Appeal number: GGE/2019/0001/BEIS

FIRST-TIER TRIBUNAL
GENERAL REGULATORY CHAMBER
ENVIRONMENT

REPSOL SINOPEC RESOURCES UK LIMITED **Appellant**

- and -

THE SECRETARY OF STATE FOR BUSINESS, ENERGY AND INDUSTRIAL STRATEGY **Respondent**

TRIBUNAL: JUDGE ALISON MCKENNA (CP)

Sitting in public at The Royal Courts of Justice on 25 on 26 September 2019

The Appellant was represented by David Hart QC and Michael Spencer, counsel, instructed by CMS Cameron McKenna Nabarro Olswang LLP

The Respondent was represented by Robert Palmer QC and Mark Westmoreland Smith, counsel, instructed by Government Legal Department

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DECISION

1. This appeal is dismissed.

2. The Notice of Recovery of Allowances dated 1 March 2019 is affirmed.

REASONS

A: Background to the Appeal

3. This appeal concerns the Greenhouse Gas Emissions Trading Scheme Regulations 2012[1], and in particular a Notice of Recovery of Allowances ("the Notice") issued by the Offshore Petroleum Regulator for Environment and Decommissioning ("OPRED") on behalf of the Secretary of State for Business, Energy and Industrial Strategy ("BEIS").

4. The Appellant is the operator of an offshore installation known as Bleo Holm, which is a Floating Production Storage and Offloading Unit located in the North Sea. The Appellant holds a "greenhouse gas emissions permit", also known as an "ETS permit". Under the terms of the European Union Emissions Trading Scheme ("EU ETS")[2], the Appellant has been allocated a free allocation of allowances in proportion to its anticipated qualifying carbon dioxide emissions from Bleo Holm. Its qualifying emissions are calculated according to a historic baseline assessment. The Appellant is then required to surrender sufficient allowances to cover its total emissions each year, whether the free allowances or additional allowances that it has purchased.

5. OPRED investigated the capacity of the Bleo Holm following a report of mechanical faults which had caused the isolation of the relevant units and a resultant lower level of regulated activity than had been anticipated. OPRED concluded that there had been a "significant capacity reduction" at Bleo Holm under the terms of the scheme, as a result of which the Appellant was not entitled to the full quantity of free allowances that had already been allocated to it (against its baseline assessment) for the period 2013-2017. OPRED consequently sought recovery of the over-allocated allowances via a Notice served under Schedule 6, paragraph 11 (2) to the 2012 Regulations. OPRED is still investigating another significant capacity reduction issue (the Clayton Boiler) in respect of which there may also have been an over-allocation of allowances to Repsol. That matter has yet to be resolved.

6. By the time of the hearing, it was accepted by Repsol that it had been under a duty formally to declare a significant capacity reduction in the circumstances pertaining at Bleo Holm, but that it had not done so within the deadline. Repsol had

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[1] http://www.legislation.gov.uk/uksi/2012/3038/contents/made

[2] https://ec.europa.eu/clima/policies/ets_en

originally argued that, so long as it intended to repair the units affected, there had not been a notifiable event under the terms of the scheme. That argument was not pursued before the Tribunal.

7. While the particular issues relating to Repsol's allowances for 2013-2017 were still being discussed, the European Commission made a Decision in December 2018 to suspend the allocation of free allowances to UK operators, in view of the uncertainties surrounding the UK's impending EU exit. That suspension was still in operation at the date of the Tribunal hearing. The suspension of allowances meant that Repsol did not receive the free allowances it had expected to receive for 2018 (and to which it asserts entitlement) and so it had to purchase sufficient allowances to offset its emissions for that year. Repsol values its suspended 2018 allowances at around 2 million euros. The Notice, issued on 1 March 2019, required Repsol to surrender 165,983 allowances received between 2013 and 2017, with a value of around 4 million euros.

8. Repsol's case, in essence, is that BEIS should have "netted-off" the suspended allowances from those it was required to surrender. If so, it would be obliged to surrender only the balance of over-allocated allowances worth around 2 million euros, retaining the value of the allowances which had been suspended by the EC's Decision. It argues that, if the Notice is enforced as served, it will have to surrender 4 million euros' worth of allowances without any guarantee that it will ever receive the 2 million euros' worth of free allowances to which it is entitled. It argues that BEIS has the power and the duty to resolve this inequity through a proper interpretation of the Regulations. BEIS takes the view that it has no power to net-off allowances in the manner Repsol suggests.

9. The Appellant's lodgement of its appeal with the Tribunal had, under the terms of Regulation 76 of the 2012 Regulations, the effect of suspending its obligation to surrender the allowances referred to in the Notice until the final determination of this appeal.

10. The Tribunal convened an oral hearing on 25 and 26 September 2019. The Appellant was represented by David Hart QC and Michael Spencer of counsel. The Respondent was represented by Robert Palmer QC and Mark Westmoreland Smith of counsel. I am grateful to them all for their clear oral and written submissions. I am also grateful to those who instructed them for the preparation of a comprehensive multi-volume bundle. I also thank the witnesses for both parties who gave helpful oral and written evidence.

11. At the conclusion of the hearing I reserved my Decision, which I now provide in this document.

B: Appeal to the Tribunal

12. The Appellant's Notice of Appeal dated 14 March 2019 relied on grounds that: (i) BEIS had issued the Notice unlawfully because it had sought to recover the total number of allowances which had been over-allocated, without netting off the

allowances which were due to Repsol; (ii) that the European Commission's Decision of 17 December 2018 2018/8707[3] (which *inter alia* suspended the allocation of certain free allowances to UK operators in respect of the 2018 scheme year) was unlawful; and (iii) that BEIS's decision to issue the Notice without netting off the allowances to which it was entitled was unlawful in failing to give effect to Repsol's property rights under Article 1 of the First Protocol to the European Convention on Human Rights ("A1P1")[4]. It asked the Tribunal to quash the Notice.

13. The Respondent's Response to the Notice of Appeal submitted that: (i) the Notice was in accordance with the law. There was no power for BEIS to net off any allowances to which Repsol claimed entitlement from the allowances which it was obliged to surrender; (ii) the Tribunal has no power to declare a Decision of the European Commission unlawful; and (iii) that the Notice was not unlawful for breach of A1P1 and there was no loss of property in any event.

14. In its Reply, the Appellant conceded that this Tribunal has no power to declare the European Commission's Decision unlawful and so ground (ii) was no longer pursued as originally drafted. In his submissions at the hearing, this ground was put by Mr Hart on the basis that BEIS had misinterpreted the effect of the EC's Decision when deciding to issue the Notice.

15. In his skeleton argument and oral submissions on behalf of the Appellant, Mr Hart QC addressed the three grounds in the Notice of Appeal. As to ground (i), he referred me to Directive 2003/87/EC[5] which established the European Trading Scheme. In particular, to Recital 5 which refers to the fulfilment of obligations under the Kyoto Protocol through an *efficient European market* in greenhouse gas emissions *with the least possible diminution of economic development and employment,* and to Article 1 which refers to the reduction of greenhouse gas emissions *in a cost-effective and economically efficient manner.* He submitted that the 2012 Regulations, which give domestic effect to this Directive, should be interpreted so as to give effect to these provisions. In particular, he submitted that BEIS's proposed interpretation would undermine the Directive's central aims and distort the market in tradable allowances. He asked the Tribunal to interpret paragraph 11 of Schedule 6 to the 2012 Regulations as a flexible corrective measure which may be deployed to achieve accurate accounting.

16. Turning to Schedule 6, paragraph 11 (2) of the 2012 Regulations (see paragraph 32 below) where the power to serve the Notice is located, Mr Hart's submission was that the reference to a Notice requiring the return of the "*sum of allowances*" to

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[3] https://ec.europa.eu/info/sites/info/files/emissions-trading-system_en.pdf

[4] https://www.echr.coe.int/Documents/Convention_ENG.pdf

[5] https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A32003L0087

which the operator is not entitled should properly be understood as requiring the calculation of a reduced entitlement, taking into account allowances which the operator is entitled to receive but which have not been issued. He submitted that BEIS's interpretation of this provision was over-literal, inconsistent with the scheme of the legislation, and produced a disproportionate and unjust result.

17. Noting that the Notice does not break down the over-allocation by year, Mr Hart submitted that BEIS' "global" approach to the Notice was inconsistent with its literal interpretation of the Regulations as imposing a strict divide between over-allocation and under-allocation. In his submission, there was no reason why the 2018 allocation should not be included in the "global" calculation underpinning the Notice.

18. BEIS had argued that one reason why it could not take the 2018 allocation into account in calculating the Notice was because, if the suspension of allocation to UK operators were lifted by the European Commission under the terms of a withdrawal agreement, Repsol would effectively receive its 2018 allocation twice. Mr Hart's response to that was that BEIS could in those circumstances issue a second Notice to recover the over-allocation. Alternatively, that Repsol could give an undertaking to return any over-allocation.

19. Mr Hart submitted that there was no express requirement under EU law for BEIS to interpret the Regulations as it has. He referred me to the judgment of the CJEU in *ArcelorMittal* C-321/15[6] in which it was noted that "*the overall scheme of Directive 2003/87 is based on the strict accounting of the issue, holding, transfer, and cancellation of allowances"* and that accurate accounting is *"inherent to the very purpose of the Directive".* The judgment accepted that the Directive did not preclude national legislation requiring the surrender of unused allowances but, in Mr Hart's submission, not precluding such a provision is different from requiring it.

20. Turning to ground (ii) and the EC's December 2018 Decision, Mr Hart submitted that the Decision, properly interpreted, only suspended the 2019 allowances not yet allocated, and not the 2018 allowances which had already been allocated. Further, that the principle of proportionality required the Decision not to go further than necessary to achieve its aim, which would justify the suspension of 2019 allocations but not the 2018 allocations. Finally, that BEIS's interpretation of the Decision as suspending the 2018 allowances for UK operators was inconsistent with the principle of equal treatment as between member states.

21. As to ground (iii), Mr Hart submitted that the allocation of allowances for 2018 constituted a "*possession"* and that the Notice constitutes an interference with Repsol's possession of the allowances. Referring me to the Supreme Court's judgment in *AXA General Insurance Limited & Ors v Lord Advocate & Ors (Scotland)* [2011] UKSC 46[7], he submitted that possessions include a wide range of

[6] [2017] Env. L.R.30

[7] https://www.bailii.org/uk/cases/UKSC/2011/46.html

economic interests and assets and that a measure exposing a person to additional contractual liabilities and consequent costs would represent an interference with such possessions. He submitted that BEIS could not blame the interference on the European Commission as it had a duty under s. 6 of the Human Rights Act 1998 not to act in a manner that was incompatible with A1P1. He submitted that the Tribunal now had an obligation to consider A1P1 in making a fresh decision and, in doing so, to avoid the consequences of BEIS' failure to give effect to the Appellant's rights.

22. On the question of remedy, although the Notice of Appeal seeks only a quashing of the Notice, Mr Hart invited me additionally to consider varying it so as to reduce the number of allocations Repsol was obliged to surrender by taking into account its preliminary allocation for 2018 or, in the alternative, issuing a direction to BEIS to re-issue the Notice so as to re-calculate the allowances required to be surrendered following the netting-off of the 2018 allocation.

23. In his skeleton argument and oral submissions on behalf of the Respondent, Mr Palmer QC referred me to the witness evidence about the operation of the EU Emissions Trading Scheme. In particular, Mr Batty's evidence that following the EC's Decision of December 2018, there is no means by which the UK can issue allowances during the currency of the suspension of allowances to UK operators. It followed, in his submissions, that even if it were lawful for BEIS to net-off the allowances, it would not be possible for it to do so.

24. Mr Palmer responded to the Appellant's Grounds of Appeal as follows. As to ground (i), he submitted that the regulator was under a duty to issue the Notice under paragraph 11 (2) of Schedule 6 to the 2012 Regulations once it became apparent that there had been an over allocation of allowances due to Repsol's failure to notify the regulator of the change of capacity at Bleo Holm. He submitted that the 2012 Regulations imposed a straightforward obligation on the regulator to issue a recovery of allowances notice in respect of the number of allowances equal to those with which the operator had been issued but was not entitled. In his submission, the Regulations would have made clear if it was intended that a netting-off approach could be applied. Instead, they made separate arrangements for the issuing of an appropriate allocation of allowances following a significant capacity reduction.

25. Mr Palmer referred me to the Registry Regulations[8] and explained (with reference to Mr Batty's witness statement) that the ETS operates as follows. Each year the Central Administrator creates sufficient free allowances to cover the entries in each Member State's National Allocation Table. These are then automatically transferred to the operators' accounts under Article 52. The UK's ability to amend the number of allowances in its National Allocation Table is as set out in Article 52 of those Regulations only, which does not permit the netting-off process suggested by Repsol. He drew my attention in particular to Article 53(4), which provides that:

[8] https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:32013R0389

"The central administrator shall ensure that an operator can perform transfers returning excess allowances to the EU Allocation Account where the central administrator has made a change to the national allocation table of a Member State pursuant to article 52 (2) to correct for an over allocation of allowances to the operator, and the competent authority has requested the operator to return such excess allowances."

26. He submitted that, as this provision demonstrated, the competent authority in any Member State was required to secure the return of any allowances which had been over allocated in order to ensure the integrity of the scheme as a whole. The process for establishing an entitlement to allowances was dealt with as an entirely separate process under the scheme. Mr Palmer submitted that, if it were possible to net-off as Repsol suggested, then it would result in Repsol potentially receiving the 2018 allowances twice, but in any event the correct allocation of allowances for 2018 had not yet been finally determined because of the Clayton Boiler issue.

27. Turning to ground (ii), Mr Palmer submitted that the effect of the EC Decision in December 2018 was to prevent the Central Administrator of the Union Registry from issuing the Appellant's 2018 allowances, even if that allocation had been finalised (which it has not). Mr Palmer explained that BEIS was conscious that the effect of the EC's Decision had been not only to suspend the 2019 allowances but also the late allocation of 2018 allowances which had been withheld due to the need to verify data. This was, he told the Tribunal, the subject of on-going discussions with the European Commission. BEIS had asked the EC to lift the suspension in respect of the 2018 allowances notwithstanding the 2019 freeze. However, he submitted that this Tribunal may not definitively rule on the correct interpretation of the EC's Decision, nor rule it unlawful, and if the Appellant seeks to challenge the EC's Decision then it must do so in the CJEU.

28. As to ground (iii) Mr Palmer submitted that the Appellant has not lost any allowances as matters stand, as the suspension imposed by the EC may yet be lifted and the suspension imposed while the inquiry into the Clayton Boiler proceeded was a protective measure pending the completion of the relevant processes. If Repsol is ultimately prevented from receiving any free allocation for 2018, then it was submitted that its loss would be directly attributable to the EC's Decision and not to the Notice before the Tribunal. Accordingly, any application for A1P1 relief should be made to the European Courts. As to the Human Rights Act 1998, he submitted that it did not require the Tribunal to interpret paragraph 11 (2) of Schedule 6 in a way which went against the grain of the legislative scheme.

29. On the question of remedy, Mr Palmer submitted that, as the Tribunal may not make a decision which the regulator could not have made, the Tribunal could neither vary the Notice to include a netting-off requested, nor direct BEIS to re-calculate the Notice according to this method. He asked the Tribunal to affirm the Notice.

30. In his submissions in reply, Mr Hart submitted that an allowance could obviously not be withheld or suspended unless it had first been allocated. So Repsol would be entitled to receive the allowances if it were not for the decisions withholding

or suspending them. He submitted that this situation engaged A1P1 rights and that the loss Repsol would suffer if its allowances were never released would not be justified by the strict accounting regime on which BEIS relied. He referred me to the anomalous treatment in the scheme provisions for a significant reduction of capacity and a significant expansion of capacity which, in his submission, suggested that there was greater flexibility in making adjustments than BEIS had suggested.

B: The Law

31. The 2012 Regulations include, at paragraph 6 of Schedule 6, a procedure for the adjustment of allowances following a significant reduction of capacity. This imposes an obligation on the regulator to withhold allowances pending the completion of a set process for determining the number of free allowances which the operator may retain and the number it must surrender. There is a right of appeal against a decision to withhold allowances in these circumstances, although that right was not exercised by Repsol.

32. The power to serve a Notice of Recovery of Allowances is to be found at Schedule 6, paragraph 11(2) to the 2012 Regulations, as follows:

> *Recovery of allowances*
>
> *11.—(1) This sub-paragraph applies where an operator ("P") has been issued allowances to which P is not entitled as a result, in particular, of—*
>
> *(a)a failure to notify the regulator of any change to an installation's capacity, activity level or operation;*
>
> *(b)the installation's allocation not being adjusted in sufficient time to prevent such an over-allocation of allowances;*
>
> *(c)the installation having permanently ceased the carrying out of regulated activities despite allowances having been issued under paragraph 7(7); or*
>
> *(d)an error of the regulator or registry administrator.*
>
> *(2) Where sub-paragraph (1) applies, the regulator must give a notice to P instructing P to return a sum of allowances equal to those to which P is not entitled.*
>
> *(3) The notice under sub-paragraph (1) must specify—*
>
> *(a)the number of allowances to which the operator is not entitled;*
>
> *(b)the reasons why the operator is not entitled to those allowances;*
>
> *(c)the process by which those allowances must be returned; and*
>
> *(d)the date by which those allowances must be returned.*
>
> *(4) An operator must comply with a notice given under sub-paragraph (2).*

33. The right of appeal against a Notice of Recovery of Allowances is to be found at regulation 76 of the 2012 Regulations as follows:

Rights of appeal

> *73.—(1) Subject to paragraph (3), the following persons may appeal to the appeal body—*
>
> *(a)a person who is aggrieved by a decision determining any application made by them under these Regulations;*

(b)a person who is aggrieved by a notice served on them under any provision mentioned in paragraph (2).

(2) Those provisions are— …

(n) paragraph 11(2) of Schedule 6;

34. At the hearing of this appeal, I raised with counsel (and invited their submissions as to) the nature of the Tribunal's jurisdiction in determining an appeal against a Notice of Recovery of Allowances, bearing in mind that this is the first such appeal to be heard. As I explained, the general approach in regulatory appeals to this Chamber is that, unless the legislation indicates otherwise, the appeal is *de novo* i.e. it requires the Tribunal to stand in the shoes of the regulator and to take a fresh decision on the evidence, giving appropriate weight to the original decision-maker's decision. The nature of such an appeal is described in *El Dupont v Nemours & Co v ST Dupont* [2003] EWCA Civ 1368 by May LJ at [96][9]. In taking a fresh decision, the Tribunal is not required to undertake a reasonableness review of the Respondent's decision to serve the Notice, but instead to decide whether it would itself issue the Notice on the evidence before it. The First-tier Tribunal has no supervisory jurisdiction – see *HMRC v Abdul Noor* [2013] UKUT 071 (TCC)[10].

35. In *R (Hope and Glory Public House Ltd v City of Westminster Magistrates' Court* [2011] EWCA Civ 31[11], the Court of Appeal decided that "*careful attention*" should be paid to the reasons given by an original decision-maker, bearing in mind that Parliament had entrusted it with making such decisions. However, the weight to be attached to the original decision when hearing an appeal is a matter of judgment for the Tribunal, "*taking into account the fullness and clarity of the reasons, the nature of the issues and the evidence given in the appeal"*. The approach in *Hope and Glory* was approved by the Supreme Court in *Hesham Ali (Iraq) v Secretary of State for the Home Department* [2016] 1 WLR 4799[12].

36. Pursuant to rule 15 (2) (a) (ii) of the Tribunal's Rules[13], the Tribunal may when hearing an appeal admit evidence whether or not it was available to the decision maker. The burden of proof in a *de novo* appeal rests with the Appellant as the party

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[9] http://www.bailii.org/ew/cases/EWCA/Civ/2003/1368.html

[10] http://taxandchancery_ut.decisions.tribunals.gov.uk/Documents/decisions/HMRC_v_Abdul_Noor.pdf

[11] http://www.bailii.org/ew/cases/EWCA/Civ/2011/31.html.

[12] https://www.supremecourt.uk/cases/docs/uksc-2015-0126-judgment.pdf

[13] https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/367600/tribunal-procedure-rules-general-regulatory-chamber.pdf

seeking to disturb the status quo. The standard of proof to be applied by the Tribunal in making findings of fact is the balance of probabilities.

37. On determining an appeal against a Notice of Recovery of Allowances, regulation 77 of the 2012 regulations provides that the Tribunal may affirm, quash or vary the Notice and may give directions to the regulator as to the exercise of its functions under the Regulations. The Tribunal may not make a decision that the regulator could not have made:

Determination of an appeal

77.—(1) In determining an appeal under regulation 73(1) the appeal body may, subject to paragraph (3)—

(a)affirm the decision;

(b)quash the decision or vary any of its terms;

(c)substitute a deemed refusal with a decision of the appeal body; or

(d)give directions to the regulator as to the exercise of the regulator's functions under these Regulations.

(2) In determining an appeal under regulation 74 the appeal body may give directions to—

(a)the registry administrator as to the exercise of its functions under the Registries Regulation 2011, or

(b)the KP administrator as to the exercise of its functions under the Registries Regulation 2010.

(3) The appeal body may not make a determination that would result in a decision which could not otherwise have been made under these Regulations or under the Registries Regulation 2010 or 2011.

38. As the status of a First-tier Tribunal Decision was discussed at the hearing, I confirm here that the First-tier Tribunal is not a Superior Court of Record so that its Decisions do not establish binding precedent. Its Decisions bind the parties to the appeal only. Onward appeals are made to the Upper Tribunal (Administrative Appeals Chamber), which is established as a Superior Court of Record under the Tribunals, Courts and Enforcement Act 2007 s. 3 (5)[14]. [15]

D: Evidence

39. The Tribunal received a two-volume hearing bundle of documentary evidence including the Notice itself, correspondence between the parties, witness statements and exhibits.

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[14] http://www.legislation.gov.uk/ukpga/2007/15/section/3

[15] See also *R (on the application of Cart) v The Upper Tribunal* [2011] UKSC 28

https://www.bailii.org/cgi-bin/format.cgi?doc=/uk/cases/UKSC/2011/28.html&query=(Cart)

40. Alasdair Knox filed a witness statement dated 28 August 2019 which stood as his evidence in chief. He attended the hearing for cross examination. He is employed by the Appellant as a Corporate Environmental Adviser, in which role he co-ordinates the company's activities in relation to the EU ETS. He explained the history of the mechanical failures on the Bleo Holm which had caused the isolation of certain units and the resultant reduction in emissions. He referred to the correspondence about it between Repsol and the regulator. It was clear from this that there had been some confusion about whether there was an obligation to account for a reduction which was, initially at least, regarded as temporary pending mechanical repair. He explained at paragraph 47 of his witness statement that Repsol was willing to return the over allocation of allowances that had resulted, and he expressed the view that this could be achieved through the co-operation of BEIS and the EU ETS. Cross examined by Mr Palmer, Mr Knox confirmed that Repsol now accepted BEIS's view that some allowances had to be returned and that its original intention to repair the unit was immaterial.

41. Paul Batty filed a witness statement dated 27 August 2019, which stood as his evidence in chief. He attended the hearing for cross examination. He is a Senior Environmental Manager at BEIS and is responsible for policy and implementation of atmospheric regulations applying to the UK's offshore oil and gas industry. His witness statement sets out his own understanding of the legislative scheme.

42. At paragraph 95 of his witness statement, Mr Batty states that Repsol had, as a result of its failure to declare and correct the baseline data held about the Bleo Holm at the appropriate time, secured an unfair commercial advantage over other operators in the EU ETS. This was because its free allocation of allowances related to Waste Heat Recovery Units which do not in themselves emit carbon dioxide but provide heat which would otherwise have to be produced by other means, emitting carbon dioxide. This means that the free allocation of allowances particularly associated with Waste Heat Recovery Units do not compensate for actual emissions, so are a valuable additional source of free allocations.

43. Mr Batty described the on-going process in respect of the Clayton Boiler, explaining that Repsol's independently-verified data will be submitted to the European Commission when received and that the free allocation had been withheld during that process as required by paragraph 6 (5) of schedule 6 to the 2012 Regulations. He states that the final free allocation figure for the Bleo Holm will only be known once an EU Commission meeting has been held later this year and the prescribed process in relation to the Clayton Boiler have both been completed. Cross examined by Mr Hart, Mr Batty confirmed that it was his understanding that there was no provision in the ETS for netting off allowances, either in the form of the Notice or in the administration of the scheme by the Registry.

44. Seamus Gallagher filed a witness statement dated 27 August 2019. He was not required to attend for cross examination. He is Head of EU ETS Delivery in BEIS. He explained the effect of the UK's decision to exit the EU on the EU ETS, including the steps taken by the European Commission to protect the integrity of the EU ETS in

the event of a "No Deal" exit and the actions taken by BEIS to resolve the issues that arose following the European Commission's actions.

E: Conclusion

45. I start my conclusions by reminding myself that the parameters of my statutory jurisdiction in this matter restrict me to making a decision within the terms of regulation 77 of the 2012 Regulations (see paragraph 37 above). Accordingly, I conclude that I have no power to determine whether there has been a significant capacity reduction in respect of the Clayton Boiler, as Mr Hart invited me to do.

46. I also remind myself that I now stand in the shoes of the regulator in deciding whether I would issue the Notice under appeal. I afford respect to the regulator as the body trusted by Parliament to issue such Notices, in accordance with the *Hope and Glory* approach described at paragraph 35 above, but must consider its reasons and the evidence before me in deciding what weight to attribute to the regulator's own conclusions. I note that Mr Batty and Mr Gallagher's evidence about the factual and regulatory situation giving rise to the Notice was unchallenged. Mr Knox, on the other hand, accepted that Repsol had misunderstood its obligations under the scheme.

47. Turning to ground (i) of Repsol's appeal, my first conclusion is that Schedule 6, paragraph 11(1)(a) to the 2012 Regulations (see paragraph 32 above) was engaged by the situation pertaining as at March 2019, so I am satisfied that there was power for the regulator to issue a Notice of Recovery. The parties agreed that there had been an over-allocation of allowances as a result of Repsol's failure (for whatever reason) to notify the regulator of the isolation of the relevant unit at Bleo Holm. Mr Knox accepted on behalf of Repsol (see paragraph 40 above) that some of its free allocation of allowances fell to be returned as a result.

48. I note that paragraph 11 (2) of Schedule 6 to the 2012 Regulations is expressed in mandatory terms, so that the regulator "must" serve a Notice on an operator where paragraph 11 (1) applies. The absence of a discretion in this regard tends in my view to support Mr Palmer's submission that the regulator's powers are limited to the recovery of those allowances that have been found to be over-allocated, without an ability to take into account the surrounding circumstances or to net-off allowances to which they are entitled.

49. I also note that paragraph 11(3) of Schedule 6 sets out the information which must be provided to an operator receiving a Notice of Recovery, and that this does not include a requirement to provide the details of any calculation undertaken to reach the "sum" of allowances to which the operator is not entitled. The absence of such a provision tends to support the view that the "sum" referred to in paragraph 11 (2) simply means the "total" and that the Regulations do not envisage a netting-off calculation being undertaken by the regulator before issuing the Notice.

50. I am mindful of the aims and objectives of the Directive to which the 2012 Regulations give domestic effect. As confirmed by the CJEU in *ArcelorMittal*, these aims are to be met through the adoption of strict accounting requirements. It does not

seem to me that BEIS's interpretation of the scheme as providing for strictly separate means of determining the allowances to be allocated and the allowances to be returned is inconsistent with these objectives. As explained by Mr Batty in his witness evidence (see paragraph 25 above) the scheme works in such a way that the EC is responsible for the administrative allocation of allowances as between Member States, but the Member States are themselves responsible for the collection of over-allocated allowances from the operators for which they have a supervisory role. These practical arrangements support, in my view, Mr Palmer's interpretation of the scheme as not permitting the netting-off process which Repsol advocates at Member State level.

51. I also take into account Mr Palmer's submission that, if BEIS netted-off the 2018 allowances from those due to be returned and the EC then lifted its suspension, Repsol would have had the benefit of the allowances twice. Mr Hart accepted the logic of this submission and I am grateful for his suggestion that Repsol could give an undertaking to return the allowances in such circumstances. However, as the Tribunal has a statutory jurisdiction, it does not enjoy the inherent jurisdiction of a court to accept such an undertaking. Further, as I can find no power permitting the regulator to accept such an undertaking, I conclude that the Tribunal also has no such power as a result of the limitations imposed on it by regulation 77 (3). It seems to me that the absence of a mechanism for making such an adjustment at a Member State level also supports BEIS's interpretation of the scheme.

52. For all these reasons, I am not persuaded that the Respondent mis-interpreted the 2012 Regulations when deciding to issue the Notice and I reject Repsol's first ground of appeal. I conclude that BEIS's interpretation of the 2012 Regulations is consistent with the Directive to which they give effect, in implementing a strict accounting system in which the responsibilities of the EC in allocating allowances and the Member States in requiring any return of allowances are strictly segregated. In these circumstances, I give weight to the Respondent's assessment of the situation as at March 2019 and consider that I would also have issued a Notice requiring the recovery of the full amount of over-allocated allowances. I concur with the Respondent that it had no power to interpret the Regulations so as to allow a netting off arrangement.

53. Turning to Repsol's ground (ii), I sympathise with Repsol's difficulty in respect of the 2018 allowances which were suspended by the EC's December 2018 Decision. BEIS has also expressed its concern about this situation. It may yet be that these allowances are un-suspended once the terms of the UK's EU-exit are determined. I note from Mr Gallagher's evidence that BEIS is involved in on-going discussions with the European Commission about lifting the suspension. Nevertheless, I am not persuaded that this Tribunal has the power to offer any re-interpretation of the EC's 2018 Decision, or to declare that the Decision was unlawful, or to declare that BEIS has misunderstood it or mis-applied it. The tribunal's jurisdiction is limited to those matters set out in Regulation 77. Accordingly, I reject Repsol's ground (ii).

54. Turning to Repsol's ground (iii), it does not seem to me that this Tribunal has any power to determine whether the suspended or withheld allocations are Repsol's

property so as to engage its A1P1 rights, or that the financial consequences to Repsol of the suspension of allowances should be regarded as engaging its A1P1 rights. I agree with Mr Palmer that Repsol must litigate this issue elsewhere. I note that Repsol's final entitlement to allowances for 2018 has not yet been determined in any event because of the Clayton Boiler issue. Even if I were to assume that Repsol's property rights were engaged, I am not persuaded that BEIS was obliged to interpret the Regulations so as to give effect to them in circumstances where such an interpretation would, as I have found, run counter to the strict accounting principles which underpin the overall scheme. Accordingly, I reject Repsol's ground (iii).

55. I asked Mr Palmer if BEIS had power to suspend enforcement of the Notice pending the conclusion of the discussions with the EC. His view was that there is no such power under the Regulations, and I am persuaded that he is correct. In the circumstances, and in view of the limitation on the Tribunal's powers imposed by regulation 77 (3) of the 2012 Regulations, I concede that I may not myself direct this measure, although it does seem to me to represent a pragmatic and fair solution in the current circumstances.

56. For all these reasons, I now dismiss the appeal and affirm the Notice.

(Signed)
Judge Alison McKenna
Chamber President **DATE: 18 November 2019**