JUDGMENT OF THE COURT (Fourth Chamber)

11 September 2008 (*)

(Environment – Directive 2000/76/EC – Incineration of waste – Classification of an installation for the production of heat and electricity – Concepts of incineration plant and co-incineration plant)

In Case C-251/07,

REFERENCE for a preliminary ruling under Article 234 EC from the Högsta domstolen (Sweden), made by decision of 7 May 2007, received at the Court on 29 May 2007, in the proceedings

Gävle Kraftvärme AB

v

Länsstyrelsen i Gävleborgs län,

THE COURT (Fourth Chamber),

composed of K. Lenaerts, President of the Chamber, R. Silva de Lapuerta, E. Juhász (Rapporteur), J. Malenovský and T. von Danwitz, Judges,

Advocate General: J. Kokott,

Registrar: C. Strömholm, Administrator,

having regard to the written procedure and further to the hearing on 17 April 2008,

after considering the observations submitted on behalf of:

– the Swedish Government, by A. Falk, Agent,

– the Austrian Government, by E. Riedl, Agent,

– the Commission of the European Communities, by J.-B. Laignelot and P. Dejmek, acting as Agents,

after hearing the Opinion of the Advocate General at the sitting on 22 May 2008,

gives the following

Judgment

1 This reference for a preliminary ruling concerns the interpretation of Directive 2000/76/EC of the European Parliament and of the Council of 4 December 2000 on the incineration of waste (OJ 2000 L 332, p. 91).

2 The reference was made in the course of proceedings between Gävle Kraftvärme AB ('Gävle Kraftvärme') and the Länsstyrelsen i Gävleborgs län (Regional Authority of Gävleborg ('the required authority')) regarding an application for authorisation to operate a combined heat and power plant.

Legal context

3 Article 3(1) of Council Directive 75/442/EEC of 15 July 1975 on waste (OJ 1975 L 194, p. 39), as amended by Commission Decision 96/350/EC of 24 May 1996 (OJ 1996 L 135, p. 32) ('Directive 75/442'), provides:

'Member States shall take appropriate measures to encourage:

(a) first, the prevention or reduction of waste production and its harmfulness …

…

(b) second:

– the recovery of waste by means of recycling, re-use or reclamation or any other process with a view to extracting secondary raw materials; or

– the use of waste as a source of energy.'

4 Directive 75/442 was repealed and codified with effect from 17 May 2006 by Directive 2006/12/EC of the European Parliament and of the Council of 5 April 2006 on waste (OJ 2006 L 114, p. 9). The wording of Article 3(1) of Directive 75/442 was taken, in almost identical terms, from Article 3(1) of Directive 2006/12.

5 Recitals 7, 13 and 24 in the preamble to Directive 2000/76 state:

'(7) … a high level of environmental protection and human health protection requires the setting and maintaining of stringent operational conditions, technical requirements and emissions limit values for plants incinerating or co-incinerating waste within the Community. The limit values set should prevent or limit as far as practicable negative effects on the environment and the resulting risks to human health.

…

(13) Compliance with the emissions limit values laid down by this Directive should be regarded as a necessary but not sufficient condition for compliance with the requirements of [Council] Directive 96/61/EC [of 24 September 1996 concerning integrated pollution prevention and control (OJ 1996 L 257, p. 26)]. Such compliance may involve more stringent emissions limit values for the pollutants envisaged by this Directive, emissions limit values for other substances and other media, and other appropriate conditions.

…

(24) The requirements for recovering the heat generated by the incineration or co-incineration process and for minimising and recycling residues resulting from the operation of incineration or co-incineration plants will assist in meeting the objectives of Article 3 on the waste hierarchy of Directive 75/442/EEC.'

6 As is apparent from the first paragraph of Article 1 of Directive 2000/76, its aim is to prevent or to limit as far as practicable negative effects on the environment, in particular pollution by emissions into air, soil, surface water and groundwater, and the resulting risks to human health, from the incineration and co-incineration of waste.

7 The second paragraph of that article states that that aim is to be met, inter alia, by means of stringent operational conditions and technical requirements and through setting emissions limit values for waste incineration and co-incineration plants.

8 The expressions 'incineration plant' and 'co-incineration plant' are defined in Article 3(4) and (5) of Directive 2000/76 as follows:

'4. "incineration plant" means any stationary or mobile technical unit and equipment dedicated to the thermal treatment of wastes with or without recovery of the combustion heat generated. This includes the incineration by oxidation of waste as well as other thermal treatment processes such as pyrolysis, gasification or plasma processes in so far as the substances resulting from the treatment are subsequently incinerated.

This definition covers the site and the entire incineration plant including all incineration lines, waste reception, storage, on site pretreatment facilities, waste[-,] fuel[-] and air-supply systems, boiler, facilities for the treatment of exhaust gases, on-site facilities for treatment or storage of residues and waste water, stack, devices and systems for controlling incineration operations, recording and monitoring incineration conditions;

5. "co-incineration plant" means any stationary or mobile plant whose main purpose is the generation of energy or production of material products and:

– which uses wastes as a regular or additional fuel; or

– in which waste is thermally treated for the purpose of disposal.

If co-incineration takes place in such a way that the main purpose of the plant is not the generation of energy or production of material products but rather the thermal treatment of waste, the plant shall be regarded as an incineration plant within the meaning of point 4.

This definition covers the site and the entire plant including all co-incineration lines, waste reception, storage, on site pretreatment facilities, waste-, fuel- and air-supply systems, boiler, facilities for the treatment of exhaust gases, on-site facilities for treatment or storage of residues and waste water, stack devices and systems for controlling incineration operations, recording and monitoring incineration conditions.'

9 Article 3(12) of Directive 2000/76 defines the concept of 'permit' as follows:

‘a written decision (or several such decisions) delivered by the competent authority granting authorisation to operate a plant, subject to certain conditions which guarantee that the plant complies with all the requirements of this Directive. A permit may cover one or more plants or parts of a plant on the same site operated by the same operator.’

10 Article 4(2) of that directive provides:

‘Without prejudice to Directive 96/61/EC, the application for a permit for an incineration or co-incineration plant to the competent authority shall include a description of the measures which are envisaged to guarantee that:

…

(b) the heat generated during the incineration and co-incineration process is recovered as far as practicable e.g. through combined heat and power, the generating of process steam or district heating;

…’

11 Article 6(1) to (3) and (6) of the Directive provides:

‘1. Incineration plants shall be operated in order to achieve a level of incineration such that the slag and bottom ashes total organic carbon (TOC) content is less than 3% or their loss on ignition is less than 5% of the dry weight of the material. If necessary, appropriate techniques of waste pretreatment shall be used.

Incineration plants shall be designed, equipped, built and operated in such a way that the gas resulting from the process is raised, after the last injection of combustion air, in a controlled and homogeneous fashion and even under the most unfavourable conditions, to a temperature of 850°C, as measured near the inner wall or at another representative point of the combustion chamber as authorised by the competent authority, for two seconds. If hazardous wastes with a content of more than 1% of halogenated organic substances, expressed as chlorine, are incinerated, the temperature has to be raised to 1 100°C for at least two seconds.

Each line of the incineration plant shall be equipped with at least one auxiliary burner. This burner must be switched on automatically when the temperature of the combustion gases after the last injection of combustion air falls below 850°C or 1 100°C as the case may be. It shall also be used during plant start-up and shut-down operations in order to ensure that the temperature of 850°C or 1 100°C as the case may be is maintained at all times during these operations and as long as unburned waste is in the combustion chamber.

During start-up and shut-down or when the temperature of the combustion gas falls below 850°C or 1 100°C as the case may be, the auxiliary burner shall not be fed with fuels which can cause higher emissions than those resulting from the burning of gasoil as defined in Article 1(1) of Council Directive 75/716/EEC [of 24 November 1975 on the approximation of the laws of the Member States relating to the sulphur content of certain liquid fuels (OJ 1975 L 307, p. 22)], liquefied gas or natural gas.

2. Co-incineration plants shall be designed, equipped, built and operated in such a way that the gas resulting from the co-incineration of waste is raised in a controlled and homogeneous fashion and even under the most unfavourable conditions, to a temperature of 850°C for two seconds. If hazardous wastes with a content of more than 1% of halogenated organic substances, expressed as chlorine, are co-incinerated, the temperature has to be raised to 1 100°C.

3. Incineration and co-incineration plants shall have and operate an automatic system to prevent waste feed:

(a) at start-up, until the temperature of 850°C or 1 100°C as the case may be or the temperature specified according to paragraph 4 has been reached;

(b) whenever the temperature of 850°C or 1 100°C as the case may be or the temperature specified according to paragraph 4 is not maintained;

(c) whenever the continuous measurements required by this Directive show that any emissions limit value is exceeded due to disturbances or failures of the purification devices.

…

6. Any heat generated by the incineration or the co-incineration process shall be recovered as far as practicable.’

12 Article 7 of Directive 2000/76, in conjunction with Annexes II and V thereto, set the emissions limit values for incineration plants and for co-incineration plants. Under the second subparagraph of Article 7(2), the emissions limit values which apply to incineration plants also apply to co-incineration plants in which more than 40% of the resulting heat release comes from hazardous waste.

The dispute in the main proceedings and the questions referred for a preliminary ruling

13 Gävle Kraftvärme is an undertaking within the Gävle Energi group of companies, which, in turn, is wholly owned by an

undertaking owned by the municipality of Gävle. Gävle Kraftvärme operates the Johannes co-generation plant, which is the basic production plant for Gävle's district heating network, producing heat and electricity.

14 Having decided to extend that plant, Gävle Kraftvärme applied to Östersunds tingsrätt, miljödomstolen (Östersund District Court, Environmental Court) for a permit to operate at a total installed supplied capacity of a maximum of 170 MW in that plant. That application related in particular to the following points:

– a permit to continue operating the existing solid fuel furnace (Furnace No 1) with a total installed thermal capacity of 85 MW;

– installation and putting into operation of a new waste furnace (Furnace No 2) with a total installed thermal capacity of a maximum of 50 MW; and

– installation and putting into operation of a new biofuel furnace with a total installed supplied capacity of a maximum of 85 MW (Furnace 3).

15 The application was also for a permit to carry out additional changes necessary for the increased operations.

16 At the time the application was made, the precise manner in which the plant would be extended had not yet been finally determined. Gävle Kraftvärme could either proceed to construct Furnace No 2 and have Furnace No 3 built only if necessary, or not construct Furnace No 2 but construct Furnace No 3 instead. In any event, the combined power was not to exceed 85 MW.

17 In its application for a permit, Gävle Kraftvärme had confirmed that both Furnace No 1 and Furnace No 2 could be classified as 'co-incineration plants'. The regional authority, which stated that it favoured the application, nevertheless took the view that the activity in question corresponded more closely to that of a waste incineration plant. The court of first instance confirmed the classification proposed by Gävle Kraftvärme, taking the view that the essential purpose of the plant was the production of energy.

18 The regional authority contested that decision before the Svea Hovrätt, Miljööverdomstolen (Svea Court of Appeal, Environmental Court of Appeal), submitting that Furnace No 1 should be classified as a 'co-incineration plant', while Furnace No 2 should be classified as an 'incineration plant', which classifications that court adopted.

19 Gävle Kraftvärme brought an appeal against the latter decision to the Högsta domstolen (Supreme Court), submitting that the court of appeal erred in classifying the furnaces separately.

20 The referring court notes that the classification of a plant is important, since the requirements for its operation differ according to the type of installation in question. Consequently, taking the view that the resolution of the dispute depends on the interpretation of Community law, it decided to stay the proceedings and refer the following questions to the Court of Justice for a preliminary ruling:

'1. Where a combined power and heating plant consists of a number of units (furnaces) for the purposes of the interpretation of Directive 2000/76 …, is each unit to be assessed as a separate plant or is the assessment to cover the combined power and heating plant as a whole?

2. For the purposes of the interpretation of Directive [2000/76], is a plant constructed for waste incineration but having as its main purpose the production of energy to be classified as an incineration plant or as a co-incineration plant?'

The questions referred

The first question

21 The concepts of 'incineration plant' and 'co-incineration' plant are defined in Article 3(4) and (5) of Directive 2000/76.

22 Under Article 3(4), a plant is defined as 'any… technical unit or equipment'.

23 The term 'plant' is not expressly defined within the definition of 'co-incineration plant' in Article 3(5) of Directive 2000/76, but it is clear that that provision refers by implication to the preceding paragraph of that article. It is apparent from the wording of Article 3(5) that the definition of 'co-incineration plant' is based on the concept of 'incineration plant' in Article 3(4) and that those provisions do not differ with regard to all the technical elements which must be taken into account for the classification of an incineration unit.

24 The technical elements which constitute an incineration plant and a co-incineration plant are listed in the second subparagraph of Article 3(4) and the third subparagraph of Article 3(5) of Directive 2000/76. Included in those elements is the 'boiler'. As the Advocate General observed in point 20 of her Opinion, in contrast to other elements listed which appear in the plural, the term 'boiler' (and also the term 'stack') is referred to in the singular.

25 The wording of Article 3(4) and (5) of Directive 2000/76 therefore strongly supports the interpretation that each individual boiler, together with its associated equipment, constitutes a separate plant for the purposes of that directive.

26 That interpretation is supported by the scheme and purpose of Directive 2000/76.

27 With regard, firstly, to its scheme, it is established that incineration plants and co-incineration plants are subject to different rules as regards the operating conditions and emissions limit values which apply to them. In general, co-incineration plants are subject to less restrictive rules.

28 As regards operating conditions in particular, those applicable to incineration plants include requirements relating to the slag and bottom ashes total organic carbon content and their loss on ignition which are not laid down for co-incineration plants. Moreover, although for both types of plant those conditions include certain requirements regarding the temperature of the combustion gases when waste is added, only incineration plants must be equipped with at least one auxiliary burner.

29 As the Advocate General observed in point 21 of her Opinion, certain provisions relating to incineration plants can be applied only to individual boilers. It follows that an interpretation by which, in a co-generation plant, each boiler is to be considered a separate plant accords with the scheme of Directive 2000/76.

30 Such a conclusion is, furthermore, supported by the rules governing the issue of an operating permit for an incineration plant or a co-incineration plant. Article 3(12) of Directive 2000/76 expressly provides that a permit may cover one or more plants or parts of a plant on the same site operated by the same operator.

31 With regard, secondly, to the purpose of Directive 2000/76, it is apparent from Article 1 thereof that it seeks to prevent or to limit as far as practicable negative effects on the environment of incineration or co-incineration of waste by means of stringent operational conditions and technical requirements and through setting emissions limit values.

32 As was stated by the Austrian Government and the Commission of the European Communities in their observations, an interpretation of Directive 2000/76 which excludes the separate classification of each boiler is likely to hinder achievement of that objective. Thus, if a co-generation plant comprising incineration and co-incineration units were to be classified, in its entirety, as a 'co-incineration plant', such a power station would be in a position to avoid the stricter obligations which apply to an incineration plant.

33 Having regard to the foregoing, the answer to the first question must be that, for the purposes of applying Directive 2000/76, where a co-generation plant comprises a number of boilers, each boiler and its associated equipment is to be regarded as constituting a separate plant.

The second question

34 Under the first subparagraph of Article 3(4) of Directive 2000/76, a plant dedicated to the thermal treatment of waste constitutes an incineration plant.

35 In accordance with the first subparagraph of Article 3(5), a plant whose main purpose is the generation of energy or production of material products and which either uses waste as a regular or additional fuel or in which waste is thermally treated for the purpose of disposal is to be regarded as a co-incineration plant.

36 The second subparagraph of Article 3(5) states that, if co-incineration takes place in such a way that the main purpose of the plant is not the generation of energy or production of material products but rather the thermal treatment of waste, the plant is to be regarded as an incineration plant within the meaning of Article 3(4).

37 It is clear from the wording of those provisions that a co-incineration plant constitutes a particular form of incineration plant and that it is on the basis of the main purpose of a plant that the assessment of whether it is an incineration plant or a co-incineration plant is to be made.

38 Assessment of the main purpose of a plant is made on the basis of facts existing at the time of that assessment, that is to say, on the capacity and function of that plant or, if the plant in question has not yet been built, on the basis of the plan in relation to which the application for an operating permit was made.

39 In its written observations, the Swedish Government submits that an approach to classification of a plant based solely on the main purpose of that plant could circumvent the purpose of Directive 2000/76. Many incineration units originally designed and built to incinerate waste could be reclassified as co-incineration plants where the recovered heat is used to produce energy. Those units would thus avoid the stricter conditions applicable to incineration plants. According to that Government, in order to distinguish between the two types of plant, it is more appropriate to base the assessment on the purpose for which the unit in question was built.

40 Such an interpretation cannot, however, be accepted. Firstly, it conflicts with the clear wording of Directive 2000/76. As the Commission pointed out in its observations before the Court, it is apparent from the express wording of Article 3(5) of that directive that it is on the basis of their main purpose that co-incineration plants are to be distinguished from incineration plants. However, that provision does not specify any criterion with regard to the purpose for which the plant was built.

41 Secondly, as is apparent from recital 24 in the preamble to that directive and from Article 3(1)(b) of Directives 75/442 and 2006/12, the Community legislation on waste seeks to encourage, as far as practicable, the recovery of waste and, in particular, its use as a source of energy. An overly restrictive interpretation of the concept of 'co-incineration plant' would be likely to hinder achievement of that objective. The application of stricter rules to plants whose main purpose is effectively the generation of energy or production of material products could dissuade operators of such units from

commencing or continuing an activity of that kind.

42 Thirdly, it must be pointed out that the fact that a plant produces energy by incinerating limited volumes of waste is not in itself sufficient to regard it as a unit whose main purpose is the generation of energy or production of material products. Recital 24 in the preamble to Directive 2000/76 and Articles 4(2)(b) and 6(6) thereof expressly envisage, where it is possible, the recovery of heat produced not only in the co-incineration process but also in the incineration process.

43 Finally, it must be recalled that Directive 2000/76 imposes strict conditions for both types of plant and lays down specific safeguards for co-incineration plants. For example, under the second subparagraph of Article 7(2), the emissions limit values laid down for incineration plants also apply to co-incineration plants when more than 40% of the released heat produced comes from hazardous waste. Furthermore, as is apparent from recital 13 in the preamble to that directive, if, because of their capacity, the plants referred to therein also fall within the scope of Directive 96/61, they must also comply with the provisions of that directive, in particular with regard to emissions limit values.

44 As the Advocate General observed in points 43 to 47 of her Opinion, the main purpose of an incineration unit must be assessed objectively on the basis of a number of facts.

45 In the context of such an assessment, it is for the competent authorities to examine the specific circumstances of each plant. In particular, they are to take account of the volume of energy generated or material products produced in relation to the quantity of waste incinerated in the plant in question and the stability or continuity of that production.

46 Having regard to the foregoing, the answer to the second question must be that it is on the basis of its main purpose that a plant is to be classified as an 'incineration plant' or a 'co-incineration plant' within the meaning of Article 3(4) and (5) of Directive 2000/76. It is for the competent authorities to identify that purpose on the basis of an assessment of the facts existing at the time at which that assessment is carried out. In the context of such an assessment, account must be taken, in particular, of the volume of energy generated or material products produced by the plant in question in relation to the quantity of waste incinerated in that plant and the stability and continuity of that production.

Costs

47 Since these proceedings are, for the parties to the main proceedings, a step in the action pending before the national court, the decision on costs is a matter for that court. Costs incurred in submitting observations to the Court, other than the costs of those parties, are not recoverable.

On those grounds, the Court (Fourth Chamber) hereby rules:

1. **For the purposes of applying Directive 2000/76/EC of the European Parliament and of the Council of 4 December 2000 on the incineration of waste, where a co-generation plant comprises a number of boilers, each boiler and its associated equipment is to be regarded as constituting a separate plant.**

2. **It is on the basis of its main purpose that a plant is to be classified as an 'incineration plant' or a 'co-incineration plant' within the meaning of Article 3(4) and (5) of Directive 2000/76. It is for the competent authorities to identify that purpose on the basis of an assessment of the facts existing at the time at which that assessment is carried out. In the context of such an assessment, account must be taken, in particular, of the volume of energy generated or material products produced by the plant in question in relation to the quantity of waste incinerated in that plant and the stability and continuity of that production.**

[Signatures]

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* Language of the case: Swedish.