Case C-271/20

Summary of the request for a preliminary ruling pursuant to Article 98(1) of the Rules of Procedure of the Court of Justice

Date lodged:

19 June 2020

Referring court:

Verwaltungsgericht Berlin (Germany)

Date of the decision to refer:

11 June 2020

Applicant:

Aurubis AG

Defendant:

Federal Republic of Germany

Subject matter of the main proceedings

Objection to an allocation decision of the German Emissions Trading Authority — Allocation element with a fuel emission value — Allocation element with process emissions

Subject matter and legal basis of the reference

Interpretation of EU law; Article 267 TFEU

Questions referred

1. Are the requirements of Article 3(d) of Commission Decision 2011/278/EU for a free allocation of emission allowances on the basis of a sub-installation with a fuel emission value fulfilled where, in an installation for the production of non-ferrous metals in accordance with Annex I to Directive 2003/87/EC, a sulphur-containing copper concentrate is used in a flash smelting furnace to produce primary copper and the non-measurable heat

required to melt the copper ore contained in the concentrate is produced essentially through oxidation of the sulphur contained in the concentrate, meaning that the copper concentrate is used both as a source of raw material and as a combustible material to generate heat?

2. If the answer to Question 1 is in the affirmative:

Can entitlements to a further free allocation of emission allowances for the third trading period be met after the end of the third trading period with entitlements for the fourth trading period where the existence of the allowance entitlement is established by a court only after expiry of the third trading period, or do allowance entitlements that have not yet been met lapse on expiry of the third trading period?

Provisions of EU law cited

Directive 2003/87/EC of the European Parliament and of the Council of 13 October 2003 establishing a scheme for greenhouse gas emission allowance trading within the Community and amending Council Directive 96/61/EC (OJ 2003 L 275, p. 32), as amended by Directive 2009/29/EC of the European Parliament and of the Council of 23 April 2009 (OJ 2009 L 140, p. 63), as amended by Decision (EU) 2015/1814 of the European Parliament and of the Council of 6 October 2015 (OJ 2015 L 264, p. 1), as last amended by Directive 2018/410 of the European Parliament and of the Council of 14 March 2018 (OJ 2018 L 76, p. 3), Article 3(t)

Commission Decision 2011/278/EU of 27 April 2011 determining transitional Union-wide rules for harmonised free allocation of emission allowances pursuant to Article 10a of Directive 2003/87/EC (OJ 2011 L 130, p. 1), Article 3(d) and (h)

Provisions of national law cited

Gesetz über den Handel mit Berechtigungen zur Emission von Treibhausgasen (Law on greenhouse gas emission allowance trading, 'the TEHG 2011') of 27 July 2011, Paragraph 9(1) and (6), Annex I, Part 2, point 1

Verordnung über die Zuteilung von Treibhausgas-Emissionsberechtigungen in der Handelsperiode 2013 bis 2020 (Regulation on the allocation of greenhouse gas emissions allowances in the 2013 to 2020 trading period, 'the ZuV 2020') in the version of 26 September 2011, Paragraph 2, point 27 (allocation element with a fuel emission value), and point 29 (allocation element with process emissions), Paragraph 3

Brief summary of the facts and procedure

1 The applicant operates an EU-ETS installation in Hamburg for the manufacture of non-ferrous raw metals and produces copper. The installation comprises two sub-installations, the Rohhüttenwerk Nord (RWN) and the Rohhüttenwerk Ost (RWO).

2 The RWO is a primary smelting works, in which primary copper is obtained from ore by smelting copper concentrate in a flash smelting furnace (with downstream process steps). This is a flash smelting process.

3 By decision of 17 February 2014, the DEHSt allocated the applicant a total of 2 596 999 free emission allowances for the years 2013 to 2020 further to its application of 20 January 2012. On 14 March 2014, the applicant lodged an objection. By decision on the objection of 3 April 2018, the DEHSt revoked the allocation decision in part, in so far as the allocation exceeds 1 784 398 emission allowances. It gave as its reason that the copper concentrate used in an allocation element with a fuel emission value cannot be taken into account and must be allocated to an allocation element with process emissions. Following recalculation of the allowance entitlement, the DEHSt revoked 523 027 allowances.

4 The applicant contested the decision on the objection by an action lodged on 30 April 2018, inasmuch as part of the original allocation was revoked.

Principal arguments of the parties to the main proceedings

5 The applicant contends that it is entitled to an allocation of an additional 1 154 794 emission allowances.

6 It argues that it is entitled to an allocation based on the fuel emission value in accordance with Paragraph 2, point 27, of the ZuV 2020 or Article 3(d) of Decision 2011/278 for the heat generated from the combustion of the sulphur contained in the copper concentrate.

7 It further argues that the copper concentrate which it uses for the flash smelting process comprises copper and iron sulphides (30% each copper, iron and sulphur); that the concentrate also contains traces of carbon and other metals; and that the copper minerals used are chalcopyrite ($CuFeS_2$), copper(I) sulfide (Cu_2S), copper(II) sulfide (CuS) and bornite (Cu_5FeS_4), alongside pyrite (FeS_2).

8 It submits that SO_2, but no CO_2, is generated in the steps of the flash smelting process described by it in detail and that small quantities of CO_2 would be generated from oxidation of the minimal quantities of carbon introduced; that the copper concentrates used contained carbon in a proportion of approximately 0.7% by mass and that carbon dioxide emissions would be generated from that proportion of carbon as a result of the oxidation process in the flash smelting furnace; that this is a climate-friendly manufacturing method; that other copper

producers rely on the use of additional carbon-containing fuels; and that it used additional heavy fuel oil in its installation until 2008, after which it optimised its production process in terms of greenhouse gas emissions.

9 It explains that the heat generated in the RWO sub-installation is generated from the combustion of fuels; that combustion is the chemical reaction of a substance with oxygen or some other oxidation agent; that, under EU law, 'combustion' is defined in Article 3(t) of Directive 2003/87 as any oxidation of fuels; that, according to the judgment of the Court of 20 June 2019, *ExxonMobil Production Deutschland*, C-682/17, EU:C:2019:518, paragraph 53, 'combustion' is not reduced to oxidation reactions which generate CO_2; and that oxidation of iron and sulphur in the flash smelting furnace takes place in a highly exothermic reaction.

10 It submits that the sulphur combusted in the flash smelting furnace is also a fuel, as it is a combustible material that releases heat during combustion; that the chalcopyrite contained in the copper concentrate has a high calorific value; and that it does not follow from the wording of Article 3(d) of Decision 2011/278 that a material can only be classified as a fuel if heat generation is the primary objective or that it must be a standard fuel such as coal, crude oil or natural gas.

11 The applicant argues that the term 'fuel' is a generic term that has to be interpreted broadly and is intended to encompass all combustible materials, and that Article 3, point 24, of Directive 2010/75/EU on industrial emissions defines fuel as any solid, liquid or gaseous combustible material.

12 It contends that the copper and sulphur in the copper concentrate should be regarded as a raw material and fuel respectively; that, of itself, the combustion of the sulphur in the flash smelting furnace serves primarily to generate heat; that the primary copper cannot be extracted without the very intensive heat generated in the flash smelting furnace to smelt the ore through the combustion of the sulphur contained in the copper concentrate; and that its installation can only be operated using the sulphur contained in the copper concentrate as a fuel.

13 The applicant refers with regard to the question of the hierarchy of the allocation elements to the fact that the defendant has always relied on a hierarchical relationship between the three fall-back methods. In the applicant's opinion, the requirements for an allocation element with a fuel emission value are fulfilled and, for that reason alone, the allocation on the basis of the (secondary) process emissions argued by the defendant is out of the question.

14 In the alternative, the applicant argues that the criteria for an allocation element with process emissions are not fulfilled. It contends that there is no chemical reduction of metal compounds in the process of relevance here.

15 The defendant is of the opinion that the copper concentrate used by the applicant does not qualify for any allocation based on a fuel emission value and that a sub-installation with a fuel emission value only exists where the primary purpose of its

use is to generate heat, whereas the primary purpose of the applicant's installation is to produce copper.

16 It argues that the copper concentrate is a raw material, as the primary purpose of the production process is to produce copper; that, moreover, the copper concentrate is not fully combusted, which is a requirement when calculating the fuel emission value.

17 It submits that a fuel within the meaning of the fuel emission value is a fuel that could be replaced by another fuel, including natural gas, and that the fuel emission value is not a catch-all criterion.

18 The defendant therefore takes the view that the requirements for an allocation element with process emissions are fulfilled in this case.

19 It explains that metal compounds are chemically reduced in the installation, including in the flash smelting furnace; that the copper is reduced by reducing the chalcopyrite to copper sulphide, which in turn is reduced to copper. In the alternative, it argues that impurities from metal compounds are removed and carbon-containing raw materials are used, the primary purpose of which is not heat generation, and that that process results in CO_2 emissions.

20 It claims that the requirements for an allocation element with a fuel emission value are not fulfilled, meaning that the hierarchy of the allocation elements is irrelevant, and that a distinction is drawn between a heat/fuel emission value, on the one hand, and an allocation element with process emissions, on the other, based on the primary purpose of the input material and the industrial process which, as stated previously, is the manufacture of copper.

Brief summary of the basis for the reference

First question

21 If the first question is answered in the affirmative and the copper concentrate or the sulphur contained in it are classed as a fuel, the applicant would be entitled to a further free allocation of emission allowances and the contested decision on the objection would be unlawful.

22 The referring court is of the opinion that the judgment delivered on 20 June 2019 in *ExxonMobil Deutschland* clarified that Article 3(t) of Directive 2003/87 does not reduce the concept of 'combustion' to oxidation reactions which themselves generate a greenhouse gas. At paragraph 57 of that judgment, it was also held that the activity of combustion of fuels is also carried out by an installation for the purpose of natural gas desulphurisation and sulphur recovery under the Claus process.

23 It is not clear if that also applies to the fuel emission value where free allowances are allocated or whether that requires a narrower definition of fuel.

24 Free allocations are intended to mitigate hardship caused by the full tax liability. That purpose is suggested by the fact that free allowances are to be allocated for the generation of non-measurable heat by such fuels, the combustion of which, as with natural gas, necessarily results in the release of CO_2 or other greenhouse gases. In the applicant's flash smelting furnace, on the other hand, only a very small quantity of CO_2 (0.026 t CO_2/t copper concentrate) is released as a result of oxidation of the carbon traces in the copper concentrate.

25 Furthermore, there is as yet no clarification as to whether an allocation based on the fuel benchmark, alongside the criteria of fuel combustion and the generation of non-measurable heat for the purposes listed in the provision, also depends on heat generation being the primary purpose of the combustion of the fuel.

26 What is peculiar about this case is that the copper concentrate used is both the raw material and the combustible material that generates the heat needed to manufacture the product. If the primary purpose for which the copper concentrate is used is the criterion for an allocation based on the fuel benchmark, the question arises as to whether that requirement is fulfilled where its two purposes (as a raw material and as a fuel) rank equally ('dual use').

27 Nor is there any clarification as to whether a fuel within the meaning of the fuel benchmark in Article 3(h) of Decision 2011/278 depends on the exchangeability of the fuel and what the effect of any such requirement would be in this case, especially as the applicant states that heavy fuel oil was used as (additional) fuel alongside the copper concentrate up to 2008.

Second question

28 The considerations of the referring court on the second question correspond wholly with its considerations in respect of the fifth question referred in its request for a preliminary ruling in Case C-126/20.