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Emissions trading: Federal Administrative Court throws out RWE action

Allocation for 2nd trading period ruled lawful

The Federal Administrative Court in Leipzig has declared the cuts in allocations for the energy sector in the 2nd trading period lawful and has dismissed the action brought by the energy supply utility RWE against these cuts in the energy sector. The Federal Administrative Court thereby affirmed the judgment reached by the lower courts and its own judgments of October and December 2012 on this basic principle of emissions trading. Six operators had brought action in separate proceedings.

The subject of the present action, which was heard on 21 February 2013, was a power plant operated by RWE located within a lignite processing plant that is not obligated to engage in emissions trading. The German Emissions Trading Authority (DEHSt) at the Federal Environment Agency (UBA) had cut allocations of allowances to the power plant in accordance with the provisions of the Allocation Act 2012 (ZuG 2012) for the energy sector and with the efficiency standard of an installation. The Court ruled this to be lawful. The implementation of a single coal benchmark for lignite plants was also ruled constitutional as it follows the polluter pays principle.

Back in October, four energy supply utilities had unsuccessfully brought action against enforcement of the cuts in allocations to the energy sector which the provisions of ZuG 2012 stipulate for the 2nd trading period. In the leap-frog appeal by the administrative court of Berlin, the Federal Administrative Court ruled that the reductions in allocation is in compliance with European Community law and German constitutional law. The Court deemed air to be a scarce resource - just as the Federal Constitutional Court had done in 1995 as regards water.

Its scarcity results from the fact that the Earth's atmosphere can only absorb up to a certain degree of greenhouse gases to counteract their harmful effects on the climate. The allowable volumes of harmful greenhouse gases can be budgeted in much the same way as is done with water. Financial constitutional law declares it unobjectionable that - as the Federal Administrative Court emphasised - the "use of air" must essentially be paid for by purchasing additional certificates. These government revenues are put into the energy and climate fund, which is used in part to fund climate protection projects. The differentiated treatment of energy and industrial installations in the emissions trading systems is entirely intentional, but the Court

sees no indication of EU law favouring industrial installations that are not affected over energy suppliers. In the meantime, two claims have proceeded to the Federal Constitutional Court. Furthermore, the Federal Administrative Court ruled that the legislator was not bound to the provisions governing allocations in the first trading period, but could instead implement the new system of allocations in effect for the second trading period. In its latest decision, the Court also clarified that power plants which are only part of an installation not subject to emissions trading (secondary installation) are nevertheless to be treated as equal to energy installations that are subject to all the legal rights and obligations associated with emissions trading. No infraction of the principle of equality laid down in the Basic Law could be determined with regard to secondary installations that are subject to emissions trading. The current trend-setting verdicts help to strengthen the system of emissions trading overall as the principle of cuts in allocations is a key factor in emissions trading during the third trading period in 2013-2020.

Further information and links

German Emissions Trading Authority (DEHSt)

The German Emissions Trading Authority at the Federal Environment Agency is the national authority entrusted with the implementation of European emissions trading for stationary installations and for the aviation industry. Its mandate includes management of the allocation and issuance of emission allowances, revision of emissions reports and operation of the emissions trading registry. It is also in charge of the administration of the project-based mechanisms Joint Implementation and Clean Development Mechanism.

Dessau-Roßlau, 4 March 2013