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Emissions trading: Class-action suits against Federal Environment Agency dismissed

Cuts made in allocation procedure deemed legitimate - single coal benchmark is not a breach of EU law

On 13 April 2010 the administrative court of Berlin threw out the suits filed against the Federal Environment by three energy supply utilities. The utilities did not succeed in gaining a retraction of the implementation of the Allocation Act 2012 (*ZuG 2012*) which foresees a cut in allowances and application of a single coal benchmark, as well as non-application of allocation regulations pursuant to the Allocation Act 2007 (*ZuG 2007*).

Three energy supply utilities filed suit objecting to the cutbacks defined in Article 20 *ZuG 2012*. As a result of these cutbacks as of the second trading period (2008-2012), power suppliers have had to acquire a portion of the emissions certificates they require for a fee. The three plaintiffs cited violation of fundamental rights and breaches of tax law.

One of the utilities also filed a charge against the discontinuation of the allocation regulations laid out in *ZuG 2007* (i.e. Art. 8 *ZuG 2007*) and valid in the first trading period (2005-2007). In particular, the issue is non-application of a compliance clause beneficial to the utility for the twelve calendar years following commissioning of installation (Art. 8 Para.1 Sent. 2 *ZuG 2007*). It was argued that fundamental rights and confidentiality were violated. These utilities also appealed to European law and claimed violations of constitutional law due to the lack of a benchmark for brown coal power stations and subsequent application of a single coal benchmark of 750 g carbon dioxide/kilowatt hour.

Neither the basis of calculation the proportional cutback pursuant to Art. 4 Para. 3 *ZuG 2012* nor the application of the law by the German Emissions Trading Authority (DEHSt) at the Federal Environment Agency to enforce *ZuG 2012* were actually challenged.

All three cases were dismissed in their entirety by the administrative court of Berlin, whereby core regulations of *ZuG 2012* were authenticated in the first instance. It also means that the demand to move the case to the Federal Constitutional Court and European courts has been rejected. The judgment is not yet final.

Dessau-Roßlau, 16 April 2010