

Case C-575/20**Request for a preliminary ruling****Date lodged:**

3 November 2020

Referring court:

Fővárosi Törvényszék (Budapest High Court, Hungary)

Date of the decision to refer:

29 September 2020

Applicant:

Apollo Tyres (Hungary) Kft.

Defendant:

Innovációért és Technológiáért Felelős Miniszter (Minister for Innovation and Technology)

Fővárosi Törvényszék (Budapest High Court)

[...]

In the administrative-law proceedings between **Apollo Tyres (Hungary) Kft.** ([...] Gyöngyöshalász [...] [Hungary]) [...], the applicant, and the **Innovációért és Technológiáért Felelős Miniszter** (Minister for Innovation and Technology) ([...] Budapest [...]) [...], the Budapest High Court has issued the following

Decision:

This court is making a reference to the Court of Justice of the European Union for a preliminary ruling in order to obtain an interpretation of the provisions 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.

This court refers [the following question] to the Court of Justice of the European Union:

Can Directive 2003/87/EC, and paragraph 3 of Annex I thereof 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 scheme 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)?

[...] [procedural considerations of domestic law]

Grounds

This court asks the Court of Justice of the European Union to interpret Article 3(e) of Directive 2003/87/EC and paragraph 3 of Annex I to the directive in order to determine the total rated thermal input of certain installations included in the scheme for greenhouse gas emission allowance trading within the Union ('the EU ETS').

I. Relevant provisions of law

EU law

Directive 2003/87/EC of the European Parliament and of the Council establishing a scheme for greenhouse gas emission allowance trading within the Community and amending Council Directive 96/61/EC.

European Commission guidance on interpretation of Annex I to the directive.

Hungarian law

Az üvegházhatású gázok közösségi kereskedelmi rendszerében és az erőfeszítés-megosztási határozat végrehajtásában történő részvételtől szóló 2012. évi CCXVII. törvény (Law CCXVII of 2012 on participation in the Community scheme for greenhouse gas [emission allowance] trading and in the implementation of the decision on effort sharing, 'Law CCXVII of 2012').

Article 2(24) of the law establishes the following definition:

'installation means a stationary technical unit where one or more activities listed in paragraphs I to XXI of Annex I 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'.

Article 2(46) and (47) of the law contains the following definitions:

‘46. reserve unit: equipment that generates emissions which is used as a replacement for the equipment that operates in an installation under normal operating conditions;

47. backup unit: equipment that generates emissions which is operational and which is brought into service in an installation where the primary source of power is not available for reasons of force majeure’.

For the purposes of paragraph 3(I) of Annex I, ‘activity’ means the ‘combustion of fuels in installations with a total rated thermal input of more than 20 MWt (other than installations for the incineration of hazardous or municipal waste)’.

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 410/2012 of 28 December 2012 on regulations implementing Law CCXVII of 2012 on participation in the Community scheme for greenhouse gas emission allowance trading and in the implementation of the decision on effort sharing, ‘Government Decree No 410/2012’).

Article 1(5): ‘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 CCXVII of 2012. Annex 3 specifies the detailed substantive requirements for emissions permits.’

Paragraph 3.I of the table in Annex 2 defines ‘activity’ as the ‘combustion of fuels in installations with a total rated thermal input of more than 20 MWt (other than installations for the incineration of hazardous or municipal waste and diesel generators used as an emergency source of power in nuclear power plants)’.

Paragraph 2(7) of Annex 2 provides as follows: ‘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 Article 15/B of Law CCXVII of 2012, that is to say, reserve and backup units — 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, including equipment which is exempt pursuant to Article 15/B of Law CCXVII of 2012. 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.’

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 53/2017 by the Minister for Agriculture of 18 October 2017 on the operating conditions for combustion units with a total rated thermal input greater than or equal to 140 kWt but less than 50 MWt and the emission limit values for air pollutants, ‘Ministerial Order 53/2017 of 18 October 2017’).

Article 2(7) of the order provides that ‘the rated thermal input is the calorific value, expressed in kilowatts [thermal] (kWt) or megawatts [thermal] (MWt), 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’.

II. Subject matter of the main proceedings and relevant facts

In 2017 the applicant began manufacturing tyres. In its operations it uses three Bosch Universal UL-S 18000 steam boilers. The company Kazántrade Kft. has certified that computer software sets the boilers’ maximum combustion power at the following levels: 8 991 kW — 8 791 kW — 8 962 kW. To ensure that the applicant’s thermal input remains below 20 MWt at all times, one of the boilers is always switched off, so that the maximum thermal input that can be reached is 17 953 kW (8 991 kW + 8 962 kW). Proof of this is provided by the gas consumption recording system, which is available online, and the daily boiler records and documentary evidence of gas consumption held at the installation. The applicant’s operating licence, updated to reflect air quality 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 kW’.

The Minister for Innovation, who is the defendant and the authority responsible for issuing emissions permits, fined the applicant for carrying on an activity that generates greenhouse gas emissions without the relevant permit. That is the issue with which the proceedings before this administrative court are concerned. The defendant considers that the operating practice cited by the applicant, which [gives] a lower thermal input for the operation of the steam boilers (the 17 953 MWt stated as the ‘rated power of the equipment’) shows the total rated thermal input of only two boilers; in other words, it is the sum of the thermal inputs of the largest boilers to which the restriction applies, and therefore it does not provide the total rated thermal input of all (three) boilers.

Citing national law and the legislation governing the EU ETS, the defendant states that there is no current provision that would enable the rated thermal input to be altered by the aforesaid method of operating the equipment in the installation (that is, using software to restrict operation). The total rated input of the three steam boilers restricted by the software still exceeds 20 MWt.

In the light of the above, the conclusion reached by the defendant in his decision was that, when examining inclusion in the EU scheme (the EU ETS), there is no requirement to take into consideration the combustion of fuel at any given time, and therefore the examination must take account of the rated thermal input of all the technical units which are part of the installation.

Main arguments of the parties

The **applicant** has asked this court, amongst other things, to declare that, when determining inclusion in the EU ETS, the calculation of the total rated thermal input must take into account a restriction which prevents the equipment subject to that restriction from running at the same time as the operational equipment, or from operating at a thermal input that exceeds the restriction.

In the applicant's opinion, under both EU law and national law, for the purpose of the inclusion of an activity in the EU ETS, if equipment — whether a generating unit or a reserve or backup unit — has a direct effect on emissions, it is important to know whether that equipment is used to carry out activities in which fuels are combusted or activities directly related to such activities, or whether the equipment has a direct technical connection with those activities.

Specifically, it argues that the concept of rated thermal input is not defined in the directive or in EU law. According to section 3.3.1 of the European Commission guidance on interpretation of Annex I to the directive, the total rated thermal input is specified by the manufacturer and is usually displayed on the equipment, with the consent of the inspection body. Where no information on the total rated thermal input specified by the manufacturer is available, the operator of the equipment must provide the competent authority with an estimate (based, for example, on the maximum fuel throughput achieved in a 24-hour period during the last year) in order to obtain approval.

Under the Hungarian legislation, the equipment's rated power is determined by an administrative decision; moreover, the equipment's rated power is not the same as the equipment's rated thermal input, since the latter is the calorific value of the fuel required in order to operate at the rated power.

Thus, Article 2(7) of Ministerial Order 53/2017 of 18 October 2017 does not stipulate that the thermal input of the installation must be specified by an administrative decision. The basic permit established the rated thermal inputs of the boilers and classed the third boiler as a 'reserve' unit, since the actual maximum thermal input required by the production technology could be met by two boilers operating simultaneously. Before the start of the administrative procedure conducted by the defendant, the basic permit was updated in order to establish the rated power of the equipment in an official document, in a manner which took into account the physical and software restrictions on the boilers. During the procedure conducted by the defendant, the applicant has provided evidence (in the form of records and statements) on several occasions to show that

the boilers are subject to both a physical and a software restriction, but the defendant has declined to accept this because, when examining inclusion in the EU ETS, he has only taken into account the total rated thermal input specified in the basic permit. According to the applicant, in order to issue an emissions permit, the defendant is required to examine specifically whether the conditions in Law CCXVII of 2012 are satisfied (that is, whether the installation operated by the applicant has a total rated thermal input of more than 20 MW), over and above the information contained in the basic permit. An examination of the total rated thermal input of the installation is an important part of the procedure for issuing an emissions permit, particularly with regard to reaching a reasoned decision, because, under Annex 3 of Government Decree No 410/2012, the determination of total rated thermal input is an obligatory element of the emissions permit. Moreover, in the course of the procedure the applicant has demonstrated that the actual thermal input of the boilers is lower than the total rated thermal input specified in the basic permit, due to the restrictions under which they operate. In the light of these considerations, the defendant's contention that a decision on inclusion in the EU ETS must be based solely on the total rated thermal input stated in the basic permit does not make sense. If the basic permit, as an official document, gives the restricted capacity as the rated power of the equipment, the defendant will disregard it; but if the basic permit gives the total rated thermal input as the rated power, the defendant will accept it at face value, without examining its characteristics. Paragraph 3 of Annex I to the directive allows regard to be had to the total rated thermal input of the technical units of the installation in which fuels are combusted. In other words, the equipment that is subject to restrictions cannot be classed as technical units in which fuels are combusted, to the extent that the restriction applies, and therefore the rated thermal input of that equipment cannot be included in the calculation of the total rated input. Based on the definition of installation in Article 3(e) of the directive, any technical unit in which it is not possible to carry out an activity because of a restriction, or in which the activity can be carried out only to a lesser extent because of a restriction imposed by software, or which does not have a direct technical connection with the activities carried out on that site cannot — for such time as the restriction remains in place, and to the extent that the restriction applies — have an effect on emissions and pollution; therefore, the part of the equipment that is restricted will not be part of the installation for the purposes of determining inclusion in the EU ETS either.

Drawing parallels with the Hungarian legislation, when calculating the total rated thermal input for the purposes of including an activity in the EU ETS, the calculation should cover the rated thermal input of the technical units of the installation in which fuels are combusted. For the restricted equipment, the activity is carried out below the value of that limit and therefore it does not produce greenhouse gases; and, because of the restriction, it can have only an indirect effect on emissions if the restriction is lifted; it follows, therefore, that the part of the equipment that is restricted is not part of the installation. Since the restricted equipment cannot be deemed a unit in service that is operating up to the

limit value, it is not classed as a reserve or backup unit under the Hungarian legislation.

To summarise these arguments, under both EU and national law, in order to decide on the inclusion of an activity in the EU ETS it is essential to determine whether there is equipment — regardless of whether it is classed as part of the installation or as a reserve or backup unit — which has a direct effect on emissions, whether activities in which fuels are combusted or directly associated activities are carried out in that equipment, or whether the equipment has a direct technical connection with those activities. If the answer is no, then the rated thermal input of that equipment may be disregarded for the purposes of calculating the total rated thermal input.

The **defendant** maintains that the only documents that could be accepted as proof of the restricted thermal input are certificates of conformity with technical safety requirements issued after the alteration or restriction which also include a reliable statement of the rated thermal input of the combustion unit. For the purposes of determining the rated thermal input as part of the procedure for issuing an emissions permit, ‘the thermal input that reflects the actual situation’ is not decisive, because only the manufacturer’s specifications (in an operating manual or displayed on the equipment) are decisive. Consequently, the rated thermal input is specified by the manufacturer and is constant; therefore it can only be altered if the boiler is altered.

Based on paragraph 2(7) of Annex 2 to Government Decree No 410/2012 and Article 1(5) of the decree, only official documents can be accepted as evidence of the total rated thermal input and, therefore, the inclusion of the applicant’s activity in the EU ETS can be assessed on the basis of the sum of the rated thermal inputs of the combustion units as stated in the applicant’s basic permit. There is no provision in the legislation governing the EU ETS that would allow the rated thermal input to be reduced to take account of physical or software restrictions on the operation of the equipment in the installation. The basic permit must also state the authorised technical practice, to enable the defendant to take that practice into consideration when issuing the emissions permit. The restriction on the boilers may be taken into account when determining the total rated thermal input of the installation if the restriction is confirmed by official documents.

III. Reasons for the request for a preliminary ruling

In order to reach a decision in these proceedings, it is necessary to determine whether, for the purposes of the inclusion of an activity in the EU ETS, regard must be had as to whether equipment — that is, a unit that is part of the installation, even if it is a reserve or backup unit — has a direct effect on emissions, whether activities in which fuels are combusted or directly associated activities are carried out in that equipment, or whether the equipment has a direct technical connection with those activities. If the answer is no, [the court asks

whether] the rated thermal input of the equipment in question may be disregarded for the purposes of calculating the total rated thermal input.

[...] [...] [procedural considerations of domestic law]

Budapest, 29 September 2020.

[...] [signatures]

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