Case C-166/23

Request for a preliminary ruling

Date lodged:

17 March 2023

Referring court:

Svea hovrätt (Mark- och miljööverdomstolen) (Sweden)

Date of the decision to refer:

15 March 2023

Appellant:

Naturvårdsverket

Respondent:

Nouryon Functional Chemicals AB

SVEA HOVRÄTT **MINUTES** […]

Mark- och miljööverdomstolen 2023-03-07 […]

[…]

PARTIES

Appellant

Naturvårdsverket

[Or. 2][…] Stockholm

Respondent

Nouryon Functional Chemicals AB […]

[…] Gothenburg

[…]

[…]

ORDER (to be notified on 2023-03-15)

1. The Mark- och miljööverdomstolen (the Land and Environment Court of Appeal; 'the MÖD') hereby decides to obtain a preliminary ruling from the Court of Justice of the European Union under Article 267 of the Treaty on the Functioning of the European Union and to submit a request for such a preliminary ruling in accordance with Annex A to these Minutes.

2. The MÖD orders the action to be stayed pending the ruling from the Court of Justice of the European Union.

[…]

[Or. 3] ANNEX A

[…]

REQUEST FOR A PRELIMINARY RULING

[…]

Introduction

1 **[Or. 4]** The Emission Allowance Trading Directive (2003/87/EC) [1] is implemented in Swedish law mainly by lagen (2020:1173) om vissa utsläpp av växthusgaser (Law (2020:1173) on certain greenhouse gas emissions; 'the Law on certain greenhouse gas emissions') and by förordningen (2020:1180) om vissa utsläpp av växthusgaser (Ordinance (2020:1180) on certain greenhouse gas emissions; 'the Ordinance on certain greenhouse gas emissions'). [2] The Law on certain greenhouse gas emissions also supplements EU Regulations adopted on the basis of the Directive, inter alia Commission Implementing Regulation (EU) 2018/2066 of 19 December 2018 on the monitoring and reporting of greenhouse gas emissions (the Monitoring and Reporting Regulation).

2 It is prohibited in Sweden without authorisation to release greenhouse gases from installations carrying out those activities set out in the annex to the Ordinance on certain greenhouse gas emissions (see Chapter 3, Paragraph 1). It is the Naturvårdsverket (Swedish Environmental Protection Agency; 'the NV') (a State administrative authority) which is responsible for handling applications and granting permits. The NV is also the regulatory authority and, in addition, the authority responsible for monitoring and reporting of greenhouse gas emissions,

[1] 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.

[2] […]

data verification and granting emission allowances. (See Chapter 2, Paragraph 1, of the Ordinance on certain greenhouse gas emissions.)

3 An operator wishing to apply for a greenhouse gas emissions permit must make the application to the NV. Annexed to the application must be, inter alia, a monitoring plan containing the information referred to in Article 12 of the Monitoring and Reporting Regulation.

4 In its capacity as the regulatory authority, the NV has ordered the company Nouryon Functional Chemicals AB ('Nouryon') – which operates a petrochemical installation in the municipality of Stenungsund (Sweden) – to supplement the company's monitoring plan. The order requires Nouryon to supplement the plan by adding to it an incinerator in which is carried out the incineration of hazardous waste in the form of waste water produced during the company's production process.

5 Nouryon appealed against the order before Nacka tingsrätt, mark- och miljödomstolen (Land and Environment Court, Nacka, Sweden), which rescinded the order on the grounds that units which incinerate hazardous waste do not have to be included in a greenhouse gas emissions permit. The court referred to instruction 4 in the Annex to the Swedish Ordinance [on emissions] which states that if the capacity threshold is exceeded all units in which fuels are combusted, other than units for the incineration of hazardous or municipal waste, are to be included in the greenhouse gas emissions permit. Instruction 4 implements clause 5 of Annex I to the Emission Allowance Trading Directive.

6 The NV has appealed against that judgment before the MÖD […]. The question before the MÖD is whether the incinerator is to be included in the monitoring plan or should be exempt from inclusion.

[Or. 5] Nouryon's installation

7 Nouryon's installation (National Allocation Plan-number 350) produces bulk organic chemicals. The activity is carried out on the basis of a permit for environmentally hazardous activity which was issued in 2004 by a judgment of Vänersborgs tingsrätt, mark- och miljödomstolen (Land and Environment Court, Vänersborg, Sweden) […]. The permit was issued on the basis of the miljöbalken (1998:808) (Environmental Code (1998:808); 'the MB') – the key environmental-law regulatory framework in Sweden – and regulates activities as regards questions of, inter alia, production quantities and pollution. In summary, the permit enables the company each year to process and produce a significant quantity of chemicals of various sorts. The production quantity exceeds one hundred tons per day.

8 The production process creates hazardous waste in the form of waste water. Pursuant to a provisional order [3] in the permit, the company is to process such

[3] […]

water in an incinerator or have the water treated in another authorised installation for hazardous waste […]. Nouryon has chosen to process the waste water in an incinerator at the installation in Stenungsund. The installation is constructed in such a way that the polluted water is piped directly from that part of the installation where the chemical production takes place to the incinerator.

9 It has emerged during the case that the incinerator is used almost exclusively to incinerate the waste water produced during the process, in all approximately 40 000 tons per year. The water's energy content, as stated by Nouryon, is near to negligible, so the incineration is carried out with the addition of combustible gas. The energy from the incineration is then recovered for the installation in the form of steam to be used in the production process. The greater part of the energy for the production is obtained, however, from an industrial boiler. In 2017, the incinerator was supplied with 4 289 tons of combustible gas, which corresponds to 245 terajoules, and returned 182 terajoules. In that year, the incineration of combustible gas in the industrial boiler corresponded to approximately 726 terajoules (approximately 14 069 tons). The incineration in the incinerator gives rise, according to Nouryon, to greenhouse gas emissions into the atmosphere of approximately 11 500 tons of carbon dioxide per year. According to the NV, the yearly emissions amount to 17 000 tons.

10 Nouryon's installation for bulk chemical production falls under activity description 23 in the annex to the Ordinance on certain greenhouse gas emissions. That means that the company not only requires authorisation under the MB […], but also a special authorisation for permission to release greenhouse gases from the installation (see Paragraph 2 of the Law on certain greenhouse gas emissions and Chapter 3, Paragraph 1 of the Ordinance on certain greenhouse gas emissions). The company does also hold such an authorisation, but that authorisation does not cover emissions from the incinerator.

The NV's order

11 **[Or. 6]** When considering the application made by Nouryon for free allocation before the fourth trading period, the NV noted that the incinerator was not mentioned in the installation's monitoring plan, that is to say, the plan which is to contain, inter alia, a description of the installation and the activities carried on there, as well as a list of the installation's emission sources (see Paragraph 6 of the Law on certain greenhouse gas emissions which refers to [the Monitoring and Reporting Regulation]). The greenhouse gas emissions from the incinerator are therefore not included in the calculation of the overall emissions from Nouryon's installation.

12 On the basis thereof, the NV ordered Nouryon to submit a supplemented monitoring plan which also included the incinerator. The NV pointed out that the company needs emission allowances for emissions from all units which are integral parts of the installation, since the installation is covered by an activity description in the annex to the Ordinance on certain greenhouse gas emissions. In

such a situation, it is, in the view of the NV, not relevant that one of the integrated units incinerates hazardous waste.

13 Nouryon argued that a unit which incinerates hazardous waste should not be included in the emission allowance trading scheme, irrespective of whether it is an integral part of an installation which is included in the scheme. The company pointed out that that follows from the wording of the directive and of the national ordinance and that there is no ground for interpreting the provisions differently. The company also stated that the recovery of the energy, and thus its integration, is merely a part of the company's energy management and that the aim of the incinerator is to incinerate the waste water produced during the production process. The monitoring plan subsequently submitted by the company to the NV did not include the incinerator.

The case before the Land and Environment Court, Nacka

14 Nouryon appealed against the order to the Land and Environment Court, Nacka. That court held that it is clear that the purpose of the incinerator is to incinerate hazardous waste. With reference to the exception in instruction 4 in the annex to the Ordinance on certain greenhouse gas emissions – that all units which burn fuel are to be included in the greenhouse gas emissions permit, except for units for the incineration of hazardous waste – the court found that the incinerator was not to be included in the permit and thus nor was it to be included in the monitoring plan for the company's greenhouse gas emissions. The court therefore rescinded the order.

The case before the MÖD

15 The NV appealed against the judgment to the MÖD and claimed that the order should be maintained. The NV also claimed that the court should request a preliminary ruling from the Court of Justice of the European Union on the question of whether the incinerator should be regarded as a part of the installation and whether the exception in clause 5 of Annex I to the Emission Allowance Trading Directive in that case means that emission allowances are not required for **[Or. 7]** the emissions from that incinerator. Nouryon contended that the judgment of the Land and Environment Court should not be amended.

16 The NV submitted, in summary, as follows. Nouryon has opted to treat the hazardous waste in its own incinerator. The waste occurs as a direct consequence of the chemical production. The incinerator gives rise to a significant amount of heat which is used directly in the production of chemicals. The incinerator is not therefore a separate unit such as is referred to in instruction 4 but is an integral part of the production installation. Since the incinerator has a function in the production of chemicals, it is not a unit for the incineration of hazardous waste. The application of instruction 4 as a general exception for units which burn hazardous waste is not in line with the overall purpose of the emission allowance trading scheme.

17 Nouryon has, in summary, submitted as follows. The expression ‘except for units for the incineration of hazardous waste’ means unequivocally that units which form part of an installation for which an emissions permit is required may be exempt. The question is therefore whether the incinerator is a unit which is covered by the exception. The purpose of the incineration plays a decisive role in that assessment. The purpose of the incinerator is not to recover energy but to incinerate the waste water produced in the production process. The installation is not dependent on the energy from the incinerator. The incinerator is linked to other parts of the installation merely so that the heat does not go to waste. A failure to make use of the heat would run counter to the aim of the environmental legislation to recover and conserve energy, but implies no functional effect on the installation. There is therefore no question of co-incineration. Against that background, the incinerator is not to be included in the emission allowance trading scheme.

EU law

The Emission Allowance Trading Directive

18 The Emission Allowance Trading Directive is to be applied to those activities set out in Annex I to the directive (see Article 2(1)). ‘Installation’ means a stationary technical unit where one or more activities listed in Annex I are carried out and any other directly associated activities which have a technical connection with the activities carried out on that site and which could have an effect on emissions and pollution (see the first subparagraph, point (e), of Article 3).

19 The introduction to the annex contains both general provisions on the activities and installations covered by the directive (see points 1 to 6) and more precise provisions on the specific activities which are covered.

20 Clause 5 [of Annex I] provides that when the capacity threshold of any activity in that annex is found to be exceeded in an installation, all units in which fuels are combusted, other than units for the incineration of hazardous or municipal waste, are to be included in the greenhouse gas emissions permit (the English-language version of the directive states ‘other than units for the incineration of hazardous or municipal waste’).

21 **[Or. 8]** The precise provisions concerning the activities which are covered by the directive include, inter alia, production of bulk organic chemicals by cracking, reforming, partial or full oxidation or by similar processes, with a production capacity exceeding 100 tonnes per day, that is to say, the type of activity carried out by Nouryon.

22 An activity which involves the combustion of fuels in installations with a total rated thermal input exceeding 20 MW (except in installations for the incineration of hazardous or municipal waste) is also included in the list of activities which are covered. Nouryon’s activity is not, so far as is apparent, covered by that description.

23 Usually it is the production capacity or production threshold which is used to assess whether an activity is to fall within the scope of the directive, but the total rated thermal input is also used. The input is calculated by adding together the rated thermal input of all technical units which form part of the installation in which fuels are combusted. Such units can, inter alia, be all types of boilers, burners, furnaces and incinerators. (Units with a rated thermal input under 3 MW and units which use exclusively biomass are not, however, to be taken into account for the purposes of that calculation.) (See points 2 and 3 of Annex I to the directive.)

The Monitoring and Reporting Regulation (EU) 2018/2066

24 The emission allowance trading scheme is based on the operators informing the regulatory authority of the emissions which the individual activities create (but also of any changes of activity). To that end, it is provided that a greenhouse gas emissions permit must contain a statement of the installation's activities and emissions and a monitoring plan (see Article 6(2)).

25 The Monitoring and Reporting Regulation provides that monitoring and reporting are to be complete and cover all process and combustion emissions from all emission sources and source streams belonging to activities listed in Annex I to the Emission Allowance Trading Directive (see Article 5). The regulation also contains specific provisions concerning the measurement and reporting of emissions for the various activities. The provisions concerning the production of bulk organic chemicals are set out in section 18 of Annex IV.

26 The operators are to modify the monitoring plan if it is not in conformity with the requirements of that regulation and the competent authority requests the operator to modify it (see Article 14(2)).

The EU Commission's Guidance

27 The Commission's Guidance [4] states, with regard to clause 5 of Annex I to the Emission Allowance Trading Directive that that concerns 'units' for the incineration of waste and further that the point deals primarily with the inclusion (in the emission allowance trading scheme) of 'associated activities', namely activities which are **[Or. 9]** directly associated with an activity referred to in the annex. To decide whether a unit is to be included or exempt under clause 5, the Commission provides the following decision-making process (see section 3.3.3):

> 1. Is there a unit part of this installation, which according to the competent authority's opinion is dedicated to the incineration (not co-incineration) of hazardous or municipal waste)? If no: no unit to be exempt.

[4] Guidance on Interpretation of Annex I of the EU Emission Trading System Directive (excl. aviation activities), 18 March 2010.

2. Is this unit part of another activity listed in Annex I of the [Emission Allowance Trading] Directive (e.g. integral part of a refinery or a bulk organic chemical production? If yes, it is included in the EU [Emissions Trading Scheme] anyway as part of that activity.

3. If under 2 the answer is no, this unit can be exempt from the EU [Emissions Trading Scheme].

28 The Guidance thus appears, on application of clause 5, to differentiate between units which are part of the activity and units which are directly associated with the activity. According to the Commission, therefore, the exception for hazardous and municipal waste is not to apply to a unit for incineration which is *part* of an activity which is listed in Annex I to the directive. That appears to mean that, under the Guidance, it is of decisive importance for the application of the exception in clause 5 whether a unit for incineration of hazardous waste is to be regarded as a part of the principal activity of the installation.

29 In that connection, it may be noted that the Guidance, as regards larger incineration plants (the introductory activity description in Annex I to the directive), states that an installation which incinerates waste is to be included in the emission allowance trading scheme, provided that the fuel used is not hazardous or municipal waste (see section 3.3.2). In the same section, it is further stated that *co-incineration* plants must also be included in the scheme. The Commission refers in that regard to the definition in the Waste Incineration Directive [5] of 'co-incineration plant'. That definition is now to be found, with essentially the same content, in the Industrial Emissions Directive. [6] Co-incineration is when the main purpose is not the disposal of waste but the generation of energy or production of material products (see Article 3(41)). If a unit with such an activity is operated within an installation for industrial production, the activity is to be deemed to be a co-incineration plant, for example when a significant part of the fuel which is used is conventional, or if it consists of waste other than hazardous or municipal waste. It appears to follow from the example given in the Guidance of the decision-making process for application of the exception provision now at issue that units for co-incineration are not to be exempt (see section 3.3.3).

[Or. 10] The Swedish legislation

30 The Law on certain greenhouse gas emissions seeks to implement the Emission Allowance Trading Directive and to supplement regulations which have been adopted on the basis of the directive (see Paragraph 1). *Greenhouse gas emissions* means the release into the atmosphere of carbon dioxide, nitrous oxide or

[5] Directive 2000/76/EC of the European Parliament and of the Council of 4 December 2000 on the incineration of waste.

[6] Directive 2010/75/EU of the European Parliament and of the Council of 24 November 2010 on industrial emissions (integrated pollution prevention and control) [(recast)].

perfluorocarbons from one or more sources situated within an installation. An *installation* means a stationary technical unit where one or more activities which give rise to emissions which requires a permit under the legislation issued on the basis of the Law, and any other directly associated activities which have a technical connection with the activities carried out on that site and which could have an effect on emissions and pollution. (See Paragraphs 2, 3 and 7.)

31 It is prohibited without a permit to release greenhouse gases from installations where activity for which authorisation is required is carried out (see Chapter 3, Paragraph 1, of the Ordinance on certain greenhouse gas emissions). The operator is to monitor and report emissions in accordance with the Monitoring and Reporting Regulation (see Chapter 3, Paragraph 13).

32 The annex to the Swedish ordinance contains – similarly to the formulation of the regulatory framework in Annex I to the Emission Allowance Trading Directive – in part instructions for the assessment of whether an activity falls within a description and in part descriptions of the activities which require authorisation. The provisions in the annex which are relevant to the present case correspond in essence to those set out in Annex I to the directive.

33 Under the Swedish ordinance, the total rated thermal input is to be calculated together for all technical units, for example boilers and incinerators, in which fuels are combusted within the installation. (Units with a rated thermal input of less than three megawatts and units which burn exclusively biomass are, however, not to be included in the calculation.) (See instruction 2.)

34 If the threshold for a particular activity has been exceeded, all units in which fuels are combusted, other than units for the incineration of hazardous or municipal waste, are to be included in the greenhouse gas emissions permit (see instruction 4). The provision has the same content as the corresponding instruction in the directive (see Emission Allowance Trading Directive, clause 5 of Annex I.)

35 Description 1 in the annex to the Swedish ordinance covers the emission of carbon dioxide from an incineration plant which (1) has a total rated thermal input of over 20 megawatts, or (2) has a rated thermal input of less than 20 megawatts and is (a) connected for delivery to a district heating network having a total rated thermal input of over 20 megawatts and (b) approved by the European Commission under Article 24 of the Emission Allowance Trading Directive.

36 Installations for the production of bulk organic chemicals with a production capacity exceeding 100 tonnes per day require a permit (see the 23rd description). The provision has in essence the same content as the corresponding provision in Annex I to the directive.

[Or. 11] The need for a preliminary ruling

37 Instruction 4 in the Swedish ordinance implements clause 5 of Annex I to the Emission Allowance Trading Directive. The MÖD considers that, with regard to

units for incineration of hazardous waste, the Swedish provision has the same wording and meaning as that of the directive. The wording appears to be clear: if an installation exceeds the capacity threshold for an activity listed in the annex, all units in which fuels are combusted are to be included in the greenhouse gas emissions permit other than, so far as relevant here, units for incineration of hazardous waste.

38 The Commission Guidance appears to take as its basis that a unit's purpose is important for the question whether a unit *for* incineration of hazardous waste is or is not to be included in the emission trading scheme. In the view of the MÖD, there is some support for the interpretation of clause 5 which states that it must be a question of a unit for incineration of hazardous waste. In its Guidance, the Commission uses the expression '*dedicated to*' incineration of hazardous waste; an incinerator which is dedicated to energy production but which can also be used to dispose of waste would thus not be exempt. The Guidance appears also to state that units for co-incineration, that is to say, units which have a main purpose other than the disposal of waste, are not to be exempt.

39 The Guidance further states that the exemption provision in clause 5 is primarily intended to regulate when a unit for the incineration of hazardous waste which is directly connected with the main activity – that is to say, a unit which, from a technical point of view, is associated to the activity which is carried out on the site and which can have an effect on emissions and pollution (associated activities) – is to be included in the emission allowance trading scheme. The Guidance states that the provision is as a rule not relevant if there is, within an installation, a unit for the incineration of hazardous waste which is an integral part of an activity covered by the directive. The MÖD considers that that view lacks direct support in the wording of the provision, but that this can indeed be a way, when applying this provision, of resolving the question whether the incinerator's purpose is to incinerate hazardous waste or to enable production (at the same time as being used for the disposal of hazardous waste).

40 The MÖD is of the view that the provision in clause 5 can be interpreted in different ways. It is not clear to the court that, under the provision, there is to be a requirement for the unit to be dedicated to the incineration of hazardous waste; an incinerator which is dedicated to producing heat for the production process but is also used to dispose of hazardous waste can be regarded as a unit for the incineration of hazardous waste. If the Commission's interpretation of the provision is accepted, it remains unclear which are the relevant criteria for the assessment of the degree to which a unit can be said to be associated with an activity. For example, it is unclear whether it should be required that the production be impossible or not allowed without the unit under consideration (see EU Commission's Guidance, page 14, footnote 14) for the unit to be regarded as an integral part [of the activity], or **[Or. 12]** whether it is sufficient for the unit to be technically linked to the installation in general and to accept hazardous waste only from that installation.

41 The MÖD is also doubtful as to whether other factors might also be relevant to the assessment of whether a unit is to be regarded as being dedicated to the incineration of hazardous waste. One factor, for example, can be that there is co-incineration and another can relate to the amount of fuel which is added to incinerate the hazardous waste (see Commission Guidance, section 3.3.2 and 3.3.3).

42 In summary, the MÖD is of the view that it is not clear and has not been clarified how clause 5 of Annex I to the Emission Allowance Trading Directive is to be interpreted in a case such as the present case. The question is relevant to EU law. In order to be able to rule in the case, the MÖD needs answers to the questions of interpretation set out below.

The request for a preliminary ruling

43 The MÖD requests the Court of Justice of the European Union to answer the following questions by a preliminary ruling.

1. Is the exemption for units for the incineration of hazardous waste in clause 5 of Annex I to the Emission Allowance Trading Directive – that all units in which fuels are combusted are to be included in the greenhouse gas emissions permit, other than units for the incineration of hazardous waste – applicable to all units which incinerate hazardous waste, or must there be some qualifying factor in order for the exemption to be applied? If such a factor is necessary, is the purpose of the unit thus to be decisive for application of the exemption, or can other factors also be relevant?

2. If the unit's purpose is decisive to the assessment, is the exemption still to be applied to a unit which incinerates hazardous waste but which has a main purpose other than that incineration?

3. If the exemption applies only to a unit which has as its main purpose the incineration of hazardous waste, which criteria are to be used in the assessment of the purpose?

4. If, in an assessment, it is decisive whether the unit is to be regarded as an integral part of an activity in an installation for which a permit is required under the directive – for example, as set out in section 3.3.3 of the Commission Guidance – which requirements are thus to be set in order for the unit to be regarded as an integral part thereof? Can it be required, for example, that the production must be impossible or not allowed without the unit (see Commission Guidance, page 14, footnote 14), or can it be sufficient for the unit to be technically linked to the installation and accept hazardous waste only from that installation?

[…]