

Case C-165/20

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:

16 April 2020

Referring court:

Verwaltungsgericht Berlin (Germany)

Date of the decision to refer:

30 March 2020

Applicant:

ET, as insolvency administrator of Air Berlin PLC & Co. Luftverkehrs KG (AB KG)

Defendant:

Federal Republic of Germany

Subject matter of the main proceedings

Action for annulment of a decision on the allocation of aviation allowances

Subject matter and legal basis of the reference

Interpretation of EU law, specifically provisions of Directives 2003/87/EC and 2008/101/EC and Regulation (EU) No 2013/389; Article 267 TFEU

Questions referred

1. Having regard to recital 20 of Directive 2008/101/EC, are Directive 2003/87/EC and Directive 2008/101/EC to be interpreted as precluding the annulment of the free allocation of aviation allowances to an aircraft operator for the years 2018 to 2020 if the allocation for the years 2013 to 2020 has been made and the aircraft operator ceased its aviation activities in 2017 due to insolvency?

Is Article 3f(1) of Directive 2003/87/EC to be interpreted as meaning that the annulment of the allocation decision after aviation activities have been ceased due to insolvency is dependent on whether there has been a continuation of the aviation activities by other air transport operators? Is Article 3f(1) of Directive 2003/87/EC to be interpreted as meaning that there has been a continuation of aviation activities if landing rights at so-called coordinated airports (slots) have been sold in part (for the insolvent air carrier's short- and medium-haul operations) to three other air transport operators?

2. If Question 1 is answered in the affirmative:

Are the provisions in Article 10(5), Article 29, Article 55(1)(a) and (3) and Article 56 of Regulation No 389/2013 (Registry Regulation 2013) compatible with Directive 2003/87/EC and Directive 2008/101/EC and valid if they preclude, in the event that the air transport operator has ceased flight operations due to insolvency, the issuing of free aviation allowances that have been allocated but not yet issued?

3. If Question 1 is answered in the negative:

Are Directives 2003/87/EC and 2008/101/EC to be interpreted as meaning that an annulment of the decision on the free allocation of aviation allowances is mandatory under EU law?

4. In the event that Question 1 is answered in the affirmative and in the event that Question 3 is answered in the negative:

Are Article 3c(3a), Article 28a(1) and (2) and Article 28b(2) of Directive 2003/87/EC, as amended by Directive (EU) 2018/410, to be interpreted as meaning that, for aircraft operators, the third trading period does not end at the end of 2020, but rather continues until 2023?

5. If Question 4 is answered in the negative:

Can entitlements to a further free allocation of emission allowances for aircraft operators for the third trading period be met after the end of the third trading period with allowances of 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, as amended by Directive 2009/29/EC of the European Parliament and of the Council

of 23 April 2009 amending Directive 2003/87/EC so as to improve and extend the greenhouse gas emission allowance trading scheme of the Community,

in particular Article 10a(19) and (20) of Directive 2003/87 as amended by Decision (EU) 2015/1814 of the European Parliament and of the Council of 6 October 2015

Article 10a(19) and (20) of Directive 2003/87/EC as amended by Directive (EU) 2018/410 of the European Parliament and of the Council of 14 March 2018,

Article 3c(1), (2) and (3a), Article 3f(1) and (8), Article 28a(1), (2) and (4) of Directive 2003/87 as amended by Directive 2018/410,

Article 10, point 5, Article 29, Article 55(1)(a) and Article 56(3) of Commission Regulation (EU) No 389/2013 of 2 May 2013 establishing a Union Registry

Decision 377/2013/EU of 24 April 2013, Regulations (EU) No 421/2014 of 16 April 2014 and (EU) 2017/2392 of 29 December 2017

Articles 107 and 119 TFEU, Articles 17 and 20 of the Charter of Fundamental Rights of the European Union

Directive 2008/101/EC of the European Parliament and of the Council of 19 November 2008 amending Directive 2003/87/EC so as to include aviation activities in the scheme for greenhouse gas emission allowance trading within the Community, recital 20

Provisions of national law cited

Gesetz über den Handel mit Berechtigungen zur Emission von Treibhausgasen (Law on greenhouse gas emission allowance trading, ‘the TEHG’), Paragraph 2(6), Paragraph 9(6), Paragraph 11 (in the version as amended by the Law of 15 July 2013) and Paragraph 11(1) and (6) (in the version as amended by the Law of 18 January 2019), Paragraph 30

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’),

Verwaltungsverfahrensgesetz (Law on administrative procedure, ‘the VwVfG’), Paragraphs 48, 49

Brief summary of the facts and procedure

- 1 Air Berlin PLC & Co. Luftverkehrs KG (AB KG) (‘Air Berlin’) was a commercial aircraft operator until into the second half of 2017 and was subject to the emissions trading obligation. By decision of 12 December 2011, the Deutsche

Emissionshandelsstelle (German Emissions Trading Authority) allocated a total of 28 759 739 aviation allowances to Air Berlin for the 2012 and 2013-2020 allocation periods. A total of 3 174 922 aviation allowances per year were allocated for the years 2013-2020. By decision of 15 January 2015, the German Emissions Trading Authority partly withdrew the allocation decision of 12 December 2011 due to the suspension, introduced by Regulation (EU) No 421/2014, of the inclusion of the international flights referred to in that regulation in the emissions trading obligation for the years 2013-2016 and set the allocation at 18 779 668 aviation allowances. That withdrawal decision is final.

- 2 On 15 August 2017, Air Berlin filed a request for insolvency proceedings to be opened in relation to its own assets. The competent insolvency court ordered a preliminary self-administration ('vorläufige Eigenverwaltung') of Air Berlin. On 28 October 2017, Air Berlin officially ceased flight operations. The main insolvency proceedings were opened by order of the insolvency court of 1 November 2017. ET was appointed as the insolvency administrator on 16 January 2018.
- 3 On 28 February 2018, the German Emissions Trading Authority issued a five-point decision concerning ET in his capacity as insolvency administrator. In point 1, it partly withdrew the decision of 12 December 2011 in the form of the withdrawal decision of 15 January 2015 and adjusted the allocation for the years 2013-2020 to 12 159 960 allowances. In point 2, it partly withdrew the allocation for the 2013-2020 allocation period to the extent that it exceeds 7 599 975 aviation allowances after having deducted the aviation allowances allocated for the 2012 allocation period. It was stated that the adjusted allocation for the years 2013-2017 had already been issued in full, while no allocation had been issued for the years 2018-2020.
- 4 The reasoning given was that the withdrawal in point 1 resulted from the continuation of the suspension of the inclusion of certain international flights in the surrender obligation by Regulation (EU) 2017/2392 for the years 2017-2020. The withdrawal in point 2 resulted from the fact that, according to its own statements, Air Berlin ceased flight operations on 28 October 2017 after insolvency proceedings had been opened. The EU operating licence expired on 1 February 2018.
- 5 The opposition filed against the decision of 28 February 2018 was rejected by the German Emissions Trading Authority by opposition decision of 19 June 2018. By his action, ET essentially challenges point 2 of the decision of 28 February 2018 in the form of the opposition decision.

Principal arguments of the parties to the main proceedings

- 6 The **applicant** takes the view that the partial withdrawal in point 2 of the decision could not be based on Paragraphs 48 and 49 VwVfG (withdrawal of an unlawful administrative act or revocation of a lawful administrative act). The reason for this

was that neither Paragraph 11 TEHG nor the other provisions of the TEHG contained a provision on the annulment of a decision allocating allowances to an aircraft operator once it had been taken. The intention of the European Union legislature also militated against an annulment of the allocation. Recital 20 of Directive 2008/101/EC stated the following: ‘Aircraft operators that cease operations should continue to be issued with allowances until the end of the period for which free allowances have already been allocated.’ The European Union legislature unequivocally stipulated that the entitlement to allocation continued to exist. This was also appropriate, as the total quantity of emission allowances allocated remained unchanged. The applicant refers to the explanatory memorandum to the draft law amending the legal bases for the further development of European emissions trading of 27 June 2018. The future provision in a newly added subparagraph 6 of Paragraph 11 TEHG covered precisely the case at issue here. However, this enabling provision did not actually exist yet, and was to be created only for the future. Therefore, such an enabling provision did not currently exist.

- 7 In any event, Air Berlin had legitimate expectations that were worthy of protection regarding the continued existence of the allocation decision and had already sold the majority of the aviation allowances issued to it in 2017 in spring/summer 2017. This was done in expectation of and in reliance upon the emission allowances to be issued in the following years of the emissions trading period. The legitimate expectations regarding the continued existence of the allocation decision were also worthy of protection. The insolvency could not have been foreseeable when the aviation allowances issued in 2017 were sold.
- 8 Based on the information currently available to the applicant, Air Berlin was unexpectedly denied financing on 11 August 2017, which led to its insolvency. Even if insolvency had already been foreseeable at the time of the sale, Air Berlin’s legitimate expectations would have been worthy of protection. It followed from recital 20 to Directive 2008/101, cited above, that Air Berlin could have expected to be allocated allowances for the current allocation period even if it ceased operations.
- 9 All the aircraft in Air Berlin’s fleet were leased from various lessors. In the course of the provisional insolvency proceedings, and also after the insolvency proceedings had been opened, the slots allocated to Air Berlin which were required to use the airport infrastructure at so-called coordinated airports on certain days at certain times for take-off and landing were sold to Deutsche Lufthansa, Easyjet and Thomas Cook in connection with the sale of assets. The applicant was not aware of whether these undertakings actually used the slots they had taken over in the same way as Air Berlin had used them or whether they served other routes. Slots for short- and medium-haul operations had been sold.
- 10 The applicant takes the view that the continuation of aviation activities within the meaning of Article 3f(1) of Directive 2003/87 was not relevant to the question of the continuation of the allocation for air transport operators. Moreover, the

question of when a continuation within the meaning of the aforementioned provision was to be assumed had not yet been clarified in the case-law.

- 11 It was also incomprehensible why the public interest in a functioning emissions trading system would be jeopardised if the allocation decision were not annulled and why Air Berlin would be given an unfair advantage to the detriment of other market participants. There was no threat of a distortion of competition because Air Berlin no longer competed on the market at all.
- 12 The **defendant** argues that Paragraphs 48 and 49 VwVfG constituted a sufficient basis for the withdrawal of the allocation for the years 2018-2020.
- 13 The allocation was originally made for the years 2013-2020 on the basis that Air Berlin would carry out its aviation activities subject to compulsory emissions trading until 2020. From the point at which it definitively ceased flight operations, Air Berlin was no longer subject to the emissions trading scheme and therefore no longer fell within the scope of the TEHG. Air Berlin's status as an aircraft operator ceased to exist upon the expiry of its operating licence. Pursuant to the TEHG, the entitlement to allocation was linked to the existence of the emissions trading obligation. This was not precluded by EU law. In its judgment of 28 February 2018, *Trinseo Deutschland* (C-577/16, EU:C:2018:127), the Court of Justice expressly stated that an installation fell within the scope of the greenhouse gas emission allowance trading scheme only if they generated direct CO₂ emissions. According to that judgment, only installations whose activities fell, in accordance with Article 2(1) of Directive 2003/87, within the scope of the emissions allowance trading scheme were eligible for the allocation of such free allowances. These statements applied mutatis mutandis to aviation activities.
- 14 Accordingly, Article 10(5) of Regulation No 389/2013 provided that the account of an aircraft operator which no longer operated flights covered by the emissions trading scheme was to be set to excluded status. Pursuant to Article 10(6) of Regulation No 389/2013, processes may no longer be initiated from such an account, unless they were for the period during which the account status was not yet set to excluded. Article 56(1) of Regulation No 389/2013 provided that the national administrator was to indicate for aircraft operators and for each year whether or not the aircraft operator should receive an allocation for that year in the national aviation allocation table. The inclusion of those provisions in Regulation No 389/2013 demonstrated that the withdrawal of allocation decisions must be permissible.
- 15 Recital 20 of Directive 2008/101 conflicted with the emissions trading scheme. That recital was drafted before the adoption of Regulation No 389/2013 — which clearly conflicted with it — and was not repeated in Regulations Nos 421/2014 of 16 April 2014 and 2017/2392 of 13 December 2017, by which Directive 2003/87 was amended in relation to aviation.

- 16 The applicant also could not invoke a legitimate expectation worthy of protection on the part of Air Berlin. The possible legitimate expectation would be worthy of protection only if, when selling the allowances allocated to it for 2017, Air Berlin could have assumed that it would still receive the allocation even if it ceased operations. Neither the allocation rules nor the defendant's conduct provided a basis for such an assumption. The withdrawal was also in the public interest. The principle of emissions trading law would be undermined if the allowances were to be placed on the market. It would distort the market price.
- 17 Maintaining the allocation after aviation activities had been ceased was incompatible with the prohibition of aid under Article 107 TFEU, the principle of an open market economy with free competition under Article 119(1) TFEU, the right to freedom to conduct a business under Article 17 of the Charter and the principle of equality under Article 20 of the Charter.

Brief summary of the basis for the reference

- 18 The **first question referred** serves to clarify the meaning of recital 20 of Directive 2008/101. The referring court takes the view that no specific provision of the relevant secondary law contains a rule that conflicts with the content of that recital. The court is not convinced by the outcome of being able to retain allocated aviation allowances despite having ceased aviation activities.
- 19 According to the settled case-law of the Court of Justice, in interpreting Directive 2003/87 it is also necessary to consider the objectives pursued by the rule. The primary objective of the directive is to protect the environment by means of a reduction of greenhouse gas emissions. The free allocation of emission allowances falls within the framework of a specific regime of transitional rules, which derogates from the principle that emission allowances must be allocated under the auctioning mechanism established in Article 10 of Directive 2003/87 (see judgment of 20 June 2019, *ExxonMobil Deutschland*, C-682/17, EU:C:2019:518, paragraphs 71 and 82, and judgment of 28 July 2016, *Vattenfall Europe Generation*, C-457/15, EU:C:2016:613, paragraph 39 and the case-law cited). However, in the absence of a provision in secondary law, this question requires conclusive clarification by the Court of Justice in the light of the objections raised by the defendant in relation to the prohibition of aid under Article 107 TFEU, the principle of an open market economy with free competition under Article 119(1) TFEU and Articles 17 and 20 of the Charter.
- 20 Regarding the continuation of aviation activities pursuant to Article 3f(1) of Directive 2003/87, it has not yet been clarified what is required for continuation within the meaning of that provision and whether the possibility of being able to retain allocated aviation allowances depends on whether the aviation activities have been continued in whole or in part within the meaning of that provision.
- 21 If the first question is answered in the affirmative, the **second question referred** seeks clarification as to the interpretation and validity of the provisions of

Articles 10(5), 29, 55 and 56 of Regulation No 389/2013. Those provisions concern the consequences of an aircraft operator ceasing activity as regards the account status and the transfer of allowances to the account.

- 22 The **third question referred**, which seeks to ascertain whether EU law requires that an allocation decision be annulled in the event that aviation activities are ceased, is relevant for the purposes of interpreting the national rules on the withdrawal and revocation of administrative acts in Paragraphs 48 and 49 VwVfG in accordance with EU law. If the third question is answered in the affirmative, this will have an impact on the national rules regarding the discretion granted to the authority in Paragraphs 48 and 49 VwVfG and also regarding the point in time from which the allocation decision can or must be annulled.
- 23 If a final decision cannot be adopted in these proceedings before the end of the third trading period, the fourth and fifth questions referred will be relevant for the referring court's judgment.
- 24 For operators of installations subject to the emission allowance trading scheme, the third trading period ends on 31 December 2020. The provisions in Article 28b(2) of Directive 2003/87 and in Paragraph 11(1) TEHG in the version of 18 January 2019 raise the question of whether, for aircraft operators, unlike for installation operators, the end of 2020 has no effect on the allocation entitlements still outstanding at that date.
- 25 The **fourth question referred** is intended to clarify when the third trading period ends for aircraft operators.
- 26 If the answer to the fourth question referred is that the third trading period ends on 31 December 2020 for air transport operators also, the referring court takes the view that the answer to the **fifth question referred** will be relevant for its judgment.
- 27 According to the case-law of the German courts, when the first and second trading periods ended, allowance entitlements outstanding until 30 April of the year following the end of the trading period could no longer be met and, as there was no explicit transitional arrangement in national law, they lapsed. Nor does national law include a transitional arrangement in the third trading period for outstanding allowance entitlements still pending before the courts. The reason given for this lack of national transitional arrangements is that the rules for the free allocation of allowances in the trading period running from 2021 to 2030 are laid down conclusively in the EU Allocation Regulation and it is only permitted to balance allocation entitlements across periods if so provided for in the EU Allocation Regulation for the fourth trading period.
- 28 The referring court would welcome a uniform decision in EU law on outstanding allocation entitlements. It notes that neither Directive 2003/87 nor Decision 2011/278 expressly regulates this matter. Nor does Commission Delegated Regulation (EU) 2019/331 of 19 December 2018 (OJ 2019 L 59, p. 8) (EU

Allocation Regulation), enacted in the meantime, have a rule governing the balancing of allocation entitlements across periods, for example in the form of a reserve in respect of pending cases.

- 29 A reserve exists only for new entrants pursuant to Article 10a(7) of Directive 2003/87 and Article 18 of the EU Allocation Regulation, and as a special reserve for air transport operators pursuant to Article 3f of Directive 2003/87. The rule in Article 13 of Directive 2003/87 on the validity of allowances makes no reference to the question of allowances that have still not been allocated at the end of the third trading period. According to recital 7 of Decision (EU) 2015/1814 of the European Parliament and of the Council of 6 October 2015, allowances not allocated to installations pursuant to Article 10a(7) of Directive 2003/87 and allowances not allocated to installations because of the application of Article 10a(19) and (20) of the directive ('unallocated allowances'), should be placed in the reserve in 2020. In the opinion of the referring court, recital 7 suggests that the transition from the third to the fourth trading periods does not cause the additional allocation entitlements not met at that point to lapse. However, there is no unequivocal rule on what happens to additional allocation entitlements not met by the end of the third trading period.
- 30 This question has arisen in several actions that are pending before the referring court and before the national courts at other instances. As it will not be possible to deliver final judgment by the end of the trading period in all the proceedings and the case-law of the German courts to date gives installation operators cause to fear that allocation entitlements will lapse, urgent proceedings have already been initiated before the chamber to protect their legal rights. The chamber cannot anticipate in such urgent proceedings to protect legal rights the ruling of the Court needed on this question.
- 31 The referring court therefore asks the Court to clarify the question what effect the end of the third trading period will have on the allowance entitlements not met by then, even independently of a ruling on the other questions referred, as this is a fundamental question that has arisen in all proceedings still pending in the European Union for an additional allocation of emission allowances and urgently needs to be clarified to ensure legal certainty and the uniform application of EU emissions trading law.