Reports of Cases

JUDGMENT OF THE COURT (Fifth Chamber)

3 December 2020 *

(Reference for a preliminary ruling – Environment – Directive 2003/87/EC – Greenhouse gas emission allowance trading scheme – Article 3(h) – New entrants – Article 10a – Transitional rules for free allocation of emission allowances – Decision 2011/278/EU – Article 18(1)(c) – Fuel-related activity level – Second subparagraph of Article 18(2) – Relevant capacity utilisation factor)

In Case C-320/19,

REQUEST for a preliminary ruling under Article 267 TFEU from the Verwaltungsgericht Berlin (Administrative Court, Berlin, Germany) by a decision of 1 April 2019, received at the Court on 19 April 2019, in the proceedings

Ingredion Germany GmbH

v

Bundesrepublik Deutschland,

THE COURT (Fifth Chamber),

composed of E. Regan (Rapporteur), President of the Chamber, M. Ilešič, E. Juhász, C. Lycourgos and I. Jarukaitis, Judges,

Advocate General: H. Saugmandsgaard Øe,

Registrar: D. Dittert, Head of Unit,

having regard to the written procedure and further to the hearing of 12 March 2020,

after considering the observations submitted on behalf of:

– Ingredion Germany GmbH, by D. Lang and L. Borchardt, Rechtsanwälte,

– the Bundesrepublik Deutschland, by J. Steegmann and H. Barth, acting as Agents,

– the German Government, by D. Klebs, acting as Agent,

– the European Commission, initially by J.-F. Brakeland and A. Becker and subsequently by A. Becker and B. De Meester, acting as Agents,

after hearing the Opinion of the Advocate General at the sitting on 18 June 2020,

* Language of the case: German.

gives the following

Judgment

1 The request for a preliminary ruling concerns the interpretation of the second subparagraph of Article 18(2) of 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 of the European Parliament and of the Council (OJ 2011 L 130, p. 1).

2 The request has been made in proceedings between Ingredion Germany GmbH and Bundesrepublik Deutschland (Federal Republic of Germany), represented by the Umweltbundesamt (Federal Environment Agency, Germany), relating to determination of the relevant capacity utilisation factor for the allocation of greenhouse gas emission allowances ('emission allowances') free of charge to a new entrant with a fuel benchmark sub-installation.

Legal context

EU law

Directive 2003/87

3 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) ('Directive 2003/87'), created an EU-wide greenhouse gas emission allowance trading scheme. That scheme has been in operation in all the States of the European Economic Area (EEA) since 1 January 2005. Under Article 13(1) of that directive, the third trading period covers eight years, from 2013 to 2020 ('the third trading period').

4 Recitals 5 and 7 of Directive 2003/87 read as follows:

'(5) The Community and its Member States have agreed to fulfil their commitments to reduce anthropogenic greenhouse gas emissions under the Kyoto Protocol jointly, in accordance with [Council Decision 2002/358/EC of 25 April 2002 concerning the approval, on behalf of the European Community, of the Kyoto Protocol to the United Nations Framework Convention on Climate Change and the joint fulfilment of commitments thereunder (OJ 2002 L 130, p. 1)]. This Directive aims to contribute to fulfilling the commitments of the European Community and its Member States more effectively, through an efficient European market in greenhouse gas emission allowances, with the least possible diminution of economic development and employment.

…

(7) Community provisions relating to allocation of allowances by the Member States are necessary to contribute to preserving the integrity of the internal market and to avoid distortions of competition.'

5 Article 3 of Directive 2003/87, entitled 'Definitions', states:

'For the purposes of this Directive the following definitions shall apply:

…

(h) "new entrant" means:

– any installation carrying out one or more of the activities indicated in Annex I, which has obtained a greenhouse gas emissions permit for the first time after 30 June 2011,

– any installation carrying out an activity which is included in the Community scheme pursuant to Article 24(1) or (2) for the first time, or

– any installation carrying out one or more of the activities indicated in Annex I or an activity which is included in the Community scheme pursuant to Article 24(1) or (2), which has had a significant extension after 30 June 2011, only in so far as this extension is concerned;

…'

6 Article 10 of that directive, entitled 'Auctioning of allowances', provides as follows in paragraph 1:

'From 2013 onwards, Member States shall auction all allowances which are not allocated free of charge in accordance with Article 10a and 10c. …'

7 According to Article 10a of the directive, entitled 'Transitional Community-wide rules for harmonised free allocation':

'1. By 31 December 2010, the Commission shall adopt Community-wide and fully harmonised implementing measures for the allocation of the allowances …

…

The measures referred to in the first subparagraph shall, to the extent feasible, determine Community-wide *ex ante* benchmarks so as to ensure that allocation takes place in a manner that provides incentives for reductions in greenhouse gas emissions and energy efficient techniques, by taking account of the most efficient techniques, substitutes, alternative production processes, high efficiency cogeneration, efficient energy recovery of waste gases, use of biomass and capture and storage of CO_2, where such facilities are available, and shall not provide incentives to increase emissions. No free allocation shall be made in respect of any electricity production, except for cases falling within Article 10c and electricity produced from waste gases.

…

2. In defining the principles for setting *ex ante* benchmarks in individual sectors or subsectors, the starting point shall be the average performance of the 10% most efficient installations in a sector or subsector in the Community in the years 2007-2008. The Commission shall consult the relevant stakeholders, including the sectors and subsectors concerned.

The regulations pursuant to Articles 14 and 15 shall provide for harmonised rules on monitoring, reporting and verification of production-related greenhouse gas emissions with a view to determining the *ex ante* benchmarks.

…

7. Five percent of the Community-wide quantity of allowances determined in accordance with Articles 9 and 9a over the period from 2013 to 2020 shall be set aside for new entrants, as the maximum that may be allocated to new entrants in accordance with the rules adopted pursuant to paragraph 1 of this Article. Allowances in this Community-wide reserve that are neither allocated to new entrants nor used pursuant to paragraph 8, 9 or 10 of this Article over the period from 2013

to 2020 shall be auctioned by the Member States, taking into account the level to which installations in Member States have benefited from this reserve, in accordance with Article 10(2) and, for detailed arrangements and timing, Article 10(4), and the relevant implementing provisions.

…

By 31 December 2010, the Commission shall adopt harmonised rules for the application of the definition of "new entrant", in particular in relation to the definition of "significant extensions".

…

11. Subject to Article 10b, the amount of allowances allocated free of charge under paragraphs 4 to 7 of this Article in 2013 shall be 80% of the quantity determined in accordance with the measures referred to in paragraph 1. Thereafter the free allocation shall decrease each year by equal amounts resulting in 30% free allocation in 2020, with a view to reaching no free allocation in 2027.

…'

Directive 2009/29

8 Recitals 8, 15 and 23 of Directive 2009/29 state:

'(8) While experience gathered during the first trading period shows the potential of the Community scheme and the finalisation of national allocation plans for the second trading period will deliver significant emission reductions by 2012, a review undertaken in 2007 has confirmed that a more harmonised emission trading system is imperative in order to better exploit the benefits of emission trading, to avoid distortions in the internal market and to facilitate the linking of emissions trading systems. Furthermore, more predictability should be ensured and the scope of the system should be extended by including new sectors and gases with a view to both reinforcing a carbon price signal necessary to trigger the necessary investments and by offering new abatement opportunities, which will lead to lower overall abatement costs and the increased efficiency of the system.

…

(15) The additional effort to be made by the Community economy requires, inter alia, that the revised Community scheme operate with the highest possible degree of economic efficiency and on the basis of fully harmonised conditions of allocation within the Community. Auctioning should therefore be the basic principle for allocation, as it is the simplest, and generally considered to be the most economically efficient, system. This should also eliminate windfall profits and put new entrants and economies growing faster than average on the same competitive footing as existing installations.

…

(23) Transitional free allocation to installations should be provided for through harmonised Community-wide rules (*ex ante* benchmarks) in order to minimise distortions of competition with the Community. …'

Decision 2011/278

9 Recitals 12, 16, 35 and 36 of Decision 2011/278 read as follows:

'(12) Where deriving a product benchmark was not feasible, but greenhouse gases eligible for the free allocation of emission allowances occur, those allowances should be allocated on the basis of generic fallback approaches. A hierarchy of three fallback approaches has been developed in order to maximise greenhouse gas emission reductions and energy savings for at least parts of the production processes concerned. The heat benchmark is applicable for heat consumption processes where a measurable heat carrier is used. The fuel benchmark is applicable where non-measurable heat is consumed. The heat and fuel benchmark values have been derived based upon the principles of transparency and simplicity, using the reference efficiency of a widely available fuel that can be regarded as second-best in terms of greenhouse gas efficiency, considering energy efficient techniques. For process emissions, emission allowances should be allocated on the basis of historical emissions. In order to ensure that the free allocation of emission allowances for such emissions provides sufficient incentives for reductions in greenhouse gas emissions and to avoid any difference in treatment of process emissions that are allocated on the basis of historical emissions and those within the system boundaries of a product benchmark, the historical activity level of each installation should be multiplied by a factor equal to 0,9700 to determine the number of free emission allowances.

…

(16) The amount of allowances to be allocated free of charge to incumbent installations should be based on historical production data. In order to ensure that the reference period is as far as possible representative of industry cycles, covers a relevant period where good quality data is available and reduces the impact of special circumstances, such as temporary closure of installations, the historical activity levels have been based on the median production during the period from 1 January 2005 to 31 December 2008, or, where it is higher, on the median production during the period from 1 January 2009 to 31 December 2010. It is also appropriate to take account of any significant capacity change that has taken place in the relevant period. For new entrants, the determination of activity levels should be based on standard capacity utilisation based on sector-specific information or on installation-specific capacity utilisation.

…

(35) Investments in significant capacity extensions giving access to the reserve for new entrants provided for in Article 10a(7) of Directive [2003/87] should be unambiguous and of a certain scale in order to avoid an early depletion of the reserve of emission allowances created for new entrants, to avoid distortions of competition, to avoid any undue administrative burden and to ensure equal treatment of installations across Member States. It is therefore appropriate to define the threshold for a significant capacity change by 10% of the installation's installed capacity and require that the change in the installed capacity triggers a significantly higher or lower activity level of the installation concerned. However, incremental capacity extensions or reductions should be taken into account when assessing whether this threshold is reached.

(36) Considering the limited number of allowances in the reserve for new entrants, it is appropriate to assess, when a considerable amount of these allowances is issued to new entrants, whether a fair and equitable access to the remaining allowances in this reserve is guaranteed. In the light of the outcome of this assessment, the possibility for a queuing system may be provided. The design and the definition of the eligibility criteria of such a system should take account of different permitting practices in Member States, avoid any misuse and not provide incentives to reserve allowances over an unreasonable period of time.'

10 Article 3 of that decision, entitled ‘Definitions’, states:

‘For the purposes of this Decision, the following definitions shall apply:

(a) “incumbent installation” means any installation carrying out one or more activities listed in Annex I to Directive [2003/87] or an activity included in the Union scheme for the first time in accordance with Article 24 of that Directive which:
(i) obtained a greenhouse gas emission permit before 30 June 2011; or
(ii) is in fact operating, obtained all relevant environmental permits, including a permit provided for in Directive 2008/1/EC [of the European Parliament and of the Council of 15 January 2008 concerning integrated pollution prevention and control (OJ 2008 L 24, p. 8)] where applicable, by 30 June 2011 and fulfilled by 30 June 2011 all other criteria defined in the national legal order of the Member State concerned on the basis of which the installation would have been entitled to receive the greenhouse gas permit;

…

(n) “start of normal operation” means the verified and approved first day of a continuous 90-day period, or, where the usual production cycle in the sector concerned does not foresee continuous production, the first day of a 90-day period split in sector-specific production cycles, during which the installation operates at least at 40% of the capacity that the equipment is designed to accommodate taking into account, where appropriate, the installation-specific operating conditions;

…’

11 Article 6 of that decision, entitled ‘Division into sub-installations’, provides as follows:

‘1. For the purposes of this Decision, Member States shall divide each installation eligible for the free allocation of emission allowances under Article 10a of Directive [2003/87] into one or more of the following sub-installations, as required:

(a) a product benchmark sub-installation;

(b) a heat benchmark sub-installation;

(c) a fuel benchmark sub-installation;

(d) a process emissions sub-installation.

…’

12 Chapter II of that decision, entitled ‘Incumbent installations’, contains Articles 5 to 14.

13 Article 7 of Decision 2011/278, entitled ‘Baseline data collection’, provides as follows in paragraph 3:

‘Member States shall require the operator to submit the initial installed capacity of each product benchmark sub-installation, determined as follows:

(a) in principle, the initial installed capacity shall be the average of the 2 highest monthly production volumes in the period from 1 January 2005 to 31 December 2008 assuming that the sub-installation has been operating at this load 720 hours per month for 12 months per year;

(b) Where it is not possible to determine the initial installed capacity according to point (a), an experimental verification of the sub-installation's capacity under the supervision of a verifier shall take place in order to ensure that the parameters used are typical for the sector concerned and that the results of the experimental verification are representative.'

14 According to Article 9 of that decision, entitled 'Historical activity level':

'1. For incumbent installations, Member States shall determine historical activity levels of each installation for the baseline period from 1 January 2005 to 31 December 2008, or, where they are higher, for the baseline period from 1 January 2009 to 31 December 2010, on the basis of the data collected under Article 7.

2. The product-related historical activity level shall, for each product for which a product benchmark has been determined as referred to in Annex I, refer to the median annual historical production of this product in the installation concerned during the baseline period.

3. The heat-related historical activity level shall refer to the median annual historical import from an installation covered by the Union scheme, production, or both, during the baseline period, of measurable heat consumed within the installation's boundaries for the production of products, for the production of mechanical energy other than used for the production of electricity, for heating or cooling with the exception of the consumption for the production of electricity, or exported to installations or other entity not covered by the Union scheme with the exception of the export for the production of electricity expressed as terajoule per year.

4. The fuel-related historical activity level shall refer to the median annual historical consumption of fuels used for the production of non-measurable heat consumed for the production of products, for the production of mechanical energy other than used for the production of electricity, for heating or cooling with the exception of the consumption for the production of electricity, including safety flaring, during the baseline period expressed as terajoule per year.

…

6. For the purposes of the determination of the median values referred to in paragraphs 1 to 5 only calendar years during which the installation has been operating for at least 1 day shall be taken into account.

If the installation has been operating less than 2 calendar years during the relevant baseline period, the historical activity levels shall be calculated on the basis of the initial installed capacity determined in accordance with the methodology set out in Article 7(3) of each sub-installation multiplied by the relevant capacity utilisation factor determined in accordance with Article 18(2).'

15 Article 10 of that decision, entitled 'Allocation at installation level', reads as follows:

'1. Based on the data collected in accordance with Article 7, Member States shall, for each year, calculate the number of emission allowances allocated free of charge from 2013 onwards to each incumbent installation on their territory in accordance with paragraphs 2 to 8.

2. For the purpose of this calculation, Member States shall first determine the preliminary annual number of emission allowances allocated free of charge for each sub-installation separately as follows:

(a) for each product benchmark sub-installation, the preliminary annual number of emission allowances allocated free of charge for a given year shall correspond to the value of this product benchmark as referred to in Annex I multiplied by the relevant product-related historical activity level;

(b) for:
   (i) the heat benchmark sub-installation, the preliminary annual number of emission allowances allocated free of charge for a given year shall correspond to the value of the heat benchmark for measurable heat as referred to in Annex I multiplied by the heat-related historical activity level for the consumption of measurable heat;
   (ii) the fuel benchmark sub-installation, the preliminary annual number of emission allowances allocated free of charge for a given year shall correspond to the value of the fuel benchmark as referred to in Annex I multiplied by the fuel-related historical activity level for the fuel consumed;
   (iii) the process emissions sub-installation, the preliminary annual number of emission allowances allocated free of charge for a given year shall correspond to the process-related historical activity level multiplied by 0,9700.

…'

16 Chapter IV of Decision 2011/278, entitled 'New entrants and closures', contains Articles 17 to 24.

17 Article 17 of that decision, entitled 'Application for free allocation', states:

'1. Upon application by a new entrant, Member States shall determine on the basis of the present rules the amount of allowances to be allocated free of charge once the installation concerned has started normal operation and its initial installed capacity has been determined.

2. Member States shall only accept applications that are submitted to the competent authority within 1 year following the start of normal operation of the installation or sub-installation concerned.

3. Member States shall divide the installation concerned in sub-installations in accordance with Article 6 of this Decision and shall require the operator to submit together with the application referred to in paragraph 1 all relevant information and data regarding each parameter listed in Annex V for each sub-installation separately to the competent authority. If necessary, Member States may require the operator to submit more disaggregated data.

4. For installations referred to in Article 3(h) of Directive [2003/87], with the exception of installations that have had a significant extension after 30 June 2011, Member States shall require the operator to determine the initial installed capacity for each sub-installation according to the methodology set out in Article 7(3) using the continuous 90-day period on the basis of which the start of normal operation is determined as a reference. Member States shall approve this initial installed capacity of each sub-installation before calculating the allocation to the installation.

…'

18 Article 18 of that decision, entitled 'Activity levels', provides:

'1. For installations referred to in Article 3(h) of Directive [2003/87], with the exception of installations that have had a significant extension after 30 June 2011, Member States shall determine activity levels of each installation as follows:

(a) the product-related activity level shall, for each product for which a product benchmark has been determined as referred to in Annex I, be the initial installed capacity for the production of this product of the installation concerned multiplied by the standard capacity utilisation factor;

(b) the heat-related activity level shall be the initial installed capacity for the import from installations covered by the Union scheme, production, or both, of measurable heat consumed within the installation's boundaries for the production of products, for the production of mechanical energy

other than used for the production of electricity, for heating or cooling with the exception of the consumption for the production of electricity, or exported to an installation or other entity not covered by the Union scheme with the exception of the export for the production of electricity multiplied by the relevant capacity utilisation factor;

(c) the fuel-related activity level shall be the initial installed capacity for the consumption of fuels used for the production of non-measurable heat consumed for the production of products, for the production of mechanical energy other than used for the production of electricity, for heating or cooling with the exception of the consumption for the production of electricity, including safety flaring, of the installation concerned multiplied by the relevant capacity utilisation factor;

(d) the process emissions-related activity level shall be the initial installed capacity for the production of process emissions of the process unit multiplied by the relevant capacity utilisation factor.

2. The standard capacity utilisation factor referred to in paragraph 1(a) shall be determined and published by the Commission on the basis of the data collection carried out by Member States in accordance with Article 7 of this Decision. For each product benchmark set out in Annex I, it shall be the 80-percentile of the average annual capacity utilisation factors of all installations producing the product concerned. The average annual capacity utilisation factor of each installation producing the product concerned shall correspond to the average annual production of the period 2005 to 2008 divided by the initial installed capacity.

The relevant capacity utilisation factor referred to in paragraphs 1(b) to (d) shall be determined by Member States on the basis of duly substantiated and independently verified information on the installation's intended normal operation, maintenance, common production cycle, energy efficient techniques and typical capacity utilisation in the sector concerned compared to sector-specific information.

…'

19 According to Article 19 of that decision, entitled 'Allocation to new entrants':

'1. For the purposes of the allocation of emission allowances to new entrants, with the exception of allocations to installations referred to in the third indent of Article 3(h) of Directive [2003/87], Member States shall calculate the preliminary annual number of emission allowances allocated free of charge as of the start of normal operation of the installation for each sub-installation separately, as follows:

(a) for each product benchmark sub-installation, the preliminary annual number of emission allowances allocated free of charge for a given year shall correspond to the value of that product benchmark multiplied by the product-related activity level;

(b) for each heat benchmark sub-installation, the preliminary annual number of emission allowances allocated free of charge shall correspond to the value of the heat benchmark for this measurable heat as referred to in Annex I multiplied by the heat-related activity level;

(c) for each fuel benchmark sub-installation, the preliminary annual number of emission allowances allocated free of charge shall correspond to the value of the fuel benchmark as referred to in Annex I multiplied by the fuel-related activity level;

(d) for each process emissions sub-installation, the preliminary annual number of emission allowances allocated free of charge for a given year shall correspond to the process-related activity level multiplied by 0,9700.

Articles 10(4) to (6) and (8), 11, 12, 13 and 14 of this Decision shall apply *mutatis mutandis* to the calculation of the preliminary annual number of emission allowances allocated free of charge.

…

4. Member States shall notify to the Commission without delay the preliminary total annual amount of emission allowances allocated free of charge. Emission allowances from the new entrants reserve created pursuant to Article 10a(7) of Directive [2003/87] shall be allocated on a first come, first served basis with regard to the receipt of this notification.

The Commission may reject the preliminary total annual amount of emission allowances allocated free of charge for the installation concerned. If the Commission does not reject this preliminary total annual amount of emission allowances allocated free of charge, the Member State concerned shall proceed to the determination of the final annual amount of emission allowances allocated free of charge.

…'

Decision 2013/447/EU

20 Commission Decision 2013/447/EU of 5 September 2013 on the standard capacity utilisation factor pursuant to Article 18(2) of Decision 2011/278/EU (OJ 2013 L 240, p. 23) sets out in its annex the standard capacity utilisation factors applicable for the third trading period for the purposes of determining the activity level of new entrants with a product benchmark.

German law

21 Paragraph 9 of the Treibhausgas-Emissionshandelsgesetz (Law on greenhouse gas emissions trading) of 21 July 2011 (BGBl. 2011 I, p. 1475) ('the TEHG') is worded as follows:

'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] in the version in force at the relevant time and with those laid down in Commission Decision [2011/278].'

22 Paragraph 34(1) of the TEHG, in the version of 18 January 2019 (BGBl. 2019 I, p. 37), states:

'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 [third trading period]. …'

23 Paragraph 2 of the Verordnung über die Zuteilung von Treibhausgas-Emissionsberechtigungen in der Handelsperiode 2013 bis 2020 (Regulation on the allocation of greenhouse gas emission allowances for the 2013 to 2020 trading period) of 26 September 2011 (BGBl. I 2011, p. 1921 ('the ZuV 2020'), entitled 'Definition', provides as follows:

'In addition to the definitions in Paragraph 3 of the [TEHG], the following definitions shall apply for the purposes of this 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];

…

27. Allocation element with fuel benchmark

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;

…’

24 According to Paragraph 16 of the ZuV 2020, entitled ‘Applications for free allocation of emission 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.

…’

25 Paragraph 17 of the ZuV 2020, entitled ‘Activity levels of new entrants’, provides:

‘(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

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.

…'

26 Article 18 of the ZuV 2020, entitled 'Allocation to new entrants', is worded as follows:

'(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 a fuel emission value, the preliminary annual number of allowances to be allocated free of charge shall correspond to the product of the fuel emission value and the fuel-related activity level;

…'

The main proceedings and the question referred for a preliminary ruling

27 Ingredion Germany operates an installation for the production of starch products in Hamburg (Germany). That installation includes sub-installations consisting of new air heating equipment and a new steam generator. The installation uses steam and natural gas to generate heat in order to produce starch.

28 On 8 August 2014, the applicant applied to the Deutsche Emissionshandelsstelle (German Emissions Trading Authority) ('the DEHSt') to be allocated free emission allowances for the new installation for the third trading period, specifically, first, an allocation based on the heat benchmark and, secondly, an allocation based on the fuel benchmark.

29 For the allocation based on the fuel benchmark, the DEHSt initially used a relevant capacity utilisation factor of 109%, in accordance with the data provided by Ingredion Germany. The initial installed capacity was determined on the basis of the production volumes within 90 days of the start of regular operation at a time when the installation had not yet reached the intended production capacity. That is why the actual utilisation of capacity during the baseline period between 15 August 2013 and 20 June 2014 was greater than 100% of the initial installed capacity.

30 By decision of 1 September 2015, the DEHSt allocated 124 908 emission allowances free of charge to Ingredion Germany for the third trading period. According to the statement of reasons of that decision, the DEHSt had initially reported the allocated amount to the Commission on the basis of a capacity utilisation factor of 109%. However, in its decision of 24 March 2015 (C(2015) 1733 final), the Commission rejected a relevant capacity utilisation factor of 100% or more in respect of three other German installations. The DEHSt therefore based itself thereafter on a capacity utilisation factor of 99.9%.

31 Ingredion Germany's objection against the DEHSt's decision of 1 September 2015, lodged with the DEHSt on 30 September 2015, was rejected by decision of 7 July 2017.

32 By its action brought on 9 August 2017 before the Verwaltungsgericht Berlin (Administrative Court, Berlin, Germany), Ingredion Germany maintained its application to be allocated emission allowances free of charge for new entrants.

33 The referring court states that the outcome of the proceedings before it depends on whether, under the second subparagraph of Article 18(2) of Decision 2011/278, the relevant capacity utilisation factor is limited for the purposes of that allocation to a value below 100%.

34 According to the referring court, the wording of that provision does not contain any limitation of the relevant capacity utilisation factor. In the case before it, a higher relevant capacity utilisation factor emerges from duly substantiated and independently verified information not merely on the intended normal operation of the installation but also on its actual operation prior to an application such as that in the main proceedings. Unlike in the case of incumbent installations, in accordance with Article 17(4) of Decision 2011/278 the determination of the initial installed capacity in the case of new entrants is based on a 90-day period after the start of normal operation rather than on a period of four years as laid down, in principle, in Article 7(3)(a) of that decision, which means that it may more frequently be the case that the intended normal operation is not yet achieved during that 90-day period.

35 However, the referring court also notes that the second subparagraph of Article 18(2) of that decision refers to the typical capacity utilisation in the sector concerned, which should regularly be below 100%. In addition, under Article 18(1)(a) of Decision 2011/278 a standard capacity utilisation factor is applied to new entrants with product benchmark sub-installations, and that factor, as established in Decision 2013/447, is always a value of less than 100%.

36 In those circumstances, the Verwaltungsgericht Berlin (Administrative Court, Berlin) stayed the proceedings and referred the following question to the Court of Justice for a preliminary ruling:

'Are Article 18(1)(c) and the second subparagraph of Article 18(2) of [Decision 2011/278], in conjunction with Article 3(h) and Article 10a of Directive [2003/87], 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%?'

The question referred

37 By its question, the referring court is enquiring, in essence, whether the second subparagraph of Article 18(2) of Decision 2011/278 must be interpreted as meaning that, for the purposes of allocating emission allowances free of charge to new entrants, the relevant capacity utilisation factor is limited to a value of less than 100%.

38 In that regard, it should be recalled at the outset that Directive 2003/87 has the purpose of establishing an emission allowance trading scheme which seeks to reduce greenhouse gas emissions into the atmosphere to a level that prevents dangerous anthropogenic interference with the climate system and the ultimate objective of which is protection of the environment (judgment of 20 June 2019, *ExxonMobil Production Deutschland*, C-682/17, EU:C:2019:518, paragraph 62 and the case-law cited).

39 There is an economic logic underlying the scheme that encourages a participant in the scheme to emit quantities of greenhouse gases that are less than the allowances originally allocated to it, in order to sell the surplus to another participant which has emitted more than its allowance (judgment of 20 June 2019, *ExxonMobil Production Deutschland*, C-682/17, EU:C:2019:518, paragraph 63 and the case-law cited).

40 Directive 2003/87 was therefore adopted with the aim of reducing, by 2020 at the latest, the overall greenhouse gas emissions of the European Union by at least 20% in comparison with 1990 levels, in an economically efficient manner (see, to that effect, judgment of 20 June 2019, *ExxonMobil Production Deutschland*, C-682/17, EU:C:2019:518, paragraph 64 and the case-law cited).

41 For that purpose, Article 10a of that directive provides, with regard to installations in certain sectors of activity, for the free allocation of emission allowances, the quantity of which, in accordance with Article 10a(11), is to decrease gradually over the third trading period, with a view to reaching the complete abolition of free allowances in 2027 (see, to that effect, judgment of 20 June 2019, *ExxonMobil Production Deutschland*, C-682/17, EU:C:2019:518, paragraph 65 and the case-law cited).

42 As is apparent, in particular, from Article 10(1) of that directive and recital 15 of Directive 2009/29, the allocation of emission allowances, with a view to reducing greenhouse gas emissions, is therefore gradually required to be based exclusively on the principle of auctioning, which, according to the EU legislature, is generally considered to be the most economically efficient system (judgment of 20 June 2019, *ExxonMobil Production Deutschland*, C-682/17, EU:C:2019:518, paragraph 66).

43 In accordance with Article 10a(1) of Directive 2003/87, by way of Decision 2011/278 the Commission determined European Union-wide harmonised rules for the free allocation of emission allowances. It follows from Article 10a(2) that in that context the Commission determines benchmarks by sector or subsector.

44 It is against that background that Article 19(1) of that decision provides that, for new entrants, as defined in Article 3(h) of Directive 2003/87 and with the exception of those referred to in the third indent of Article 3(h), the Member States are to calculate the preliminary annual number of emission allowances allocated free of charge by multiplying the value of those benchmarks with the activity level of each sub-installation. To that end, the Member States are required to distinguish, in accordance with Article 6 of that decision, the sub-installations on the basis of their activity, in order to be able to determine whether it is necessary to apply a 'product benchmark', a 'heat benchmark', a 'fuel benchmark' or a specific factor for 'process emissions sub-installations'.

45 According to Article 18(1)(c) of Decision 2011/278, the fuel-related activity level, which is the activity level relevant in the main proceedings, is, as is likewise laid down for heat and process emissions under Article 18(1)(b) and (d), the initial installed capacity of the installation concerned multiplied by the relevant capacity utilisation factor.

46 Accordingly, in order to determine the extent of new entrants' entitlement to be allocated emission allowances free of charge it is necessary to examine whether that relevant capacity utilisation factor is limited to a value of less than 100%.

47 It should be noted that the second subparagraph of Article 18(2) of Decision 2011/278 sets out the detailed arrangements for determining that factor and the elements to be taken into account for that purpose.

48 That provision states that the Member States are to determine the relevant capacity utilisation factor on the basis of duly substantiated and independently verified information, and refers in that respect to the installation's intended normal operation, maintenance, common production cycle, energy efficient techniques and typical capacity utilisation in the sector concerned compared to sector-specific information. However, it should be noted that this provision contains no indication concerning the value, as such, of the capacity utilisation factor.

49 It follows that the wording of the second subparagraph of Article 18(2) of Decision 2011/278 offers no conclusive indication as to whether that factor should be limited to a value of less than 100%.

50 That being so, it is necessary, in accordance with consistent case-law, to have regard to the general scheme of Directive 2003/87 and of Decision 2011/278 and to the objectives they pursue (judgment of 18 January 2018, *INEOS*, C-58/17, EU:C:2018:19, paragraph 35 and the case-law cited).

51 As regards, first, the general scheme of the directive and decision concerned, the provisions on the allocation of emission allowances free of charge to a new entrant, such as the applicant in the main proceedings, that has a fuel benchmark sub-installation, can be compared with those applicable to incumbent installations, on the one hand, and to new entrants with sub-installations with different benchmarks, on the other.

52 First of all, recital 16 of Decision 2011/278 states that for incumbent installations, which are defined in Article 3(a) of that decision, the emission allowances allocated free of charge should be based on historical production data for a reference period which is as far as possible representative of industry cycles, covers a relevant period where good quality data are available and reduces the impact of special circumstances, such as temporary closure of installations.

53 It is emphasised that the initial installed capacity of incumbent installations is not, prima facie, an element to be taken into account for the purposes of calculating the preliminary annual number of emission allowances allocated free of charge to those installations.

54 Indeed, under Article 10(1) and (2) of Decision 2011/278, that number is calculated by multiplying the benchmark applicable to the sub-installation concerned by its historical activity level.

55 As Article 9(1) of that decision provides, the Member States are to determine historical activity levels of each installation for the baseline period from 1 January 2005 to 31 December 2008, or, where they are higher, for the baseline period from 1 January 2009 to 31 December 2010.

56 Article 9(2) to (5) indicates furthermore that the historical activity level refers to the median value of a factor specific to each benchmark and is, in accordance with Article 9(4), in the case of the fuel-related historical activity level, the annual historical consumption of fuels used for the production of non-measurable heat consumed for certain activities indicated in that provision during the baseline period.

57 It must therefore be found that, in the light of the rules to which they are subject, emission allowances are allocated free of charge to incumbent installations on the basis of data representative of their actual operation.

58 In contrast, it also emerges from recital 16 of Decision 2011/278 that those rules do not cover new entrants, in relation to which it is expressly provided that the allocation of emission allowances free of charge is subject to a different calculation methodology.

59 As indicated in paragraphs 44 and 45 of this judgment, those allowances are allocated to new entrants on the basis of the initial installed capacity of the installations concerned.

60 It should be noted in particular that, in accordance with Article 17(4) of that decision, the initial installed capacity concerned is determined using the methodology indicated in Article 7(3), according to which that initial capacity is, in principle, the average of the two highest monthly production volumes in a given period, using as a reference the continuous 90-day period on the basis of which the start of normal operation is determined.

61 Furthermore, the start of normal operation is defined in Article 3(n) of that decision as the verified and approved first day of a continuous 90-day period, or, where the usual production cycle in the sector concerned does not foresee continuous production, the first day of a 90-day period split into sector-specific production cycles, during which the installation operates at least at 40% of the capacity that the equipment is designed to accommodate taking into account, where appropriate, the installation-specific operating conditions.

62 As the Advocate General indicated in point 54 of his Opinion, it is unambiguously clear from the short baseline period and low capacity threshold laid down that the Commission explicitly decided not to make the allocation of emission allowances free of charge to new entrants dependent on data that was required in all cases to be representative of actual operation of the installations concerned.

63 In accordance with the Court's settled case-law, the principle of equal treatment, as a general principle of EU law, requires that comparable situations must not be treated differently and that different situations must not be treated in the same way unless such treatment is objectively justified (judgment of 20 June 2019, *ExxonMobil Production Deutschland*, C-682/17, EU:C:2019:518, paragraph 90 and the case-law cited).

64 Having regard to their different circumstances, two separate bodies of rules have been established, on the one hand, in order to allocate emission allowances free of charge to incumbent installations and, on the other hand, to new entrants.

65 Accordingly, as the Advocate General noted in point 60 of his Opinion, it is untenable to argue that the relevant capacity utilisation factor is intended to ensure that, as for incumbent installations, emission allowances are allocated free of charge to new entrants on the basis of data which reflect actual utilisation of the capacity of the installation concerned, exceeding 100% if necessary.

66 Thereafter, in order to interpret the second subparagraph of Article 18(2) of Decision 2011/278 in the light of the general scheme of Directive 2003/87 and of that decision, the situation of a new entrant with a fuel benchmark sub-installation, such as Ingredion Germany, must be assessed having regard to the situation of new entrants with sub-installations falling under other benchmarks.

67 As set out in paragraph 44 of this judgment, in order to calculate the preliminary annual number of emission allowances allocated free of charge to new entrants, it is necessary to determine whether the sub-installations concerned have a product benchmark, a heat benchmark or a fuel benchmark or whether they are process emissions sub-installations.

68 In that regard, the Court has already pointed out that the definitions, set out in Article 3 of Decision 2011/278, of product benchmark sub-installations, heat benchmark sub-installations, fuel benchmark sub-installations and process emissions sub-installations are mutually exclusive (judgment of 18 January 2018, *INEOS*, C-58/17, EU:C:2018:19, paragraph 29 and the case-law cited).

69 As can be seen from recital 12 of that decision, it is only in the case where deriving a product benchmark has not been feasible, but greenhouse gases eligible for the free allocation of emission allowances occur, that those allowances should be allocated on the basis of the three other so-called

'fallback' approaches, in accordance with the hierarchy thus determined, in order to maximise greenhouse gas emission reductions and energy savings for at least parts of the production processes concerned (judgment of 18 January 2018, *INEOS*, C-58/17, EU:C:2018:19, paragraph 30 and the case-law cited).

70 In the case of the allocation of emission allowances free of charge to new entrants, and in particular in order to determine the activity level of the installations concerned, it is necessary to distinguish between product benchmark sub-installations, on the one hand, and heat benchmark, fuel benchmark and process emissions installations, on the other.

71 Indeed, whereas, in relation to process emissions installations, as can be seen from Article 18(1)(b) to (d) of Decision 2011/278, the activity level is determined on the basis of the relevant capacity utilisation factor, that is not so of new entrants with product benchmark installations. In respect of product benchmark installations, Article 18(1)(a) of that decision provides that the product-related activity level, for each product for which a product benchmark has been determined, is to be the initial installed capacity for the production of this product of the installation concerned multiplied by the standard capacity utilisation factor.

72 As can be seen from the first subparagraph of Article 18(2) of that decision, that standard capacity utilisation factor is determined and published by the Commission. It is pointed out that the value of that standard capacity utilisation factor, as laid down for the third trading period by Decision 2013/447, is less than 100% for each of the product benchmarks.

73 This means that when the second subparagraph of Article 18(2) of Decision 2011/278 is construed in the light of the provisions concerning determination of the activity level of new entrants with product benchmark installations, it is impossible to argue that the value of the relevant capacity utilisation factor may be equal to or greater than 100%.

74 Indeed, as the Advocate General noted in points 43 to 46 of his Opinion, that provision cannot be interpreted in such a way that, where it has not been possible to determine a product benchmark as required, in principle, by that decision, the use of a different benchmark as a fallback option, in relation to the allocation of emission allowances free of charge, may lead to more favourable treatment for new entrants that operate sub-installations with heat, fuel or process emissions benchmarks, to the detriment of new entrants operating product benchmark sub-installations.

75 Those considerations are borne out by the objectives pursued by the EU legislature.

76 It should be recalled that, although the principal objective of Directive 2003/87, as already indicated in paragraph 38 of this judgment, is to reduce greenhouse gas emissions substantially, that objective must be attained in compliance with a series of sub-objectives. As indicated in recitals 5 and 7 of that directive, those sub-objectives include the safeguarding of economic development and employment and the preservation of the integrity of the internal market and of conditions of competition (judgment of 22 June 2016, *DK Recycling und Roheisen* v *Commission*, C-540/14 P, EU:C:2016:469, paragraph 49 and the case-law cited).

77 The existence of unequal treatment between the categories of new entrants referred to in paragraph 74 of this judgment, without objective justification, would impede attainment of those sub-objectives.

78 In the light of the foregoing, the question referred should be answered to the effect that the second subparagraph of Article 18(2) of Decision 2011/278 must be interpreted as meaning that, for the purposes of allocating emission allowances free of charge to new entrants, the relevant capacity utilisation factor is limited to a value of less than 100%.

Costs

79 Since these proceedings are, for the parties to the main proceedings, a step in the action pending before the national court, the decision on costs is a matter for that court. Costs incurred in submitting observations to the Court, other than the costs of those parties, are not recoverable.

On those grounds, the Court (Fifth Chamber) hereby rules:

The second subparagraph of Article 18(2) of 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 of the European Parliament and of the Council must be interpreted as meaning that, for the purposes of allocating emission allowances free of charge to new entrants, the relevant capacity utilisation factor is limited to a value of less than 100%.

[Signatures]