



Reports of Cases

JUDGMENT OF THE COURT (Tenth Chamber)

16 December 2021 *

(Reference for a preliminary ruling – Atmospheric pollution – System for greenhouse gas emission allowance trading – Directive 2003/87/EC – Installations for the combustion of fuels – Annex I – Total rated thermal input – Rules for calculation – Aggregation rule)

In Case C-575/20,

REQUEST for a preliminary ruling under Article 267 TFEU from the Fővárosi Törvényszék (Budapest High Court, Hungary), made by decision of 29 September 2020, received at the Court on 3 November 2020, in the proceedings

Apollo Tyres (Hungary) Kft.

v

Innovációért és Technológiáért Felelős Miniszter,

THE COURT (Tenth Chamber),

composed of C. Lycourgos (Rapporteur), President of the Fourth Chamber, acting as President of the Tenth Chamber, I. Jarukaitis and M. Ilešič, Judges,

Advocate General: E. Tanchev,¹

Registrar: A. Calot Escobar,

having regard to the written procedure,

after considering the observations submitted on behalf of:

- Apollo Tyres (Hungary) Kft., by T. Biczi, ügyvéd,
- the Hungarian Government, by M.Z. Fehér and K. Szíjjártó, acting as Agents,
- the European Commission, by G. Wils, B. De Meester and K. Talabér-Ritz, acting as Agents,

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

* Language of the case: Hungarian.

¹ Serving Advocate General when the case was presented at the General Meeting on 28 September 2021.

gives the following

Judgment

- 1 This request for a preliminary ruling concerns the interpretation of paragraph 3 of Annex I to Directive 2003/87/EC of the European Parliament and of the Council of 13 October 2003 establishing a system for greenhouse gas emission allowance trading within the Union and amending Council Directive 96/61/EC (OJ 2003 L 275, p. 32), as amended by Directive (EU) 2018/410 of the European Parliament and of the Council of 14 March 2018 (OJ 2018 L 76, p. 3) ('Directive 2003/87').
- 2 The request has been made in proceedings between Apollo Tyres (Hungary) Kft. ('Apollo Tyres') and the Innovációért és Technológiáért Felelős Miniszter (Minister for Innovation and Technology, Hungary) ('the Minister for Innovation') concerning the fine imposed by the latter on that company on the ground that it had emitted greenhouse gases without holding an emissions permit.

Legal context

European Union law

- 3 Article 2(1) of Directive 2003/87 provides:

'This Directive shall apply to emissions from the activities listed in Annex I and greenhouse gases listed in Annex II.'
- 4 Article 3 of that directive provides:

'For the purposes of this Directive the following definitions shall apply:

...

(b) "emissions" means the release of greenhouse gases into the atmosphere from sources in an installation or the release from an aircraft performing an aviation activity listed in Annex I of the gases specified in respect of that activity;

...

(e) "installation" means a stationary technical unit where one or more activities listed in Annex I are carried out and any other directly associated activities which have a technical connection with the activities carried out on that site and which could have an effect on emissions and pollution;

...'
- 5 Article 4 of that directive states:

'Member States shall ensure that, from 1 January 2005, no installation carries out 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 with Articles 5 and 6, or the installation is excluded from the [European Union system for greenhouse gas emission allowance trading (ETS)] pursuant to Article 27. This shall also apply to installations opted in under Article 24.’

6 Article 7 of that directive provides:

‘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. Where there is a change in the identity of the installation’s operator, the competent authority shall update the permit to include the name and address of the new operator.’

7 Under Article 12(3) of Directive 2003/87:

‘For the period until 31 December 2020, Member States shall ensure that, by 30 April each year, the operator of each installation surrenders a number of allowances, other than allowances issued under Chapter II, that is equal to the total emissions from that installation during the preceding calendar year as verified in accordance with Article 15, and that those allowances are subsequently cancelled. For the period starting from 1 January 2021, Member States shall ensure that, by 30 April each year, the operator of each installation surrenders a number of allowances, that is equal to the total emissions from that installation during the preceding calendar year as verified in accordance with Article 15, and that those allowances are subsequently cancelled, subject to the review referred to in Article 28b.’

8 Article 14(3) of that directive provides:

‘Member States shall ensure that each operator of an installation or an aircraft operator monitors and reports the emissions from that installation during each calendar year, or, from 1 January 2010, the aircraft which it operates, to the competent authority after the end of that year in accordance with the acts referred to in paragraph 1.’

9 Article 27a(3) of that directive provides:

‘Member States may also exclude from the EU ETS reserve or backup units which did not operate more than 300 hours per year in each of the three years preceding the notification under point (a) of paragraph 1, under the same conditions as set out in paragraphs 1 and 2.’

10 The activities listed in Annex I to that directive, entitled ‘Categories of activities to which this directive applies’, include the ‘combustion of fuels in installations with a total rated thermal input exceeding 20 MW (except in installations for the incineration of hazardous or municipal waste)’.

11 Paragraph 3 of that annex provides:

‘When the total rated thermal input of an installation is calculated in order to decide upon its inclusion in the EU ETS, the rated thermal inputs of all technical units which are part of it, in which fuels are combusted within the installation, are added together. These units could include all types of boilers, burners, turbines, heaters, furnaces, incinerators, calciners, kilns, ovens, dryers, engines, fuel cells, chemical looping combustion units, flares, and thermal or catalytic post-combustion units. Units with a rated thermal input under 3 MW and units which use

exclusively biomass shall not be taken into account for the purposes of this calculation. “Units using exclusively biomass” includes units which use fossil fuels only during start-up or shut-down of the unit.’

Hungarian law

- 12 Paragraph 2(24) of az üvegházhatású gázok közösségi kereskedelmi rendszerében és az erőfeszítés-megosztási határozat végrehajtásában történő részvételről szóló 2012. évi CCXVII. törvény (Law No 217 of 2012 on participation in the scheme for greenhouse gas emission allowance trading within the Community and the implementation of the decision on effort sharing) (*Magyar Közlöny* 2012/180. (XII.27.)), provides:

‘Installation means a stationary technical unit where one or more activities listed in paragraphs I to XXI of Annex 1 are carried out, or any other technically related activities, and any other activities which have a technical connection with the activities carried out on that site and which result in the emission of greenhouse gases listed in Annex I or which have a direct effect on such emissions.’

- 13 Paragraph 3.1 of Annex 1 to that law defines the activity as the ‘combustion of fuels in installations with a total rated thermal input exceeding 20 MW (except in installations for the incineration of hazardous or municipal waste)’.

- 14 Paragraph 1(5) of az üvegházhatású gázok közösségi kereskedelmi rendszerében és az erőfeszítés-megosztási határozat végrehajtásában való részvételről szóló 2012. évi CCXVII. törvény végrehajtásának egyes szabályairól szóló 410/2012. (XII. 28.) Korm. rendelet (Government Decree No 410 of 29 December 2012 on certain rules for the implementation of Law No 217 of 2012 on participation in the scheme for greenhouse gas emission allowance trading within the Community and the implementation of the decision on effort sharing) (*Magyar Közlöny* 2012/182. (XII.28.)) provides:

‘The authority shall issue an emissions permit on the basis of an administrative decision which establishes the environmental conditions of use where it considers that the operator satisfies the conditions established in [Law No 217 of 2012]. Annex 3 specifies the detailed substantive requirements for emissions permits.’

- 15 Under paragraph 2.7 of Annex 2 to that decree:

‘When the total rated thermal input of an installation is calculated in order to decide upon its inclusion in the Community scheme, the rated thermal inputs of all technical units which are part of it – including equipment which is exempt pursuant to Paragraph 15/B of [Law No 217 of 2012], that is to say, reserve and backup units – in which fuels are combusted within the installation, are added together. These units include all types of boilers, burners, turbines, heaters, furnaces, incinerators, calciners, kilns, ovens, dryers, engines, fuel cells, chemical looping combustion units, flares, and thermal or catalytic post-combustion units, including equipment which is exempt pursuant to Paragraph 15/B of [Law No 217 of 2012]. Units with a rated thermal input of less than 3 MW and units which use exclusively biomass shall not be taken into account for the purposes of this calculation. “Units using exclusively biomass” includes units which use fossil fuels only during start-up or shut-down of the unit.’

16 Paragraph 2(7) of a 140 kWth és annál nagyobb, de 50 MWth-nál kisebb teljes névleges bemenő hőteljesítményű tüzelőberendezések működési feltételeiről és légszennyező anyagainak kibocsátási határértékeiről szóló 53/2017. (X. 18.) FM rendelet (Order of the Minister for Agriculture No 53 of 18 October 2018 on the operating conditions and emission limit values for combustion units with a total rated thermal input greater than or equal to 140 kW but less than 50 MW) (*Magyar Közlöny* 2017/169. (X.18.)) provides:

‘The rated thermal input is the calorific value, expressed in kilowatts (kW) or megawatts (MW), of the fuel supplied per unit time to the combustion unit in question in order for the combustion unit to operate at the rated power established in an administrative decision.’

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

17 In its tyre production, Apollo Tyres operates three steam boilers.

18 The sole representative of the manufacturers of those boilers has certified that the maximum thermal input of those boilers had been set, by means of software, at the following levels: 8.991 MW, 8.791 MW and 8.962 MW. Furthermore, to ensure that the thermal input of those boilers remains below 20 MW, one of the boilers is always switched off, so that the maximum thermal input that can be reached by the installation is 17.953 MW (8.991 MW + 8.962 MW). Proof of this is provided by the gas consumption recording system, by the daily boiler records and by documentary evidence of gas consumption. The operating licence issued to Apollo Tyres, updated to reflect air quality protection requirements, also states that no more than two boilers may be in operation at any time; therefore, the maximum total rated thermal input that can be achieved is 17.953 MW.

19 On 20 March 2020, the Minister for Innovation imposed a fine of 29 000 000 forint (HUF) (approximately EUR 81 200) on Apollo Tyres for greenhouse gas emissions without a permit, on the ground that, contrary to what that company claims, having regard to the rated thermal input of the three boilers which are part of its installation, that installation has a total rated thermal input in excess of 20 MW, without it being necessary to take into account the restrictions placed on the rated power of those boilers.

20 Apollo Tyres disputes the lawfulness of that decision before the Fővárosi Törvényszék (Budapest High Court, Hungary).

21 That court is uncertain whether, in order to determine whether an installation must be included in the EU ETS, it is necessary for a technical unit which is part of that installation to have a direct effect on emissions. In other words, the issue is whether activities involving the combustion of fuels or directly associated activities are carried out in that technical unit, or whether the technical unit has a direct technical connection with those activities.

22 In those circumstances, the Fővárosi Törvényszék (Budapest High Court) decided to stay the proceedings and to refer the following question to the Court of Justice for a preliminary ruling:

‘Can [Directive 2003/87], and paragraph 3 of Annex I [thereto] in particular, be interpreted as meaning that, for the purposes of deciding upon the inclusion of the [combustion of fuels] by a particular installation in the [system] for greenhouse gas emission allowance trading within the

European Union (the EU ETS), [the calculation of] the total rated thermal input of the installation should take account of the fact that certain equipment that is part of the installation in question is subject to a restriction (which has been verified)?’

Consideration of the question referred

- 23 By its question referred for a preliminary ruling, the referring court asks, in essence, whether paragraph 3 of Annex I to Directive 2003/87 must be interpreted as meaning that the calculation of the total rated thermal input of an installation must take account of the restrictions placed by its operator on the maximum rated thermal input of that installation.
- 24 As a preliminary point, it must be recalled that Directive 2003/87 has the purpose of establishing an emission allowance trading system which seeks to reduce greenhouse gas emissions into the atmosphere to a level that prevents dangerous anthropogenic interference with the climate system and the ultimate objective of which is protection of the environment (judgment of 11 November 2021, *Energieversorgungscenter Dresden-Wilschdorf*, C-938/19, EU:C:2021:908, paragraph 67 and the case-law cited).
- 25 Article 2(1) of Directive 2003/87 provides that the scope of that directive applies to emissions from the activities listed in Annex I and greenhouse gases listed in Annex II, including, in particular, carbon dioxide (judgment of 28 July 2016, *Vattenfall Europe Generation*, C-457/15, EU:C:2016:613, paragraph 28).
- 26 In accordance with Article 3(e) of that directive, ‘installation’ is defined as a stationary technical unit where one or more activities listed in Annex I are carried out and any other directly associated activities which have a technical connection with the activities carried out on that site and which could have an effect on emissions and pollution.
- 27 The activities referred to in Annex I to that directive include the combustion of fuels in installations with a total rated thermal input exceeding 20 MW, except in installations for the incineration of hazardous or municipal waste (judgment of 28 July 2016, *Vattenfall Europe Generation*, C-457/15, EU:C:2016:613, paragraph 35).
- 28 Paragraph 3 of Annex I lays down an aggregation rule which specifies the conditions under which it is necessary to assess whether the total rated thermal input within an installation exceeds 20 MW (see, to that effect, judgment of 29 April 2021, *Granarolo*, C-617/19, EU:C:2021:338, paragraph 59).
- 29 Under that aggregation rule, the total rated thermal input of an installation is calculated by adding together the rated thermal input of all the technical units which are part of that installation, in which fuels are combusted, except units with a rated thermal input of less than 3 MW and units which use exclusively biomass.
- 30 In the present case, it is apparent from the order for reference that the installation at issue in the main proceedings, the activity of which consists in the combustion of fuels producing greenhouse gases, comprises three boilers. Although the maximum rated thermal input of each of those boilers exceeds 12 MW, a computerised process makes it possible to limit their respective rated

thermal input to 8.991 MW, 8.791 MW and 8.962 MW. Furthermore, a mechanism installed by the operator of those boilers has the effect that only two of those three boilers can operate simultaneously.

- 31 In order to answer the question referred by the referring court, it should be noted, in the first place, that the aggregation rule laid down in paragraph 3 of Annex I to Directive 2003/87 must be interpreted as requiring, in principle, the maximum rated thermal input of all the technical units which are part of the installation in question to be added up, even where those units do not function at full capacity.
- 32 First, such an interpretation is consistent with the objective pursued by Directive 2003/87, which, as stated in Article 1 thereof, consists in promoting reductions of greenhouse gas emissions in a cost-effective and economically efficient manner (judgment of 20 June 2019, *ExxonMobil Production Deutschland*, C-682/17, EU:C:2019:518, paragraph 55 and the case-law cited).
- 33 Thus, taking into account the maximum rated thermal input of the technical units of the installation in question when calculating the total rated thermal input of that installation makes it possible to subject more installations which emit greenhouse gases to the obligations imposed by that directive in order to protect the environment.
- 34 Moreover, taking that into account allows both the national authority competent for the allocation of allowances ('the competent national authority') and the operators to identify in a predictable way the installations which fall within the scope of that directive.
- 35 The obligations imposed by Directive 2003/87 on operators of installations subject to the EU ETS, and in particular: the obligation, laid down in Article 4 thereof, to obtain a greenhouse gas emissions permit; the obligation, laid down in Article 14(3) thereof, to monitor and report the greenhouse gas emissions caused by their activities; and the obligation, laid down in Article 12(3) thereof, to surrender, in principle, a number of allowances equal to the total emissions from their installations, would become extremely difficult to enforce by the competent national authority if an installation could lawfully be included or excluded from the ETS on the basis of mere temporary changes in the scale of its activity of combustion of fuels.
- 36 In addition, taking into account the maximum rated thermal input of the technical units which are part of an installation makes it possible to ensure that the constraints on operators of installations subject to the EU ETS are predictable and thus also contributes to the observance of the principle of legal certainty, according to which EU law must allow those concerned to know unequivocally what their rights and obligations are and take steps accordingly (see, to that effect, judgment of 25 November 2021, *Aurubis*, C-271/20, EU:C:2021:959, paragraph 69 and the case-law cited).
- 37 Second, such an interpretation is borne out by Article 27a(3) of Directive 2003/87. Under that provision, Member States may exclude from the EU ETS reserve or backup units of an installation provided, inter alia, that they did not operate more than 300 hours per year during the three years preceding the notification, by the Member State concerned, of those units to the European Commission. It follows that the mere fact that a technical unit of an installation does not operate during a certain period does not automatically mean that it should not be taken into account for the purposes of determining whether the installation of which it forms part is subject to the EU ETS.

- 38 Furthermore, the Commission document of 18 March 2010 entitled ‘Guidance on Interpretation of Annex I of the EU ETS Directive’, which, while not binding, may serve to clarify the general scheme of that directive (see, to that effect, judgment of 18 January 2018, *INEOS*, C-58/17, EU:C:2018:19, paragraph 41 and the case-law cited), states, in Section 3.3.1 thereof, that the total rated thermal input is normally specified by the manufacturer and is displayed on the technical device with the consent of an inspection body.
- 39 Third, the need to take into account, in the calculation of the total thermal input of an installation, the maximum rated thermal input of the technical units which are part of it is further confirmed by the fact that a number of language versions of paragraph 3 of Annex I to Directive 2003/87, inter alia the version in Spanish, Greek, Italian, Hungarian, Dutch or Portuguese, make express reference to the total ‘rated’ thermal input of the installation, calculated by adding together the ‘rated’ thermal input of the technical units which are part of that installation (see, by analogy, judgment of 22 June 2021, *Latvijas Republikas Saeima (Penalty points)*, C-439/19, EU:C:2021:504, paragraph 79).
- 40 Where it is used, as in the present case, in a technical and energy context, the adjective ‘rated’ refers, in its usual sense, to a characteristic or performance declared by the manufacturer of an appliance or installation or to a maximum continuous power which is achieved under normal operating conditions at the time of receipt of that appliance or installation, irrespective of whether that appliance or installation may, as the case may be, operate at certain times below such maximum power.
- 41 That being so, in the second place, it cannot be ruled out that an input restriction or the shutting down of an installation or a technical unit which is part of it may, under certain conditions, be taken into account in order to determine whether the total rated thermal input of the installation remains above 20 MW.
- 42 In that regard, it should be noted that, in order to ensure the accuracy of the data and circumstances that must be taken into account under the EU ETS, Article 7 of Directive 2003/87 requires operators to inform the competent national authorities of any extension or significant reduction of the capacity of their installations, which may require updating the greenhouse gas emissions permit (see, to that effect, judgment 8 March 2017, *ArcelorMittal Rodange et Schifflange*, C-321/15, EU:C:2017:179, paragraphs 25 and 26). It follows that, where the actual combustion capacity of an installation is reduced below 20 MW, that operator must be able to argue before the competent national authority that its installation is no longer subject to the obligation to hold an emissions permit.
- 43 Moreover, where permanent and verifiable restrictions are placed on the maximum rated thermal input of an installation or on one of its units, it would be contrary to the objective pursued by Directive 2003/87, as set out in paragraph 32 above, to fail to take account of such restrictions in order to determine whether that installation still falls within the EU ETS.
- 44 The guidance document referred to in paragraph 38 above states, moreover, in Section 4.3 thereof, that legal or physical restrictions which effectively prevent the full use of the maximum rated thermal input may be taken into account provided, first, that those restrictions are clearly identified by the competent national authority in an enforceable measure and, second, that they are subject to regular inspection by that authority.

- 45 In the light of the foregoing, and having regard, in particular, to the non-binding guidance provided by that guidance document, it must be held that, for the purposes of the aggregation rule provided for in paragraph 3 of Annex I to Directive 2003/87, the maximum rated thermal input of a technical unit which is part of an installation must not be taken into account, in its entirety, where, first, that production capacity has been reduced permanently by its operator, that is to say, in such a way that the reduction cannot be reversed without major technical intervention or without the agreement of the competent national authority, and, second, both that reduction and its permanent nature can in fact be verified by that authority. It is for that operator to provide that authority with the necessary evidence in that regard.
- 46 Provided that the conditions set out in the preceding paragraph of this judgment are complied with, the shutting down of a technical unit which is part of an installation means, for its part, that the maximum rated thermal input of that unit does not have to be taken into account for the purposes of that aggregation rule.
- 47 In the light of all the foregoing considerations, the answer to the question raised by the referring court is that paragraph 3 of Annex I to Directive 2003/87 must be interpreted as meaning that the total rated thermal input of an installation must be calculated by adding together the maximum rated thermal input of the technical units which are part of that installation, except where the restrictions placed by the operator on that maximum rated thermal input are permanent, and the existence of those restrictions and their permanent nature are in fact verifiable by the national authority competent for the allocation of allowances.

Costs

- 48 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 (Tenth Chamber) hereby rules:

Paragraph 3 of Annex I to Directive 2003/87/EC of the European Parliament and of the Council of 13 October 2003 establishing a system for greenhouse gas emission allowance trading within the Union and amending Council Directive 96/61/EC, as amended by Directive (EU) 2018/410 of the European Parliament and of the Council of 14 March 2018, must be interpreted as meaning that the total rated thermal input of an installation must be calculated by adding together the maximum rated thermal input of the technical units which are part of that installation, except where the restrictions placed by the operator on that maximum rated thermal input are permanent, and the existence of those restrictions and their permanent nature are in fact verifiable by the national authority competent for the allocation of allowances.

[Signatures]