Case C-320/19

Request for a preliminary ruling

Date lodged:

19 April 2019

Referring court:

Verwaltungsgericht Berlin (Germany)

Date of the decision to refer:

1 April 2019

Applicant:

Ingredion Germany GmbH

Defendant:

Bundesrepublik Deutschland

VG 10 K 771.17

VERWALTUNGSGERICHT BERLIN

(ADMINISTRATIVE COURT, BERLIN)

ORDER

In the administrative-law case

Ingredion Germany GmbH,

[...] Hamburg,

Applicant,

[...]

v

Bundesrepublik Deutschland

(Federal Republic of Germany),

represented by the Umweltbundesamt (Federal Environment Agency)

[...],

Defendant,

the 10th Chamber of the Verwaltungsgericht Berlin

[...]

made the following order on 1 April 2019:

The proceedings before the Verwaltungsgericht Berlin are stayed.

The following question is referred to the Court of Justice of the European Union for a preliminary ruling pursuant to Article 267 TFEU: **[Or. 2]**

Are Article 18(1)(c) and the second subparagraph of Article 18(2) of European Commission Decision 2011/278/EU, in conjunction with Article 3(h) and Article 10a of Directive 2003/87/EC, to be interpreted as meaning that, for new entrants, the capacity utilisation factor relevant for the fuel-related activity level is limited to a value of less than 100%?

Grounds

I. The applicant operates an installation for the production of starch products in Hamburg. The installation includes a newly constructed air heating installation and steam generator. The installation's overall rated thermal input is now 30.045 Megawatts. Steam and natural gas are used in the installation to generate heat for the production of starch.

On 8 August 2014 the applicant requested the Deutsche Emissionshandelsstelle (German Emissions Trading Authority; 'the DEHSt') to allocate free emission allowances for the new installation, specifically, first, an allocation according to the heat benchmark, CL risk, and, second, according to the fuel benchmark, CL risk. The regular operation of the installation began on 15 August 2013. For the fuel benchmark, the DEHSt initially assumed a relevant capacity utilisation factor of 109%, in accordance with the applicant's indications. The initial installed capacity was determined by way of the production volumes within 90 days of the beginning of regular operation at a time when the installation had not yet reached the intended production capacity. The actual capacity utilisation in the measurement period from 15 August 2013 to 20 June 2014 for that reason exceeded 100% of the initial installed capacity.

By decision of 1 September 2015, the DEHSt allocated to the applicant 124 908 free emission allowances for the allocation period from 2013 to 2020. As reasoning, it was stated that the DEHSt had initially reported the allocation

amount to the European Commission (EU Commission) on the basis of the relevant capacity utilisation factor of 109%. By decision of 24 March 2015 — C(2015) 1733 final — the EU Commission had rejected a relevant capacity utilisation factor of 100% or more in respect of three other German installations. Accordingly, the DEHSt had henceforth assumed a capacity utilisation factor of 99.9%. The EU Commission had agreed to the allocation amount calculated in this manner. The opposition filed against this on 30 September 2015 was rejected by the **[Or. 3]** DEHSt by opposition decision of 7 July 2017, served on 10 July 2017. As reasoning, the defendant cited, in addition to the EU Commission's decision of 24 March 2015, Guidance Document No 2 and the document 'Frequently Asked Questions on New Entrants & Closures Applications', which, while not legally binding, constitute an interpretation aid for the Member States.

By its action brought on 9 August 2017, the applicant is pursuing its request. By revocation decision of 28 January 2019, the DEHSt revoked the decision of 1 September 2015 in so far as the allocation exceeded 116 088 emission allowances. As grounds it stated that, by letter of 16 April 2018, the applicant had disclosed that the allocation request with regard to the allocation element with a fuel benchmark had contained a calculation error. The applicant accordingly adapted its claim on 20 January 2019 and no longer seeks 8 273, but merely 7 467 additional emission allowances.

The applicant is of the opinion that the provisions of Paragraph 17(2) of the Zuteilungsverordnung (Allocation Regulation; ZuV) 2020 and of the second subparagraph of Article 18(2) of Decision 2011/278/EU that are decisive for the calculation of the relevant capacity utilisation factor for new installations do not provide for any limitation of the capacity utilisation factor to a value below 100%. The wording of those provisions, which forms the boundary of interpretation, does not, it submits, state anything in this regard. The legal view taken by the EU Commission is not, in its view, justified by standpoints of the equal treatment of incumbent and new installations. The EU Commission's decision of 24 March 2015 has neither a direct nor an indirect binding effect on the applicant. Guidance Document No 2 and the 'Frequently Asked Questions' are also not legally binding.

The applicant requests that:

> the defendant, with partial amendment of the decision of the Deutsche Emissionshandelsstelle of 1 September 2015 in the form of its opposition decision **[Or. 4]** [of] 7 July 2017 and its revocation decision of 29 January 2019, be obliged to allocate to the applicant a further 7 467 emission allowances, in so far as this is not refused by the European Commission,
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> in the alternative,
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> the defendant, with partial amendment of the decision of the Deutsche Emissionshandelsstelle of 1 September 2015 in the form of its opposition

decision [of] 7 July 2017 and its revocation decision of 29 January 2019, be obliged to decide on the applicant's request of 8 August 2014 in the form of the calculations of 16 April 2018, having regard for the court's legal opinion, with the proviso that, for the allocation element of fuel benchmark, CL risk, a relevant capacity utilisation factor of 109% is used as a basis.

The defendant requests that:

the action be dismissed.

It is of the view that the relevant capacity utilisation factor of 109% requested by the applicant is not permissible. When interpreting Paragraph 17(2) ZuV 2020, which transposes the second subparagraph of Article 18(2) of Decision 2011/278/EU, it is to be assumed that a value of 100% should not be reached or exceeded. This view taken by the EU Commission, which is explained in more detail in the grounds for the decision of 24 March 2015, follows from the requirement of equal treatment of incumbent installations and new installations and of new installations with a product benchmark which use the standard capacity utilisation factor.

II. The relevant provisions of EU law are contained in 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 Union and amending Council Directive 96/61/EC (OJ 2003 L 275, p. 32; the Emissions Trading Directive in the currently applicable version), in particular in Article 3(h) and Article 10a(7) of the Emissions Trading Directive and in European 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, in particular in Article 3(d) and (n) and in Articles 17 to 19.

The relevant provisions of national law are contained in Paragraph 9 of the Gesetz über den Handel mit Berechtigungen zur Emission von Treibhausgasen (Law on greenhouse gas emission allowance trading; TEHG 2011) of 27 July 2011 (BGBl. [Federal Law Gazette] I p. 3154) in conjunction with Paragraph 34 TEHG in the version of 18 January 2019, and in the Verordnung über die Zuteilung von Treibhausgas-Emissionsberechtigungen in der Handelsperiode 2013 bis 2020 (Regulation on the allocation of greenhouse gas emission allowances in the trading period 2013 to 2020; ZuV 2020) of 26 September 2011, in particular in Paragraph 2.2, 2.10 and 2.27 and in Paragraphs 16 to 18: **[Or. 5]**

Paragraph 34 TEHG of 18 January 2019

(1) [1]In respect of the release of greenhouse gases through activities within the meaning of Annex 1, Paragraphs 1 to 36 in the version applicable until the end of 24 January 2019 are still to be applied in relation to the trading period from 2013 to 2020.

Paragraph 9 TEHG 2011

(1) Installation operators shall receive an allocation of free allowances in accordance with the principles laid down in Article 10a(1) to (5), (7) and (11) to (20) of Directive 2003/87/EC in the respectively applicable version and in 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).

ZuV 2020:

Paragraph 2 Definitions

In addition to the definitions in Paragraph 3 of the Greenhouse Gas Emission Trading Law, the following definitions shall apply to the present regulation:

2. Start of regular operation

the first day of a continuous 90-day period or, in the case where the common production cycle in the sector concerned does not provide for continuous production, the first day of a 90-day period split into sector-specific production cycles, during which the installation operates at an average of at least 40% of the production capacity for which it is designed, taking into account, where appropriate, the installation-specific operating conditions;

10. New installations

all new entrants pursuant to the first indent of Article 3(h) of Directive 2003/87/EC;

27. Allocation element with fuel benchmark **[Or. 6]**

Combination of input flows, output flows and related emissions not covered by an allocation element under number 28 or number 30 for cases of the production of non-measurable heat by fuel combustion, in so far as the non-measurable heat

(a) is consumed for the production of products, for the production of mechanical energy, for heating or for cooling or

(b) is produced by safety flares, in so far as the associated combustion of pilot fuels and highly variable amounts of process or residual gases is provided for under regulatory law for exclusive installation relief in the case of operational disruption or other unusual operational states;

excluded herefrom in each case is non-measurable heat which is consumed for power generation or exported for power generation;

Paragraph 16 Application for free allocation of allowances

(1) Applications for free allocation for new entrants are to be made within a year of the start of the regular operation of the installation, and, in the case of significant capacity extensions, within a year of the start of the amended operation.

(4) The initial installed capacity for new installations shall correspond for each allocation element, in a departure from Paragraph 4, to the average of the two highest monthly production volumes within the continuous 90-day period on the basis of which the start of regular operation is determined, projected for a calendar year.

Paragraph 17 Activity levels of new entrants

(1) In respect of the allocation elements of new installations to be determined under Paragraph 3, the activity levels relevant to the allocation of allowances shall be determined as follows:

3. the fuel-related activity level for an allocation element with fuel benchmark shall correspond to the initial installed capacity of the allocation element concerned multiplied by the relevant capacity utilisation factor

(2) The relevant capacity utilisation factor pursuant to subparagraph 1 numbers 2 to 4 shall be determined on the basis of the applicant's indications regarding **[Or. 7]**

1. the actual operation of the allocation element prior to the application and the intended operation of the installation or the allocation element, their intended maintenance periods and production cycles,

2. the use of energy- and greenhouse gas-efficient technologies which may influence the relevant capacity utilisation factor of the installation,

3. the typical capacity utilisation within the sectors concerned.

Paragraph 18 Allocation for new entrants

(1) In respect of the allocation of allowances for new installations, the competent authority shall calculate the preliminary annual number of allowances to be allocated free of charge as of the start of regular operation of the installation for the remaining years of the trading period from 2013 to 2020 as follows and separately for each allocation element:

3. for each allocation element with fuel benchmark, the preliminary annual number of allowances to be allocated free of charge shall correspond to the product of the fuel benchmark and the fuel-related activity level:

III. The question referred is material to the decision.

The applicant is entitled to an additional allocation of free emission allowances if the calculation is to be based on a relevant capacity utilisation factor of 109%. The interpretation of the relevant provision in the second subparagraph of Article 18(2) of Decision 2011/278/EU, which is to be used for an EU-law compliant interpretation of Paragraph 17(2) ZuV 2020, is not clear and unambiguous in this respect.

On the one hand, the wording does not contain any limitation of the relevant capacity utilisation factor to below 100%. A higher capacity utilisation factor emerges in the present case on the basis of duly substantiated and independently verified information not merely on the intended normal operation, but also on the actual normal operation of the installation prior to the application. Unlike in the case of incumbent installations, the determination of the initial installed capacity in the case of new entrants takes account of a 90-day period after the start of normal operation (see Article 17(4) of Decision 2011/278/EU) and not of a period of four years (see Article 7(3)(a) of Decision 2011/278/EU), which means that it may more frequently be the case that the intended normal operation is not yet achieved. **[Or. 8]**

On the other hand, the second subparagraph of Article 18(2) of Decision 2011/278/EU also refers to the typical capacity utilisation in the sector concerned, which should regularly be below 100%. In the case of new entrants with product benchmark sub-installations, account is also taken of a standard capacity utilisation factor (see Article 18(1)(a) of Decision 2011/278/EU), which has been fixed in Commission Decision 2013/447/EU and in no case reaches 100%. The free allocation of allowances pursuant to Article 10a of Directive 2003/87/EC is a temporary departure from the principle of the auctioning of allowances, which argues in favour of a restrictive interpretation of the corresponding provisions (see the Opinion of the Advocate General of 28 February 2019 in Case C-682/17, point 69).

Ultimately, the question arises as to what extent the EU Commission is to be granted a wide scope when interpreting the provisions adopted by it for the purpose of ensuring uniform implementation in the Member States and whether the boundary of interpretation is exceeded here.

[...]

[Signatures]

[...]