

Thirdly, the applicant contends that the contested decision is unlawful because, instead of carrying out its limited functions under Article 9(3) of Directive 2003/87/EC, the Commission carried out an entirely independent calculation of the appropriate total emissions in Slovakia and imposed this on the Slovak Republic. Thereby the Commission usurped the competence of the Member States under Articles 9 and 11 of Directive 2003/87/EC.

Fourthly, the applicant submits that the contested decision is unlawful in that it was based on a rigid mathematical calculation which was imposed without public consultation and which ignored known factors influencing emissions specific to Slovakia in the period 2008-2012. The applicant finds that this approach violated Article 9(1) and 11(2) of Directive 2003/87/EC, criteria (1), (2) and (3) of Annex III to the said directive as well as the principle of legitimate expectations. The applicant contends that insofar as the Commission possessed any margin of appreciation, the Commission committed a manifest error in that appreciation.

Finally, the applicant claims that the contested decision is vitiated by a misuse of powers as it was motivated by a desire to achieve a scarcity of allowances as such in order to drive the prices of allowances upwards.

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- (<sup>1</sup>) 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 L 275, 2003, p. 32).
- (<sup>2</sup>) Act concerning the conditions of accession of the Czech Republic, the Republic of Estonia, the Republic of Cyprus, the Republic of Latvia, the Republic of Lithuania, the Republic of Hungary, the Republic of Malta, the Republic of Poland, the Republic of Slovenia and the Slovak Republic and the adjustments to the Treaties on which the European Union is founded (OJ L 236, 2003, p. 33).

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## Action brought on 7 February 2007 — Fels-Werke GmbH and Others v Commission of the European Communities

(Case T-28/07)

(2007/C 69/55)

*Language of the case: German*

### Parties

*Applicants:* Fels-Werke GmbH (Goslar, Germany), Saint-Gobain Glass Deutschland GmbH (Aachen Germany) and Spenner Zement GmbH & Co KG (Erwitte, Germany) (represented by: H. Posser and S. Altenschmidt, lawyers)

*Defendant:* Commission of the European Communities

### Form of order sought

- Annul Article 1.2 of the Commission's Decision of 29 November 2006 on the national plan for the allocation of greenhouse gas emission allowances notified by Germany pursuant to Directive 2003/87/EEC of the European Parliament and of the Council (document number unpublished), insofar as it declares the allocation guarantees in respect of the first action period described in Chapter 6.2 of Germany's national allocation plan under the headings 'Additional new installations under Paragraph 11 of the ZuG 2007' and 'Allocations under Paragraph 8 of the ZuG 2007' to be incompatible with Directive 2003/87/EC;
- annul Article 2.2 of that decision insofar as it issues to the Federal Republic of Germany instructions for the application of the allocation guarantees in respect of the first action period described in Chapter 6.2 of Germany's national allocation plan under the headings 'Additional new installations under Paragraph 11 of the ZuG 2007' and 'Allocations under Paragraph 8 of the ZuG 2007' and in so doing also requires the application of the same performance factor as for other comparable existing installations;
- order the Commission to pay the costs.

### Pleas in law and main arguments

The applicants challenge the Commission's decision of 29 November 2006 concerning the national plan for the allocation of greenhouse gas emission allowances which Germany notified in accordance with Directive 2003/87/EC of the European Parliament and of the Council. In that decision the Commission objects to certain aspects of the national allocation plan for Germany on account of incompatibility with Annex III to Directive 2003/87/EC (<sup>1</sup>).

The applicants, operators of installations subject to compulsory emissions trading, claim to be directly and individually concerned by the contested decision.

In support of their action that they put forward four pleas:

First of all, they submit that on 29 November 2006 the defendant was no longer entitled to reject the German national allocation plan, as the mandatory time-limit for doing so in Article 9(3) of Directive 2003/87/EC had already expired.

Moreover, on the merits, the applicants complain of an incorrect application of Article 9(3) in conjunction with the criteria of Annex III to Directive 2003/87/EC. In their view, the allocation guarantees criticised by the Commission for new installations are not State aid within the meaning of Article 87(1) EC. No unjustified preference was given to the installations in question.

In addition the contested decision contains an inadequate statement of reasons and therefore infringes Article 253 EC.

Finally, the contested decision infringes the Community principle of the protection of legitimate expectations.

(<sup>1</sup>) 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 L 275, 2003, p. 32).

### Action brought on 9 February 2007 — Lactalis Gestion Lait and Lactalis Investissements v Council

(Case T-29/07)

(2007/C 69/56)

*Language of the case: French*

#### Parties

*Applicants:* Lactalis Gestion Lait and Lactalis Investissements (Laval, France) (represented by: A. Philippart, lawyer)

*Defendant:* Council of the European Union

#### Form of order sought

- rule that the first subparagraph of Article 1 of Council Directive 67/227/EEC, read in the light of the fourth recital in the preamble, requires the Member States to abolish and replace cumulative multi-stage turnover taxes which distort competition and hinder trade between Member States;
- rule that subparagraph 3 of Article 1 of Directive 67/227/EEC, read in the light of the eighth recital in the preamble, prohibits Member States (old or new) from maintaining or introducing measure providing for flat-rate equalisation of turnover taxes on importation or exportation in trade between Member States;
- rule that Article 1 of First Directive 67/227/EEC replaces cumulative multi-stage taxes with the common system of value added tax and that henceforward the maintenance or introduction of cumulative multi-stage taxes which distort competition and hinder trade must be prohibited;

— rule that contrary to the objective that it set, Council Directive 2006/112/EC of 28 November 2006 on the common system of value added tax, by repealing First Directive 67/227/EEC, gives, with the exception of Article 2 defining the characteristics of VAT, an incomplete and incorrect image of the existing VAT legislation and jeopardises the harmonisation of laws on turnover tax;

— rule that by removing all references to the principle of principle of the prohibition on cumulative multi-stage taxes and thereby enabling the maintenance and reintroduction of turnover taxes of such a kind as to distort competition and hinder trade between Member States, the Council infringes the objectives set by Articles 3 and 93 EC and directly and individually affects the applicants' interests;

— annul Article 411/1 of Directive 2006/112/EC in so far as it repeals recitals 4 and 8 and subparagraphs 1 and 3 of Article 1 of Council Directive 67/227/EEC and clearly infringes Articles 3 and 93 EC;

— order the Council to reimburse the irrecoverable expenses incurred in these proceedings

#### Pleas in law and main arguments

By this action, the applicants seek annulment of Article 411/1 of Council Directive 2006/112/EC of 28 November 2006 on the common system of value added tax (<sup>1</sup>) in so far as it repeals subparagraphs 1 and 3 of Article 1 of First Council Directive 67/227/EEC of 11 April 1967 on the harmonisation of legislation of Member States concerning turnover taxes (<sup>2</sup>) providing for the abolition and prohibiting the maintenance or introduction of cumulative multi-stage taxes.

The applicants claim that by adopting such a directive, the Council infringes the objectives of the Treaty set out in Articles 3 and 93 EC which provide for the harmonisation of laws on turnover taxes. The applicants also submit that the repeal of Directive 67/227/EEC by Directive 2006/112/EC calls into question the principle of the prohibition on cumulative multi-stage taxes which the applicants argue are, by their very nature, of such a kind as to distort the conditions of competition and hinder trade between Member States.

(<sup>1</sup>) OJ L 347, 2006, p. 1.

(<sup>2</sup>) OJ L 71, 2006, p. 1301.