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Press and Information

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Judgment of the Court of First Instance in Case T-374/04

Federal Republic of Germany v Commission of the European Communities

THE COURT OF FIRST INSTANCE ANNULS THE COMMISSION DECISION WHICH FOUND THAT 'EX-POST ADJUSTMENTS' THAT MAY BE MADE IN GERMANY TO GREENHOUSE GAS EMISSION ALLOWANCES ARE INCOMPATIBLE WITH COMMUNITY RULES

The Commission has not demonstrated that the subsequent downward adjustments provided for in the German national allocation plan infringe the criteria laid down in the directive establishing a scheme for greenhouse gas emission allowance trading within the Community

Directive 2003/87 establishes a scheme for greenhouse gas emission allowance trading within the Community, in order to promote reductions of such emissions, in particular emissions of carbon dioxide, in a cost-effective and economically efficient manner. A permit must be obtained in advance for emissions from the installations listed in the directive and the emissions must be covered by allowances allocated in accordance with a national allocation plan (NAP). If an operator manages to reduce his emissions, he may sell the excess allowances to operators of installations the emissions of which are too high.

On 31 March 2004 Germany notified its NAP for the period 2005-2007 to the Commission. Under this NAP it is possible in certain specified cases to reduce, in the course of an allocation period, the amount of allowances allocated to an installation. These downward ex-post adjustments are envisaged, in particular, in the following cases:

- an installation's annual emissions amount to less than 60% of the emissions during the base period,
- an operator commences operation of a new installation which replaces an old installation whose production capacity was greater,
- the actual production volume of an installation the operation of which began in 2003 or 2004 is below that initially forecast,

- the actual level of activity of an installation whose operation begins after 1 January 2005 is lower than the level of activity declared.

The German NAP also provides that emission allowances that are not issued or are withdrawn are transferred to the reserve. These allowances are available for new entrants located on German territory.

By decision of 7 July 2004, the Commission declared the ex-post adjustment measures provided for by the German NAP to be incompatible with certain criteria laid down in Annex III to the directive and requested their omission. Germany brought proceedings before the Court for annulment of that decision.

In its judgment delivered today, the Court has examined the legality of the Commission's assessment of the ex-post adjustments provided for by the German NAP in the light of the criteria alleged to have been infringed.

The requirement that the NAP is to contain a list of the installations covered by the directive with the quantities of allowances intended to be allocated to each (criterion 10)

The Court holds that the Commission misconstrued the effect of this criterion, as read in the light of the objectives of the directive, in that it treated the ex-post adjustments at issue as measures contrary to the directive's general system.

It observes that the principal declared objective of the directive is to reduce greenhouse gas emissions substantially. In the pursuit of this objective, the allocation of allowances must nevertheless observe certain 'sub-objectives', such as preserving the integrity of the internal market and avoiding distortions of competition.

The Court holds that the mere fact that the ex-post adjustments at issue are liable to deter operators from reducing their production volume and, therefore, their emission rates is not sufficient to call into question the adjustments' legality in light of the directive's objectives as a whole, such as the objective of maintaining cost-effective and economically efficient conditions, the objective of reducing emissions through improvements in technology and the objective of preserving the integrity of the internal market and maintaining conditions of competition.

The Commission therefore has not demonstrated that the requirement under the directive to indicate, in the NAP, the allowances to be allocated to the respective installations reduced the Member States' freedom of action as to the forms and methods for transposing the directive into national law so as to prohibit application of the ex-post adjustments in Germany.

The prohibition on discrimination between companies or sectors in such a way as to favour certain undertakings or activities unduly (criterion 5)

The Court holds that **the Commission has not demonstrated that the ex-post adjustments applicable to new entrants are contrary to the prohibition of discrimination.**

It points out that neither the contested decision nor Commission communications disclose why and to what extent new entrants would be in an analogous or a different situation compared with other operators as regards application of the ex-post adjustments.

The Commission's argument that it is advantageous for new entrants to have a possibility of subsequent correction of the amount of allowances allocated, because that allows them to overestimate production volume when submitting the application for an allocation and gives rise to laxer checks on the part of the German authorities, is manifestly contradictory and erroneous.

The Court concludes that the Commission failed to apply the conditions governing the application of the principle of equal treatment, in that it did not demonstrate that comparable situations are treated differently.

Consequently, the Court annuls the Commission decision in so far as it declares the ex-post adjustment measures provided for by the German NAP to be **incompatible with** the criteria laid down by **the directive** and requests their omission.

REMINDER: An appeal, limited to points of law only, may be brought before the Court of Justice of the European Communities against a decision of the Court of First Instance, within two months of its notification.

Unofficial document for media use, not binding on the Court of First Instance.

Languages available: BG ES CS DE EL EN ET FR HU IT NL PL PT RO SK SL

*The full text of the judgment may be found on the Court's internet site
<http://curia.europa.eu/jurisp/cgi-bin/form.pl?lang=EN&Submit=rechercher&numaff=T-374/04>
It can usually be consulted after midday (CET) on the day judgment is delivered.*

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