Annotations

Comment on case C-127/07

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The law on emissions trading is a very dynamic area. In this case, the Court on the one hand confirms that the regulations on emissions trading may develop in a step-by-step approach. On the other hand, regarding the dynamics in the area of the law of emissions trading, the origins of this judgment go back to the "founding times" of the law of emissions trading, i.e. to the time before the first trading period 2005 to 2007.

I.

Originally, the applicant in this judgment, the steel producer Arcelor, challenged the EU Emissions Trading System (EU ETS) directly before the Court of First Instance. On January 15 2004 Arcelor appealed to the Court of First Instance against the ETS Directive (Directive 2003/87/EC) by arguing that this Directive infringes its fundamental rights to property, that the steel industry has very little technical potential to reduce their greenhouse gas emissions and by invoking a breach of the principal of equality, alleging that other sectors in direct competition with the applicant and with comparable or higher emissions of greenhouse gases, such as producers of non-ferrous metals and chemicals, are not subject to the Directive.[12]

Whereas this action encountered problems of admissibility and was therefore not further followed, Arcelor followed the last mentioned problem of equality by applying against the French Decree No. 2004/832 dated as of August 19 2004, which implements Directive 2003/87 in the French legal order. As the requests of the applicants remained unanswered, Arcelor brought an action to the Conseil d'Etat for judical review. Whereas the Conseil d'Etat rejected the pleas in law put forward by the applicants such as the breach of the constitutional right to property and the freedom to carry on the business, the Conseil d'Etat further considered the question whether there is a breach of the constitutional principal of equal treatment as a result of a different treatment of comparable situations. In light of those considerations, the Conseil d'Etat

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[12] Case T-16/04, official journal of the European Union C-71/36, 20 March 2004.

decided to stay the proceedings and refer the question whether the Directive 2003/87 is valid in light of the principle of equal treatment, in so far as it makes the allowance trading scheme applicable to installations in the steel sector without including in its scope the aluminium and plastic industries to the Court for a preliminary ruling on the Article 234 EC.[13]

First of all, the Court states that the sectors that fall under the application of the EU ETS have certain economic disadvantages compared to the sectors which do not fall in the EU ETS: the operators which fall under the EU ETS have to hold a permit issued by a competent authority. Even more important than that, any operator in the scope of the EU ETS has the obligation to surrender allowances equal to the total emissions of the installation in each calendar year. Any operator who does not surrender sufficient allowances to cover its emissions during a calendar year shall be held liable for the payment of an access emissions penalty. The access emissions penalty shall be 100 € for each tonne of CO_2-equivalent emitted by that installation for that the operator has not surrendered allowances.

In this respect, the Court holds that the steel, chemical and non-ferrous metal sectors are therefore, for the purposes of examining the validity of Directive 2003/87, from the point of view of the principle of equal treatment, in a comparable position while being treated differently. According to the case law, for the Community legislative to be accused of breaching the principle of equal treatment, it must have treated comparable situations differently, thereby subjecting some persons to disadvantages as opposed to others. However, the principle of equal treatment will not be infringed, if the different treatment of the steel sector on the one hand and the chemical and non-ferrous sectors on the other hand is justified. A difference in treatment is justified if it is based on objective and reasonable criteria, that is, if the difference relates to a legally permitted aim pursued by the legislation in question and it is proportionate to the aim pursued by the treatment.

In its findings, the Court acknowledges that in the exercise of the powers confirmed on it the Community Legislator has a broad discretion where its actions involves political, economic and social choices and where it is called on to undertake complex assessments and evaluations. In addition, where it is called on to restructure or establish a complex system, it is entitled to have recourse to a step-by-step approach and to proceed in the light of experience gained. However, even where it has such a discretion,

13) This case C-127/07, Official Journal of the European Union C-117/8, 26 May 2007.

the Community Legislator is obliged to base its choice on objective criteria appropriate to the aim pursued by the legislation in question.

In the present case the Court finds that it is common ground that first the allowance trading scheme introduced by the Directive 2003/87 is a novel and complex scheme whose implementation and functioning could have been disturbed by the involvement of a too great number of participants and second, that the original definition of the scope of the Directive was dictated by the objective of attaining the critical mass of participants necessary for the scheme to be set up. In this regard, the chemical sector has an especially large number of installations, of the order of 34,000, not only in terms of the emissions they produce but also in relation to the number of installations currently included in the scope of the Directive, which is in the order of 10,000. The inclusion of that sector and the scope of Directive 2003/87 could therefore have made the management of the allowance trading scheme more difficult and increased the administrative burden, so that the possibility that the functioning of the scheme could have been disturbed at the time of its implementation as a result of that inclusion cannot be excluded. Therefore and having regard to the step-by-step approach on which the Directive 2003/87 is based, in a first stage of implementation of the allowance trading scheme, the difference in treatment between the chemical sector and the steel sector may be regarded as justified. Therefore, the Court finds that the Community Legislator did not infringe the principle of equal treatment by treating comparable situations differently when it excluded the chemical and non-ferrous metal sector from the scope of Directive 2003/87.

II.

By confirming this step-by-step approach in the development of the law of emissions trading, the Court has justified one of the main features of the EU ETS. Regarding the urgency situation in the environmental problem of climate change, the EC had decided to start with the ETS in 2005 with a limited scope. This limitation did not only apply to the scope of the sectors and operators, but also to the greenhouse gases: The EC limited itself at the beginning to regulate CO_2. In addition to this, experience was also gained during the development of the EU ETS with the allocation method. To start the system, the EC limited itself on the grandfathering method for the first trading period.

In all these three respects, the development went on for the three trading periods. This dynamic character was laid down in Article 30 of the original Directive which regulated the further development concerning other sectors

and also other gases. With respect to this dynamic development, the EC used the advantage that the international obligations of the Kyoto-Protocol where laid down in periods. In this context, the EC could use the first trading period from 2005 to 2007 as a "learning phase" and for implementing the infrastructure of the ETS. With these lessons learned, the EC could make some amendments to the Directive for the actual Kyoto compliance period 2008 to 2012. For example, in this period the benchmarking approach was more frequently used in the allocation of allowances. Further on, starting in 2012, the aviation sector will also be included in the ETS.[14] Starting 2013, the ETS will be fundamentally amended and altered in a number of aspects.[15] New sectors such as the production of aluminium, production and processing of non-ferrous metals and the chemical industry, as well as new gases such as perfluorocarbons and nitrous oxid will be included. Above all, the method of allocation will fundamentally be altered to auctioning allowances for the energy sector and basically allocate allowances to the industry sector by using the benchmarking method.

III.

The legal action concerning this case was brought to the Court in 2004, that is before the starting of the ETS in 2005. At this time, some parts of the industry tried to challenge the ETS fundamentally. Today in spring 2009, it can be stated that the ETS was basically confirmed by the European Court of Justice and the National Courts,[16] however a great number of judical proceedings to the European Court of Justice and to National Courts were

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14) The Directive 2008/101/EC of the European Parliament and the Council of 19 November 2008 emending Directive 2003/87/EC so as to include aviation activities in the scheme for greenhouse gas emission allowance trading within the Community was published on 13 January 2009 in the Official Journal of the European Union L 8/3 *et seq*, and entered into force on 2 February 2009. The Directive provides that each flight within the EC or from or to the EC shall fall in the ETS.

15) See Proposal for a Directive of the European Parliament and of the Council amending Directive 2003/87/EC so as to improve and extend the greenhouse gas emission allowance trading system of the Community, as adopted by the Council summit on 12 December 2008 and by the European Parliament on 17 December 2008.

16) For example decisions of the German Federal Administrative Court dated as of 30 June 2005 and decision of the German Federal Constitutional Court as of Spring 2007.

brought to the Courts regarding questions within the system of the ETS.[17] So, whereas the Court has basically confirmed the ETS and its step-by-step approach, questions within the systems have still to be decided.

[17] Court of first instance, decision as of 7 November 2007 (T-374/04) concerning German ex-post corrections; Court of First Instance, decision as of 11 September 2007 (T-28/07) concerning guaranties of allocation in the German National Allocation Act; Court of First Instance, decision as of 23 November 2005 (T-178/05) concerning the British National Allocation Act.