

**Case C-76/21**

**Request for a preliminary ruling**

**Date lodged:**

8 February 2021

**Referring court:**

Verwaltungsgericht Berlin (Germany)

**Date of the decision to refer:**

20 January 2021

**Applicant:**

Wacker Chemie AG

**Defendant:**

Bundesrepublik Deutschland (Federal Republic of Germany),  
represented by the Umweltbundesamt, Deutsche  
Emissionshandelsstelle

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[...]

VERWALTUNGSGERICHT BERLIN (ADMINISTRATIVE COURT, BERLIN)

ORDER

In the administrative-law case of

Wacker Chemie AG,

[...] Munich,

Applicant,

[...]

v

Bundesrepublik Deutschland (Federal Republic of Germany),

represented by the Umweltbundesamt (Federal Environment Agency),

[...]

Deutsche Emissionshandelsstelle (German Emissions Trading Authority),

[...] Berlin,

Defendant,

the 26th Chamber of the Administrative Court, Berlin

[...]

ordered as follows on 20 January 2021:

The following questions are referred to the Court of Justice of the European Union for a preliminary ruling pursuant to Article 267 TFEU in the proceedings stayed by order of 27 November 2020: **[Or. 2]**

1. Is the definition of capacity extension in the Commission's ETS Guidelines (OJ 2012 C 158, p. 4), whereby the installation can be operated at a capacity that is at least 10% higher compared to the installation's initial installed capacity before the change and it results from a physical capital investment (or a series of incremental physical capital investments) to be interpreted as meaning that this depends on:
  - a) a causal link between the physical capital investment and an extension of the technically and legally possible maximum capacity; or
  - b) in keeping with Article 3(i) and (l) of Commission Decision 2011/278/EU of 27 April 2011, a comparison with the average of the 2 highest monthly production volumes within the first 6 months following the start of changed operation?
2. If point 1(b) applies, is Article 3(i) of Commission Decision 2011/278/EU of 27 April 2011 to be interpreted as meaning that it depends not on the scope of the extension of the technically and legally possible maximum capacity, but solely on the average values referred to in Article 3(l) of Decision 2011/278, irrespective of whether and to what extent they follow from the physical change made or a higher load?
3. Is the term 'initial installed capacity' in Annex I to the ETS Guidelines to be interpreted in accordance with Article 7(3) of Decision 2011/278/EU?

4. Is a decision by the European Commission not to raise objections to a notified State aid scheme to be interpreted as meaning:
  - a) that it finds that the national scheme is compatible overall with the State aid guidelines even with regard to additional references in the national aid scheme to other provisions of national law; or
  - b) that the national aid scheme and the other provisions of national law are to be interpreted as meaning that they must as a result comply with the aid guidelines?
5. If 4(a) applies, is a decision by the European Commission not to raise objections to a notified State aid scheme binding on the national court with regard to the finding that it complies with the relevant aid guidelines?
6. Does the fact that the European Commission refers to its aid guidelines in a decision not to raise objections to a notified State aid rule and examines the compatibility of the notified aid based on the guidelines mean that those guidelines are binding on the Member State for the purpose of the interpretation and application of the approved aid scheme?
7. Is Article 10a(6) of Directive 2003/87/EC, as amended by Directive (EU) 2018/410, which states that the Member States should adopt financial measures to compensate for indirect CO<sub>2</sub> costs, relevant to the interpretation of point 5 of the ETS Guidelines, which states that aid must be limited to the minimum needed to achieve the environmental protection sought? **[Or. 3]**

### Grounds

#### I.

- 1 The questions referred have arisen in a dispute concerning State aid granted to compensate for indirect CO<sub>2</sub> costs.
- 2 The applicant produces ultrapure silicon. In 2014 and 2015, it made technical modifications to the power supply in one of its plants by fitting various new components to the heating elements in the 'converter' in which tetrachlorsilane is heated to produce trichlorsilane, the precursor needed for silicon separation. The investments in those modifications totalled in excess of EUR 2 million. Following the change, the heating elements were activated in parallel rather than in series, meaning that individual heating elements can be activated separately and, if necessary, switched off separately in the event of earth leakages. This is designed to avoid the need to switch off the entire converter, which should allow longer run times overall. According to the applicant, this increases the theoretical capacity of the separation plant by 1 050 t of polysilicon.

- 3 On 22 May 2017, the applicant applied to the Federal Environment Agency’s German Emissions Trading Authority (‘the DEHSt’) for aid to compensate for the price of electricity for the 2016 settlement year, including a capacity extension for the three separation plants (Poly 4, 6 and 7). On 1 December 2017, the DEHSt adopted a decision granting it aid of EUR 14 902 385.43 and rejecting the application as to the remainder concerning the capacity extension claimed, stating as its reason that an increased load is not a capacity extension. On 29 November 2018, the DEHSt adopted a decision rejecting the applicant’s objection, because the applicant had failed to prove the necessary causal link between the physical change and the capacity change. By its action received by the Administrative Court on 24 December 2018, the applicant is pursuing its claims. It argues that the requirements for a capacity extension have been fulfilled, and that production from the three plants concerned actually rose by 3 087 t in 2016 and was thus over 10% higher than in the relevant reference period. The court discussed the factual and legal aspects of the case with the parties at the hearing on 27 November 2020 and stayed the proceedings in order to make an order for reference. **[Or. 4]**
- 4 The case is referred to the Court of Justice of the European Union for a preliminary ruling pursuant to the second paragraph of Article 267 TFEU. The questions referred concern the EU legal framework governing State aid to compensate for indirect CO<sub>2</sub> costs. Of particular relevance to the adjudicating court are the requirements of EU law that must be fulfilled in order to find that the capacity of the plants at issue has been extended.
- 5 1. There is no legal basis in national law that would give rise to a claim to aid. The aid is based on the Richtlinie für Beihilfen für Unternehmen in Sektoren bzw. Teilsektoren, bei denen angenommen wird, dass angesichts der mit den EU-ETS-Zertifikaten verbundenen Kosten, die auf den Strompreis abgewälzt werden, ein erhebliches Risiko der Verlagerung von CO<sub>2</sub>-Emissionen besteht (Beihilfen für indirekte CO<sub>2</sub>-Kosten) (Guidelines on aid to undertakings in sectors and subsectors deemed to be exposed to a significant risk of carbon leakage due to EU ETS allowance costs passed on in electricity prices (aid for indirect emission costs) published on 23 July 2013 (‘the aid scheme’). As a result of its administrative practice, the defendant is now bound under national law to grant aid where the requirements of the aid scheme are fulfilled.
- 6 Point 5.2.4(a) of the aid scheme states:
- ‘If the production capacity of a plant was extended significantly between 2013 and 2020, the baseline production level shall be increased in proportion to the individual capacity extension from the settlement year following the capacity extension. The requirements for a significant capacity extension shall be determined in accordance, *mutatis mutandis*, with Paragraph 2, point 24(a) and (b)(aa) of the Zuteilungsverordnung 2020 (2020 Allocation Regulation, ‘the ZuV 2020’) of 26 September 2011 (Federal Law Gazette I, p. 1921).’

- 7 According to Paragraph 2, point 24(a) and (b)(aa) of the ZuV 2020, a significant capacity extension is defined as:

‘a significant increase in a sub-installation’s initial installed capacity whereby all of the following take place:

a) one or more identifiable physical changes relating to the technical configuration of the sub-installation and its operation other than the mere replacement of an existing production line; and

b) an increase in:

aa) the capacity of the sub-installation of at least 10% compared to its initial installed capacity before the change’. **[Or. 5]**

- 8 The European Commission decided on 17 July 2013 not to raise objections to the aid scheme (see document C(2013) 4422 final).

The Commission refers in that decision to its ‘Guidelines on certain State aid measures in the context of the greenhouse gas emission allowance trading scheme post-2012’ (OJ 2012 C 158, p. 4), as corrected on 21 March 2013 (OJ 2013 C 82, p. 9) (‘ETS Guidelines’), and the formulae and definitions set out therein. It states at paragraph 36 of the Decision:

‘In principle, the German scheme uses these formulae for the calculation of the maximum possible aid amount, and the formulae’s elements are equivalent to the definitions in Annex I to the Guidelines and to the values in Annex III and IV.’

- 9 2. The referring court is of the opinion that, if national law alone is applied, a capacity extension would have to be assumed, meaning that the applicant has a claim to a higher sum in aid. The applicable national allocation rules, to which the aid scheme refers for the purpose of determining the capacity extension, are explained by the defendant in the Leitfaden für das Zuteilungsverfahren (Allocation Procedure Guidelines, ‘the Guidelines’), 20.13-2020, Part 5, Chapter 7.1., as meaning that there must be:

‘a causal link between the physical change and the change in capacity in the sense that the physical change itself may have a (direct or indirect) impact on allocatable production or on allocatable consumption. However, there is no need for a quantitative correlation between the size of the physical change and the capacity change (available at <https://www.dehst.de>, p. 80).

- 10 The defendant explains this further with the help of an example illustrating that even a 5% increase in the technically and legally possible maximum capacity, alongside an increase in load, may suffice to substantiate overall a capacity extension of at least 10% (see the Guidelines, p. 81). The referring court is of the opinion that the Guidelines reflect the defendant’s administrative practice and that

- 11 the relevant preconditions to a capacity extension laid down in the Guidelines have been fulfilled. In particular, there has been a physical change to the technical configuration of the plant and its operation [**Or. 6**] based on a physical capital investment. The actual output of the three plants has increased by over 10% compared to the reference value. This has been confirmed by the applicant's auditors. Having considered the applicant's contentions at the hearing, the court assumes for the rest that the change to the power supply is capable in principle of resulting in a higher conversion output and thus leading to an increase in silicon separation. The referring court considers that, if national law alone were applied, it would not matter whether the increase in production had been caused in its entirety by the technical change.
- 12 3. The answers to the questions referred will determine whether the application of EU law gives a different result.
- a) Question 1:
- 13 The wording of the definition of a capacity extension in Annex I to the ETS Guidelines differs from the national scheme. According to the ETS Guidelines, it is necessary that the installation can be operated at a capacity that is at least 10% higher compared to the installation's initial installed capacity before the change and it results from a physical capital investment. The referring court understands this to mean that there must be a causal link between the physical capital investment and an extension of the technically and legally possible maximum capacity (variation (a)). Only then is the potential capacity increase ('can be operated') a genuine consequence of the physical capital investment.
- 14 An interpretation in keeping with Article 3(i) and (l) of Commission Decision 2011/278/EU of 27 April 2011 (variation (b)), on the other hand, would mean that it depends not on the technically and legally possible maximum capacity, but on a comparison between two average values: (1) the average of the 2 highest monthly production volumes in the period from 1 January 2005 to 31 December 2008 in accordance with Article 7(3)(a) of Decision 2011/278/EU; and (2) the average of the 2 highest monthly production volumes within the first 6 months following the start of changed operation. However, the second value may simply be the consequence of an increased load based on a business decision and need not result in its entirety from the technical change. However, the referring court is of the opinion that that interpretation would be incompatible with the wording of the ETS Guidelines. [**Or. 7**]
- b) Question 2:
- 15 If the Court is of the opinion that the definitions of a capacity extension in the ETS Guidelines and Decision 2011/278/EU tally, the question then arises as to whether and to what extent there must be a causal link between the technical change and the increased average production volume. If one assumes that the technical change must be a *condition sine qua non* for the increased production

volume, that is, it would not be achievable in its specific form/amount without it, then the referring court is of the opinion that the only criterion is that the technically and legally possible maximum capacity must be increased by at least 10%. Only then does a strict causal link exist.

- 16 If, conversely, one takes the actual average values as the sole criterion, irrespective of whether they are caused by the technical change or an increased load for other reasons, a full causal link would not be ensured. It might be possible, under certain circumstances, to achieve the increased production volume, albeit not in full, without the technical change.

c) Question 3:

- 17 The ETS Guidelines use the term ‘initial installed capacity’ in Annex I without including a separate definition of the term. The referring court assumes that the term ‘initial installed capacity’ in the ETS Guidelines is to be interpreted in keeping with Article 7(3) of Decision 2011/278/EU. Given that capacity extension is defined in the ETS Guidelines separately and differently from Decision 2011/278/EU, the question arises as to whether that understanding is correct.

d) Question 4:

- 18 This question concerns the impact and scope of the Commission’s decision under aid law in the preliminary examination procedure. If the Commission finds in its decision pursuant to Article 4(3) of Regulation (EC) No 1999/659 or Regulation (EU) 2015/1589 (‘the procedural regulations’) that the elements of the formulae laid down in a national aid scheme are equivalent to the definitions in the relevant aid guidelines, the question arises as to whether this also applies to references in the aid scheme to other provisions of national law [Or. 8]. In this case, the definition of capacity extension in the notified aid scheme only follows specifically from the reference to the rules laid down in the national Allocation Regulations for emissions calculations. However, that definition differs from the Commission’s ETS Guidelines, as stated in Question 1. It seems to the referring court, based on the Court’s case-law to date, that the scope of the effect of the findings made in Commission decisions on State aid in relation to findings on the national law is not unambiguous.
- 19 It would be conceivable to assume (variation (a)) that the Commission carries out a comprehensive examination in a preliminary examination procedure of all the provisions of national law applied to implement a notified aid scheme and that the decision not to raise objections fully negates the implementation ban enacted in Article 108(3) TFEU for the Member State in relation to the notified aid, irrespective of whether the Commission has rightly assumed that the applicable national law complies fully with the definitions in the relevant aid guidelines. On the one hand, this might be suggested by the principle of legal certainty. On the other hand, according to Article 4(6) of the procedural regulations, aid is deemed to have been authorised after 2 months, even without a decision under Article 4(3)

of the procedural regulations, unless the Commission initiates a formal examination procedure. This also suggests that even a potentially erroneous or incomplete decision by the Commission does not prevent the implementation of the aid.

20 In any event, it does, however, appear appropriate to the referring court in a case such as this that (variation (b)) the Commission's finding that the elements of the national formulae are equivalent to the definitions in the ETS Guidelines is to be understood as meaning that the national scheme is to be interpreted in light of the ETS Guidelines and must comply with them in its practical application. Although, according to the Court's case-law, aid guidelines do not have a direct binding effect on the Member States (see judgment of 19 July 2016, C-526/14, EU:C:2016:570, paragraph 44, and also Question 6), it is settled case-law that the Commission has the facility to impose obligations on itself. In light of this, it is to be assumed that the Commission assumed that the national scheme is equivalent in fact to the aid guidelines and did not raise any objections in that respect only. Inasmuch as scope for interpretation exists in the application of the national aid scheme [Or. 9], the Member State would therefore need to take account of that in the implementation of the aid measure.

e) Question 5:

21 If, according to Question 4, variation (a), it is to be assumed that the Commission's decision approving the aid also explicitly or implicitly encompasses a derogation from the aid guidelines, the question arises as to whether that is also binding on the national courts. According to the case-law of the Bundesverwaltungsgericht (Federal Administrative Court) [...], decisions in the preliminary examination procedure have no such binding effect.

f) Question 6:

22 According to the Court's case-law (ibid), aid guidelines do not in principle have a binding effect on the Member States; they simply limit the Commission's own margin of discretion. As a supplementary question to Question 4, the referring court is unclear as to whether, in a case such as this, it follows that the ETS Guidelines are binding on the Member State in the interpretation and application of the notified aid scheme from the fact that the Commission expressly refers to them several times in its decision approving the aid, thereby including them in its decision.

g) Question 7:

23 The ETS Guidelines refer in paragraph 5 to the general principle that State aid must be limited to the minimum needed to achieve the objective sought. Article 10a(6) of Directive 2003/87/EC, as amended by Directive (EU) 2018/410, differs from its original version; it now includes the rule that the Member States should adopt financial measures to compensate for indirect CO<sub>2</sub> costs. The

referring court assumes that this does not mean that the general principle of the need for the aid has been abandoned.

[...]

WORKING DOCUMENT