Neutral citation number: [2023] UKFTT 847 (GRC)

Case Reference: NV/2022/0062/GGE

First-tier Tribunal
(General Regulatory Chamber)
Environment

Heard remotely by CVP
Heard on 28 July 2023 and subsequent written submissions
Decision given on: 13 October 2023

Before

TRIBUNAL JUDGE NEVILLE
TRIBUNAL MEMBER MCCAUGHEY

Between

ABX AIR, INC.

Appellant

and

ENVIRONMENT AGENCY

Respondent

Representation:
Appellant: Written submissions only
Respondent: Mr G Lewis KC, instructed by the Environment Agency

Decision: The appeal is dismissed. The decision dated 18 September 2022 to impose a penalty notice upon ABX Air, Inc. is affirmed.

REASONS

1. This appeal concerns a penalty of £382,900 imposed by the Environment Agency upon ABX Air, Inc. It is one of the first penalties issued under the United Kingdom's Emissions Trading Scheme. The Tribunal has had to decide how it should approach the appeal, particularly in light of Article 1 of the First Protocol to the European Convention on Human Rights.

Background to the appeal

2. As long ago as 1992, the United Nations Framework Convention on Climate Change recognised the need for "stabilisation of greenhouse gas concentrations in the atmosphere at a level that would prevent dangerous anthropogenic interference with the climate system." In 1997, the Kyoto Protocol was formulated to implement that objective. In 2002, the European Parliament and Council expressed a commitment to achieving an 8% reduction in greenhouse gas emissions over the following decade and a 70% reduction in the longer term. This resulted in the European Union Emissions Trading System, the EU ETS, being established by Directive 2003/87/EC. The United Kingdom was instrumental in the development of EU ETS, and the Environment Agency responsible for its domestic implementation and administration.

3. Following the United Kingdom's departure from the European Union, the UK Emissions Trading Scheme was duly established by the Greenhouse Gas Emissions Trading Scheme Order 2020. It began to operate on 1 January 2021 and like its EU equivalent is a 'cap and trade' scheme. The Department for Energy Security and Net Zero describes such schemes as follows:[i]

> *Emissions trading schemes usually work on the 'cap and trade' principle, where a cap is set on the total amount of certain greenhouse gases that can be emitted by sectors covered by the scheme. This limits the total amount of carbon that can be emitted and, as it decreases over time, will make a significant contribution to how we meet our Net Zero 2050 target and other legally binding carbon reduction commitments.*
>
> *Within this cap, participants receive free allowances and/or buy emission allowances at auction or on the secondary market, which they can trade with other participants as needed.*
>
> *Each year, installation operators and aircraft operators covered by the scheme must surrender allowances to cover their reportable emissions. The cap is reduced over time, so that total emissions must fall.*

4. As set out in the evidence before us, the UK ETS is intended to be "at least as ambitious" as the EU ETS and to "provide a smooth transition for relevant sectors"[ii].

<u>How the UK ETS scheme operates</u>

5. The Order places overall responsibility for the scheme on the UK ETS Authority, made up of the national authorities of each constituent part of the UK: the Secretary of State; the Scottish Ministers, the Welsh Ministers and the relevant Northern Ireland department. In practice, the work of the UK ETS Authority is divided up between them.

6. The UK ETS Authority is required by Schedule 5A of the Order to establish the UK ETS Registry:

> *(1) The UK ETS authority must establish an electronic system (the "registry") for the purposes of the UK ETS, in particular, to keep track of—*

(a) operators of installations and aircraft operators participating in the UK ETS;

(b) allowances held by persons and the allocation and transfer of allowances;

(c) reportable emissions of installations and aviation emissions of aircraft operators;

(d) the surrender of allowances by operators and aircraft operators in accordance with articles 27 and 34.

7. For the aviation industry, with which this appeal is concerned, Article 11 assigns a 'regulator' to each aircraft operator dependent on where it is based. The Environment Agency regulates operators based either in England or outside the UK. It is also responsible for administering the UK ETS Registry for the whole of the UK.

8. An 'aircraft operator' is defined by Article 6. In the majority of cases, an aircraft operator is one that operates over a certain number "full-scope flights", or that cause emissions over a certain threshold. A "full-scope flight" is one:

   a. Between two UK destinations;

   b. Between the UK and Gibraltar; and/or

   c. From the UK to a state in the European Economic Area.

9. An aircraft operator, as so defined, has four principal obligations:

   a. Within 42 days of meeting the definition of an "aircraft operator", it must apply to its regulator for an Emissions Monitoring Plan ("EMP"). This obligation does not apply if the operator was previously regulated by the UK under the EU ETS, in which case the regulator will issue an EMP in substantially the same terms. (Articles 28 and 29).

   b. The operator must then monitor its emissions in accordance with its EMP. (Article 32)

   c. The operator must submit a verified report of its aviation emissions for each scheme year. This must be done by 31 March in the subsequent year. (Article 33)

   d. The operator then has until 30 April to surrender allowances equivalent to its aviation emissions for that scheme year by 30 April. The surrendered allowances must be entered in the operator's Aircraft Operator Holding Account ("AOHA") in the UK ETS Registry. (Article 34)

10. Operators usually obtain the allowances they require from participants in the UK carbon market that hold trading accounts in the UK ETS Registry, although in some cases operators may qualify for a free allocation of allowances. Allowances can be surrendered by either the authorised representative appointed in relation to the AOHA, or by the Environment Agency "in accordance with instructions from

account holders", by virtue of paragraph 6(1)(c) of Schedule 5A. The registry is accessed using an online reporting and management portal called ETSWAP.

11. If an operator fails to comply with an obligation imposed upon it by the scheme, the Order enables the regulator to impose a civil penalty.

The excess emissions penalty

12. The obligation to surrender sufficient allowances is provided by Article 34(1):

> *34. –*
>
> *(1) A person who is an aircraft operator in relation to a scheme year must surrender, on or before 30th April in the following year, an amount of allowances equal to its aviation emissions in that scheme year (expressed in tonnes).*
>
> *[…]*

13. Article 52 provides (so far as relevant):

> *52. –*
>
> *(1) Subject to paragraphs (4) to (9), the operator of an installation or an aircraft operator is liable to the civil penalty (the "excess emissions penalty") referred to in paragraph (2) where –*
>
> *[omitted]*
>
> *(b) in the case of the aircraft operator, the aircraft operator fails to surrender sufficient allowances, contrary to article 34.*
>
> *(2) The excess emissions penalty is £100 multiplied by the inflation factor for each allowance that the operator or the aircraft operator fails to surrender.*

14. Article 47(2) provides that where an operator is liable to the excess emissions penalty as defined above, the regulator must impose a civil penalty. This is done by giving a penalty notice, which renders the civil penalty recoverable as a civil debt. Likewise, while Article 48 gives the regulator power to amend or withdraw most types of penalty notice, it specifically excludes that power in the case of an excess emissions penalty.

15. On the plain words of the Order, it therefore appears that if an operator fails to surrender sufficient allowances then a civil penalty must follow. Once the fact of the failure to surrender is established, there can be no defence or mitigation. Neither the operator nor the Environment Agency would have any no room for manoeuvre. Nor would the Tribunal be able to intervene, Article 73(2) prohibiting it from determining an appeal by making any decision which could not otherwise have been made under the Order.

16. ABX Air argues that the circumstances leading up to the penalty under appeal are such that its imposition would be contrary Article 1 of the First Protocol to the

European Convention on Human Rights ("A1P1"). The Environment Agency accepts that applying the statutory provisions as interpreted in the above paragraph might, in some cases, give rise to a contravention of A1P1. It does not accept that it would do so in the present case. Both parties agree that deciding this appeal requires the Tribunal to determine how the Order ought to be read and given effect in a way that is compatible with A1P1.

Interpreting the Order compatibly with A1P1

17. The full text of A1P1 is as follows:

> 1. *Every natural or legal person is entitled to the peaceful enjoyment of his possessions. No one shall be deprived of his possessions except in the public interest and subject to the conditions provided for by law and by the general principles of international law.*
>
> 2. *The preceding provisions shall not, however, in any way impair the right of a State to enforce such laws as it deems necessary to control the use of property in accordance with the general interest or to secure the payment of taxes or other contributions or penalties.*

18. Section 3(1) of the Human Rights Act 1998 places a duty upon both the Environment Agency and the Tribunal to read and give effect to legislation in a way which is compatible with the Convention rights, including A1P1. In Poplar Housing and Regeneration Community Association Ltd v Donoghue [2001] EWCA Civ 595 at [75], Lord Woolf CJ made the following points concerning the section 3 duty:

> *a) unless the legislation would otherwise be in breach of the Convention section 3 can be ignored; (so courts should always first ascertain whether, absent section 3, there would be any breach of the convention),*
>
> *b) if the court has to rely on section 3 it should limit the extent of the modified meaning to that which is necessary to achieve compatibility;*
>
> *c) section 3 does not entitle the court to legislate; ...its task is still one of interpretation, but interpretation in accordance with the direction contained in section 3),*
>
> *d) the views of the parties and of the Crown as to whether a "constructive" interpretation should be adopted cannot modify the task of the court; (if section 3 applies the court is required to adopt the section 3 approach to interpretation),*
>
> *e) where despite the strong language of section 3, it is not possible to achieve a result which is compatible with the convention, the court is not required to grant a declaration and presumably in exercising its discretion as to whether to grant a declaration or not it will be influenced by the usual considerations which apply to the grant of declarations.*

19. While those observations are *obiter*, and this Tribunal is not concerned with making any declaration of incompatibility, we see no reason not to apply them. Therefore, the Tribunal's first task is to ascertain whether the literal application of the relevant

provisions in the Order could, in principle, give rise to a breach of A1P1. The parties are agreed on the issue, but we should nonetheless set out our own assessment.

Do the Order's provisions concerning the excess emissions penalty contravene A1P1?

20. In approaching this issue, s.2 of the 1998 Act requires us to take account of decisions made by the European Court of Human Rights. In Krayeva v Ukraine 72858/13 (Judgment : Article 1 of Protocol No. 1 - Protection of property : Fifth Section) [2022] ECHR 41, the Court considered a Ukrainian law imposing a mandatory fine for breach of certain customs regulations, fixed in the sum of 100% of the value of the goods concerned.

21. Citing previous Strasbourg authority, the Court first confirmed at [19] that the imposition of a fine is capable of engaging the protection of property afforded by A1P1. We see no reason to distinguish between a "fine" and a "civil penalty" in this context. While English law may use the former term in criminal proceedings and the latter in a regulatory setting, for present purposes we see no material distinction between the two. Each is a mandatory financial penalty, and the enforcement powers available to the state include seizure and sale of other property in its satisfaction. We hold that imposition of the excess emissions penalty under the Order is capable of engaging the protection afforded by A1P1.

22. The Court, at [24], next noted that the second paragraph of A1P1 expressly allows the state to control the use of property to secure the payment of taxes or other contributions or penalties, but that to be compatible with the first paragraph a measure must fulfil three conditions: it must be lawful, pursue a legitimate aim and must strike a fair balance between the general interest of the community and the individual's fundamental rights. It went on to accept that the fine fulfilled the first two conditions, being lawful and in pursuit of the legitimate aim of ensuring payment of taxes.

23. We consider that the first two conditions are easily fulfilled in the present case. The imposition of the penalty is prescribed by law, the Order having been properly made in council in accordance with the requirements set out in the Climate Change Act 2008. It further pursues a legitimate aim, being to secure compliance with regulatory requirements. Importantly, those requirements are in support of the protection of the environment, the importance and legitimacy of which has been recognised in Strasbourg jurisprudence, see O'Sullivan McCarthy Mussel Development Ltd v Ireland - 44460/16 (Judgment : Remainder inadmissible : Fifth Section) [2018] ECHR 471 at [109].

24. It is the Court's treatment of the third condition, proportionality, that is of importance in the present appeal. It held as follows:

> *31. Moreover, by virtue of Article 483 § 1 of the Customs Code, under which the applicant was found guilty, the fine in an amount equal to the value of the goods - a very high amount in itself - and the confiscation of the goods were mandatory measures with no exceptions allowed. The lack of any discretion in this regard left no room to the Ukrainian courts for the assessment of individual situation, making*

> *any such assessment futile. The Court has already noted that such a rigid system is in itself incapable of ensuring the requisite fair balance between the requirements of the general interest and the protection of an individual's right to property (see, mutatis mutandis, Gyrlyan v. Russia, no. 35943/15, § 31, 9 October 2018, in which the domestic legislation prevented the courts from considering a more lenient sanction than a fine equivalent to at least the undeclared amount or confiscation of the undeclared cash). It has no reason to find otherwise in the present case.*
>
> *32. The mandatory nature of the sanction, in the circumstances of the present case - the amount of the fine, - deprived the applicant of any possibility of arguing her case with any prospect of success in the proceedings against her.*
>
> *33. The foregoing considerations are sufficient to enable the Court to conclude that, in the circumstances of the present case, the sanction imposed on the applicant, in particular the amount of the fine which she was ordered to pay as a result of the decision of the Court of Appeal applying Article 483 § 1 of the Customs Code, constituted a disproportionate interference with her property rights contrary to the requirements of Article 1 of Protocol No. 1 to the Convention.*

25. As it is cited in the above extract, we have also considered the Court's decision in Gyrlyan v. Russia - 35943/15 (Judgment : Article 1 of Protocol No. 1 - Protection of property : Third Section) [2018] ECHR 816. At [24], the Court held that while A1P1 contains no procedural requirement, in addressing whether a contravention has occurred:

> *… the Court must consider whether the proceedings as a whole afforded the applicant a reasonable opportunity to put his case to the competent authorities with a view to enabling them to establish a fair balance between the conflicting interests at stake (see Grifhorst , § 94; Paulet , § 65; and Boljević , § 41, all cited above; Denisova and Moiseyeva v. Russia , no. 16903/03, §§ 58-59, 1 April 2010; and Rummi v. Estonia , no. 63362/09, § 104, 15 January 2015).*

26. At [31], it concluded that the Russian law in question:

> *…does not appear to leave the sentencing court any discretion in the matter by imposing a choice between a fine equivalent to at least the undeclared amount or confiscation of the undeclared cash. In either case, it was the entire undeclared amount that was forfeited to the State. In the Court's view, such a rigid system is incapable of ensuring the requisite fair balance between the requirements of the general interest and the protection of an individual's right to property (see Grifhorst , cited above, § 103 in fine , and also Vasilevski v. the former Republic of Macedonia , no. 22653/08, § 57, 28 April 2016, and Andonoski v. the former Yugoslav Republic of Macedonia , no. 16225/08, § 38, 17 September 2015, in which the domestic legislation prevented the courts from considering the relationship between the applicant's conduct and the offence).*

27. Taking account of these judgments of the European Court, we agree with the parties that a literal interpretation of the Order (insofar as it concerns the excess emissions penalty) contravenes A1P1. Like the penalties considered in Krayeva and Gyrlyan, it prohibits *any* consideration of the nature of the offending conduct so that a fair balance can be struck between the conflicting interests at stake. Nor, we observe, does

the Order permit the Environment Agency to take account of any representations on that subject that might be made by the operator. While the Tribunal is able to hear such representations as it thinks fit before deciding an appeal, on the literal interpretation of the Order those representations could make no difference to the outcome.

28. We still question whether a requirement to apply section 3 necessarily follows. Section 6 of the 1998 Act provides, so far as relevant:

> *6. Acts of public authorities*
>
> *(1) It is unlawful for a public authority to act in a way which is incompatible with a Convention right.*
>
> *(2) Subsection (1) does not apply to an act if—*
>
> *(a) as the result of one or more provisions of primary legislation, the authority could not have acted differently; or*
>
> *(b) in the case of one or more provisions of, or made under, primary legislation which cannot be read or given effect in a way which is compatible with the Convention rights, the authority was acting so as to give effect to or enforce those provisions.*

29. If imposing a particular penalty notice would be incompatible with A1P1, it would be unlawful under section 6(1) for the Environment Agency to do it. This is unaffected by it being a mandatory result of the Order, which is secondary (rather than primary) legislation.

30. Nonetheless, we recognise that we were not addressed on this point and that both parties put their cases on the basis that some form of words must be read in to the Order to meet the 1998 Act's requirements. We therefore turn to section 3 of the 1998 Act to determine whether the Order can be interpreted compatibly with the Convention.

Convention-compliant interpretation of the Order

31. In applying section 3 we pay careful attention to the speech of Lord Nicholls in Ghaidan v. Godin-Mendoza [2004] UKHL 30, and in particular the following:

> *33. Parliament, however, cannot have intended that in the discharge of this extended interpretative function the courts should adopt a meaning inconsistent with a fundamental feature of legislation. That would be to cross the constitutional boundary s3 seeks to demarcate and preserve. Parliament has retained the right to enact legislation in terms which are not Convention-compliant. The meaning imported by application of s3 must be compatible with the underlying thrust of the legislation being construed. Words implied must, in the phrase of my noble and learned friend Lord Rodger of Earlsferry, "go with the grain of the legislation". Nor can Parliament have intended that s3 should require courts to make decisions for which they are not equipped. There may be several ways of making a provision*

Convention-compliant, and the choice may involve issues calling for legislative deliberation.

32. As well as recognising that this is secondary legislation rather than an Act of Parliament, relevant to identifying the "underlying thrust" of the legislation is the way in which the present situation came about. It is well established that interpretation of legislation should take into account "the historical context of the situation which led to its enactment": R. (Quintavelle) v Secretary of State for Health [2003] UKHL 13, at [8].

33. The UK ETS is functionally similar to the EU ETS, and by reference to the evidence provided we accept the Environment Agency's submission that the former was intended to follow the latter very closely. As noted at paragraph 4 above, one objective in formulating the scheme was to enable a "smooth transition" for operators. Article 16(3) of the Directive provides that:

> *(3) Member States shall ensure that any operator who does not surrender sufficient allowances by 30 April of each year to cover its emissions during the preceding year shall be held liable for the payment of an excess emissions penalty. The excess emissions penalty shall be EUR 100 for each tonne of carbon dioxide equivalent emitted by that installation for which the operator has not surrendered allowances. Payment of the excess emissions penalty shall not release the operator from the obligation to surrender an amount of allowances equal to those excess emissions when surrendering allowances in relation to the following calendar year.*

34. Like the Order, this comes with no explicit defence. It is, however, subject to the general EU law principle of *force majeure*. Unlike its namesake in English law of contract, it a principle that applies equally in public law. It was considered in relation to Directive 2003/87 by the Court of Justice in Billerud Karlsborg AB v Naturvardsverket [2013] EUECJ C-203/12. Rejecting arguments by two Swedish operators, the Court held that the penalty at Article 16(3) for failure to surrender sufficient allowances still applied where the operator could show that it did hold sufficient allowances at the relevant time. The Court also rejected an argument that the Directive permitted the penalty to be varied by a national court on the basis of proportionality. In reaching those conclusions, it observed that:

> *31. Even in the absence of specific provisions, however, recognition of circumstances constituting force majeure presupposes that the external cause relied on by individuals has consequences which are inexorable and inevitable to the point of making it objectively impossible for the persons concerned to comply with their obligations (see, inter alia, Joined Cases 154/78, 205/78, 206/78, 226/78 to 228/78, 263/78 and 264/78, 39, 31/79, 83/79 and 85/79 Ferriera Valsabbia and Others v Commission [1980] ECR 907, paragraph 140). Consequently, it is for the referring court to determine whether the Billerud companies, despite all due care having been exercised in order to comply with time limits, were faced with unusual and unforeseeable circumstances which were beyond their control (see Case C-99/12 Eurofit [2013] ECR I-0000, paragraph 31) and went beyond mere internal breakdown.*

35. A more detailed discussion of the EU principle of *force majeure* can be found in Eurofit SA v Bureau d'intervention et de restitution belge (BIRB) [2013] EUECJ C-99/12. While this case does not specifically concern the EU ETS, we have found the following summary of the principle to be of assistance:

> *31. As a preliminary point, it should be noted that, according to the Court's settled case-law, the concept of force majeure must be understood as referring to unusual and unforeseeable circumstances which were beyond the control of the party by whom it is pleaded and the consequences of which could not have been avoided even if all due care had been exercised (Case 145/85 Denkavit België [1987] ECR 565, paragraph 11; Case C-377/03 Commission v Belgium [2006] ECR I-9733, paragraph 95; and Case C-218/09 SGS Belgium and Others [2010] ECR I-2373, paragraph 44).*
>
> *32. Since the concept of force majeure does not have the same scope in the various spheres of application of European Union law, its meaning must be determined by reference to the legal context in which it is to operate (see, inter alia, Case C-12/92 Huygen and Others [1993] ECR I-6381, paragraph 30; Case C-124/92 An Bord Bainne Co-operative and Compagnie Inter-Agra [1993] ECR I-5061, paragraph 10; and SGS Belgium and Others, paragraph 45).*

36. It can therefore be seen that the excess emissions penalty in the EU ETS *does* carry a potential defence: an operator would not be liable for the penalty if it arose from consequences that were inexorable and inevitable to the point of making it objectively impossible for the operator to comply with the obligation. A *force majeure* defence cannot, however, be implied into the UK ETS in the same way – there is no such public law concept in the laws of its participating jurisdictions. The Order is made under the Climate Change Act 2009 and is not retained EU law. We accept that Environment Agency's case that the omission of this potential defence is an unintended consequence of transposing European provisions into a purely domestic law.

37. For the above reasons, an interpretation which provides a limited form of defence in order to comply with A1P1 would not be so incompatible with the "underlying thrust" of the legislation as to make it impossible.

38. Having identified an incompatibility, and the context in which it arose, how does section 3 of the 1998 Act require the Tribunal to interpret the Order? ABX Air makes no suggestions, leaving the matter to the Tribunal. The Environment Agency argues that A1P1 compatibility would be obtained by reviving the *force majeure* defence. It suggests that Article 34 be read as if contained the following additional text, shown as underlined:

> *34 – Surrender of allowances by aircraft operators*
>
> *(1) A person who is an aircraft operator in relation to a scheme year must surrender, on or before 30th April in the following year, an amount of allowances equal to its aviation emissions in that scheme year (expressed in tonnes), unless this is objectively impossible*

due to unusual and foreseeable circumstances beyond the control of the operator, the consequences of which could not have been avoided even if all due care had been exercised.

39. This would, argues the Environment Agency, preserve the very limited and narrow scope for a successful defence that was a feature of the European legislation, and is consistent with the important aims of the domestic scheme. To illustrate the importance of maintaining the integrity of the scheme, we were taken to some examples of where a *force majeure* defence under the EU ETS had been rejected; the Environment Agency is unaware of any occasion on which it has been successful.

40. We are unable to accept the Environment Agency's interpretation. First, our power begins and ends with reading the Order in a way which is compatible with Convention rights. Any words to be read in to the legislation can do no more, and no less.

41. Second, we have been shown no authority to support the proposition that making a *force majeure* defence available would be sufficient to render the Order A1P1 compliant. If an operator fails to show that compliance was objectively impossible, it loses. There remains no room for the balancing exercise of the type described in Krayeva and Gyrlyan. Nothing in those authorities justifies restricting the factors that might weigh against imposing penalty to impossibility of compliance. The lack of any previous challenge to an excess emissions penalty under EU ETS by reference to A1P1 does not mean that such a challenge would be without merit.

42. Third, the different focus of the *force majeure* defence likewise risks it having effects beyond that which is required to secure compliance with A1P1. While penalising conduct that arose from *force majeure* would be very unlikely to satisfy A1P1, we cannot say that it is inconceivable. In that situation an operator would benefit from a defence created only because the Tribunal had taken on the role of legislator, contrary to the warning given by Lord Woolf in Donoghue.

43. Fourth, and most fundamentally, we see no justification for importing *force majeure* into what is accepted to be wholly domestic legislation. Neither ordinary principles of statutory interpretation nor section 3 operate to resolve non-compliant legislation by looking around for a way in which it is done somewhere else, then importing that wholesale. Why must impossibility be objective rather than subjective? Why must the consequences have been unavoidable even if all due care had been exercised? None of these requirements arise from domestic or Convention jurisprudence.

44. Properly understood, the Environment Agency's suggested interpretation does not provide the balance required by A1P1, but rather specifies factors that must weigh in it. There is nothing inherently objectionable about legislation specifying such factors, and indeed the weight that they should normally carry: see, for example, the provisions concerning the Article 8(2) balancing exercise discussed in Rhuppiah v Secretary of State for the Home Department [2018] UKSC 58 at [49]. But specification of such factors is the role of the legislature (or the executive under delegated legislative powers) and goes well beyond the interpretive function of a court or tribunal under section 3 of the 1998 Act.

45. In the circumstances, we consider that section 3 requires nothing more than for Articles 47(2) and 48(4) to be read and given effect as if they contained the following additional, underlined words:

> ***47. Penalty notices***
>
> …
>
> *(2) But where the regulator considers that a person is liable to a civil penalty under any of the following, the regulator must impose a civil penalty on the person––*
>
> *(a) article 52 (failure to surrender allowances), but only if the person is liable to the excess emissions penalty referred to in article 52(2);*
>
> *(b) article 54 (hospitals and small emitters: exceeding emissions target), except where paragraph (3) of that article applies;*
>
> *(c) article 59 (ultra-small emitters: reportable emissions exceeding maximum amount);*
>
> *save where to impose a civil penalty on the person would be contrary to section 6(1) of the Human Rights Act 1998.*
>
> …
>
> ***48. Penalty notices***
>
> …
>
> *(4) But the regulator may withdraw a penalty notice referred to in paragraph (3) if there is an error in the notice (including an error in the basis on which the civil penalty imposed by the notice is calculated) or where to do otherwise would be contrary to s.6(1) of the Human Rights Act 1998.*

46. This may be disappointing to the Environment Agency, which in its submissions has sought to have it recognised on the face of the Order that there is a very high threshold before an operator can avoid an excess emissions penalty. Yet the consequences of having a domestic scheme, implemented by domestic legislation, include having its principles established by that legislation being interpreted and applied by domestic courts and tribunals. If principles of EU law were intended to apply, then this would have been specified in legislation.

47. Finally, for completeness on this topic, we see no basis upon which A1P1 demands that the Environment Agency is able to impose a lesser (as opposed to no) penalty. The size of the penalty that would result from imposing the penalty is simply a factor to be considered when deciding whether to impose it at all, and there are already several regulatory provisions in the field of environmental regulation that operate in this way: see, for example, the legislation discussed in Environment Agency v Amphenol Invotec Ltd [2022] UKUT 318 (AAC).

How should the Tribunal approach an appeal against an excess emissions penalty?

48. The Order does not provide any specific approach to be taken by the Tribunal on this appeal, nor specify the grounds on which such an appeal should be brought. In R. (Begum) v Special Immigration Appeals Commission [2021] UKSC 7 at [68] it was held that appellate tribunals cannot generally decide how a statutory discretion conferred upon the primary decision-maker ought to have been exercised, or exercise the discretion themselves, in the absence of any statutory provision authorising them to do so. Instead:

> *68. … They are in general restricted to considering whether the decision-maker has acted in a way in which no reasonable decision-maker could have acted, or whether he has taken into account some irrelevant matter or has disregarded something to which he should have given weight, or has erred on a point of law: an issue which encompasses the consideration of factual questions, as appears, in the context of statutory appeals, from Edwards (Inspector of Taxes) v Bairstow [1956] AC 14. They must also determine for themselves the compatibility of the decision with the obligations of the decision-maker under the Human Rights Act, where such a question arises.*

49. We see no basis upon which this appeal should be approached differently. In an excess emissions penalty appeal, the first question is likely to be whether the operator did in fact fail to comply with the obligation at Article 34(1). Applying the principles discussed in R. (A) v London Borough of Croydon [2009] UKSC 8 (in particular at [26] to [27]), we consider that this should be approached as a precedent fact that the Tribunal decides for itself on the evidence. If the operator did comply with Article 34(1) then the appeal must be allowed.

50. If the operator failed to comply with Article 34(1), then the statutory scheme requires the appeal to be dismissed unless the imposition of the penalty would breach s.6(1) of the 1998 Act. Krayeva and Gyrlyan explain that the decision maker (and the Tribunal on appeal) must assess whether, in the individual circumstances, the imposition of the penalty would establish a fair balance between the public interest pursued and the protection of the operator's right to property. This includes the consideration of the operator's conduct when failing to comply with Article 34(1). While no such assessment was carried out by the Environment Agency in the present case, this is remedied by ABX Air having been able to make its A1P1 argument on appeal.

51. In performing the above balancing exercise, the public interest in maintaining the integrity of UK ETS must be afforded proper weight. As was noted by the Court of Justice in Billerud, at [36], the EU ETS:

> *… was a legislative choice which translated a political orientation in a context of urgency in addressing serious environmental concerns, as evidenced by the Conclusions of the Council of the European Union of 8 March 2001, referred to in the recital 1 in the preamble to Directive 2003/87. …*

52. Likewise, with reference to the surrender obligation, the Court of Justice in Billerud observed that:

> *25. It follows from the very letter of Directive 2003/87 that the obligation to surrender allowances equal to the emissions for the preceding year by 30 April of the current year in order to have them cancelled applies with particular force. Referred to obligatorily in the greenhouse gas emissions permit under Article 6(2)(e) and formulated unequivocally in Article 12(3), that obligation is the only one for which Directive 2003/87 itself provides for a specific sanction, whereas the sanction for any other conduct contrary to its provisions is, under Article 16, left to the discretion of the Member States. The key role of the allowance surrender process in the scheme of the directive is also apparent from the fact that being ordered to pay the penalty does not release the operator from the obligation to surrender the corresponding allowances during the surrender process the following year. The only flexibility allowed under Directive 2003/87 with respect to the penalty concerns its level, which is lowered from EUR 100 to EUR 40 for the 'learning' period for the scheme, that is to say, 2005 - 2007.*
>
> *26 Furthermore, it should be borne in mind that while the ultimate objective of the allowance trading scheme is the protection of the environment by means of a reduction in greenhouse gas emissions, the scheme does not of itself reduce those emissions but encourages and promotes the pursuit of the lowest cost of achieving a given amount of emissions reductions. The benefit for the environment depends on the stringency of the total quantity of allowances allocated, which represents the overall limit on emissions allowed by the scheme (Case C-127/07 Arcelor Atlantique and Lorraine and Others [2008] ECR I-9895, paragraph 31).*
>
> *27. The overall scheme of the directive is thus based on the strict accounting of the issue, holding, transfer and cancellation of allowances, the framework for which is provided for by Article 19 thereof and requires the establishment of a system of standardised registries through a separate Commission regulation. That accurate accounting is inherent in the very purpose of the directive, consisting in the establishment of a Community scheme for greenhouse gas emission allowance trading, which aims to reduce greenhouse gas emissions in the atmosphere to a level that prevents dangerous anthropogenic interference with the climate system, with the ultimate objective of protection of the environment (see Arcelor Atlantique and Lorraine and Others, paragraph 29). As observed by the Commission, in introducing itself a predefined penalty, the Community legislature wished to shield the allowance trading scheme from distortions of competition resulting from market manipulations.*
>
> *28. In that regard the Billerud companies' argument to the effect that they cannot be blamed for excessively environmentally harmful conduct must be rejected. Article 16(3) and (4) of the directive has as its object and effect to penalise not 'polluters' generally, but rather those operators whose number of emissions for the preceding year exceeds, as at 30 April of the current year, the number of allowances listed in the section of the surrendered allowance table designated for their installations for that year in the centralised registry of the Member State to which they report under*

Article 52 of Regulation No 2216/2004. This – and not the emissions which are per se excessive - is how the concept of 'excess emissions' is to be construed.

53. The United Kingdom was a full participant in the legislative choice described by the Court, and in formulating the documents it cites. The adoption of similar provisions in the UK ETS, and the mandatory nature of the excess emissions penalty, illustrates continued support for those principles. This conclusion is further supported by the statement in the July 2019 consultation that the UK ETS should have "an equally robust and proportionate enforcement system" as that in place for the EU ETS. Taking this together with the historical context of the legislation, from the UNFCCC, through the Kyoto Protocol, Council conclusions and resolutions, to the Directive, and now the UK ETS, we consider that the public interest in the excess emissions penalty being imposed is very high indeed. This is supported by O'Sullivan McCarthy Mussel Development Ltd and the other authorities discussed therein.

54. To succeed on the basis of A1P1, an operator must establish even weightier private interests and circumstances on the other side of the scales. The circumstances that would establish a *force majeure* defence may qualify, but others will be fact-sensitive and must be identified in individual appeals. We predict that they will be rare, but each case will turn on its own facts.

55. Accordingly, we turn to the circumstances of the present appeal.

ABX Air's appeal

The hearing

56. The appeal was heard by CVP, together with another excess emissions appeal penalty brought by Gullivair Limited under reference NV/2022/0063/GGE. Our decision and reasons on that appeal will be given separately. ABX Air did not attend the hearing, having confirmed that it was content to rely on its written submissions. Nor has it provided a witness statement in support of its factual assertions. We have nonetheless taken careful account of its written case, and have independently and critically analysed the evidence and arguments put forward by the Environment Agency.

57. The Environment Agency provided witness statements from Mike Higgins and John Insole, both of whom are Senior Technical Officers involved in implementing and administering UK ETS. A witness statement was also provided by Ruth Welsh, its lawyer with conduct of the present appeal. Each witness attended the hearing and confirmed the truth of their witness statements.

58. At the hearing we requested some further information on the Environment Agency's workload at the material time, which was provided and sent to all parties after the hearing.

Facts leading up to the penalty notice

59. The following findings of fact have been made according to the standard of the balance of probabilities, based on the witness and documentary evidence we have received. There is little difference between the parties' factual cases, and we indicate below where it has been necessary to resolve any conflict.

How the Environment Agency communicated the requirements of UK ETS

60. The Environment Agency has evidenced the following efforts to ensure that operators were aware of the need to take part in UK ETS, and its requirements:

    a. Several guidance documents were published, most being made available on gov.uk:

        i. "UK Emissions Trading Scheme for aviation: how to comply", published 4 March 2021;

        ii. "UK Registry Document Guide", published in May 2021;

        iii. "UK ETS Aviation: Do I have a UK ETS compliance obligation?", published on 17 December 2021;

        iv. "UK ETS Aviation: Reporting Guide No. 1 – Simplified Reporting" and "UK ETS Aviation: Reporting Guide No. 2 – Reporting through Verification", provided from February 2022 onwards.

    b. The above guidance supplemented other communications. We have been shown a selection:

        i. In 2020, the Environment Agency produced the first issue of its new "UK ETS Aviation Newsletter", sending it to any organisation that was likely to qualify as an aircraft operator for the purposes of UK ETS for the 2021 scheme year. One version was sent to the operators that the Environment Agency had already regulated under the UK ETS, and a slightly different version sent to those it had not. The latter organisations were identified using air traffic data. The newsletter introduced the UK ETS, described its scope and the qualifying criteria for inclusion as an aircraft operator, and the obligations that would follow. It also set out instructions for obtaining an ETSWAP account. Details were given for a helpdesk that was available to assist any operators with queries.

        ii. In January 2021, the Environment Agency produced the second issue of the newsletter and sent it to all those it had identified as potentially qualifying as aircraft operators under the UK ETS. This explained how an operator entitled to an allocation of free allowances could make an application.

iii. In February 2021, the Environment Agency produced the third issue of the newsletter and sent it to the same audience. The newsletter is focused on how an organisation can identify whether it has obligations as an aircraft operator under UK ETS. We observe that the newsletter is written in a plain and user-friendly way, and again gives an email address for the helpdesk.

iv. The fourth issue was also sent in February 2021 and stressed the deadline of 31 March 2021 for making an application for an allocation of free allowances.

v. The fifth issue of the newsletter was sent in December 2021 to all aircraft operators that the Environment Agency believed had obligations under UK ETS. This clearly sets out the scheme's requirements and emphasises the 2021 scheme year deadlines of 31 March 2022 for reporting and 30 April 2022 for surrender. It states:

> *The UK ETS reporting and surrender deadlines are mandated by the Order and we do not have the power to extend them.*

vi. In February 2022 the Environment Agency sent out three different versions of the sixth issue of the newsletter. The first, Issue 6.1, was sent to aircraft operators with both an EMP and an AOHA; the second, Issue 6.2, was sent to those who had applied for an EMP but did not yet have an AOHA with an authorised representative in place; and the third, Issue 6.3, was sent to those who had yet to apply for an EMP.

vii. A further compliance reminder was emailed on 23 March 2022 ahead of the imminent reporting deadline on 31 March 2022.

61. The contents of Issues 6.2 and 6.3 of the newsletter are particularly relevant to this appeal. Issue 6.2 begins:

> *You are receiving this newsletter because we believe that you are a UK ETS Operator and have UK ETS compliance obligations for the 2021 Scheme Year.*
>
> *You have applied for a UK ETS Emissions Monitoring Plan (EMP), But you do not yet have an Aircraft Operator Holding Account (AOHA) with an approved Authorised Representative in the UK ETS Registry, which you need in order to surrender UK ETS allowances.*

62. The context in which this newsletter was sent is that the practice at the Environment Agency had been to open the AOHA only after approval of the EMP. This meant that any delay in approving EMPs pushed operators closer to the surrender deadline which, as pointed out by the Environment Agency in a previous newsletter, it had no power to extend. Furthermore, under paragraph 2 of Schedule 3, the Environment Agency was required to determine an application for EMP within two months of receipt, or such longer period as may be agreed in writing with the operator.

63. Issue 6.2 therefore set out a "Revised Process", where an AOHA would be opened on receipt of the application for an EMP. This meant that, in this first year of UK ETS, an operator would not have to wait until approval of its EMP before it could obtain an AOHA and surrender its allowances. The Revised Procedure was explained in the newsletter as follows: (emphasis in the original)

> *Once your AOHA has been opened, the Registry Administrator will contact you with an offer to surrender for you under a 'Letter of Authority' (**the LoA Procedure**).*
>
> *If you opt for the LoA Procedure and meet its conditions, including returning a signed LoA and delivering allowances to your AOHA by the dates specified by the Registry Administrator, the Registry Administrator will surrender allowances for you.*
>
> *After surrender, the Registry Administrator will explain what you need to do to add a Primary Contact and at least one Authorised Representative to your AOHA to make it fully operational in time for 2022 Scheme Year compliance.*
>
> *The only practicable alternative to the LoA Procedure, is to nominate an Authorised Representative who is already enrolled in the UK ETS Registry (for example, from a management company), who could then be approved and given access to your AOHA by the Registry Administrator in time to surrender by 30 April 2022.*
>
> ***If you do not use the LoA Procedure or get an enrolled Authorised Representative added to your AOHA, you are at risk of not being able to surrender from your AOHA by 30 April 2022.***

64. That revised procedure was permitted by paragraph 1 of Schedule 5A, already set out earlier in these reasons.

65. Again, the key deadlines of 31 March 2022 and 30 April 2022 were highlighted in the newsletter. Also pointed out was the fact that 30 April 2022 fell on a Saturday, meaning that no assistance with the process could be provided after 4pm on 29 April 2022. The excess emissions penalty of £100 per allowance was reiterated, and that if the operator had any questions it should contact the helpdesk.

66. Issue 6.3 is much briefer, we infer because it was aimed at operators who had not begun to comply with UK ETS at all. It sets out the relevant deadlines and how an excess emissions penalty would be calculated in stark terms.

67. On 11 March 2022 the Environment Agency wrote to operators who might require it to surrender allowances on their behalf, asking whether they wished to make use of the LoA procedure. Those that did were sent a pro forma on 11 April 2022 with a return deadline of 18 April 2022. Another chasing email was sent on 20 April 2022 to those operators who risked failing to comply with the surrender deadline, alerting them to the need to take immediate action.

68. In April 2022, as the surrender deadline loomed, the Environment Agency was dealing with a significant number of operators whose EMP applications have been made but not yet determined. A decision was therefore made to concentrate

resources on ensuring that operators are in a position to surrender their allowances by the deadline, and approve any outstanding EMP applications later.

ABX Air's participation in UK ETS

69. ABX Air is a corporation incorporated under the laws of Delaware and headquartered in Wilmington, Ohio. It operates cargo flights. We agree with the Environment Agency that ABX Air's narrative grounds of appeal can be summarised as putting forward three reasons why it did not surrender the required allowances by the deadline:

    a. It was not granted access to its AOHA before the surrender deadline;

    b. It was not aware that the LoA Procedure was the only way in which it could surrender on time; and

    c. It believed that an extension of time that had been agreed with the Environment Agency for the approval of its EMP had also extended the surrender deadline.

70. In order to address these assertions, we make the following findings of fact.

71. The Director of Safety & Compliance at ABX Air contacted the Environment Agency on 23 March 2021, via its email helpdesk, seeking information about UK ETS compliance. The Environment Agency responded two days later by sending a copy of Issues 1, 3 and 4 of the newsletter described above, and inviting any additional questions. ABX Air acknowledged receipt.

72. On 27 August 2021 ABX Air responded to a request for user details for the ETSWAP portal. It gave two individuals' email addresses as those who would "deal with volunteering and reporting requirements of UK ETS". On a date in December 2021 (the exact date appears to have been mistakenly redacted from our copy) ABX Air was sent Issue 5 of the newsletter.

73. On 21 February 2022 ABX Air sent the following email to the helpdesk:

    Good Morning

    ABX Air, Inc is in need of setting up our company in order to submit a monitoring plan. Could you please assist me with this request?

    Thank you

74. Mike Higgins responded the same day with the following:

    Thank you for your e-mail. I note that you have not yet logged into your ETSWAP account. I will reset your password which will resend the first time login e-mail to you, you can then follow the first time login process.

> *I will send you another e-mail with instructions on how to submit an Emissions Monitoring Plan (EMP), which you should do as soon as possible. Please note that as ABX Air Inc's full-scope emissions are in excess of 25,000 tCO2 and their emissions from UK ETS Aviation Activities are in excess of 3,000 tCO2, they are ineligible to use simplified reporting and must submit an EMP which uses a Fuel Use Monitoring Method.*

75. We pause to note that ABX Air had been required to make its application by 12 February 2021, and could have easily ascertained that deadline from Issue 1 of the newsletter sent to it on 23 March 2021. On 22 February 2022 ABX Air was sent Issue 6.3 of the newsletter.

76. ABX Air's EMP application was submitted and the relevant fee paid on 25 February 2022. Its AOHA was opened on 25 March 2022 and on 28 March 2022 it used ETSWAP to report its aviation emissions for the 2021 scheme, totalling 3,829 tCO_2e.

77. On 11 April 2022 the Environment Agency sent an e-mail to ABX Air attaching a pro forma Letter of Authority, according to the LoA Procedure. We do note that the wording of the email seems to assume that ABX Air had received Issue 6.2 of the newsletter, explaining the LoA Procedure. As ABX Air had not submitted its EMP at the time, it had in fact received Issue 6.3. Nonetheless, the email of 11 April 2022 could not be clearer that the Letter of Authority must be returned by 18 April 2022 if the Environment Agency were to surrender allowances on ABX Air's behalf by the surrender deadline. We consider that any reasonable recipient of the email would appreciate that some form of action was required, even if clarification had to be sought.

78. On 19 April 2022 the Environment Agency wrote to ABX Air requesting its agreement to an extension of the two-month deadline within which the Order requires the Environment Agency to determine an EMP application. A conversation took place on the following day concerning approval of the EMP and access to ETSWAP. ABX Air agreed the extension requested by the Environment Agency.

79. The offer to surrender allowances on ABX Air's behalf if a Letter of Authority was submitted was repeated on 20 April 2022, after the deadline expressed in the e-mail of 11 April 2022 had passed, and asking that the Letter of Authority be submitted "immediately if you want the Registry Administrator to surrender on your behalf for the 2021 Scheme Year." We do not set out the e-mail at length, but find that the surrender deadline of 30 April 2022 (as well as 4pm on the previous day being the latest that assistance could be provided) could hardly have been made clearer.

80. ABX Air's EMP was approved on 25 April 2022, and this was notified by email. On 28 April 2022 Mike Higgins telephoned ABX Air, but his call was unanswered. He left a voicemail urging ABX Air to return the Letter of Authority so that the Environment Agency could surrender the necessary allowances. There was no response before the surrender deadline. Nor, in any event, had ABX Air delivered sufficient allowances to its AOHA for the Environment Agency to surrender on its behalf.

81. On 20 May 2022 ABX Air replied to the email of 25 April 2022, referring to the improvements that the Environment Agency had suggested to its EMP and asking that once they had been addressed the Environment Agency:

> *…let us know if we are compliant/complete.*
>
> *We realize our extension is thru May 28 and do not want to be delinquent.*

82. That concludes the relevant chronology, and we return to ABX Air's arguments on appeal.

83. First, ABX Air argues that it was not granted access to its AOHA before the surrender deadline so that it could appoint a representative and surrender its allowances. This is not accepted by the Environment Agency, but do not need to make a finding on this point. The correspondence of 11 and 20 April 2022 made it clear that the surrender deadline continued to apply, and that in the absence of an authorised representative the LoA Procedure was the only way in which an operator in ABX Air's position could meet it. In its skeleton argument for the hearing ABX Air argues that it:

> *has no record of receiving such documentation and did not understand that the Environment Agency was offering this in lieu of the process set out in the Order and the guidelines published by the Environment Agency (namely that an AOHA should be opened for the operator to allow it to surrender sufficient credits).*

84. This claim that documentation was not received is inconsistent with the claim that it was not understood. While ABX Air's correspondence in response to the Notice of Intent repeats the assertion that the LoA Procedure documentation was not received, its Grounds of Appeal include the following:

> *While we did not appreciate it at the time, the Environment Agency, out of concern that it would not be possible to appoint authorised representatives to AOHAs in the UK ETS Registry in time for airlines to meet the 30 April 2022 surrender deadline, devised an alternative process whereby the Registry Administrator would surrender sufficient emissions allowances on behalf of an airline if it signed and returned a letter of authority for this purpose. The Environment Agency implemented this alternative process by sending emails to airline account holders, including ABX Air, Inc. We simply did not appreciate that this one time alternative process was the sole means by which we could timely surrender our emissions allowances for 2021, for the following reasons: (i) we were still in the application process during the period in question; (ii) we had agreed to an extension of the determination period for our application to 27 May 2022 at the request of the Environment Agency, which we believed also extended the 30 April 2022 deadline, since there was not enough time for the Environment Agency to grant us access to our AOHA prior to that date; and (iii) an online AOHA account is normally the sole means through which an airline, such as ABX Air, Inc., can surrender its emissions allowances.*

85. This appears to accept that the emails implementing the LoA Procedure *were* sent to ABX Air. Given this inconsistency in the presentation of ABX Air's case, and the lack of any evidence to support the assertion that the LoA Procedure emails were not

received, we find that they were received. We also note an internal email dated 23 March 2022 opening AOHAs for several operators (including ABX Air) and stating that newsletter Issue 6.2 would be sent to them. While we do not have the email to ABX Air in which this was done, we find on the balance of probabilities that it was. We find, as is accepted by the Environment Agency, that ABX Air did not appreciate the significance of the LoA correspondence and that it misunderstood the agreed extension for the EMP application determination as also extending the surrender deadline.

86. While we find that ABX Air made genuine mistakes in reaching the above misunderstanding, we cannot accept that those mistakes were reasonable. The first cause of ABX Air's failure to surrender was its own brinkmanship. As the above chronology shows, ABX had been put on notice of its obligations as early as February 2021. Yet its email of 21 February 2022 reveals that no meaningful attention had been paid to them whatsoever. The subsequent EMP application was made only nine weeks before the surrender deadline. While that application ought to have been determined by the Environment Agency within two months, nothing in the Order or anywhere else suggests that failure to meet that deadline would also postpone the surrender deadline. Even had there been no LoA or other alternative procedure, as ABX Air appears to have thought, it could have had no reasonable expectation that the precedent steps to surrendering allowances under the 'usual' procedure could be completed in the time it had left itself, especially given that no allowances had been provided in its AOHA.

87. We are unable to read the EMP application determination extension correspondence (such as the letter of 19 April 2022) as giving any impression whatsoever that the surrender deadline would also be extended in line. On the contrary, the newsletters and the LoA correspondence had made it clear that the surrender deadline was immovable and that in the absence of an authorised representative the LoA Procedure was the only way to comply. It was reiterated in multiple pieces of correspondence from the Environment Agency that failure to comply with the surrender deadline would result in a penalty of £100 per allowance, and ABX Air would have known that it required 3,829 allowances, yet ABX Air's attitude throughout its engagement with UK ETS can be described as careless at best.

88. During the hearing we questioned whether the introduction of a revised procedure for this first year of the UK ETS might bespeak an inability on the Environment Agency's part to cope with its workload in the weeks preceding the deadline. The evidence instead paints a picture of considerable agility in the face of last minute applications by operators. The LoA procedure, including the ability to access an AOHA and surrender allowances before approval of the EMP, was lawful under the Order. We see no reason why an operator that followed its instructions would be prevented from complying with the surrender deadline, especially given the evidence of the proactive steps taken by the Environment Agency to secure compliance. In this case, it included an extension to the deadline for returning the LoA and a telephone call to ABX Air when it failed to engage.

Conclusion

89. Taking a step back, UK ETS is a carbon trading scheme that arises from longstanding and important commitments by governments around the world to combat the climate emergency. We have not been provided with any information concerning the size and financial resources of ABX Air, but compliance with such schemes is now a fundamental part of doing business as an airline operator. For the reasons already given, in particular by the Court of Justice in Billerung, the importance of enforcing compliance with such schemes to preserve their integrity lies behind both the mandatory nature of the penalty and the high financial level at which it is set. That objective would be seriously undermined if an operator were to escape the penalty having put forward little more than its own disorganisation and lack of engagement. None of the circumstances put forward by ABX Air come close to establishing that the penalty is disproportionate within the meaning of A1P1, and this appeal must be dismissed.

Signed — Date:

Judge Neville — 13 October 2023

[i] https://www.gov.uk/government/publications/participating-in-the-uk-ets/participating-in-the-uk-ets

[ii] Consultation: The future of UK carbon pricing, May 2019: https://www.gov.uk/government/consultations/the-future-of-uk-carbon-pricing