Reports of Cases

ORDER OF THE COURT (First Chamber)

6 February 2019*

(Reference for a preliminary ruling — Environment — Scheme for greenhouse gas emission allowance trading within the European Union — Directive 2003/87/EC — Monitoring plan — Regulation (EU) No 601/2012 — Second subparagraph of Article 49(1) — Point 20 of Annex IV — Calculation of the emissions of an installation — Subtraction of carbon dioxide (CO_2) transferred — Exclusion of CO_2 used in the production of precipitated calcium carbonate — Assessment of the validity of the exclusion)

In Case C-561/18,

REQUEST for a preliminary ruling under Article 267 TFEU from the Verwaltungsgericht Berlin (Administrative Court, Berlin, Germany), made by decision of 27 August 2018, received at the Court on 4 September 2018, in the proceedings

Solvay Chemicals GmbH

v

Bundesrepublik Deutschland

THE COURT (First Chamber),

composed of J.-C. Bonichot (Rapporteur), President of the First Chamber, C. Toader, A. Rosas, L. Bay Larsen and M. Safjan, Judges,

Advocate General: E. Sharpston,

Registrar: A. Calot Escobar,

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,

makes the following

Order

1 This request for a preliminary ruling concerns the validity of Article 49(1), second subparagraph, of Commission Regulation (EU) No 601/2012 of 21 June 2012 on the monitoring and reporting of greenhouse gas emissions pursuant to Directive 2003/87/EC of the European Parliament and of the Council (OJ 2012 L 181, p. 30) and point 20 of Annex IV thereto.

* Language of the case: German.

2 The request has been made in proceedings between Solvay Chemicals GmbH and the Bundesrepublik Deutschland (Federal Republic of Germany) concerning the counting of carbon dioxide ('CO_2') generated in a soda ash production installation and transferred to a precipitated calcium carbonate ('PCC') installation as emissions within the meaning 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 the Council of 23 April 2009 (OJ 2009 L 140, p. 63) ('Directive 2003/87').

Legal context

EU law

Directive 2003/87

3 Directive 2003/87 applies, in accordance with Article 2(1) of that directive, 'to emissions from the activities listed in Annex I and greenhouse gases listed in Annex II'.

4 Article 3(b) of that directive defines the concept of 'emissions' as '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'.

5 Under Article 12(3) and (3a) of that directive:

'(3) 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.

(3a) An obligation to surrender allowances shall not arise in respect of emissions verified as captured and transported for permanent storage to a facility for which a permit is in force in accordance with Directive 2009/31/EC of the European Parliament and of the Council of 23 April 2009 [on the geological storage of carbon dioxide and amending Council Directive 85/337/EEC, European Parliament and Council Directives 2000/60/EC, 2001/80/EC, 2004/35/EC, 2006/12/EC, 2008/1/EC and Regulation (EC) No 1013/2006 of the European Parliament and of the Council (OJ 2009 L 140, p. 114)].'

6 Article 14(1) of Directive 2003/87, entitled 'Monitoring and reporting of emissions', states:

'By 31 December 2011, the Commission shall adopt a regulation for the monitoring and reporting of emissions and, where relevant, activity data, from the activities listed in Annex I, for the monitoring and reporting of tonne-kilometre data for the purpose of an application under Articles 3e or 3f, which shall be based on the principles for monitoring and reporting set out in Annex IV and shall specify the global warming potential of each greenhouse gas in the requirements for monitoring and reporting emissions for that gas.

That measure, designed to amend non-essential elements of this Directive by supplementing it, shall be adopted in accordance with the regulatory procedure with scrutiny referred to in Article 23(3).'

Regulation No 601/2012

7 The first paragraph of Article 5 of Regulation No 601/2012 provides:

'Monitoring and reporting for an installation shall cover all process and combustion emissions from all emission sources and source streams belonging to activities listed in Annex I to Directive 2003/87/EC and other relevant activities included pursuant to Article 24 of the Directive and of all greenhouse gases specified in relation to those activities while avoiding double-counting.'

8 Article 11(1) of that regulation is worded as follows:

'Each operator or aircraft operator shall monitor greenhouse gas emissions on the basis of a monitoring plan approved by the competent authority in accordance with Article 12, taking into account the nature and functioning of the installation or aviation activity to which it applies.

…'

9 It follows from Article 20(2) of that regulation that, 'when defining the monitoring and reporting process, the operator shall include the sector specific requirements laid down in Annex IV'.

10 Article 49(1) of Regulation No 601/2012, entitled 'Transferred CO_2', provides:

'The operator shall subtract from the emissions of the installation any amount of CO_2 originating from fossil carbon in activities covered by Annex I to Directive 2003/87/EC, which is not emitted from the installation, but transferred out of the installation to any of the following:

(a) a capture installation for the purpose of transport and long-term geological storage in a storage site permitted under Directive 2009/31/EC;

(b) a transport network with the purpose of long-term geological storage in a storage site permitted under Directive 2009/31/EC;

(c) a storage site permitted under Directive 2009/31/EC for the purpose of long-term geological storage.

For any other transfer of CO_2 out of the installation, no subtraction of CO_2 from the installation's emissions shall be allowed.'

11 Annex IV to that regulation, headed 'Activity-specific monitoring methodologies related to installations (Article 20(2))' addresses, in point 20, the 'Production of soda ash and sodium bicarbonate as listed in Annex I to Directive 2003/87/EC'. Under point 10(B) of Annex IV to Regulation No 601/2012, concerning 'Specific monitoring rules', it is provided, inter alia:

'Where CO_2 from the production of soda ash is used for the production of sodium bicarbonate, the amount of CO_2 used for producing sodium bicarbonate from soda ash shall be considered as emitted by the installation producing the CO_2.'

German law

12 As set out in Paragraph 5(1) of the Gesetz über den Handel mit Berechtigungen zur Emission von Treibhausgasen (Law on greenhouse gas emission allowance trading) of 21 July 2011 (BGBl. 2011 I, p. 1475), as amended:

'The operator shall, in accordance with Part 2 of Annex 2, calculate the emissions caused by its activities in a calendar year and shall report those emissions to the competent authority by 31 March of the following year.'

13 Paragraph 6(1) of that law, as amended, states:

'The operator shall, for each allowance trading period, submit a monitoring plan concerning the calculation and reporting of emissions under Paragraph 5(1) to the competent authority. …'

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

14 Solvay Chemicals operates an installation for the production of soda ash in Rheinberg (Germany), whose operation is subject to the scheme for greenhouse gas emission allowance trading. The parties agree that part of the CO_2 generated by that installation is transferred to another installation for the production of PCC, that CO_2 thus not being released into the atmosphere.

15 By its judgment of 19 January 2017, *Schaefer Kalk* (C-460/15, EU:C:2017:29), the Court found that the second subparagraph of Article 49(1) of Regulation No 601/2012 and point 10(B) of Annex IV to that regulation are invalid, in so far as they systematically include the CO_2 transferred to another installation for the production of PCC in the emissions of the lime combustion installation, regardless of whether that CO_2 is released into the atmosphere.

16 Following that decision, within the framework of the process of authorising a modified monitoring plan for its installation, Solvay Chemicals applied by post, on 25 September 2017, to the Deutsche Emissionshandelsstelle (German Emissions Trading Authority) ('the DEHSt'), for authorisation not to report on the CO_2 transferred for the purpose of PCC production on the ground that, being chemically bound within the PCC, the CO_2 was not released into the atmosphere and, therefore, does not correspond to the 'emissions' referred to in Article 3(b) of Directive 2003/87.

17 By decision of 21 December 2017, the DEHSt rejected that modified monitoring plan. That decision was confirmed on 4 May 2018. The DEHSt in fact took the view that the Court of Justice, by its judgment of 19 January 2017, *Schaefer Kalk* (C-460/15, EU:C:2017:29), expressly limited its declaration of invalidity to the rule contained in Regulation No 601/2012 according to which the CO_2 produced by lime combustion installations and transferred for the purpose of PCC production cannot be subtracted. Furthermore, the DEHSt found that, although it was probable that the similar provision in Regulation No 601/2012 governing production of soda ash, namely point 20 of Annex IV of that regulation, was also invalid, it did not have the competence, as an administrative authority, to disapply a rule of EU law.

18 By its action brought on 17 May 2018 before the Verwaltungsgericht Berlin (Administrative Court, Berlin, Germany), Solvay Chemicals contested the DEHSt's decision.

19 Entertaining doubts as to the validity of those provisions of Regulation No 601/2012, that court decided to stay the proceedings and to refer the following questions to the Court for a preliminary ruling:

'(1) Is Regulation [No 601/2012] invalid and does it infringe the aims of Directive 2003/87 in so far as the second subparagraph of Article 49(1) provides that CO_2 that is not transferred within the meaning of the first subparagraph of Article 49(1) is to be considered emitted by the installation producing the CO_2, regardless of whether it was released into the atmosphere?

(2) Is Regulation [No 601/2012] invalid and does it infringe the aims of Directive 2003/87 in so far as the second subparagraph of Article 49(1), applied in conjunction with Annex IV, point 20, of that regulation, provides that the CO_2 that is transferred from a soda ash production installation to another installation for the purpose of PCC production must systematically be included in that installation's emissions?'

Consideration of the questions referred

20 As a preliminary matter, it must be stated that, under the second subparagraph of Article 49(1) of Regulation No 601/2012 and point 20(B) of Annex IV thereto, the CO_2 produced by an installation for the production of soda ash and transferred, as in the case in the main proceedings, to another installation for the production of PCC is regarded as having been emitted by the first installation.

21 By its questions, which it is appropriate to consider together, in essence, the referring court asks the Court of Justice to rule on the validity of those provisions in so far as, by systematically including the CO_2 transferred for the production of PCC in the emissions of an installation for the production of soda ash, regardless of whether that CO_2 is released into the atmosphere, those provisions go beyond the definition of emissions as provided for in Article 3(b) of Directive 2003/87.

22 Under Article 99 of the Rules of Procedure of the Court of Justice, where a question referred for a preliminary ruling is identical to a question on which the Court has already ruled, where the reply to such a question may be clearly deduced from existing case-law or where the answer to the question referred for a preliminary ruling admits of no reasonable doubt, the Court may at any time, on a proposal from the Judge-Rapporteur and after hearing the Advocate General, decide to rule by reasoned order.

23 It is appropriate to apply that provision in the present reference for a preliminary ruling.

24 It should be noted that Regulation No 601/2012 was adopted on the basis of Article 14(1) of Directive 2003/87, according to which the Commission is to adopt a regulation relating, inter alia, to the monitoring and reporting of emissions, that measure being designed to amend non-essential elements of the directive by supplementing it. Consequently, an assessment, in the present case, of the validity of the provisions at issue of that regulation requires determination whether the Commission, by adopting those provisions, did not exceed the limits as provided for in Directive 2003/87 (judgment of 19 January 2017, *Schaefer Kalk*, C-460/15, EU:C:2017:29, paragraph 27).

25 According to Article 3(b) of Directive 2003/87, 'emissions' are, for the purposes of that directive, defined as the release of greenhouse gases into the atmosphere from sources in an installation. It thus follows from the very wording of that provision that, for there to be an 'emission' within the meaning of that provision, a greenhouse gas must be released into the atmosphere (judgment of 19 January 2017, *Schaefer Kalk*, C-460/15, EU:C:2017:29, paragraph 32).

26 It should be noted in that regard that Article 12(3a) of Directive 2003/87 indeed provides that, subject to certain conditions, emissions which have been captured and transported for their permanent geological storage to a facility for which a permit is in force in accordance with Directive 2009/31 are not subject to the allowance surrender obligations. Nevertheless, that does not mean that the EU legislature considered that operators are exempt from the obligation to surrender only in the sole instance of permanent geological storage (judgment of 19 January 2017, *Schaefer Kalk*, C-460/15, EU:C:2017:29, paragraphs 33 and 34).

27 By contrast to the second subparagraph of Article 49(1) of Regulation No 601/2012, which provides that for any other transfer of CO_2 no subtraction of CO_2 from the installation's emissions is to be allowed, Article 12(3a) of Directive 2003/87 contains no similar rule (judgment of 19 January 2017, *Schaefer Kalk*, C-460/15, EU:C:2017:29, paragraph 35).

28 The latter provision, which refers only to a particular situation and is intended to encourage the storage of greenhouse gases, was not intended to, and did not, amend the definition of 'emissions' within the meaning of Article 3 of Directive 2003/87, or even, by implication, the scope of that directive as established in Article 2(1) thereof (judgment of 19 January 2017, *Schaefer Kalk*, C-460/15, EU:C:2017:29, paragraph 36).

29 Consequently, for the purposes of determining whether the CO_2 resulting from the activity of soda ash production by an installation such as that at issue in the main proceedings falls within the scope of Directive 2003/87, under Article 2(1) thereof, and Annexes I and II thereto, it is necessary to ascertain whether such soda ash production leads to the release of CO_2 into the atmosphere (see, to that effect, judgment of 19 January 2017, *Schaefer Kalk*, C-460/15, EU:C:2017:29, paragraph 37).

30 It appears from the material before the Court that the CO_2 used for the production of PCC is chemically bound in that stable product. Moreover, the activities of PCC production are not among those which fall within the scope of that directive under Article 2(1) of Directive 2003/87 read in conjunction with Annex I thereto.

31 As evidenced by paragraph 39 of the judgment of 19 January 2017, *Schaefer Kalk* (C-460/15, EU:C:2017:29), in a situation where the CO_2 produced by an installation for the production of soda ash is transferred to an installation for the production of PCC, it appears, under the second subparagraph of Article 49(1) of Regulation No 601/2012 and point 10(B) of Annex IV to that regulation, that all of the CO_2 transferred, whether or not part of that CO_2 is released into the atmosphere during its transportation, due to leakages, or even the production process itself, is regarded as having been emitted by the installation for the production of soda ash in which that CO_2 was produced, although the transfer might not result in any release of CO_2 into the atmosphere. Those provisions therefore create an irrefutable presumption that the transferred CO_2 is, in its entirety, released into the atmosphere.

32 Similarly, in a situation where the CO_2 produced by an installation for the production of soda ash is transferred to an installation for the production of PCC, the application of the second subparagraph of Article 49(1) of Regulation No 601/2012 and of point 20(B) of Annex IV to that regulation, creates an irrefutable presumption that the transferred $CO_2$is, in its entirety, released into the atmosphere.

33 Those provisions thus lead to the CO_2 transferred in such circumstances being regarded as falling under the definition of 'emissions' within the meaning of Article 3(b) of Directive 2003/87, despite not always being released into the atmosphere. By adopting the second subparagraph of Article 49(1) of Regulation No 601/2012 and point 20(B) of Annex IV to that regulation, the Commission therefore broadened the scope of that definition (see, to that effect, judgment of 19 January 2017, *Schaefer Kalk*, C-460/15, EU:C:2017:29, paragraph 40).

34 Consequently, it follows from that presumption that the operators concerned may not, in any circumstances, subtract the amount of CO_2 transferred for the production of PCC from the aggregate emissions of their installations for the production of soda ash, despite the fact that that CO_2 may not always be released into the atmosphere. An impossibility such as that means that the allowances must be surrendered for all of the CO_2 transferred for the production of PCC and may no longer be sold as excess, thus calling into question the allowance trading scheme in circumstances nevertheless consonant with the ultimate objective of Directive 2003/87, which seeks to protect the environment by means of a reduction of greenhouse gas emissions (see, by analogy, judgment of 19 January 2017, *Schaefer Kalk*, C-460/15, EU:C:2017:29, paragraph 41).

35 It follows from all the foregoing that the Commission, having altered an essential element of Directive 2003/87 in adopting the second subparagraph of Article 49(1) of Regulation No 601/2012 and point 20(B) of Annex IV thereto, overstepped the limits laid down in Article 14(1) of that directive (see, by analogy, judgment of 19 January 2017, *Schaefer Kalk*, C-460/15, EU:C:2017:29, paragraph 48).

36 Consequently, the answer to the questions referred is that the second subparagraph of Article 49(1) of Regulation No 601/2012 and point 20(B) of Annex IV to that regulation are invalid in so far as they systematically include the CO_2 transferred to another installation for the production of PCC in the emissions of the installation for production of soda ash, regardless of whether that CO_2 is released into the atmosphere.

Costs

37 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 (First Chamber) hereby orders:

The second subparagraph of Article 49(1) of Commission Regulation (EU) No 601/2012 of 21 June 2012 on the monitoring and reporting of greenhouse gas emissions pursuant to Directive 2003/87/EC of the European Parliament and of the Council and point 20(B) of Annex IV to that regulation are invalid in so far as they systematically include the carbon dioxide (CO_2) transferred to another installation for the production of precipitated calcium carbonate in the emissions of the installation for production of soda ash, regardless of whether that CO_2 is released into the atmosphere.

[Signatures]