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Case Law of the Court of Justice of the European Union and the General Court

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Overview of the Judgments

Wrongful Free Allocation of Emission Allowances under the ETS Directive

Judgment of the Court (Second Chamber) of 28 April 2016 in Joined Cases C-191/14, C-192/14, C-389/14 and C-391/14 to C-393/14 – *Borealis Polyolefine GmbH and Others*

Subject Matter

This request for a preliminary ruling concerns a series of appeals, made by installations covered by the ETS Directive in Germany, the Netherlands and Italy, including Borealis Polyolefine. On different grounds they challenged the manner in which national authorities in their countries had implemented Decision 2011/278/EU, determining Union-wide rules for harmonized free allocation of emission allowances under Article 10a of the ETS Directive, and Decision 2013/448/EU, concerning national implementation measures for the transitional free allocation of emission allowances under Article 11(3) of the ETS Directive.

1 Judgements and orders not published in ECR have been included in this report only if considered of particular interest for the development of EU environmental law. Given the length of this special issue of JEEPL, only the overview of judgments is published.

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Being the claims put forward by Borealis Polyolefine GmbH and Others based, inter alia, on the invalidity of these two EU measures, the national courts decided to refer the matter to the Court of Justice. The Court of Justice decided in favor of the plea of illegality only as regards Directive 2013/448/EU, for the reason reported below, but limited the effects of the judgment in time.

Key Findings

65 Consequently, the reference in Article 10a(5) of Directive 2003/87 to 'installations which are not covered by paragraph 3' must be understood as referring to installations which are neither electricity generators, installations for the capture of CO_2, pipelines for transport of CO_2 nor CO_2 storage sites.

68 As a consequence, by not permitting the taking into account of the emissions of electricity generators in determining the maximum annual amount of allowances, Article 15(3) of Decision 2011/278 is consistent with the wording of Article 10a(5) of Directive 2003/87, read in conjunction with Article 10a(3) of that directive.

98 Since, as has been found in paragraph 95 above, the Commission did not determine the maximum annual amount of allowances in accordance with the requirements of subparagraph (b) of Article 10a(5) of Directive 2003/87, the correction factor laid down in Article 4 of, and Annex II to, Decision 2013/448 is also contrary to that provision.

111 It follows from all of the foregoing considerations that it is appropriate to limit the temporal effects of the declaration of invalidity of Article 4 of, and Annex II to, Decision 2013/448 so that, first, that declaration does not produce effects until 10 months following the date of delivery of this judgment so as to enable the Commission to adopt the necessary measures and, second, measures adopted during that period on the basis of the invalidated provisions cannot be called into question.

Reconciling Climate Change and Water Protection under the Water Framework Directive

Judgment of the Court (First Chamber) of 4 May 2016 in Case C-346/14 – *European Commission v Republic of Austria*

Subject Matter

This case concerns an infringement procedure against Austria for failing to comply with the requirements of the Water Framework Directive. According to the

Commission, the authorization for the building of a hydropower plant on the Schwarze Sulm granted in 2007 is in breach of Article 4 of the Water Framework Directive. Austria replied that the project is covered by the derogation ground in Article 4(7) of the Directive as it serves the mandatory requirement of promoting renewable energy in order to achieve several public goals, including fighting climate change.

Key Findings

82 In disputing the merits of the assessment conducted by the Governor of the Province of Styria, the Commission argues in particular that hydroelectricity is only one source of renewable energy among others and that the energy produced by the hydropower plant envisaged in the contested project will have only a minor impact on the regional and national energy supply. However, as the Commission has not put forward any specific complaints showing, for example, how the study referred to in paragraph 75 above, the conclusions of which were incorporated into the 2007 decision, is incomplete or incorrect due to inadequate analysis of the ecological impact of the project on the status of the body of surface water of the Schwarze Sulm, or due to a reliability issue vitiating the hydroelectricity production forecasts, or even comparative factors permitting a classification of the forecasted electricity production as low in comparison to the scale of the project, the conclusion must be that the Commission has failed to establish the infringement as alleged.

On the Relevance of Mitigating Factors for Errors in Completing the Forms for the Shipment of Waste

Judgment of the Court (Fourth Chamber) of 9 June 2016 in Case C-69/15 – *Nutrivet D.O.O.E.L.*

Subject Matter

This request for a preliminary ruling concerns a proceeding started by Nutrivet against the fine imposed upon the company by the Hungarian authorities. Nutrivet recognizes that it had compiled the accompanying document wrongly. Yet, the correct information had been made available to the competent authorities by means of other documents and there was no intention to mislead the authorities. Accordingly, Nutrivet asked the national court to conclude that the shipment of waste was not illegal under the Basel Regulation or that the fine was in breach of the EU principle of proportionality given the non-taking into account of such

mitigating factors. The national court hearing the case decided to refer the matter to the Court of Justice.

Key Findings

35 It should be noted in that regard that the information that must be given in the accompanying document on inter alia the importer/consignee, the recovery facility and the countries/States concerned enable a proper tracking of shipments to be ensured. Not only is that information relevant in terms of environmental protection, it is also necessary for the proper performance of the missions of supervision and control in order to preserve, protect and improve the quality of the environment and human health.

38 Given those errors and inconsistencies, the accompanying documents at issue in the main proceedings did not by themselves allow for tracking of the waste shipments at issue in the main proceedings. Therefore, those waste shipments must be held to be illegal shipments within the meaning of Article 2(35)(g)(iii) of Regulation No. 1013/2006.

40 This conclusion not called into question by the fact that the information required to be stated in the accompanying document is reproduced correctly in other documents made available to the competent authorities. Similarly, nor do a lack of intentional element and a failure to implement the procedures provided for in Article 24 of that regulation have any bearing on the matter.

54 In the present case, as evidenced by paragraph 38 of this judgment, the incorrect and inconsistent information contained in the accompanying documents at issue in the main proceedings constituted an infringement of the provisions of Regulation No. 1013/2006. Such an infringement may, in principle, be subject to an equivalent penalty to that provided for in respect of infringement of the obligation to complete that document.

55 However, according to the Court's settled case-law, the imposition of a fine penalising a shipment of waste for which the accompanying document contains incorrect or inconsistent information, the basic amount of which is the same as the fine imposed for infringement of the obligation to complete that document, is considered proportionate if the circumstances of the infringement make it possible to find that they involve equally serious infringements in the light of the risks they entail for protection of the environment and human health, which it is for the national court to ascertain (see, to that effect, judgment of 26 November 2015 in Total Waste Recycling, C-487/14, EU:C:2015:780, paragraphs 54 and 56).

On the Meaning of the Concepts of 'Installation' and 'Fuel Exported from an Installation' under the ETS Regime

Judgment of the Court (Sixth Chamber) of 9 June 2016 in Cases C-158/15 – *Elektriciteits Produktiemaatschappij Zuid-Nederland EPZ NV*

Subject Matter

This request for a preliminary ruling concerns an appeal brought by EPZ, an operator of a coal-fired power plant, against the decision of the Netherlands emissions authority (NEa). NEa decided not to consider the coal lost as a result of self-heating during the storage period as fuel exported from that installations within the meaning of Article 27(2) of Regulation No. 601/2012, on the monitoring and reporting of greenhouse gas emissions pursuant the ETS Directive. This affected the content of the monitoring plan for the EPZ installation. In appeal, EPZ argued that NEa had misinterpreted the EU regulatory framework. The Dutch Council of State asked the Court of Justice first whether the site in which the coal is sited can be consider as a separate installation under the ETS Directive, and, second, whether coal lost as a consequence of self-heating falls under Article 27(2) of Regulation No. 601/2012.

Key Findings

28 By contrast, with regard to the storage activity, even if it is assumed that the process of natural self-heating of the coal intended for that power plant, during the storage of that fuel, could be regarded as a combustion of fuels as referred to in Annex I to that directive, it is not apparent from the file before the Court that the thermal input of the storage site at issue in the main proceedings exceeds the threshold of 20 MW set by Annex I to that directive. That site cannot, therefore, be regarded as a stationary technical unit within the meaning of Article 3(e) of Directive 2003/87.

39 Both the wording of that provision, which incorporates the concept of 'export' rather than that of 'loss', and the objective pursued by Regulation No. 601/2012 of ensuring complete monitoring and reporting which cover, as Article 5 of that regulation makes clear, all process and combustion emissions from all emission sources and source streams belonging to activities listed in Annex I to Directive 2003/87 and of all greenhouse gases specified in relation to those activities, while avoiding double-counting, justify the conclusion that the loss of fuel such as that at issue in the main proceedings is not to be regarded as coal exported from the installation

within the meaning of the first subparagraph of Article 27(2) of that regulation.

On the Granting of Extra Free Emission Allowances to Avoid Undue Hardship under the ETS Directive

Judgment of the Court (First Chamber) of 22 June 2016 in Case C-540/14 P – *DK Recycling und Roheisen GmbH*

Subject Matter

This case concerns an appeal bought by DK Recycling against the General Court's judgement that had upheld only in part DK Recycling's claim for annulment of Commission Decision 2013/448/EU. By means of this Decision, the Commission had refused to accept German authorities' approval for the inscription of DK Recycling's installations on the list of ETS installations eligible for free allowances allocation. Before the Court of Justice, the Commission requested the substitution of the grounds of the General Court's judgment. The General Court had indeed dismissed the action brought by DK Recycling on the basis that the Commission could lawfully have adopted a provision providing for the free allocation of allowances in cases of 'undue hardship'. According to the Commission, the General Court should have dismissed the action by confining itself to noting that the Commission was not in any event competent to adopt such a provision.

Key Findings

52 Thus, in Article 10a(1) of Directive 2003/87, the legislature emphasised the requirement of full harmonisation by providing that 'the Commission shall adopt Community-wide and fully-harmonised implementing measures for the allocation of the allowances', and, moreover, indicated to the Commission the criteria in accordance with which harmonisation was to be undertaken, namely, in essence, on the basis of benchmarks in sectors and subsectors.

55 There is no doubt that the Commission's introduction into Decision 2011/278 of a provision permitting the free allocation of allowances to certain undertakings faced with 'undue hardship' following the application of the sectoral criteria laid down by that decision would have conflicted with the principle of the harmonised and sectoral allocation of allowances free of charge, since it would necessarily have implied a

case-by-case approach based on there being particular and individual circumstances peculiar to each operator affected by such 'undue hardship'. Consequently, such a provision would have been such as to amend an essential element of Directive 2003/87, thus undermining the scheme it establishes.

56 In those circumstances, the General Court erred in law in ruling, in paragraph 50 of the judgment under appeal, that the Commission was empowered, under Article 10a(1) of Directive 2003/87, to introduce such a provision.

On the Importance of Timely, Clear and Binding Rules to Implement the Water Framework Directive

Judgment of the Court (Sixth Chamber) of 30 June 2016 in Case C-648/13 *European Commission v Republic of Poland*

Subject Matter

This case concerns an infringement procedure against Poland for failure to implement several provisions of the Water Framework Directive. Despite the many improvements brought forward by Poland during the pre-litigation phase, there were still several aspects of the Polish implementation which were considered unacceptable by the Commission, which hence added the Court of Justice. The Court of Justice underlined the importance of adopting implementing measures which have unquestionable binding force, and are specific, precise and clear so as to satisfy the requirements of legal certainty, and concluded that Polish law did not fulfil such requirements, as recognized by the Polish government in most of the cases.

Judgment

1. Declares that, by failing to transpose completely or correctly Articles 2(19), (20), (26) and (27), 8(1), 9(2), 10(3) and 11(5) of Directive 2000/60/EC of the European Parliament and of the Council of 23 October 2000 establishing a framework for Community action in the field of water policy, as amended by Directive 2008/32/EC of the European Parliament and of the Council of 11 March 2008, points 1.3, 1.3.4, 1.3.5, 1.4 and 2.4.1 of Annex V to that directive and points 7.2 to 7.10 of Part A of Annex VII to that directive, the Republic of Poland has failed to fulfil its obligations under those provisions and Article 24 of that same directive;

On the Difference between Conservation, Preventive and Compensatory Measures under the Habitats Directive

Judgment of the Court (Seventh Chamber) of 21 July 2016 in Joined Cases C-387/15 and C-388/15 *Hilde Orleans and others*

Subject Matter

This request for a preliminary ruling concerns an appeal brought by Hilde Orleans and others against the validity of decisions by the Flemish Region establishing the Regional Development Implementation Plan for the 'Demarcation of the maritime port area of Antwerp — Port development on the left bank' ('the RDIP*'). The implementation of this plan includes a project for enlarging the port of Antwerp, which would affect a Nature 2000 site located in that area. According to the applications, this plan should have been subjected to the authorization procedure under Article 6(3 and 4) of the Habitats Directive, while the Flemish Region considered the plan a managing plan under Article 6(1) of the Directive, as the plan envisaged measures to create habitats in the nature reserve before the enlargement of the port is possible. The Belgian Council of State decided to add the Court of Justice and ask for a clarification of the provisions on the Directive on this matter.*

Key Findings

33 Accordingly, Article 6 of the Habitats Directive divides the measures into three categories, namely conservation measures, preventive measures and compensatory measures, provided for in Article 6(1), (2) and (4), respectively.

38 It should therefore be observed that, first, the findings of fact made by that court show that the measures at issue in the main proceedings envisage, inter alia, the disappearance of a part of that site. It follows that such measures cannot constitute measures ensuring the conservation of that site.

40 Accordingly, a preventive measure complies with Article 6(2) of the Habitats Directive only if it is guaranteed that it will not cause any disturbance likely significantly to affect the objectives of that directive, particularly its conservation objectives (judgment of 14 January 2016 in Grüne Liga Sachsen and Others, C-399/14, EU:C:2016:10, paragraph 41 and the case-law cited).

42 Accordingly, the points of law needed in order to provide an answer to the question referred should be confined to Article 6(3) and (4) of that directive.

50 However, the Court's case-law emphasises the fact that the assessment carried out under Article 6(3) of the Habitats Directive may not have lacunae and must contain complete, precise and definitive findings and conclusions capable of removing all reasonable scientific doubt as to the effects of the works proposed on the protected site concerned (judgment of 14 January 2016 in Grüne Liga Sachsen and Others, C-399/14, EU:C:2016:10, paragraph 50 and the case-law cited).

64 In the light of the foregoing considerations, the answer to the question referred is that Article 6(3) of the Habitats Directive must be interpreted as meaning that measures, contained in a plan or project not directly connected with or necessary to the management of a site of Community importance, providing, prior to the occurrence of adverse effects on a natural habitat type present thereon, for the future creation of an area of that type, but the completion of which will take place subsequently to the assessment of the significance of any adverse effects on the integrity of that site, may not be taken into consideration in that assessment. Such measures can be categorised as 'compensatory measures', within the meaning of Article 6(4), only if the conditions laid down therein are satisfied.

On the Relationship between Supremacy and Legal Certainty

Judgment of the Court (First Chamber) of 28 July 2016 in Case C-379/15 *Association France Nature Environnement*

Subject Matter and Judgment

This request for a preliminary ruling stems from a dispute between a French NGO (*Association France Nature Environnement*) *and the French Government concerning the validity of a French Decree relating to the assessment of certain plans and programmes having effect on the environment. The national court is of the opinion that, in light of earlier judgment of the Court of Justice, the decree breaches Directive 2001/42/EC on the assessment of the effects of certain plans and programmes on the environment. Indeed, the authority competent to perform the assessment is not sufficiently independent from the administrative body granting the authorization to fulfill the requirements of the Directive. The national judge is concerned by the effects that a declaration of illegality of the decree would have on the plan and programmes that have been established at the hand of provisions which are in breach of EU law. Accordingly, the national judge asked the Court of Justice to clarify under what conditions the effects of a*

declaration of invalidity of national law due to a breach of EU law can be limited in time. Further, the national court wanted to know in which cases it is required to ask for a preliminary reference in order to limit the effects of the declaration of invalidity in time.

Judgment

1. A national court may, when this is allowed by domestic law, exceptionally and case by case, limit in time certain effects of a declaration of the illegality of a provision of national law adopted in disregard of the obligations provided for by Directive 2001/42/EC of the Parliament and of the Council of 27 June 2001 on the assessment of the effects of certain plans and programmes on the environment, in particular the obligations arising from Article 6(3) of the directive, provided that such a limitation is dictated by an overriding consideration linked to environmental protection and having regard to the specific circumstances of the case pending before it. That exceptional power may, however, be exercised only if all the conditions flowing from the judgment of 28 February 2012 in Inter-Environnement Wallonie and Terre wallonne (C-41/11, EU:C:2012:103) are satisfied, namely:
   - that the contested provision of national law constitutes a measure correctly transposing EU law on environmental protection;
   - that the adoption and coming into force of a new provision of national law do not make it possible to avoid the damaging effects on the environment arising from annulment of the contested provision of national law;
   - that annulment of the contested provision of national law would have the effect of creating a legal vacuum concerning the transposition of EU law on environmental protection which would be more damaging to the environment, in the sense that that annulment would result in lesser protection and would thus run counter to the essential objective of EU law; and
   - that any exceptional maintaining of the effects of the contested provision of national law lasts only for the period strictly necessary for the adoption of the measures making it possible to remedy the irregularity found.

2. As EU law now stands, a national court against whose decisions there is no longer any judicial remedy under law is in principle required to make a reference to the Court for a preliminary ruling, so that the Court

may assess whether, exceptionally, provisions of national law held to be contrary to EU law may be provisionally maintained in the light of an overriding consideration linked to environmental protection and in view of the specific circumstances of the case pending before that national court. That national court is relieved of that obligation only when it is convinced, which it must establish in detail, that no reasonable doubt exists as to the interpretation and application of the conditions set out in the judgment of 28 February 2012 in Inter-Environnement Wallonie and Terre wallonne (C-41/11, EU:C:2012:103).

Conditions for Considering Backfilling of Excavation Voids with Waste Other than Excavation Waste as Waste for Recovery

Judgment of the Court (Fourth Chamber) of 28 July 2016 in Case C-147/15 *Cittá Metropolitana di Bari v Edilizia Mastrodonato*

Subject Matter

This request for a preliminary ruling stems from a dispute between the Municipality of Bari (Italy) and a building company. The latter wanted to backfill areas previously quarried using waste other than extractive waste. The construction company considered the waste it intended to use to backfill the quarry as waste for recovery, and hence wanted to apply the simplified authorization procedure provided for under Italian law implementing Directive 2006/21/EC on the management of waste from excavation industries. The Provincial Police Service of the Municipality of Bari considered that such operation should be subjected to the normal authorization procedure under national law implementing Directive 1999/31/EC on the landfill of waste, as it concerns waste disposal. The Italian Council of State decided to add the Court of Justice to receive clarification on the relationship between these two Directives and as regards the criteria to consider waste other than extraction waste used for backfilling as waste for disposal or, instead, waste for recovery.

Key Findings

31 Directive 1999/31 applies only to waste that is disposed of, not to waste that is to be recovered. As the Advocate General noted in point 38 of her Opinion, Article 3(1) of the directive provides that its provisions are to apply to all landfills, which are defined in Article 2(g) of the directive as waste disposal sites for the deposit of waste onto or into land.

34 Consequently, Article 10(2) of Directive 2006/21 must be interpreted as not having the effect of making an operation entailing the backfilling of a quarry using waste other than extractive waste subject to the requirements of Directive 1999/31, if that operation does not amount to a disposal, but to a recovery of waste.

38 Thus, that definition corresponds to the definition developed in the Court's case-law, according to which the essential characteristic of a waste recovery operation is that its principal objective is that the waste serves a useful purpose in replacing other materials which would have had to be used for that purpose, thereby enabling natural resources to be preserved (judgment of 27 February 2002 in ASA, C-6/00, EU:C:2002:121, paragraph 69).

49 In the light of the considerations set out in paragraphs 41 to 46 of the present judgment, it is incumbent on the referring court to determine whether, first, Edilizia Mastrodonato would still proceed with the backfilling of the excavation voids of the quarry it owns even if it had to refrain from using waste other than extractive waste to do so, and, second, whether the waste which is planned to be used is suitable for such backfilling. The operation at issue in the main proceedings may not be classified as a 'recovery' unless these two cumulative requirements are satisfied.

On the Starting of the Obligation to Surrender Emission Allowances

Judgment of the Court (Sixth Chamber) of 28 July 2016 in Case C-457/15 – *Vattenfall Europe Generation AG*

Subject Matter

This request for a preliminary ruling concerns a dispute between the operation of a power plant, Vattenfall Europe Generation AG, and the German Republic. The German Republic contested to Vattenfall Europe Generation AG the failure of the duty to surrend emission allowances in 2013 for the emissions generated by the power plant during its trial period. Vattenfall Europe Generation AG contested before the national court the applicability of the ETS Directive to such kinds of emissions as they are not intended for the generation of electricity. The Administrative Court, Berlin, Germany, decided to ask the Court of Justice whether the interpretation of the ETS Directive proposed by Vattenfall Europe Generation was correct.

Key Findings

33 The third paragraph of Article 20(1) of Regulation No. 601/2012 states that that obligation covers not only emissions from regular operations but also those generated by abnormal events, such as the start-up and shut-down of an installation. Since that list is not exhaustive, emissions generated during other abnormal events, such as those produced during the trial period of an installation, must also be taken into account for the purposes of the monitoring and reporting of emissions.

37 It is therefore not relevant, in an initial trial period during which there are releases of greenhouse gases into the atmosphere, that a power plant within the scope of Directive 2003/87 does not generate electricity, since it is not necessary, in the light of the obligation to surrender allowances, that the heat resulting from the combustion of fuels be used for that purpose.

38 It follows from the foregoing that an installation for the generation of electricity from the combustion of fuels whose production capacity exceeds the value set out in Annex I to Directive 2003/87 is subject to the obligations of the emissions trading scheme and, in particular, to the reporting obligation, with respect to emissions from all sources and source streams belonging to activities carried out at the installation, including the emissions generated during a trial period preceding the start of normal operation of that installation.