Reports of Cases

OPINION OF ADVOCATE GENERAL
SAUGMANDSGAARD ØE
delivered on 18 June 2020[1]

Case C-320/19

Ingredion Germany GmbH
v
Bundesrepublik Deutschland

(Request for a preliminary ruling
from the Verwaltungsgericht Berlin (Administrative Court, Berlin, Germany))

(Reference for a preliminary ruling — Environment — Directive 2003/87/EC — Greenhouse gas emission allowance trading scheme –Article 3(h) — Concept of a 'new entrant' — Article 10a — Transitional rules for free allocation of emission allowances — Decision 2011/278/EU — Allocation of emission allowances to new entrants free of charge — Sub-installation with fuel benchmark — Article 18(1)(c) and second subparagraph of Article 18(2) — Determination of the fuel-related activity level — Relevant capacity utilisation factor — Limitation of the relevant capacity utilisation factor to a value lower than 100%)

I. Introduction

1. The present request for a preliminary ruling from the Verwaltungsgericht Berlin (Administrative Court, Berlin, Germany) relates to the interpretation of Article 3(h) and Article 10a of Directive 2003/87/EC,[2] which establishes a scheme for greenhouse gas emission allowance trading within the European Union, and of Article 18(1)(c) and the second subparagraph of Article 18(2) of Decision 2011/278/EU,[3] determining transitional EU-wide rules for harmonised free allocation of emission allowances.

2. The request has been made against the background of proceedings between Ingredion Germany GmbH ('Ingredion' or 'the applicant in the main proceedings') and the Federal Republic of Germany, represented by the Umweltbundesamt (Federal Environment Agency, Germany), concerning an application for free allocation of emission allowances in respect of an installation which comes within the meaning of 'new entrant' in Article 3(h) of Directive 2003/87.[4]

1 Original language: French.

2 Directive 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').

3 Commission Decision 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).

4 I note that the expression 'new entrant' is defined in Article 3(h) of Directive 2003/87 so as to include (inter alia) any 'installation … which has obtained a greenhouse gas emissions permit for the first time after 30 June 2011'. The provisions concerning 'new entrants' form the subject matter of Chapter IV of Decision 2011/278.

3. In that context, the referring court is unsure whether, for the purposes of determining the preliminary annual number of allowances to be allocated free of charge in respect of one of the sub-installations making up that installation, which is a sub-installation with a fuel benchmark, the relevant capacity utilisation factor referred to in Article 18(1)(c) and the second subparagraph of Article 18(2) of Decision 2011/278 is limited to a value below 100%.

4. The examination of that issue will add to a long line of case-law on the greenhouse gas emission allowance trading scheme and the transitional rules for harmonised free allocation of emission allowances,[5] while also giving the Court the opportunity to consider, for the first time, the rules relating to 'new entrants'.

5. At the conclusion of my analysis, I will propose that the Court should rule that, under this scheme, the relevant capacity utilisation factor must, as regards a fuel benchmark sub-installation such as that, operated by Ingredion, to which the main proceedings relate, be limited to a value below 100%.

II. Legal background

A. EU law

1. Directive 2003/87

6. Article 3 of Directive 2003/87, entitled 'Definitions', provides:

'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 listed 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;

…'

7. Article 10a of that directive, headed 'Transitional Community-wide rules for harmonised free allocation', provides:

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

5 In relation to greenhouse gas emissions allowances, I have previously delivered Opinions in the following cases: *INEOS Köln* (C-572/16, EU:C:2017:896) and *ExxonMobil Production Deutschland* (C-682/17, EU:C:2019:167).

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 …, and shall not provide incentives to increase emissions.

…

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. …

…

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".

…'

2. Decision 2011/278

8. Article 17 of Decision 2011/278, headed 'Application for free allocation', contains a paragraph 4 which reads as follows:

'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.'

9. Article 18 of Decision 2011/278, which is headed '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:

…

(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;

…

2. …

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.

…

3. For installations which had a significant capacity extension after 30 June 2011, Member States shall determine in accordance with paragraph 1 the activity levels only for the added capacity of the sub-installations to which the significant capacity extension relates.

For installations which had a significant capacity reduction after 30 June 2011, Member States shall determine in accordance with paragraph 1 the activity levels only for the reduced capacity of the sub-installations to which the significant capacity reduction relates.'

10. Article 19 of that decision, which is headed 'Allocation to new entrants', provides:

'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:

…

(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;

…

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.'

B. German law

11. Paragraph 9(1) 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:

'(1) Installation operators shall receive an allocation of free allowances in accordance with the principles laid down in Article 10a … of Directive [2003/87] … and in … Decision [2011/278].'

12. 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 2013-2020 trading period) of 26 September 2011 (BGBl. I 2011, p. 1921; 'the ZuV 2020'), which is headed 'Definition', provides:

'…

10. New installations

All new entrants pursuant to the first indent of Article 3(h) of Directive [2003/87];

…'

13. Paragraph 16 of the ZuV 2020, which is headed 'Applications for free allocation of emission allowances', provides:

'(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.

…'

14. Paragraph 17 of the ZuV 2020, which is headed '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 a fuel emission value 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, points 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.

…’[6]

15. Under Paragraph 18 of the ZuV 2020, which is headed ‘Allocation to new entrants’:

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

…

3. for each allocation element with 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;

…’

III. The dispute in the main proceedings, the question referred for a preliminary ruling and the procedure before the Court

16. The applicant in the main proceedings, Ingredion, operates an installation for the production of starch products in Hamburg (Germany).[7] That installation incorporates air-heating equipment and a steam generator, and those sub-installations use steam and natural gas to generate heat, in order to produce starch.

17. On 8 August 2014, Ingredion applied to the Deutsche Emissionshandelsstelle (the German emission allowance trading agency; ‘the DEHSt’) for a free allocation of emission allowances in respect of those two sub-installations. In relation to one of those sub-installations, its application was based on a heat benchmark, and in relation to the other it was based on a fuel benchmark.[8]

18. The DEHSt initially calculated the preliminary number of emission allowances capable of being allocated free of charge, in respect of the sub-installation with a fuel benchmark, on the basis of a relevant utilisation factor of 109%. On the basis of the data provided by Ingredion, the actual utilisation of the capacity of that sub-installation, during the period between the date of entry into regular service (15 August 2013) and the date on which the allocation application was made (20 June 2014), was in fact greater than 100% of its initial installed capacity.[9]

6 I note that, in Decision 2011/278, the term used is ‘sub-installation’, and not ‘allocation element’. Similarly, the decision uses the term ‘fuel benchmark’, and not ‘fuel emission value’. In the remainder of this Opinion, I will refer solely to the terms used in that decision, since the terms used in the ZuV 2020 are to be interpreted in the same way.

7 Starch products include all agro-alimentary products containing starch.

8 As I observed in my Opinion in *INEOS Köln* (C-572/16, EU:C:2017:896, point 58 and footnote 35), in essence, ‘the benchmarks equate to a specific quantity of … emissions which the Commission recognises as being necessary for the production of a particular amount of the relevant product’ (see Opinion of Advocate General Kokott in *Borealis Polyolefine and Others*, C-191/14, C-192/14, C-295/14, C-389/14 and C-391/14 to C-393/14, EU:C:2015:754, point 40). For the purposes of calculating the preliminary annual number of emission allowances to be allocated free of charge, the Member States are required to distinguish, in accordance with Article 6 of Decision 2011/278, 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’ (see judgments of 8 September 2016, *Borealis and Others*, C-180/15, EU:C:2016:647, paragraph 61, and of 18 January 2018, *INEOS*, C-58/17, EU:C:2018:19, paragraph 28). 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 (see judgment of 8 September 2016, *Borealis and Others*, C-180/15, EU:C:2016:647, paragraph 62).

9 As regards initial installed capacity, I note that Article 17(4) of Decision 2011/278 essentially provides that, for installations referred to in Article 3(h) of Directive 2003/87 (or, in other words, new entrants), with the exception of installations that have had a significant extension after 30 June 2011, the initial installed capacity for each sub-installation is to be determined using the ‘continuous 90-day period on the basis of which the start of normal operation is determined’ as a reference (see also point 8 of the present Opinion).

19. The DEHSt subsequently adopted the view that, as the Commission had, in its decision of 24 March 2015,[10] rejected a utilisation factor of 100% or more in respect of three other German installations, it would henceforth be appropriate to apply a relevant capacity utilisation factor of 99.9%, and not 109%. On that basis, by decision of 1 September 2015, it determined the number of emission allowances to be allocated free of charge to Ingredion for the 2013-2020 allocation period.

20. The applicant in the main proceedings lodged an objection to that decision. Its objection was rejected by decision of 7 July 2017, which was notified to the applicant on 10 July 2017. In its reasons for rejecting the objection, the DEHSt referred to the Commission decision of 24 March 2015 and also to guidance documents issued by the Commission.[11]

21. By legal proceedings brought on 9 August 2017 before the Verwaltungsgericht Berlin (Administrative Court, Berlin), the applicant in the main proceedings maintained its claim.

22. By decision of 28 January 2019, the DEHSt withdrew its decision of 1 September 2015 in so far as there was an arithmetical error in the allocation application relating to the sub-installation with a fuel benchmark. On 20 January 2019, as a result of that arithmetical error, Ingredion had amended its application in the legal proceedings.

23. 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 can be equal to or greater than 100%, as regards sub-installations with a fuel benchmark which, like that of Ingredion, are subject to the rules for 'new entrants'.

24. In particular, the referring court observes that the wording of that provision does not contain any limitation of the relevant capacity utilisation factor to below 100%. It finds that a higher capacity utilisation factor emerges, in the case before it, on the basis of duly substantiated and independently verified information not merely on the intended normal operation of Ingredion's sub-installation, but also on its actual operation prior to the application. It adds that, unlike in the case of incumbent installations,[12] the determination of the initial installed capacity in the case of new entrants takes account of the 90-day period after the start of normal operation (in accordance with Article 17(4) of Decision 2011/278) and not of a period of four years.[13]

25. However, the referring court also observes, making the comparison with new entrants having product benchmark sub-installations, that the standard capacity utilisation factor which applies to such sub-installations, under Article 18(1)(a) of Decision 2011/278, in no case reaches 100%.[14] It goes on to state that the free allocation of allowances pursuant to Article 10a of Directive 2003/87 is a temporary departure from the principle of the auctioning of allowances,[15] which argues in favour of a restrictive interpretation of the corresponding provisions.

10 Decision C(2015) 1733 final of 24 March 2015 on the preliminary total amount of emission allowances from the new entrants reserve allocated free of charge to the German installations with the identifiers DE000000000001744, DE000000000201341 and DE000000000203762.

11 Those documents, entitled 'Guidance Document No 2 on the harmonised free allocation methodology for the EU-ETS post 2012 (Guidance on allocation methodologies)' and 'Frequently Asked Questions on New Entrants & Closures Applications', are available on the Commission website at the following address: https://ec.europa.eu/clima/policies/ets/allowances_en#tab-0-1

12 Under Article 3(a) of Decision 2011/278, the term 'incumbent installation' is defined as 'any installation … which (i) obtained a greenhouse gas emission permit before 30 June 2011; or (ii) is in fact operating, obtained all relevant environmental permits, … 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 …'.

13 Under Article 9(1) of Decision 2011/278, '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'.

14 The standard capacity utilisation factors are fixed in accordance with the Annex to 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).

15 Article 10(1) of Directive 2003/87, which is headed 'Auctioning of allowances', provides inter alia that, for the activities referred to in Annex I to that directive, other than aviation activities, Member States are required, from 2013 onwards, to auction 'all allowances which are not allocated free of charge in accordance with Article 10a and 10c'.

26. In those circumstances, the Verwaltungsgericht Berlin (Administrative Court, Berlin) decided to stay the proceedings and to refer the following question to the Court 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%?'

27. Written observations have been submitted to the Court by Ingredion, the Federal Republic of Germany and the European Commission.

28. Ingredion, the Federal Republic of Germany, the German Government and the Commission were represented at the hearing, which was held on 12 March 2020.

IV. Analysis

A. Preliminary observations

29. This request for a preliminary ruling essentially invites the Court to determine whether, under the system for allocating emission allowances to 'new entrants' free of charge, the relevant capacity utilisation factor can, as regards a sub-installation with a fuel benchmark, be equal to or greater than 100%. Where appropriate, a relevant capacity utilisation factor equal to or greater than 100% would enable a greater number of free allowances to be allocated, in cases where the actual utilisation of the capacity of the sub-installation exceeds its initial installed capacity.

30. I note that that fuel-related activity level is calculated on the basis of the relevant capacity utilisation factor, by multiplying it by the initial installed capacity. Under Article 19(1)(c) of Decision 2011/278, the preliminary annual number of emission allowances to be allocated free of charge is then determined by multiplying that fuel-related activity level by the corresponding benchmark.

31. In this regard, I note that, while the second subparagraph of Article 18(2) of Decision 2011/278 provides for the relevant capacity utilisation factor to be 'determined by Member States on the basis of duly substantiated and independently verified information … compared to sector-specific information', that provision does not, however, lay down any express limit on its value.

32. In their written observations, and at the hearing before the Court, the parties also made the same observation. They essentially advanced three different positions, which may be summarised as follows.

33. First, Ingredion submitted that the relevant capacity utilisation factor can be adjusted to a value greater than 100% where, over a period going beyond that of 90 days from the start of normal operation of the installation, the actual utilisation of the capacity of its fuel benchmark sub-installation exceeds the initial installed capacity. [16]

16 At the hearing before the Court, Ingredion made clear that its position was not that the maximum capacity of the sub-installation had to be taken as the reference value, but that the relevant capacity utilisation factor had to reflect the actual use of the capacity of that sub-installation.

34. Secondly, the Federal Republic of Germany and the German Government submitted, in essence, that whether or not the utilisation factor is limited to a value below 100% depends essentially on the discretion left to the Member States, under the second subparagraph of Article 18(2) of Decision 2011/278, to determine that utilisation factor. [17]

35. Thirdly, the Commission submitted that, in accordance with Article 3(i) and Article 20 of that decision, only a significant capacity extension, or in other words an extension of at least 10% by comparison with the initial installed capacity, could lead to a change in the number of allowances provisionally allocated to a new entrant. It would be contrary to the scheme and objectives of that decision, it submitted, for the relevant capacity utilisation factor to be used to take account of extensions which, as in Ingredion's case, did not exceed the 10% threshold and thus were not subject to the mechanism laid down by those provisions. Furthermore, in relation to product benchmark sub-installations subject to the rules applicable to 'new entrants', it submitted that the standard capacity utilisation factor would always be less than 100%. Having regard to the principle of equal treatment as between 'new entrants', the same, it is submitted, should apply to the relevant capacity utilisation factor, as regards fuel benchmark sub-installations.

36. I would point out at the outset that the concerns expressed by Ingredion seem to me to arise essentially from the duration of the reference period used to calculate the initial installed capacity, which it considers to be too short. I reiterate that, under Article 17(4) of Decision 2011/278, the reference period corresponds to the 90 days following the start of normal operation of the installation. [18]

37. As regards the determination of the relevant capacity utilisation factor, German law permits the actual operation of the installation up to the making of the allocation application to be taken into account. [19] Ingredion submits, essentially, that the value of the relevant capacity utilisation factor must therefore reflect the actual utilisation of the capacity of the sub-installation as it stood at the end of that period (in its case, the period from 15 August 2013 to 20 June 2014), by means, where necessary, of a value greater than 100%, in cases where the actual utilisation exceeds the initial installed capacity.

38. In the following sections of this Opinion I will set out the reasons why I take the view, contrary to Ingredion's submissions, that it is necessary to limit the relevant capacity utilisation factor to a value below 100%, having regard, first, to the wording and context of the first subparagraph of Article 18(2) of Decision 2011/278, which relates to the standard capacity utilisation factor applicable to product benchmark sub-installations (section B), secondly, to the general scheme of that decision (section C), and thirdly, to the overall purpose and the objectives of the system for preliminary allocation of free allowances (section D).

17 For the sake of completeness, I would add that, in its written observations, the Federal Republic of Germany submitted that the positions of Ingredion and of the Commission were both compatible with Directive 2003/87 and with Decision 2011/278. It emphasised, however, that the Member States were entitled to rely on final decisions of the Commission concerning the preliminary allocation of free allowances to other installations within their territory, and that it was open to the DEHSt, in the light of Commission Decision C(2015) 1733 final of 24 March 2015, to refuse to apply a relevant capacity utilisation factor equal to or greater than 100%.

18 I note that, in its written observations, the Federal Republic of Germany also emphasised that the main argument against a limitation of the relevant capacity utilisation factor is that the initial installed capacity, determined in accordance with Article 17(4) of Decision 2011/278, was not always representative of the capacity of the installation, because of the short 90-day period.

19 Paragraph 17(2.1) of the ZuV 2020 provides that, for sub-installations set up on German territory, the relevant capacity utilisation factor is to be determined on the basis of information concerning, inter alia, the actual operation of the sub-installation *up to the making of the allocation application*, and of the expected operation, maintenance periods and maintenance cycles of the installation or sub-installation. At the hearing before the Court, the Federal Republic of Germany emphasised that, inasmuch as new entrants often did not make applications for the allocation of free allowances until the sub-installation had been in use for a year, it was possible, under the ZuV 2020, to use the relevant capacity utilisation factor to correct any inaccuracies in the data gathered during the reference period, on the basis of data covering the period up to the date on which the application was made. However, the Commission submits that such additional data are not necessary for the purposes of allocating free allowances to new entrants, and accordingly that it is not appropriate for the national authorities of any Member State to have regard to such data.

39. For the sake of completeness, I will also make some observations concerning the discretion left to the Member States by the second subparagraph of Article 18(2) of that decision, in response to the arguments set out by the Federal Republic of Germany and the German Government (section E).

B. Interpretation having regard to the wording and context of the first subparagraph of Article 18(2) of Decision 2011/278

40. I note that, under Article 18(1)(a) and the first subparagraph of Article 18(2) of Decision 2011/278, the formula for calculating the activity level of sub-installations with product benchmarks is different from that applicable to sub-installations with heat, fuel or process emission benchmarks.[20] As regards sub-installations with product benchmarks, the relevant capacity utilisation factor is not applicable, and the calculation is based on the standard capacity utilisation factor, the value of which is determined by the Commission in a concrete and precise manner.[21]

41. In that regard, I observe — as indeed did the referring court — that in Decision 2013/447, which determined the standard capacity utilisation factor for the years 2013 to 2020, the values are in all cases below 1 (and thus 100%).[22]

42. I confess that I find it difficult to conceive that the factor used to determine the activity level applicable to new entrants, and, at a later stage, the number of preliminary allowances to be allocated to them, should be capable of exceeding 100% in relation to fuel benchmark sub-installations, when that is not possible in relation to product benchmark sub-installations.

43. On the one hand, I consider that the principle of equal treatment of new entrants, which is set out, in essence, in recital 36 of Decision 2011/278,[23] requires, as the Federal Republic of Germany submits, that the limits imposed on the standard capacity utilisation factor used to determine the level of activity should be the same for all 'new entrants'.

44. On the other hand, it is apparent from the definitions in Article 3(b) to (d) and (h) of Decision 2011/278, read together, that the method of calculation set out in the first subparagraph of Article 18(2) of that decision, in relation to product benchmark installations, must be considered to be the most precise. As the Commission explained, the relevant capacity utilisation factor is only used where it has not been possible to calculate a product benchmark.[24]

45. That interpretation is supported by the hierarchical relationship between the different benchmarks capable of applying to a given sub-installation, to which express reference is made in recital 12 of Decision 2011/278. That recital states that the methods for allocating emission allowances free of charge which are applicable to sub-installations with heat or fuel or process emissions benchmarks are 'three fallback approaches' for cases where it has not been possible to calculate a product benchmark.

20 As to the relevance of these different benchmarks and the relationship between them, I refer to footnote 8 to this Opinion.

21 I also note that, under the first subparagraph of Article 18(2) of Decision 2011/278, the standard capacity utilisation factor, which applies to product benchmark sub-installations, is the '80-percentile of the average annual capacity utilisation factors of all installations producing the product concerned'.

22 More precisely, the values range from 0.731 to 0.964.

23 I would point out that, according to recital 36 of Decision 2011/278, 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' (emphasis added).

24 See, to that effect, judgment of 28 April 2016, *Borealis Polyolefine and Others* (C-191/14, C-192/14, C-295/14, C-389/14 and C-391/14 to C-393/14, EU:C:2016:311, paragraph 68). The Commission's interpretation also seems to me to be confirmed by recital 4 of Decision 2011/278, which states that '*to the extent feasible*, the Commission has developed benchmarks for products' (emphasis added).

46. Thus, it seems to me that if, pursuant to Decision 2013/447, the standard capacity utilisation factor is less than 1 (or 100%), the same must be true of the relevant capacity utilisation factor, in relation to fuel benchmark sub-installations. This limitation is, to my mind, necessary in order to guarantee equality of treatment in regard to all new entrants and to give effect to the hierarchy between those benchmarks. [25]

C. Interpretation in the light of the general scheme of Decision 2011/278

47. Limiting the relevant capacity utilisation factor to a value below 100% seems to me, moreover, to be necessary in the light of the general scheme of Decision 2011/278 and the various methods of calculation provided for by that decision, in relation to the preliminary allocation of free allowances for 'incumbent installations' [26] and 'installations which have had a significant capacity extension'. [27]

1. The rules applicable to 'incumbent installations'

48. As regards 'incumbent installations', I note that these are subject to a separate body of rules from 'new entrants'. In cases where a fuel benchmark is applicable to such an installation, the preliminary annual number of emission allowances allocated free of charge corresponds, as can be seen from Article 10(2)(b)(ii) of Decision 2011/278, to the value of the fuel benchmark multiplied by the fuel-related historical activity level for the fuel consumed. The activity level referred to corresponds, essentially, to the median annual historical consumption of fuels used for certain types of production, [28] during a reference period running from 1 January 2005 to 31 December 2008 or from 1 January 2009 to 31 December 2010. [29]

49. I note that this reference period (of two to four years) is much longer than the 90-day period laid down in the decision for the purposes of determining the initial installed capacity of new entrants. Furthermore, as the Commission rightly points out, the activity levels of incumbent installations are calculated without the use of a factor comparable to those applicable to new entrants.

50. Against that background, one might wonder about the role played by the relevant capacity utilisation factor, as regards fuel benchmark sub-installations which are subject to the rules for 'new entrants'. Is it intended, as Ingredion submits, to compensate for the relatively short reference period used to calculate the initial installed capacity of such a sub-installation? [30]

51. In my view, that question must be answered in the negative.

25 In particular, given that, in accordance with Decision 2013/447, the standard capacity utilisation factor is below 1 in all cases, it seems to me that the relevant capacity utilisation factor must also remain strictly below 100%.

26 As regards the definition of 'incumbent installations', see footnote 12 to this Opinion.

27 As regards installations which have had a significant capacity extension, I note that these are included in the definition of 'new entrant', in Article 3(h) of Directive 2003/87. That definition includes, as new entrants, not only 'any installation … which has obtained a greenhouse gas emissions permit for the first time after 30 June 2011' (which, I note, covers the Ingredion sub-installation at issue in the main proceedings), but also 'any installation … which has had a significant extension after 30 June 2011, but only in so far as this extension is concerned'.

28 The different types of production in question are listed in Article 9(4) of Decision 2011/278.

29 As I stated in footnote 9 to this Opinion, this period (of two to four years) is defined in Article 9(1) of Decision 2011/278.

30 In that regard, I note that under Article 17 of Commission Delegated Regulation (EU) 2019/331 of 19 December 2018 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 2019 L 59, p. 8), allowances are allocated free of charge to 'new entrants', for the period from 2021 to 2030 (the fourth trading period), on the basis of the historical activity level, determined over the first calendar year after the start of normal operation. The relevant capacity utilisation factor and the 90-day reference period thus no longer have any bearing on allocations made from 2021 onwards.

52. Admittedly, the differing durations of the reference periods applicable to incumbent installations and new entrants mean that, in the case of a new entrant, there is a greater probability of the initial installed capacity not reflecting the actual utilisation of capacity than in the case of an incumbent installation. On the approach advocated by Ingredion, that risk could be partly counterbalanced by having regard, at the point when the relevant capacity utilisation factor is determined, to data from a longer period, running up to the date on which the allocation application is made, on the basis of which the activity level of the sub-installations could, where appropriate, be increased with a consequent increase in the number of allowances allocated free of charge.

53. However, it seems to me that, even if the relevant capacity utilisation factor were used to reflect the actual utilisation of sub-installations between the end of the 90-day reference period and the making of the application for allocation of allowances, the data gathered in relation to new entrants would not extend over as long a period as is covered by the historical data [31] relating to incumbent installations. Indeed, since Article 3(h) of Directive 2003/87 defines 'new entrant' so as to include, inter alia, all installations obtaining a greenhouse gas emissions permit for the first time *after 30 June 2011*, it is quite simply impossible for the reference period applied to them, at the point when the allocation application is made, to be as long as that applicable to incumbent installations.

54. Furthermore — and most importantly — Article 17(4) of Decision 2011/278, which lays down the short reference period of 90 days, is entirely unambiguous. The Commission has stated that it was aware, when it adopted that decision, that installations or sub-installations which had recently come into service would not have achieved their expected normal operation by the beginning of that period. It rightly added that the possibility of the actual utilisation of the capacity of the installation or sub-installation exceeding the initial installed capacity used to determine the preliminary number of free allowances allocated to 'new entrants' had been 'consciously accepted' [32] when Decision 2011/278 was adopted, given that that decision provides, in Article 3(n), for the reference period to begin when the installation begins to operate at least at 40% of the capacity that it is designed to accommodate.

55. Having regard to those matters, I share the view of the Federal Republic of Germany that to increase the relevant capacity utilisation factor to a value equal to or greater than 100%, in cases where the actual utilisation of the capacity of a sub-installation such as that operated by Ingredion equals or exceeds the initial installed capacity, would run counter to a deliberate legislative choice to restrict the reference period used for the purposes of determining the initial installed capacity to the 90 days following the start of normal operation of the installation. Such an increase would ultimately contradict the wording of Article 17(4) of that decision, read in conjunction with Article 3(n), since it would have the same effect as an increase in the initial installed capacity.

56. I would add that it seems to me, as the Federal Republic of Germany and the Commission submitted, that any difference in treatment between incumbent installations and new entrants is objectively justified, [33] given that the preliminary annual number of emissions allowances allocated free of charge is not a function of the *actual emissions* of the beneficiary, but of the *theoretical 'benchmarks'* calculated by the Commission on the basis of the emissions of the 10% most efficient installations, pursuant to Article 10a(2) of Directive 2003/87.

31 I note that, under Article 7(1) of Decision 2011/278, for each incumbent installation, Member States are to collect from the operator 'for all years of the period from 1 January 2005 to 31 December 2008, or 1 January 2009 to 31 December 2010 where applicable, during which the installation has been operating, … all relevant information and data …'.

32 I observe that, in adopting Decision 2011/278, the Commission was acting pursuant to its implementing powers under Article 10a of Directive 2003/87. In that regard, I note that under Article 291(3) TFEU, where the Commission adopts implementing measures, the Parliament and the Council are to lay down in advance the rules and general principles concerning mechanisms for control by Member States of its exercise of implementing powers. Furthermore, the Parliament may oppose such measures and, if it does so, the Commission is obliged to take its position into account, even if it is not obliged to accept it.

33 In that regard, I note that according to settled case-law, the general principle of equal treatment 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 (see, inter alia, judgment of 16 December 2008, *Arcelor Atlantique et Lorraine and Others*, C-127/07, EU:C:2008:728, paragraph 23).

57. Thus, whichever body of rules applies to a sub-installation (those governing incumbent installations or those governing new entrants), the preliminary number of free allowances depends on those theoretical benchmarks, which are the same for incumbent installations and new entrants alike. The differences relating to the other elements involved in the calculation arise from the lack of reliable and sustainable historical data as regards installations which have recently come into service, and the consequent need to use an estimate of their activity level for the purposes of determining the preliminary number of allowances that can be allocated to them free of charge.

58. In that regard, I must also emphasise that Articles 20 and 21 of Decision 2011/278 already provide for the same formula to apply to incumbent installations and to installations coming into service after 30 June 2011,[34] in so far as they are subject to a significant capacity change, or in other words 'a significant capacity extension or a significant capacity reduction'.[35]

59. Thus, although there is a greater risk, as the legislature was aware, of the activity level not being representative of the actual utilisation of capacity in the case of a new entrant, as compared with an incumbent installation, any discrepancy in excess of 10% can be taken into account over the longer term, notably under Article 20 of Decision 2011/278.[36] In such a case, moreover, a period of six months (rather than only 90 days) has been expressly laid down by the legislature for the purposes of determining the additional capacity.[37]

60. Consequently, I do not consider that it follows, on a comparative examination of the rules applicable to incumbent installations and new entrants, that where the actual utilisation of the capacity of a fuel benchmark sub-installation is equal to or greater than its initial installed capacity, the relevant capacity utilisation factor should be equal to or greater than 100%. On the contrary, the legislature's express intention to restrict the reference period applicable to new entrants to the 90 days following the start of normal operation of the installation seems to me, as I stated in point 55 above, to support the view that the relevant capacity utilisation factor is limited to values of less than 100%.

2. The rules applicable to 'installations which have had a significant capacity extension'

61. I consider, furthermore, that it would be contrary to the mechanism laid down in Article 20 of Decision 2011/278 for the relevant capacity utilisation factor to be capable, in the case of a fuel benchmark sub-installation subject to the rules applicable to 'new entrants', of attaining or exceeding a value of 100%, where the extension of capacity is less than the 10% threshold laid down in that provision.

62. I note in this regard that, under Article 20 of Decision 2011/278, the number of emission allowances to be allocated free of charge in order to reflect a significant extension of capacity depends, as the Federal Republic of Germany observed, on the two conditions laid down in Article 3(i) of that decision.

34 Articles 20(1) and 21(1) of Decision 2011/278 provide, essentially, that where an installation has had a significant capacity extension or reduction after 30 June 2011, the Member States are to determine, upon application by the operator, the number of free emission allowances to be allocated, in so far as the extension or reduction is concerned. In such a case, it is the methodology set out in Article 19 of the decision, or in other words the method of calculation prescribed for new entrants, which applies.

35 This definition of 'significant capacity change' appears in Article 3(k) of Decision 2011/278.

36 Admittedly, the mechanism laid down in Article 20 of Decision 2011/278 does not allow for the preliminary number of free allowances allocated to a sub-installation, on the basis of the initial application, to be corrected after the event. It is therefore true that, in the case of a new entrant, it is not possible to compensate, at a later stage, for any underestimation of the relevant capacity at the time of the initial allocation. Nonetheless, the Commission stated at the hearing that new entrants could come within Article 20 from the year following that initial allocation, provided that they have had a significant capacity extension.

37 See Article 3(l) of Decision 2011/278. I note that, in the main proceedings, Ingredion bases its submissions on the actual utilisation of its sub-installation during the period from 15 August 2013 to 20 June 2014, a period of over 10 months. It is thus claiming that, in a case where the utilisation of a sub-installation is 9% greater than the initial installed capacity, as measured at the end of the reference period of 90 days and before the application is lodged, the relevant capacity factor can be adjusted on the basis of data relating to a significantly longer period (of at least four months) than is applicable in the case of a significant capacity extension (in other words, an extension of more than 10%).

63. Thus, first of all, one or more identifiable physical changes relating to the technical configuration and functioning of the sub-installation, other than the mere replacement of an existing production line, must have taken place. Secondly, the sub-installation must either be capable of being operated at a capacity that is at least 10% higher compared with its initial installed capacity before the change, or have a significantly higher activity level resulting in an additional allocation of emission allowances of more than 50 000 allowances per year.

64. Furthermore, under Article 20(2) of Decision 2011/278, 'Member States shall require the operator to submit together with the application evidence demonstrating that the criteria for a significant capacity extension have been met'.

65. In those circumstances I consider that if, as Ingredion claims, the relevant capacity utilisation factor could rise above 100% so as to reflect an actual utilisation figure which — as in the case of its sub-installation — is 9% greater than the initial installed capacity,[38] the existence of that possibility would run counter to the express intention of the legislature not to permit an adjustment to the number of allowances allocated except where there has been a significant extension, or in other words an extension of at least 10% as compared with the initial installed capacity.

66. In my view, recital 35 of Decision 2011/278 makes clear that this was the intention of the legislature, stating as it does that 'investments in significant capacity extensions giving access to the reserve for new entrants … 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'.[39]

67. I would add that, at the hearing before the Court, the Commission confirmed that the relevant capacity utilisation factor was not to be used to take account of any extensions of the capacity of the installation, such extensions being covered by the specific mechanism (and the limits) set out in Article 20 of Decision 2011/278.

68. In the light of the matters set out above, I concur with that position.

3. Interim conclusion

69. In my view, having regard to the rules applicable to 'incumbent installations' and 'installations which have had a significant capacity extension', the relevant capacity utilisation factor must, in accordance with the general scheme of Decision 2011/278, be limited to a value below 100%.[40]

70. In the following section, I will explain why it seems to me that the objectives of the system for preliminary allocation of emission quotas free of charge, established by Decision 2011/278 and Directive 2003/87, also point towards a limitation of the relevant capacity utilisation factor to a value less than 100%.

38 Ingredion submits that the relevant capacity utilisation factor should, in such a case, be fixed at a value of 109%.

39 I observe in this regard that, in accordance with Article 19(4) of Decision 2011/278, emission allowances from the new entrants reserve are to be allocated on a 'first come, first served basis'.

40 See, to the same effect, 'Guidance Document No 2 on the harmonised free allocation methodology for the EU-ETS post 2012 (Guidance on allocation methodologies)', p. 32, and 'Frequently Asked Questions on New Entrants & Closures Applications', p. 8, documents which were cited by the referring court and which state that no value of the relevant capacity utilisation factor equal to or greater than 100% must be accepted. In that regard, I note that, while those documents are not legally binding, they nonetheless constitute additional indications of such a kind as to clarify the general scheme of Directive 2003/87 and of Decision 2011/278 (see, inter alia, judgments of 18 January 2018, *INEOS*, C-58/17, EU:C:2018:19, paragraph 41 and the case-law cited, and of 14 May 2020, *Spenner*, C-189/19, EU:C:2020:381, paragraph 49).

D. Interpretation having regard to the overall purpose and the objectives of the system for preliminary allocation of allowances free of charge

71. I observe that, according to settled case-law of the Court, in interpreting a provision of EU law, it is necessary to consider not only the wording of that provision but also its context and the objectives pursued by the rules of which it is part.[41]

72. As regards the overall purpose and the objectives of the system for allocating free emissions allowances established by Article 10a of Directive 2003/87 and Decision 2011/278, I note that this system derogates from the principle of auctioning allowances, which, in the words of the legislature, is 'the simplest, and generally considered to be the most economically efficient, system',[42] from the point of view of the objective of '[reducing] greenhouse gas emissions in a cost-effective and economically efficient manner', as laid down in Article 1 of Directive 2003/87.[43]

73. Against that background, Article 10a(11) of that directive provides for the amount of emission allowances allocated free of charge to be gradually reduced over the period from 2013 to 2020, with a view to reaching the point of no free allocation in 2027.[44] The allocation of emission allowances free of charge, so as to promote a reduction in greenhouse gas emissions, thus comes, incrementally, to be based on the auctioning principle alone.

74. With a view to the attainment of that objective, recital 36 of Decision 2011/278 emphasises the limited number of allowances in the reserve for new entrants.[45] Furthermore, the second sentence of the first subparagraph of Article 10a(7) of Directive 2003/87 provides that allowances in the reserve for new entrants that are not allocated are to be auctioned by the Member States.

75. In this regard, the Commission has also stated that the reason why it chose, when adopting Decision 2011/278, not to compensate for an increase in the utilisation of the capacity of a sub-installation, in comparison with the initial installed capacity, by adjusting the relevant capacity utilisation factor to a value above 100%, was precisely in order to encourage the use, in such a situation, of efficient methods for reducing greenhouse gases, or, as the case may be, the acquisition of an equivalent number of emissions allowances under the trading scheme.

76. Taking those matters into account, it can hardly be doubted, in my view, that the overall purpose and the objectives of the system for allocation of emissions allowances free of charge — as well as the indications given in the first subparagraph of Article 18(2) and the general scheme of Decision 2011/278 — require the relevant capacity utilisation factor to be strictly limited to a value below 100%.[46]

41 See judgment of 20 June 2019, *ExxonMobil Production Deutschland* (C-682/17, EU:C:2019:518, paragraph 71 and the case-law cited).

42 See recital 15 of Directive 2009/29/EC of the European Parliament and of the Council of 23 April 2009 amending Directive [2003/87] so as to improve and extend the greenhouse gas emission allowance trading scheme of the Community. I also refer to my Opinion in *ExxonMobil Production Deutschland* (C-682/17, EU:C:2019:167, point 69).

43 See judgments of 12 April 2018, *PPC Power* (C-302/17, EU:C:2018:245, paragraph 18), and of 17 May 2018, *Evonik Degussa* (C-229/17, EU:C:2018:323, paragraph 41).

44 See judgment of 20 June 2019, *ExxonMobil Production Deutschland* (C-682/17, EU:C:2019:518, paragraph 65 and the case-law cited).

45 In that regard, I note that under the first sentence of the first subparagraph of Article 10a(7) of Directive 2003/87, only 5% of the quantity of allowances allocated in respect of the period 2013 — 2020 is to be set aside for new entrants, and that this percentage is a maximum.

46 In this regard, I observe that, in my Opinion in *ExxonMobil Production Deutschland* (C-682/17, EU:C:2019:167, point 69), I indicated that every restriction on the allocation of free allowances contributes to the gradual establishment of the comprehensive auction system intended by the legislature.

E. Supplementary remarks on the discretion left to the Member States

77. For the reasons set out above, I consider that the question whether the relevant capacity utilisation factor is limited, as regards sub-installations with a fuel benchmark subject to the rules on 'new entrants', to a value below 100%, must be answered by means of a contextual and purposive interpretation, based on the general scheme of Decision 2011/278 and on the overall purpose and objectives of the system for preliminary allocation of allowances free of charge. Thus, contrary to the submissions of the Federal Republic of Germany and the German Government, this question does not relate to the discretion which is left to the Member States by the second subparagraph of Article 18(2) of Decision 2011/278.

78. In that regard, I would observe for the sake of completeness that, so far as the free allocation of emissions allowances is concerned, the legislature emphasised, in Article 10a(1) of Directive 2003/87, that complete harmonisation was imperative, providing that 'the Commission shall adopt Community-wide and fully harmonised implementing measures for the allocation of allowances'.

79. As I previously indicated in my Opinion in *INEOS Köln*,[47] it was on that basis that the Commission adopted Decision 2011/278, and there is little doubt in my view that that decision, read in conjunction with Article 10a of Directive 2003/87, brings about exhaustive harmonisation of the substantive aspects of the free allocation of allowances.[48]

80. In particular, the second subparagraph of Article 19(4) of that decision provides that the Commission may reject the preliminary total annual amount of emission allowances allocated free of charge to a new entrant.

81. Accordingly, it seems to me that, even if the Court were to hold, in line with the submissions advanced by the Federal Republic of Germany and the German Government, and contrary to my proposed approach, that the Member States remain free, within the limits laid down by the second subparagraph of Article 18(2) of Decision 2011/278, to fix the relevant capacity utilisation factor at a value greater than 100%, the Member States could not be criticised for adopting the Commission's position, not least in cases where (as in the main proceedings)[49] this has emerged from the application of the same decision in the context of specific installations, inasmuch as they may anticipate that the same will apply to other installations.

V. Conclusion

82. In the light of all of the foregoing considerations, I propose that the Court should answer the question referred by the Verwaltungsgericht Berlin (Administrative Court, Berlin, Germany) as follows:

Article 18(1)(c) and 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, read in conjunction with Article 3(h) and Article 10a of 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

47 C-572/16, EU:C:2017:896, point 70.

48 See judgment of 22 June 2016, *DK Recycling and Roheisen* v *Commission* (C-540/14 P, EU:C:2016:469, paragraphs 52 to 55).

49 As I have stated in point 19 of this Opinion, in the main proceedings in this case, the DEHSt decided to apply a relevant capacity utilisation factor of 99.9%, on the basis that, in its decision of 24 March 2015, the Commission had rejected a relevant capacity utilisation factor of 100% or more in respect of three other German installations.

amended by Directive 2009/29/EC of the European Parliament and of the Council of 23 April 2009, must be interpreted as meaning that the relevant capacity utilisation factor applicable to the fuel-related activity level is limited to a value of less than 100% in respect of new entrants.