Reports of Cases

JUDGMENT OF THE COURT (Sixth Chamber)

8 September 2016*

(Reference for a preliminary ruling — Environment — Greenhouse gas emission allowance trading scheme within the European Union — Directive 2003/87/EC — Harmonised free allocation of emission allowances — Decision 2011/278/EU — Change to the allocation — Article 24(1) — Obligation of the operator of the installation to provide information — Scope)

In Case C-461/15,

REQUEST for a preliminary ruling under Article 267 TFEU from the Verwaltungsgericht Berlin (Administrative Court, Berlin, Germany), made by decision of 3 June 2015, received at the Court on 28 August 2015, in the proceedings,

E.ON Kraftwerke GmbH

v

Bundesrepublik Deutschland,

THE COURT (Sixth Chamber),

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

Advocate General: E. Sharpston,

Registrar: A. Calot Escobar,

having regard to the written procedure,

after considering the observations submitted on behalf of:

— E.ON Kraftwerke GmbH, by S. Altenschmidt and A. Sitzer, Rechtsanwälte,

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

— the European Commission, by E. White and K. Herrmann, acting as Agents,

having decided after hearing the Advocate General, to proceed to judgment without an Opinion,

gives the following

* Language of the case: German.

Judgment

1 This request for a preliminary ruling concerns the interpretation of Article 24(1) of Commission Decision 2011/278/EU of 27 April 2011 determining transitional Union-wide rules for harmonised free allocation of emission allowances pursuant to Article 10a of Directive 2003/87/EC of the European Parliament and of the Council (OJ 2011 L 130, p. 1).

2 The request has been made in proceedings between E.ON Kraftwerke GmbH and Bundesrepublik Deutschland (Federal Republic of Germany) concerning the extent of E.ON Kraftwerke's obligation to provide information for the free allocation of emission allowances, having regard to changes made to the operation of one of its power stations.

Legal context

EU law

Directive 2003/87

3 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 the Council of 23 April 2009 (OJ 2009 L 140, p. 63), ('Directive 2003/87') states in Article 7, 'Changes relating to installations':

'The operator shall inform the competent authority of any planned changes to the nature or functioning of the installation, or any extension or significant reduction of its capacity, which may require updating the greenhouse gas emissions permit. Where appropriate, the competent authority shall update the permit. …'

4 In accordance with Article 10(1) of Directive 2003/87:

'From 2013 onwards, Member States shall auction all allowances which are not allocated free of charge in accordance with Articles 10a and 10c. …'

5 Article 10a of the directive, 'Transitional Community-wide rules for harmonised free allocation', provides in paragraph 1:

'By 31 December 2010, the Commission shall adopt Community-wide and fully-harmonised implementing measures for the allocation of the allowances …'

Decision 2011/278

6 In accordance with Article 7, 'Baseline data collection', of Decision 2011/278:

'1. For each incumbent installation eligible for the free allocation of emission allowances under Article 10a of Directive 2003/87/EC, including installations that are operated only occasionally, in particular, installations that are kept in reserve or on standby and installations operating on a seasonal schedule, Member States shall, for all years of the period from 1 January 2005 to 31 December 2008, or 1 January 2009 to 31 December 2010 where applicable, during which the installation has been operating, collect from the operator all relevant information and data regarding each parameter listed in Annex IV.

2. Member States shall collect data for each sub-installation separately. If necessary, Member States may require the operator to submit more data.

…’

7 Article 10(1) of Decision 2011/278 reads as follows:

‘Based on the data collected in accordance with Article 7, Member States shall, for each year, calculate the number of emission allowances allocated free of charge from 2013 onwards to each incumbent installation on their territory in accordance with paragraphs 2 to 8.’

8 Articles 19 to 21 of Decision 2011/278 define the conditions under which the Member States are to allocate the emission allowances to be issued following a significant extension or a significant reduction of the capacity of the installation concerned.

9 Article 24 of Decision 2011/278, ‘Changes to the operation of an installation’, provides:

‘1. Member States shall ensure that all relevant information about any planned or effective changes to the capacity, activity level and operation of an installation is submitted by the operator to the competent authority by 31 December of each year.

2. Where there is a change to an installation’s capacity, activity level or operation which has an impact on the installation’s allocation, Member States shall submit, using an electronic template provided by the Commission, all relevant information, including the revised preliminary total annual amount of emission allowances allocated free of charge for the installation concerned determined in accordance with this Decision, to the Commission before determining the final total annual amount of emission allowances allocated free of charge. The Commission may reject the revised preliminary total annual amount of emission allowances allocated free of charge for the installation concerned.’

Regulation (EU) No 601/2012

10 As Article 1 states, Commission Regulation (EU) No 601/2012 of 21 June 2012 on the monitoring and reporting of greenhouse gas emissions pursuant to Directive 2003/87 (OJ 2012 L 181, p. 30) lays down rules for the monitoring and reporting of greenhouse gas emissions and activity data pursuant to Directive 2003/87 in the trading period of the EU emission allowance trading scheme commencing on 1 January 2013 and subsequent trading periods.

11 Article 12 of Regulation No 601/2012, ‘Content and submission of the monitoring plan’, provides:

‘1. An operator or an aircraft operator shall submit a monitoring plan to the competent authority for approval.

The monitoring plan shall consist of a detailed, complete and transparent documentation of the monitoring methodology of a specific installation or aircraft operator and shall contain at least the elements laid down in Annex I.

…

2. Where Annex I makes a reference to a procedure, an operator or an aircraft operator shall establish, document, implement and maintain such a procedure separately from the monitoring plan.

…

3. In addition to the elements referred to in paragraphs 1 and 2 of this Article, Member States may require further elements to be included in the monitoring plan of installations to meet the requirements of Article 24(1) of [Decision 2011/278], including a summary of a procedure ensuring the following:

(a) the operator regularly checks if information regarding any planned or effective changes to the capacity, activity level and operation of an installation is relevant under that Decision;

(b) the information referred to in point (a) is submitted by the operator to the competent authority by 31 December of each year.'

German law

12 On 26 September 2011 the Federal Government adopted the Verordnung über die Zuteilung von Treibhausgas-Emissionsberechtigungen in der Handelsperiode 2013 bis 2020 (Regulation on the allocation of greenhouse gas emission allowances for the trading period 2013 to 2020) (BGBl. I, p. 1921, 'the ZuV 2020').

13 Paragraph 22 of the ZuV 2020, 'Changes to the operation of an installation', provides:

'(1) The installation operator must notify to the competent authority all relevant information about any planned or effective changes to the capacity, activity levels and operation of the installation by 31 January of the following year, as of 31 January 2013.

(2) In the event of a significant capacity reduction pursuant to Paragraph 19, the installation operator is obliged to notify the competent authority without delay of the withdrawn capacity and the installed capacity of the allocation element after the significant capacity reduction. In the event of a cessation of operations pursuant to Paragraph 20(1), the installation operator is obliged to notify the competent authority without delay of the date of the cessation of operations.'

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

14 E.ON Kraftwerke is an undertaking in the energy sector which operates several power stations in Germany subject to the greenhouse gas emission allowances trading obligation. For its plant in Heyden (Germany) it applied to the German emission allowance trading office (Deutsche Emissionshandelsstelle, 'the DEHSt') for a free allocation of emission allowances for the third trading period (2013 to 2020) in proportion to the heat emission value.

15 E.ON Kraftwerke informed the DEHSt by letter of 5 September 2013 that, contrary to what was required by the DEHSt on the basis of Paragraph 22(1) of the ZuV 2020, it would communicate data on the activity levels of each allowance element only if the data could lead to changes to the allocation decision.

16 By letter of 24 September 2013, the DEHSt replied to that letter by stating that the relevant information which had to be communicated under Paragraph 22(1) of the ZuV 2020 was not limited to information whose effect was to change the allocation, but comprised all information relating to the data on which the allocation was based.

17 In E.ON Kraftwerke's report for 2013, the figure 0 appeared in the entry for activity level.

18 By an application to the Verwaltungsgericht Berlin (Administrative Court, Berlin) of 27 November 2013, E.ON Kraftwerke sought a declaration, in essence, that it was not obliged under Paragraph 22(1) of the ZuV 2020 to provide all the data relating to capacity, activity level or operation of the installation, but was required to communicate only the data relating to changes that might affect the allocation of allowances. That was the meaning of Article 24 of Commission Decision 2011/278 and the Commission's Guidance Document No 7.

19 The DEHSt, reading those Commission documents differently, submitted that it was for the Member States to determine the information relevant to the allocation.

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

'(1) Which information belongs to the relevant information within the meaning of Article 24(1) of Decision 2011/278? Is the restriction to be understood qualitatively or quantitatively; is, in particular, information about any planned or effective changes to the capacity, activity level and operation of an installation which does not directly result in the cancellation or adaptation of the allocation decision pursuant to Articles 19 to 21 of Decision 2011/278 and does not trigger any obligation to communicate under Article 24(2) of [that decision] also included?

(2) If Question 1 is answered in the negative: Is Article 24(1) of Decision 2011/278 to be interpreted as prohibiting the Member State from requiring the installation operator also to provide information about any planned or effective changes to the capacity, activity level and operation of the installation which does not result in the cancellation or adaptation of the allocation decision pursuant to Articles 19 to 21 of Decision 2011/278?'

Consideration of the questions referred

21 By its questions, which should be considered together, the referring court asks, in essence, whether Article 24(1) of Decision 2011/278 must be interpreted as precluding a Member State from requiring undertakings which, being subject to the greenhouse gas emission allowance trading obligation within the EU, receive a free allocation of those allowances to provide information relating to all planned or effective changes to the capacity, activity level and operation of an installation, without limiting that requirement solely to information relating to changes that would affect the allocation.

22 Decision 2011/278 governs the free allocation of greenhouse gas emission allowances in accordance with Article 10a of Directive 2003/87.

23 It should be recalled here that Directive 2003/87 aims to reduce, by 2020, the overall greenhouse gas emissions of the European Union by at least 20% in comparison with 1990 levels, in an economically efficient manner. In order to attain that objective, the EU legislature devised two mechanisms. The first, put in place by Article 9 of Directive 2003/87, consists in the reduction in the number of allowances available by the application of a linear factor of 1.74% compared to the average annual total quantity of allowances issued by Member States in accordance with the Commission's decisions on their national allocation plans for the period from 2008 to 2012. The second mechanism is the auctioning of allowances, which also aims to facilitate the reduction of greenhouse gas emissions in an economically efficient manner (judgment of 28 April 2016, *Borealis Polyolefine and Others*, C-191/14, C-192/14, C-295/14, C-389/14 and C-391/14 to C-393/14, EU:C:2016:311, paragraph 81).

24 As regards the installations which, in certain sectors of activity, receive greenhouse gas emission allowances free of charge in accordance with Article 10a(11) of Directive 2003/87, the quantity of those allowances allocated is to decrease gradually from 2013, with a view to reaching the abolition of free allowances in 2027 (judgment of 28 April 2016, *Borealis Polyolefine and Others*, C-191/14, C-192/14, C-295/14, C-389/14 and C-391/14 to C-393/14, EU:C:2016:311, paragraph 82).

25 In this context, provision is made, in accordance with Article 7 of Decision 2011/278, that for each incumbent installation eligible for the free allocation of greenhouse gas emission allowances, the Member States are, for all years of the period from 1 January 2005 to 31 December 2008, or 1 January 2009 to 31 December 2010 where applicable, during which the installation has been operating, to collect from the operator all relevant information and data regarding each of the parameters listed in Annex IV to that decision which enables the amount of the allocation to be determined.

26 In accordance with Article 10 of Decision 2011/278, the Member States, on the basis of the information collected pursuant to Article 7, are to calculate for each year the number of emission allowances allocated free of charge from 2013 onwards to each incumbent installation on their territory.

27 As stated in recital 15 of Decision 2011/278, the Member States should ensure that data collected from the operators and used for allocation purposes is complete and consistent and presents the highest achievable accuracy.

28 It is in the light of those considerations that, in order to answer the referring court's questions, the 'relevant information' must be identified which the Member States are entitled to require from the operators concerned in accordance with Article 24(1) of Decision 2011/278.

29 It must be observed, in the first place, that Decision 2011/278 does not directly lay down an obligation for operators to provide information, but leaves it to the Member States to determine themselves the means of obtaining data from operators that is sufficiently relevant for the purposes of the free allocation of greenhouse gas emission allowances.

30 As regards that data, the Member States are enjoined, in accordance with Article 24(1) of Decision 2011/278, to ensure that all relevant information about any planned or effective changes to the capacity, activity level and operation of an installation is submitted by the operator to the competent authority by 31 December of each year.

31 It should be noted, in the second place, that Article 24(2) of Decision 2011/278, the object of which is to govern the obligation of the Member States to submit to the Commission the relevant information for determining the final total annual amount of emission allowances allocated free of charge, limits that obligation solely to cases in which such changes have an impact on an installation's allocation of emission allowances.

32 On the other hand, Article 24(1) of Decision 2011/278, which refers to all relevant information concerning such changes, does not limit the operators' obligation of communication solely to cases in which those changes have an impact on the free allocation of emission allowances.

33 That interpretation of Article 24(1) of Decision 2011/278 is, in the third place, consistent with the scheme and objectives of Directive 2011/278.

34 In the system of allocation of emission allowances, the Member States, as noted in paragraph 26 above, are to calculate for each year, on the basis of the information collected pursuant to Article 7 of Decision 2011/278, the number of emission allowances allocated free of charge to each incumbent

installation on their territory. It is therefore for the competent authorities of the Member States alone to assess, on the basis of the information collected from the operators, whether that information is such as to have an impact on the determination of the number of allowances allocated.

35 Moreover, neither from Directive 2003/87, in particular Article 7, nor from Decision 2011/278 does it appear that the EU legislature intended to allow operators to choose the information they have to submit pursuant to those provisions according to the impact it is thought to have on the allocation of emission allowances.

36 It may be seen from the provisions of Article 24 of that decision that they aim to take account of changes to the operation of installations, in order for the Member States, in a first stage, to determine the number of emission allowances allocated free of charge to each incumbent installation on their territory and for the Commission, in a second stage, to determine the final total annual amount of emission allowances allocated free of charge.

37 In that context, as recalled in paragraph 27 above, the Member States must ensure that the data collected from the operators and used for allocation purposes is complete and consistent and presents the highest achievable accuracy. It is therefore for the Member States to determine themselves what relevant information for the competent authorities must be collected from the operators.

38 By referring to the relevance of the information thus sought, Article 24(1) of Decision 2011/278 authorises the Member States to require the submission to the competent authorities of the items of information which enable them to make an objective assessment of the changes to the installation in question, and precludes them from requiring other information that is not related to that assessment, such as information concerning the reasons for those changes or, generally, the economic or commercial need for them, which is for the national courts to ascertain. That provision does not, on the other hand, require the submission of information to be limited to the information relating to changes which appear to the operators to have an impact on the allocation of allowances free of charge.

39 That conclusion cannot be invalidated by statements made in a document entitled ‘Guidance Document No 7 on the harmonised free allocation methodology for the EU-ETS post 2012: Guidance on New Entrants and Closures’ which the Commission has published on its website. As expressly indicated in that document, it is not legally binding and does not represent an official position of the Commission.

40 In the light of the above considerations, the answer to the questions referred for a preliminary ruling is that Article 24(1) of Decision 2011/278 must be interpreted as not precluding a Member State from requiring undertakings which, being subject to the greenhouse gas emission allowance trading obligation within the EU, receive a free allocation of those allowances to provide information relating to all planned or effective changes to the capacity, activity level and operation of an installation, without limiting that requirement solely to information relating to changes that would affect the allocation.

Costs

41 Since these proceedings are, for the parties to the main proceedings, a step in the action pending before the national court, the decision on costs is a matter for that court. Costs incurred in submitting observations to the Court, other than the costs of those parties, are not recoverable.

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

Article 24(1) of Commission Decision 2011/278/EU of 27 April 2011 determining transitional Union-wide rules for harmonised free allocation of emission allowances pursuant to Article 10a of Directive 2003/87/EC of the European Parliament and of the Council must be interpreted as not precluding a Member State from requiring undertakings which, being subject to the greenhouse gas emission allowance trading obligation within the European Union, receive a free allocation of those allowances to provide information relating to all planned or effective changes to the capacity, activity level and operation of an installation, without limiting that requirement solely to information relating to changes that would affect the allocation.

[Signatures]