Neutral citation number: [2024] UKFTT 241 (GRC)

Case Reference: NV/2023/0007/GGE

First-tier Tribunal
(General Regulatory Chamber)
Environment

Decided without a hearing
Decision given on: 21 March 2024

Before

JUDGE NEVILLE

Between

AGCO LIMITED

Appellant

and

ENVIRONMENT AGENCY

Respondent

Decision:

(i) The appeal is allowed
(ii) The Tribunal substitutes a penalty notice in the sum of £60,000

REASONS

1. AGCO Limited appeals against a civil penalty notice in the sum of £95,025, served on it by the Environment Agency on 17 February 2023.

The F Gas Regulation

1. EU Regulation 517/2014 aims to control emissions of fluorinated greenhouse gases ("F-gases"), including hydrofluorocarbons ("HFCs"), by (among other measures) imposing a stepped reduction of the total that can be placed on the market in the European Union. F-gases are a major contributor to climate change and, weight for weight, some have a global warming effect many thousands of times higher than

carbon dioxide. Following the United Kingdom's departure from the European Union, the EU Regulation was retained in domestic law. It is now the GB F-gas Regulation, and regulates F-gases placed on the market in Great Britain. There is furthermore a separate GB F-gas registry and quota system. This has had consequences for British businesses engaged in the sale of F-gases and goods containing them. Previously, a business in the UK buying F-gases from another EU member state (termed a 'downstream operator') would have faced no obligations under the EU Regulation. Now, they are treated as importers and must comply with the GB Regulation's requirements accordingly.

2. As to how different products are treated, from 1 January 2015, the EU Regulation prohibited the bulk importation or production of HFCs by an organisation unless it held sufficient quota. From 1 January 2017, pursuant to Article 14(1), organisations were prohibited from placing refrigeration, air conditioning and heat pump equipment pre-charged with HFCs on the market unless a sufficient number of quota authorisations had been obtained. It is important to emphasise the difference between quota and quota authorisations. Quota cannot be used directly for pre-charged equipment; the importer must instead obtain sufficient quota authorisations from a quota holder. These features are preserved in the GB Regulation.

3. If the prohibition at Article 14(1) is breached, Regulation 31A of the Fluorinated Greenhouse Gases Regulations 2015 provides that an enforcing authority (here, the Environment Agency) may impose a civil penalty, and Paragraph 1(4) of Schedule 4 sets the maximum civil penalty at £200,000. It is that provision under which the present penalty notice was served.

The penalty notice

4. The service of the penalty notice followed a Notice of Intent sent on 6 October 2022, in response to which AGCO had admitted placing equipment charged with F-gases on the market in GB without the necessary quota authorisations and made representations as to why a penalty should not be imposed.

5. In deciding to issue the penalty notice, the Environment Agency applied its *Enforcement and Sanctions Policy*[i] ("ESP"). The introduction to the ESP is as follows:

> *This document sets out the Environment Agency's enforcement and sanctions policy. It applies to England only.*
>
> *The Environment Agency is responsible for enforcing laws that protect the environment. We aim to use our enforcement powers efficiently and effectively to secure compliance. This contributes to our work to create better places for people and wildlife, and support sustainable development.*
>
> *This document explains:*
>
> - *the results we want to achieve*

- *the regulatory and penalty principles we uphold*
- *the enforcement and sanction options available to us how we make enforcement decisions*
- *the enforcement framework for the climate change schemes and the control of mercury regime*

6. At Section 2 the ESP sets out an outcome focused approach to enforcement, and at Section 3 that the Environment Agency will follow the regulators' code (save where necessary), act proportionately, have regard to economic growth, be consistent, transparent and accountable, and target its regulatory effort in a number of specified ways. At Section 4, it records that enforcement activity will aim to:

    - *change the behaviour of the offender*
    - *remove any financial gain or benefit arising from the breach*
    - *be responsive and consider what is appropriate for the particular offender and regulatory issue, including punishment and the public stigma that should be associated with a criminal conviction*
    - *be proportionate to the nature of the breach and the harm caused*
    - *take steps to ensure any harm or damage is restored*
    - *deter future breaches by the offender and others*

7. Annex 2 to the ESP provides a specific civil penalties framework for climate change schemes. As it explains:

    Section A explains the steps we will take to decide whether to impose a civil penalty or to work out the final penalty amount. Within the steps we will assess:

    - *the nature of the breach*
    - *culpability (blame)*
    - *the size of the organisation*
    - *financial gain*
    - *any history of non-compliance*
    - *the attitude of the non-compliant person*
    - *personal circumstances*

8. For F-gases, Section E also provides as follows:

E2.1 Our nature of the breach assessment

We will normally impose a civil penalty for all breaches referred to in Regulation 31A of the F Gas Regulations subject to the additional enforcement position (see E2.2).

We will normally use the statutory maximum as the initial penalty amount. This is because the civil penalties in the F Gas Regulations have been set based on the seriousness of the breach taking into account the:

- *impact the breach has on the integrity of the scheme*
- *environmental effect of the breach, where relevant*

However, we may decide to use an initial penalty amount lower than the statutory maximum where we consider the breach warrants this, for example when:

- *a breach is serious because of its potential for environmental harm but the actual harm caused is much less*
- *we impose a civil penalty for failure to comply with an enforcement notice and we don't think the statutory maximum of £200,000 is justified*

E2.2 Additional enforcement position

We may not impose a civil penalty where:

- *we consider giving advice and guidance will be sufficient to rectify the breach*
- *punishment or future deterrent is not necessary*

If after we have given advice and guidance the breach is not rectified, we may then impose a civil penalty.

9. The penalty notice makes no reference to E2.2, nor does it provide any reasons why the Environment Agency decided not to exercise its discretion to impose no penalty.

10. The ESP requires the penalty amount to be determined in a similar way to a sentencing guideline in the criminal courts, setting a penalty range and a starting point. The starting point is a multiplier of the maximum statutory penalty as follows:

Table 1: Size of organisation (based on turnover or equivalent)

Breach category	Large	Medium	Small	Micro
Deliberate	1	0.4	0.1	0.05
Reckless	0.55	0.22	0.055	0.03
Negligent	0.3	0.12	0.03	0.015

Low or no culpability	0.05	0.02	0.005	0.0025

11. After setting the starting point, the next table is used to calculate the penalty range:

Table 2: Size of organisation (based on turnover or equivalent)

Breach category	**Large**	**Medium**	**Small**	**Micro**
Deliberate	0.45 to statutory maximum	0.17 to statutory maximum	0.045 to 0.4	0.009 to 0.095
Reckless	0.25 to statutory maximum	0.1 to 0.5	0.024 to 0.22	0.003 to 0.055
Negligent	0.14 to 0.75	0.055 to 0.3	0.013 to 0.12	0.0015 to 0.03
Low or no culpability	0.025 to 0.13	0.01 to 0.05	0.0025 to 0.02	0.0005 to 0.005

12. In this penalty notice, the Environment Agency decided as follows:

Step 1	Check or determine statutory maximum for the breach	Statutory maximum –£200,000
Step 2	Set initial penalty amount by assessing the nature of the breach and other enforcement positions in line with Sections B, C, D, E and F	Initial penalty amount – £200,000 AGCO Limited failed to obtain 3,801 HFC quota authorisations before placing HFCs on the market within Great Britain (GB) as required by Article 14 (1) of EU Regulation 517/2014 on fluorinated greenhouse gases.
Step 3	Work out penalty starting point and penalty range	Culpability category – Negligent Size of organisation – Large Penalty starting point – £60,000 Penalty range –£28,000 to

		£150,000 Revised penalty starting point taking into account financial gain £95,025.
Step 4	Set final penalty amount by assessing the aggravating and mitigating factors	Final penalty amount – £95,025 The final penalty has been set at the calculated costs avoided.

13. The following reasoning was provided in support:

> *In assessing the 'nature of the breach' in line with Section E2.1 of the ESP we consider this breach undermines the integrity of the quota system and has a detrimental impact on organisations that have complied with the Regulations. Compliant organisations that purchased all their required quota in 2021 incurred costs to obtain quota and were therefore at a competitive disadvantage.*
>
> *In assessing the size of your organisation, we looked at your financial statements on Companies House and consider you to be a large organisation.*
>
> *In assessing the culpability category we consider that AGCO Limited failed to take reasonable care to put in place and enforce proper systems for avoiding commission of the offence.*

14. The penalty notice next purports to consider the relevant aggravating and mitigating factors. It nonetheless only mentions one: financial gain by AGCO by avoiding the cost of obtaining the required authorizations in 2021. This calculation was performed by applying the maximum known cost paid for a quote authorisation in that year, being £25, and multiplying it by the number of required authorisations. This equals the amount of the penalty, £95,025. It was considered appropriate to take the maximum figure to ensure that AGCO did not make any financial gain.

The appeal

15. The 2015 regulations provide a right of appeal at Schedule 5, on the following grounds at paragraph 4(2):

> *(a) that the relevant enforcing authority's decision to serve the civil penalty notice was –*
>
> *(i) based on an error of fact;*
>
> *(ii) wrong in law;*
>
> *(iii) wrong for any other reason;*
>
> *(iv) unreasonable;*
>
> *(b) that the amount specified in, or determined by, the notice is unreasonable.*

16. The narrative grounds submitted in support of AGCO's appeal can be fairly summarised as follows:

    a. AGCO had obtained the "wrong type of quota in 2021", which it had not appreciated until March 2022 when it had conducted its F-gas audit for 2021.

    b. The method by which the claimed financial gain had been calculated was unlawful, arbitrary and unfair.

    c. By adopting the highest known price for an authorisation, the Environment Agency had unlawfully or unreasonably applied a second punitive element to the penalty.

    d. The Environment Agency ought to have taken the median price of a 2021 authorisation as the most likely approximation of any "costs avoided" by AGCO.

17. I pause to note that in its response to the Notice of Intent AGCO had pointed out that in 2022 it had paid £8 per authorisation, rather than the £25 used by the Environment Agency.

18. Both parties consented to the appeal being decided without a hearing. I have been provided with a bundle containing the notice and grounds of appeal, the Environment Agency's rule 23 Response, AGCO's Rule 24 Reply, and further written submissions from the Environment Agency. AGCO has written to the Tribunal taking exception to that final document being taken into account, as no permission had been given for further written submissions. I need not formally exclude the Environment Agency's further written submissions as, for reasons that will become clear, doing so would not materially alter the decision I have reached.

The Tribunal's approach to the appeal

19. There is no authority on how the Tribunal should approach these particular regulations. In contrast with the statutory scheme discussed in R. (Begum) v Special Immigration Appeals Commission & Anor [2021] UKSC 7 at [67]-[68], I consider that Paragraph 4 of the regulations does permit the Tribunal to decide how a discretion conferred upon the Environment Agency ought to have been exercised, subject to the important qualification that the particular ground has made out. This legislative intent is clear from the grounds' expansive wording, particularly the use of the word "wrong" and the phrase "for any other reason". Furthermore, Paragraph 1 clearly confers a power to exercise the discretion at Schedule 1 for itself:

    (5) The First-tier Tribunal may –

    (a) affirm the notice;

    (b) direct the Environment Agency or Secretary of State to vary or withdraw the notice;

> *(c) impose such other enforcement notice, civil penalty notice or enforcement cost recovery notice as the First-tier Tribunal thinks fit.*

20. The qualification above should be reiterated. The Tribunal must find that one or more of the grounds is made out. In making that decision, appropriate weight must be afforded to the view taken by the Environment Agency: the regulator entrusted by Parliament to administer the scheme and maintain its integrity and effectiveness through enforcement action, and having expertise and experience in doing so; see Hesham Ali v Secretary of State for the Home Department [2016] UKSC 60 at [45].

21. Finally on the Tribunal's legal approach, I do not consider the word 'unreasonable' at Paragraph 4(2)(a)(iv) to denote unreasonableness in the classic public law sense described in Associated Provincial Picture Houses Ltd v Wednesbury Corporation [1948] 1 KB 223. This is inconsistent with the powers given to the Tribunal at Paragraph (5), and I instead treat the word as having its everyday meaning of unfair, unsound or excessive.

Consideration

22. AGCO make no argument that the Environment Agency should not have imposed any penalty at all, nor is evidence provided of facts that might justify engaging the discretion at E2.2 of the ESP. N The actual issue between the parties is narrow, being whether it was unlawful or unreasonable for the Environment Agency to adopt the figure of £25 per authorisation in an attempt to ensure that the penalty was sufficient to rule out any possibility of financial gain.

23. The Environment Agency has explained that in order to determine the appropriate deemed cost of a 2021 authorisation, it:

> *…contacted all Bulk Incumbent organisations and Authorisations Managers and requested data on the minimum, maximum, mean and median price charged by their organisation for a tonne of carbon dioxide equivalent (CO_2e)…*

24. A table is provided with the results, showing those figures for all 21 respondents. In its Reply, AGCO Complaints that it is unclear whether the figures are for Bulk Transfers, Authorisations or Authorisation Delegations. I disagree; the wording above the table makes it clear that the prices are for authorisations. £25 is the highest figure in the table. It is the maximum price paid by Respondent 2, who is also the only respondent not to provide the median and mean price paid. In further justification of its methodology, the Environment Agency argues as follows:

> *The above data was provided voluntarily and therefore we are limited to the data that has been provided in determining the 2021 authorisation price. The price of authorisations is market-driven with varying costs through the year, with the price increasing towards the end of the year and the compliance deadline. We considered that we should use the maximum cost of a quota authorisation in 2021 when determining the costs avoided to ensure that the Appellant did not benefit financially from the breach. We do not know which quota holder the Appellant would have approached and what price they charged. The*

maximum cost was £25/tCO2 equivalent as highlighted in the table above. Using anything less than the maximum price paid to calculate financial gain might have the effect of undermining the final civil penalty.

For example, if we used the overall mean price of £7.41/tCO2 in this case the costs avoided would be 3801 (authorisations needed but not purchased) x £7.41 = £28,165.41.

This is less than the Appellant paid for quota delegations in 2022. The Appellant's response to the Notice of Intent quoted the price the Appellant paid for quota delegations in 2022 at £8.00. Using that price, the costs avoided are calculated to be £30,408. This is substantially lower than the costs avoided using the maximum market data information.

If we apply less than the maximum authorisation price when calculating the costs avoided that would give the Appellant an unfair financial advantage over compliant organisations that bought their authorisations in 2021.

We consider that the price paid by the Appellant in March 2022 is not valid as the Appellant should have bought authorisations in 2021. There will have been a shift in price from when they should have complied in 2021 to when they bought authorisations in 2022. The prices for authorisations in 2022 are therefore not appropriate to consider in this case. We consider that the costs avoided should be based on the maximum available 2021 market price and not 2022 prices as detailed above.

25. There is, I consider, merit in AGCO's core criticism that the £25 figure is "an outlier". It is more than the maximum figure given by all other organisations. The next four highest figures are £19, £15.38, £14.30 and £12. Below this, however, the figures are all much lower. This can be illustrated by (according to my calculations) the mean maximum figure being £9, with a standard deviation of £5.83.

26. I agree with the Environment Agency on the importance of ensuring that there is no financial gain from non-compliance. This is recognised in the principles underlying the ESP, already set out above. I also consider that the Environment Agency is entitled to use a reasonable and workable method for achieving that objective, even if in some cases that may result in a greater penalty than would be imposed if there were more data on what the organisation would have likely paid. There is no burden on the Environment Agency to provide definitive proof of an exact figure, such as expert valuation evidence or detailed market analysis. It is entitled to adopt a reasonable methodology.

27. The ESP sets out a detailed process for calculating a penalty range and starting point that takes account of a number of factors. Choosing the figure of £25, according to a methodology *not* found in the ESP, leads to a penalty figure that is over 50% more than the starting point. The proportionality of that penalty therefore depends on there being at least a reasonable degree of likelihood (according to the standard identified in the above paragraph) that the deemed maximum allocation cost could be that high. For the reasons argued by AGCO, and set out above, I find it very unlikely indeed that AGCO would have spent that much on allocations had it complied. The mean maximum figure is £9, slightly above what was actually paid by

AGCO the following year. The Environment Agency rejects the 2022 price out of hand on the basis that markets may fluctuate. That is a relevant factor, but it is irrational to completely ignore that it is so similar to 2021 the mean maximum and the mean price paid. Furthermore, by its own admission the Environment Agency is working with a very limited dataset, but the lack of information as to why one respondent paid so much more than most is not then taken into account when placing reliance is placed on the figure.

28. I agree with the Environment Agency that if a figure of £8 is used then there is a real risk that AGCO might gain from its non-compliance. A handful of respondents did pay more than that. Its error, however, was to ignore the output of the ESP. It is the ESP that suggests a starting point, which should be *increased* or *decreased* by reference to considerations that include avoiding financial gain, as follows:

> ***Set the final penalty amount: step 4***
>
> *We may adjust the penalty from the starting point within the penalty range by assessing the following aggravating and mitigating factors:*
>
> - *financial gain - whether or not a profit has been made or costs avoided as a result of the breach*
> - *history of non-compliance - includes the number, nature and time elapsed since the previous non-compliance(s)*
> - *attitude of the non-compliant person - the person's reaction, including co-operation, self-reporting, acceptance of responsibility, exemplary conduct and steps taken to remedy the problem*
> - *personal circumstances - including financial circumstances (such as profit relative to turnover), economic impact and ability to pay (only if sufficient evidence is provided). Also for a public or charitable body whether the proposed penalty would have a significant impact on the provision of its service (only if sufficient evidence is provided)*

29. It does not provide for the starting point to be simply replaced with an alternative basis for calculation not found anywhere in the ESP. The ESP provides no methodology by which financial gain *must* be calculated nor any hard-edged principle that any financial gain *must* be ruled out at the maximum cost paid by anyone. Here, the identified starting point was £60,000. The question the Environment Agency ought to have asked itself is the one posed by the ESP: whether that figure *ought* to be increased to address financial gain. It can be seen, dividing £60,000 by the 3,801 missing authorisations, that the figure will be sufficient to meet financial gain so long as AGCO would not have paid more than £15.79 per authorisation. A simple glance at the table shows it to be very unlikely that it would: £15.79 would have been the third highest payment that year, above the mean maximum and its standard deviation, and much more than AGCO paid the following year. On any reasonable view, the starting point ought <u>not</u> to have been increased to

recognise financial gain. Certainly, to do so in this way was unreasonable and disproportionate.

30. Being satisfied that the statutory ground at paragraph 4(2)(a)(iv) is made out, I turn to paragraph 1(5). The £60,000 starting point was reached by a process that is unchallenged by AGCO. No other mitigating or aggravating factors put forward by either party as applicable, nor is it the function of the Tribunal to identify them for itself. In those circumstances I substitute a penalty notice of £60,000.

Signed | Date:

Judge Neville | 21 March 2024

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[i] The version applicable at the time of the penalty notice can be accessed here: https://webarchive.nationalarchives.gov.uk/ukgwa/20230202140413/https://www.gov.uk/government/publications/environment-agency-enforcement-and-sanctions-policy/environment-agency-enforcement-and-sanctions-policy