2010:321, paragraph 51, and *Billerud Karlsborg and Billerud Skärblacka*, C-203/12, EU:C:2013:664, paragraph 34).

25 With regard to judicial review of those conditions, however, the EU legislature must be allowed a broad discretion when it is asked to intervene in an area which entails political, economic and social choices on its part, and in which it is called upon to undertake complex assessments. In its judicial review of the exercise of such powers, the Court cannot substitute its own assessment for that of the EU legislature. It could only find fault with its legislative choice if it appeared manifestly incorrect or if the resultant disadvantages for certain economic operators were wholly disproportionate to the advantages otherwise offered (see judgment in *Billerud Karlsborg and Billerud Skärblacka*, C-203/12, EU:C:2013:664, paragraph 35 and the case-law cited).

26 In that regard, it is apparent from the conclusions of the Council of the European Union of 8 March 2001, referred to in recital 1 of Directive 2003/87, that the introduction of an EU-wide scheme for accounting and trading of carbon dioxide equivalent emission allowances was a legislative choice which translated a political orientation in a context of urgency owing to the necessity of addressing serious environmental concerns. That legislative choice was, moreover, based on highly complex and lengthily debated economic and technical considerations, set out in Green Paper on greenhouse gas emissions trading within the European Union (COM(2000) 87 final). In order to contribute towards the fulfilment of their commitments by the European Union and its Member States under the Kyoto Protocol, the EU legislature was thus led to consider itself the future, uncertain effects of its action (see judgment in *Billerud Karlsborg and Billerud Skärblacka*, C-203/12, EU:C:2013:664, paragraph 36).

27 In addition, the assessment of the proportionality of an EU measure cannot depend on a retrospective assessment of its efficacy. Where the EU legislature has to assess the future effects of legislation to be enacted, although those effects cannot be accurately foreseen, its assessment is open to criticism only if it appears manifestly incorrect in the light of the information available to it at the time of the adoption of the legislation in question (see, to that effect, judgments in *Jippes and Others*, C-189/01, EU:C:2001:420, paragraph 84 and the case-law cited, and *Billerud Karlsborg and Billerud Skärblacka*, C-203/12, EU:C:2013:664, paragraph 37).

28 In applying those principles, the Court acknowledged, in *Billerud Karlsborg and Billerud Skärblacka* (C-203/12, EU:C:2013:664), the proportional character not only of the transitional fine of EUR 40 per tonne provided for under Article 16(4) of Directive 2003/87 in its original version, but also the lump-sum penalty of EUR 100 per tonne provided for under paragraph 3 of the same article, on the ground that there is no possibility for the amount to be varied by a national court.

29 The Court further held that Directive 2003/87 granted operators a reasonable amount of time in which to comply with their surrender obligation and that the Member States remain free to introduce mechanisms for warnings, reminders and advance surrender to allow good-faith operators to be fully informed of their surrender obligation and not to run any risk of penalties (judgment in *Billerud Karlsborg and Billerud Skärblacka*, C-203/12, EU:C:2013:664, paragraphs 40 and 41).

30 The Court noted in particular that the EU legislature viewed the obligation to surrender provided for under Article 12(3) of Directive 2003/87 and the lump-sum penalty enforcing that obligation provided for in Article 16 of that directive, and without any flexibility other than a transitional lowering of the amount between 2005 and 2007, as necessary in the pursuit of the legitimate objective of establishing an efficient carbon dioxide equivalent allowance trading scheme, in order to prevent certain operators or market intermediaries from being tempted to circumvent or manipulate the scheme by speculating abusively on prices, quantities, time limits or complex financial products which tend to come about in any market (judgment in *Billerud Karlsborg and Billerud Skärblacka*, C-203/12, EU:C:2013:664, paragraph 39).

31 In particular, the Court held that the relatively high level of the penalty is justified by the need to have infringements of the obligation to surrender a sufficient number of allowances treated in a stringent and consistent manner throughout the European Union (judgment in *Billerud Karlsborg and Billerud Skärblacka*, C-203/12, EU:C:2013:664, paragraph 39).

32 The fact that the amount involved exceeds that on which the Court gave its ruling in *Billerud Karlsborg and Billerud Skärblacka* (C-203/12, EU:C:2013:664) cannot call into question this assessment, since the imposition of a lower fine during the first trading period was justified, as the Court found at paragraph 25 of that judgment, by the fact that it was a learning period for the scheme, in the context of which the economic actors concerned were subjected to less onerous obligations.

33 It should be noted that the EU legislature has also not increased the amount of the penalty applicable after this first trading period, but temporarily 'lowered' the fixed amount of the penalty during that first period, normally EUR 100 as provided for in the second sentence of Article 16(3) of Directive 2003/87 (see judgment in *Billerud Karlsborg and Billerud Skärblacka*, C-203/12, EU:C:2013:664, paragraphs 25 and 39).

34 As regards the argument that the price of emission allowances has decreased significantly since the first trading period, the Court has already stated, at paragraph 27 of the judgment in *Billerud Karlsborg and Billerud Skärblacka* (C-203/12, EU:C:2013:664), that the EU legislature wished, by introducing a predefined penalty itself, to shield the allowance trading scheme from distortions of competition resulting from market manipulation. As is apparent from paragraph 25 above, the Court cannot substitute its own assessment for that of the EU legislature.

35 Consequently, consideration of the question referred has revealed nothing capable of affecting, in the light of the principle of proportionality, the validity of the second sentence of Article 16(3) of Directive 2003/87, in that it provides for a penalty of EUR 100 per tonne of carbon dioxide equivalent emitted for which the operator has not surrendered allowances.

Costs

36 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:

Consideration of the question referred has revealed nothing capable of affecting, in the light of the principle of proportionality, the validity of the second sentence of Article 16(3) of Directive 2003/87/EC of the 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 2009/29/EC of the European Parliament and of the Council of 23 April 2009, in that it provides for a penalty of EUR 100 per tonne of carbon dioxide equivalent emitted for which the operator has not surrendered allowances.

[Signatures]