

**Case T-374/04**

**Federal Republic of Germany**

**v**

**Commission of the European Communities**

(Environment — Directive 2003/87/EC — Scheme for greenhouse gas emission allowance trading — German national allocation plan for emission allowances — Measures for the ex-post adjustment of the amount of allowances allocated to installations — Commission rejection decision — Equal treatment — Duty to state reasons)

Judgment of the Court of First Instance (Third Chamber, Extended Composition), 7 November 2007 . . . . . II - 4441

**Summary of the Judgment**

1. *Community law — Principles — Principle of subsidiarity*  
(Arts 5, second para., EC, 174 EC to 176 EC, 211 EC, 226 EC, 249, third para., EC)

2. *Environment — Atmospheric pollution — Directive 2003/87 — National allocation plan for the allocation of greenhouse gas emission allowances (NAP)*  
*(European Parliament and Council Directive 2003/87, recital 5 and Arts 1, 9(3) and 10)*
  
3. *Environment — Atmospheric pollution — Directive 2003/87 — National allocation plan for the allocation of greenhouse gas emission allowances (NAP)*  
*(Arts 211 EC and 226 EC; Commission Regulation No 2216/2004; European Parliament and Council Directive 2003/87, Arts 9 and 11(1) and Annex III)*
  
4. *Environment — Atmospheric pollution — Directive 2003/87 — National allocation plan for the allocation of greenhouse gas emission allowances (NAP)*  
*(Art. 249 EC; European Parliament and Council Directive 2003/87, Arts 9(1) and (3) and 10, and Annex III)*
  
5. *Environment — Atmospheric pollution — Directive 2003/87 — Aim*  
*(European Parliament and Council Directive 2003/87, recitals 2, 5, 7 and 20 and Art. 1)*
  
6. *Environment — Atmospheric pollution — Directive 2003/87 — Criteria applicable to national allocation plans (NAP)*  
*(European Parliament and Council Directive 2003/87, recital 7 and Annex III, criterion 10)*
  
7. *Environment — Atmospheric pollution — Directive 2003/87 — Criteria applicable to national allocation plans (NAP)*  
*(European Parliament and Council Directive 2003/87, recitals 5, 7 and 20, Art. 1 and Annexes I and III, criterion 10)*
  
8. *Environment — Atmospheric pollution — Directive 2003/87 — Criteria applicable to national allocation plans (NAP)*  
*(European Parliament and Council Directive 2003/87, Art. 1 and Annex III, criterion 5)*

9. *Acts of the institutions — Statement of reasons — Obligation — Scope*  
 (Art. 253 EC; European Parliament and Council Directive 2003/87, Art. 9(3))

1. When a directive does not prescribe the form and methods for achieving a particular result, the freedom of action of the Member States as to the choice of the appropriate forms and methods for obtaining that result remains, in principle, complete. Nevertheless, the Member States are required, within the bounds of the freedom left to them by the third paragraph of Article 249 EC, to choose the most appropriate forms and methods to ensure the effectiveness of directives. It also follows that, where there is no Community rule prescribing clearly and precisely the form and methods that must be employed by the Member State, the Commission has the task, when exercising its supervisory power, pursuant in particular to Articles 211 EC and 226 EC, of proving to the required legal standard that the instruments used by the Member State in that respect are contrary to Community law.

fall within its exclusive competence the Community is to take action only if and in so far as the objectives of the proposed action cannot be sufficiently achieved by the Member States and can therefore, by reason of the scale or effects of the proposed action, be better achieved by the Community. Accordingly, in a field, such as that of the environment governed by Articles 174 EC to 176 EC, where the Community and the Member States share competence, the Commission bears the burden of proving the extent to which the powers of the Member State and, therefore, its freedom of action, are limited.

(see paras 78, 79)

It is only by applying those principles that compliance with the principle of subsidiarity enshrined in the second paragraph of Article 5 EC can be ensured, a principle which binds the Community institutions in the exercise of their legislative functions. According to that principle, in areas which do not

2. Whilst the Member States have a degree of freedom of action when transposing Directive 2003/87, establishing a scheme for greenhouse gas emission allowance trading within the Community and amending Directive 96/61, the fact remains that, first, the Commission is empowered to verify whether the measures adopted by Member States are consistent with the criteria set out in

Annex III to the directive and with Article 10 thereof and, second, in carrying out that review itself has a discretion in so far as the review entails complex economic and ecological assessments carried out in the light of the general objective of reducing greenhouse gas emissions by means of a cost-effective and economically efficient allowance trading scheme (Article 1 of Directive 2003/87 and recital 5 in its preamble).

that the competent authority did not clearly exceed the bounds of its discretion and that the procedural guarantees, which are of particularly fundamental importance in this context, have been fully observed.

(see paras 80, 81)

It follows that, in its review of legality in that regard, the Community judicature conducts a full review as to whether the Commission applied properly the relevant rules of law, whose meaning must be determined in accordance with the methods of interpretation recognised by the case-law. On the other hand, the Community judicature cannot take the place of the Commission where the latter must carry out complex economic and ecological assessments in this context. In this respect, the Court is obliged to confine itself to verifying that the measure in question is not vitiated by a manifest error or a misuse of powers,

3. The fact that Article 11(1) of Directive 2003/87 establishing a scheme for greenhouse gas emission allowance trading within the Community and amending Directive 96/61 obliges the Member State to base its allocation decision on its national allocation plan (NAP), as examined by the Commission under Article 9 of that directive and possibly amended at its request, does not necessarily mean that a subsequent modification of the individual allocations of allowances is no longer possible. In accordance with the final words of the second sentence of Article 11(1), read in conjunction with criterion 9 of Annex III to Directive 2003/87, the content of the allocation decision also depends on the second public consultation. This second public consultation does not take place until after the Commission has examined the notified NAP, and it must be capable of leading to amendment of the allocation which the Member State

proposes to lay down by its allocation decision, if that consultation is not to be deprived of its effectiveness and the comments of the public are not to be rendered purely academic.

cises as a result of the instruments for management and verification that are provided for by Regulation No 2216/2004 for a standardised and secured system of registries pursuant to Directive 2003/87 and Decision No 280/2004, and the general supervisory power with which it is vested under Articles 211 EC and 226 EC and which permits it to act at any time if Community law is infringed.

Thus, in the absence of an express prohibition in Article 11(1) of subsequent amendment of the individual allocation of allowances for greenhouse gas emissions, the NAP and the allocation decision may expressly provide for such a possibility of amendment, provided that the criteria for exercise of that power are laid down in an objective and transparent manner.

(see paras 105, 106)

Since those additional criteria do not constitute criteria defined in Annex III to Directive 2003/87, the Commission's power of review under Article 9(3) of that directive is necessarily restricted and is limited to the question whether the additional criteria — introduced by the Member State in the exercise of the discretion which it is allowed for transposition of the directive — fulfil the conditions of objectivity and transparency. Any subsequent amendment of the individual allocations of allowances, occurring after the allocation decision under Article 11(1) of that directive, does not result in the Commission losing all possibility of review, given the permanent supervision which it exer-

4. The guidance developed by the Commission in accordance with Directive 2003/87 establishing a scheme for greenhouse gas emission allowance trading within the Community and amending Directive 96/61, though founded on an express legal basis laid down in the final sentence of the first subparagraph of Article 9(1) of that directive, according to which 'the Commission shall ... develop guidance on the implementation of the criteria listed in Annex III', does not correspond to any of the measures of secondary Community law that are provided for in Article 249 EC. Accordingly, the guidance falls within the

category of rules which, as such, do not, in principle, have independent binding effect vis-à-vis third parties and of which the Commission makes extensive use in its administrative practice in order to structure, and increase the transparency of, the exercise of its discretion and supervisory power.

However, by adopting rules of administrative conduct designed to produce external effects and announcing by publishing them that it will henceforth apply them to the cases to which they relate, the Commission imposes a limit on the exercise of its own discretion and cannot depart from those rules, if it is not to be found, in some circumstances, to be in breach of general principles of Community law, such as the principles of equal treatment, of legal certainty or of the protection of legitimate expectations. Consequently, the Commission is liable to have its guidance raised against it, in particular by the Member States to which it is addressed, when it adopts measures running counter to that guidance.

allocation plans, exercised by the Commission pursuant to Article 9(3) of Directive 2003/87, is very circumscribed, being limited to examining whether they are compatible with the criteria in Annex III and Article 10 alone.

Accordingly, in the absence of any reference in the Commission guidance to the question of the lawfulness of downward ex-post adjustments to the amount of individually allocated allowances and the question of the Member State's freedom of action for that purpose, the Commission cannot legitimately raise against the Member State the objection that those adjustments are prohibited, if it is not to infringe the principles of legal certainty and of the protection of legitimate expectations, but must, conversely, have this lack of reference raised against it by the Member State, unless that is contrary to other provisions of Community law, in particular higher-ranking provisions of Community law.

(see paras 110-112, 116)

The Commission is thus required to establish that guidance, in particular as regards the most essential aspects, with the greatest possible clarity and precision. That is all the more so because the power to review and reject national

5. The principal declared objective of Directive 2003/87 establishing a scheme for greenhouse gas emission allowance

trading within the Community and amending Directive 96/61 is to reduce greenhouse gas emissions substantially in order to be able to fulfil the commitments of the Community and its Member States under the Kyoto Protocol. This objective must be achieved in compliance with a series of 'sub-objectives' and through recourse to certain instruments. The principal instrument for this purpose is constituted by the Community scheme for greenhouse gas emissions trading (Article 1 of Directive 2003/87 and recital 2 in its preamble), the functioning of which is determined by certain 'sub-objectives', namely the maintenance of cost-effective and economically efficient conditions, the safeguarding of economic development and employment, and the preservation of the integrity of the internal market and of conditions of competition (Article 1 and recitals 5 and 7). The directive also encourages utilisation of a particular type of instrument, that is to say use of more energy-efficient technologies enabling emissions per unit of output to be reduced (recital 20).

within the Community and amending Directive 96/61, which refers to the allocation of allowances to the installations listed in the national allocation plan (NAP), constitutes a Community provision relating to allocation of allowances by the Member States within the meaning of recital 7 in the preamble to the directive and is thus intended 'to contribute to preserving the integrity of the internal market and to avoid distortions of competition'. Accordingly, when interpreting criterion 10 teleologically, the 'sub-objectives' which preservation of the integrity of the internal market and preservation of conditions of competition represent are of particular importance.

(see para. 125)

(see para. 124)

6. Criterion 10 of Annex III to Directive 2003/87 establishing a scheme for greenhouse gas emission allowance trading
7. For the purposes of applying criterion 10 of Annex III to Directive 2003/87 establishing a scheme for greenhouse gas emission allowance trading within the Community and amending Directive 96/61 to ex-post adjustments under a national allocation plan (NAP) which are linked, primarily, to changes in production volume, account should be taken in particular of the following relevant analytical criteria: (i) the relation existing between production volume and the emission rate in the light of the objective of reducing emissions; (ii) the relation existing between that objective and the objective of maintaining cost-effective

and economically efficient conditions (Article 1 of Directive 2003/87); (iii) the objective of reducing emissions through improvements in technologies (recital 20 in the preamble to the directive); and (iv) the objective of safeguarding the internal market and maintaining conditions of competition (recital 7 to the directive).

Whilst it is true that ex-post adjustments of allowances allocated by a NAP which are linked, primarily, to changes in production volume, that is to say to changes in the number of units of output, and not to a change in an installation's emission rate, are liable to compromise achievement of the objective of efficient functioning of the trading market in accordance with Article 1 and recital 5 of Directive 2003/87 inasmuch as they deter operators from reducing their installations' production volume thereby supplying that market with emission allowances, that finding is not sufficient to establish that those adjustments harm the principal objective of Directive 2003/87, namely the reduction of greenhouse gas emissions as a whole.

As regards the relation existing between the objective of reducing emissions and

the objective of maintaining cost-effective and economically efficient conditions, a fall in production volume which does not necessarily lead to a reduction in the overall emission rate could result in the relevant market for goods being undersupplied in so far as production is no longer sufficient to satisfy demand on those markets, a situation which, although resulting from the economic logic of the trading market, appears difficult to reconcile with the objective of maintaining cost-effective and economically efficient conditions with regard to the sectors of activity and markets for goods, as referred to in Annex I to Directive 2003/87. The criteria of cost-effectiveness and economic efficiency do not apply solely to the functioning of the trading market as such, but also to the sectors of activity referred to in Annex I to Directive 2003/87, which are subject to the objective of reducing emissions, such as the steel-production sector or the energy sector.

As regards the objective of reducing emissions through improvements in technologies, those ex-post adjustments, though liable to deter operators from reducing their production volume in order to reduce emissions, do not compromise either the objective of encouraging operators to invest in the development of more energy-efficient technologies or the certainty of such investments. On the contrary, in so far



as those adjustments deter operators from reducing their production in conflict with their own forecasts, they are liable, having regard to the limited quantity of emission allowances available, to reinforce the incentive to reduce emissions by means of investments in improving the energy efficiency of production technology. The use of new, more environmentally-efficient, production technologies, in that they reduce emissions per unit of output, is liable, first, to make a substantial contribution to the principal objective of reducing emissions and, second, to safeguard cost-effective and economically efficient conditions, both on the trading market and on the markets for the goods in question, since it does not lead to a reduction in production volume that might be harmful to their proper functioning. This also shows that investment in more energy-efficient technologies constitutes an instrument at least equivalent, if not superior, to that of reducing production volume, for the purpose of successfully reconciling the objective of substantially reducing emissions and that of safeguarding cost-effective and economically efficient conditions both on the trading market and on the market for the goods in question.

Consequently, the mere fact that ex-post adjustments are liable to deter operators

from reducing their production volume and, therefore, their emission rates is not sufficient to call into question those adjustments' legality in the light of the objectives of Directive 2003/87 as a whole.

(see paras 129, 130, 134, 136, 137, 139-140, 148)

8. Criterion 5, whose wording expressly refers to the concept of discrimination, is the specific application of the general principle of equal treatment in the context of implementation by the Member States of Directive 2003/87 establishing a scheme for greenhouse gas emission allowance trading within the Community and amending Directive 96/61 and, more specifically, in the context of the allocation of allowances effected on the basis of national allocation plans. In that context, in order to determine whether the Commission correctly applied the principle of equal treatment to a given case concerning the application of ex-post adjustments, it is appropriate to begin by considering whether it duly verified whether or not the operators in question are in an analogous situation to that of other operators of installations. The Commission cannot

merely assert that there is unequal treatment without having first considered, with all necessary diligence, the factors relevant in this regard — the need to compare the situation of the persons concerned and the possibility of objectively justifying discrimination — and without having taken due account of them in justifying its conclusion.

(see paras 153, 154, 163)

lishing a scheme for greenhouse gas emission allowance trading within the Community and amending Directive 96/61, which concerns decisions adopted by the Commission rejecting the whole or part of a national allocation plan, is of particularly fundamental importance because exercise of the Commission's power of review under Article 9(3) of the directive entails complex economic and ecological assessments and review by the Community judicature of the legality and merits of those assessments is restricted.

9. Compliance with the obligation under Article 253 EC to state reasons, as reaffirmed in the final sentence of Article 9(3) of Directive 2003/87 estab-

(see para. 168)