OPINION OF ADVOCATE GENERAL
SAUGMANDSGAARD ØE
delivered on 23 November 2017 (1)

Case C-572/16

INEOS Köln GmbH

v

Bundesrepublik Deutschland

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

(Reference for a preliminary ruling — Directive 2003/87/EC — Environment — Scheme for greenhouse gas emission allowance trading within the European Union — Article 10a — Decision 2011/278/EU — Transitional rules for free allocation of allowances — Legislation enacted by a Member State which makes an allocation application subject to a mandatory time limit — Impossibility of supplementing or correcting the application after that time limit has expired — No exhaustive harmonisation — Procedural autonomy — Principles of equivalence and effectiveness)

I. Introduction

1. By decision of 3 November 2016, which was received at the Court on 14 November 2016, the Verwaltungsgericht Berlin (Administrative Court, Berlin, Germany) submitted to the Court a request for a preliminary ruling on the interpretation of Article 10a of Directive 2003/87/EC (2) and Decision 2011/278/EU. (3)

2. That request has been made in a dispute between INEOS Köln GmbH (INEOS) and the Bundesrepublik Deutschland (Federal Republic of Germany), represented by the Umweltbundesamt (Federal Environment Agency, Germany), concerning the refusal to allow the company to correct its application for free allocation of greenhouse gas emission allowances for the third trading period (2013-2020) on the ground that the mandatory time limit under national legislation for submitting such applications had expired.

3. The referring court asks the Court whether such a mandatory time limit is compatible with Article 10a of Directive 2003/87 and Decision 2011/278.

4. I will propose that the Court answer this question to the effect that those provisions, in conjunction with the principles of equivalence and effectiveness, are to be interpreted as not precluding legislation enacted by a Member State which prescribes such a mandatory time limit, thereby making it impossible for an operator to correct or supplement its application for free allocation of emission allowances after the time limit has expired, provided that that procedural requirement is no less favourable than procedural requirements in respect of similar actions of a domestic nature.

II. Legislative framework

A. European Union law

1. Directive 2003/87

5. Article 1 of Directive 2003/87, entitled 'Subject matter', provides:

'This Directive establishes a scheme for greenhouse gas emission allowance trading within the [European Union] in order to promote reductions of greenhouse gas emissions in a cost-effective and economically efficient manner.'

…'

6. Article 10a of Directive 2003/87, entitled '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. The maximum annual amount of allowances that is the basis for calculating allocations to installations which are not covered by paragraph 3 and are not new entrants shall not exceed the sum of:

the annual [Union]-wide total quantity, as determined pursuant to Article 9, multiplied by the share of emissions from installations not covered by paragraph 3 in the total average verified emissions, in the period from 2005 to 2007, from installations covered by the Community scheme in the period from 2008 to 2012; and

the total average annual verified emissions from installations in the period from 2005 to 2007 which are only included in the Community scheme from 2013 onwards and are not covered by paragraph 3, adjusted by the linear factor, as referred to in Article 9.

A uniform cross-sectoral correction factor shall be applied if necessary.

...'

7. Article 11 of that directive, entitled 'National implementation measures', provides:

'1. Each Member State shall publish and submit to the Commission, by 30 September 2011, the list of installations covered by this Directive in its territory and any free allocation to each installation in its territory calculated in accordance with the rules referred to in Article 10a(1) and Article 10c.

...'

2. Decision 2011/278

8. Under Article 1, Decision 2011/278 lays down transitional Union-wide rules for the harmonised free allocation of emission allowances under Directive 2003/87 from 2013 onwards.

9. Article 7 of that decision, entitled 'Baseline data collection', provides:

'1. For each incumbent installation eligible for the free allocation of emission allowances under Article 10a of Directive [2003/87] …, Member States shall, 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, collect from the operator all relevant information and data regarding each parameter listed in Annex IV.

…

7. Member States shall require operators to submit complete and consistent data and to ensure that there are no overlaps between sub-installations and no double counting. Member States shall, in particular, ensure that operators exercise due diligence and submit data that presents highest achievable accuracy so as to enable reasonable assurance of the integrity of data.

To this end, Member States shall ensure that each operator also submits a methodology report containing, in particular, a description of the installation, the compilation methodology applied, different data sources, calculation steps and, where applicable, assumptions made and the methodology applied to attribute emissions to the relevant sub-installations in accordance with paragraph 6. Member States may order the operator to demonstrate the accuracy and completeness of the data provided.

8. Where data is missing, Member States shall require the operator to duly justify any lack of data.

Member States shall require the operator to substitute all missing data with conservative estimates, in particular, based on best industry practice, recent scientific and technical knowledge before or, at the latest, during verification by the verifier.

...'

10. Article 8 of the decision, entitled 'Verification', provides:

'1. In the process of collecting data in accordance with Article 7, Member States shall only accept data that has been verified as satisfactory by a verifier. The verification process shall relate to the methodology report and the reported parameters referred to in Article 7 and Annex IV. The verification shall address the reliability, credibility and accuracy of the data provided by the operator and shall come to a verification opinion that states with reasonable assurance whether the data submitted is free from material misstatements.

…

4. Member States shall not allocate emission allowances free of charge to an installation where data relating to this installation has not been verified as satisfactory.

...'

11. Article 10 of Decision 2011/278, entitled 'Allocation at installation level', provides:

'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 …

…

4. For the purpose of implementing Article 10a(11) of Directive [2003/87], the factors referred to in Annex VI shall be applied to the preliminary annual number of emission allowances allocated free of charge determined for each sub-installation pursuant to paragraph 2 of this Article for the year concerned where the processes in those sub-installations serve sectors or subsectors deemed not to be exposed to a significant risk of carbon leakage as determined by Decision 2010/2/EU.

…

9. The final total annual amount of emission allowances allocated free of charge for each incumbent installation, except for installations covered by Article 10a(3) of Directive [2003/87], shall be the preliminary total annual amount of emission allowances allocated free of charge for each installation determined in accordance with paragraph 7 multiplied by the cross-sectoral correction factor as determined in accordance with Article 15(3).

...'

12. Under Article 15 of that decision, entitled 'National Implementation measures':

'1. In accordance with Article 11(1) of Directive [2003/87], Member States shall submit to the Commission by 30 September 2011 a list of installations covered by Directive [2003/87] in their territory, including installations identified pursuant to Article 5, using an electronic template provided by the Commission.

…

3. Upon receipt of the list referred to in paragraph 1 of this Article, the Commission shall assess the inclusion of each installation in the list and the related preliminary total annual amounts of emission allowances allocated free of charge.

After notification by all Member States of the preliminary total annual amounts of emission allowances allocated free of charge over the period from 2013 to 2020, the Commission shall determine the uniform cross-sectoral correction factor as referred to in Article 10a(5) of Directive [2003/87] …

4. If the Commission does not reject an installation's inscription on this list, including the corresponding preliminary total annual amounts of emission allowances allocated free of charge for this installation, the Member State concerned shall proceed to the determination of the final annual amount of emission allowances allocated free of charge for each year over the period from 2013 to 2020 in accordance with Article 10(9) of this Decision.

...'

B. German law

13. Paragraph 9(1) to (4) of the Gesetz über den Handel mit Berechtigungen zur Emission von Treibhausgasen (Treibhausgas-Emissionshandelsgesetz – TEHG) (Law on greenhouse gas emissions trading) of 21 July 2011 (BGBl. I p. 1475, TEHG) has the following wording:

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

(2) Allowances shall be allocated only upon application to the competent authority. The application for allocation of free allowances shall be submitted within a time limit which shall be published in the *Bundesanzeiger* (German Federal Gazette) by the competent authority at least three months before its expiry. The time limit shall not be published before the entry into force of the regulation on the rules of allocation as provided for in Paragraph 10. The late submission of an application shall eliminate any entitlement to free allocation. The documents required for the purposes of verifying entitlement shall be enclosed with the application. Unless Paragraph 10 of the regulation provides otherwise, the data contained in the allocation application shall be verified by a verifier pursuant to Paragraph 21.

(3) The competent authority shall calculate the preliminary allocations, publish in the *Bundesanzeiger* a list of all the installations falling within the scope of this Law together with the preliminary allocations and forward that list to the European Commission. When calculating the preliminary allocations, it shall take into account only data, as submitted by the operator, for which there is a sufficient guarantee of accuracy. …

(4) The competent authority shall decide on the allocation of free allowances for an installation to an installation operator which has submitted an application within the time limit notified in accordance with the

second sentence of Paragraph 2 before the beginning of the trading period. The allocation procedure shall also be subject to the provisions of the Law on administrative procedure.'

14. By a notice in the electronic version of the German Federal Gazette (elektronischer Bundesanzeiger, eBAnz AT118 2011 B1, 20 October 2011), the Deutsche Emissionshandelsstelle (German Emissions Trading Authority, DEHSt) fixed the time limit pursuant to Paragraph 9(2) of the TEHG at 23 January 2012.

15. Paragraph 5 of the Verordnung über die Zuteilung von Treibhausgas-Emissionsberechtigungen in der Handelsperiode 2013 bis 2020 (Zuteilungsverordnung 2020 – ZuV 2020) (German Regulation on the allocation of greenhouse gas emission allowances for the 2013-2020 trading period) of 26 September 2011 (BGBl. I. 2011, p. 1921), entitled 'Baseline data collection', provides, in paragraph 1, that the installation operator must include with the application for free allocation for existing installations, inter alia, general information relating to the installation, general information relating to each allocation component and additional information relating to allocation components in special cases.

III. The dispute in the main proceedings and the question referred for a preliminary ruling

16. INEOS operates a cracker which is used to produce chemical products through steam cracking of naphtha at high temperatures. The installation has been subject to compulsory emissions trading since 1 January 2008.

17. On 23 January 2012, INEOS applied to the DEHSt for the free allocation to that installation of emission allowances for the 2013-2020 trading period, as provided for in Paragraph 9(1) of the TEHG, on the basis of the 2005-2008 reference period. The time limit for making that application had been fixed at that same date pursuant to Paragraph 9(2). The application was verified by a verifier. It stated inter alia that it was assuming a preliminary annual allocation of 547 635 emission allowances.

18. By decision of 17 February 2014, the DEHSt allocated INEOS 3 867 032 allowances for that trading period in respect of emissions of the installation in question, explaining that the allocation had been calculated on the basis of the data communicated by INEOS in its application.

19. On 11 March 2014, INEOS lodged an administrative objection to that decision with the DEHSt, claiming, inter alia, that the DEHSt was required to take into account additional data relating to the calculation of direct emissions in 2006 and 2007.

20. On 3 September 2015, the DEHSt dismissed that objection on the ground that, inter alia, the new data could not be taken into account for the allocation decision, as INEOS had not submitted the data until April 2015 in the context of the administrative objection, that is to say more than three years after the time limit for making applications had expired on 23 January 2012. It stated not only that Paragraph 9(2) of the TEHG laid down a statutory mandatory time limit, but also that the close integration of the national procedure in the European allocation procedure precluded any amendment of the data in the application.

21. On 29 September 2015, INEOS brought an action against that decision at the Verwaltungsgericht Berlin (Administrative Court, Berlin), arguing, inter alia, that it had inadvertently omitted to submit certain data concerning direct emissions for 2006 and 2007, wrongly assuming that the DEHSt already had the data, while the installation in question was subject to the trading scheme for greenhouse gas emission allowances only from 1 January 2008. In the view of INEOS, the DEHSt was under an obligation to ask it to supplement or correct the data provided for the purposes of the application.

22. According to the referring court, since EU law does not contain any express rule on the legal consequences of the submission of information by an operator after expiry of the time limit in national law for making allocation applications, it must be clarified whether Paragraph 9(2) of the TEHG, under which, in the case of the late submission of an application, there is no entitlement to free allocation, is compatible with the provisions of Directive 2003/87 and Decision 2011/278.

23. 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:

'Do the provisions of Article 10a of Directive [2003/87] and the provisions of … Decision [2011/278] preclude legislation enacted by a Member State which, for the 2013-2020 trading period, prescribes a mandatory substantive time limit applicable to out-of-time applications for the allocation of free emissions allowances to existing installations, thereby making it impossible to correct errors or to supplement (incomplete) data in the allocation application in cases where such shortcomings are not established until after the time limit laid down by the Member State has expired?'

IV. Procedure before the Court

24. The request for a preliminary ruling was lodged at the Court Registry on 14 November 2016.

25. Written observations have been submitted by INEOS, the German Government and the Commission.

26. INEOS, the Federal Office of the Environment, the German Government and the Commission appeared

at the hearing on 14 September 2017 in order to present oral argument.

V. Analysis

27. By its question, the referring court asks the Court whether Article 10a of Directive 2003/87 and Decision 2011/278 are to be interpreted as precluding legislation enacted by a Member State which, for the 2013-2020 trading period, prescribes a mandatory time limit for the submission of applications for the free allocation of allowances, thereby making it impossible for an operator to correct or supplement that application after that time limit has expired.

28. I would begin by pointing out that the background against which the question is being asked is that the operator committed an error when making its application for free allocation and wishes to correct its error in order to obtain a higher number of free allowances. (4)

29. I will confine the remainder of my analysis to this scenario. I will not therefore take a view on the situation of an error committed by the competent authority or the situation of a correction with a view to reducing the number of allowances allocated free of charge. Notwithstanding their interest, these other scenarios fall outside the scope of the dispute in the main proceedings.

30. I will examine hereinafter whether the mandatory time limit at issue in the dispute in the main proceedings is contrary to the principle of effectiveness in respect of the rights conferred pursuant to Article 10a of Directive 2003/87. (5) In examining this question, I consider it appropriate first to describe the main features of the system established by Directive 2003/87.

A. The system established by Directive 2003/87

31. The system established by Directive 2003/87 can be described by reference to its objectives, the three main obligations imposed on operators and the three methods of acquiring emission allowances.

1. The objectives pursued by Directive 2003/87

32. I do not think that there is any need to dwell on the objectives pursued by Directive 2003/87, despite their fundamental importance, as those objectives are clear from EU legislation and case-law.

33. According to recitals 3 to 5, Directive 2003/87 is intended to establish a scheme for greenhouse gas emission allowance trading capable of contributing to the fulfilment of the commitments of the European Union under the United Nations Framework Convention on Climate Change, (6) which seeks to reduce those emissions into the atmosphere to a level preventing dangerous interference with the climate system. (7)

34. This objective of reducing anthropogenic greenhouse gas emissions is part of combating climate change, which is expressly identified in Article 191(1) TFEU as one of the objectives of Union policy on the environment.

35. As is apparent, inter alia, from recitals 3 and 5 of Directive 2009/29, (8) Directive 2003/87 was intended to help to reduce, by 2020, the overall greenhouse gas emissions of the European Union by at least 20% in comparison with 1990 levels in an 'economically efficient' manner. (9)

36. Economic efficiency is another objective pursued by Directive 2003/87, as is confirmed by Article 1. It is the rationale for the '*cap and trade*' system established by the directive. The possibility of selling allowances ('*trade*'), the number of which is capped for all operators under the system ('*cap*'), should encourage reductions in emissions at the installations where they can be made at the lowest cost. (10)

37. The economic logic of the allowances trading scheme thus consists in ensuring that the reductions of greenhouse gas emissions required to achieve a predetermined environmental outcome take place at the lowest cost. By allowing, in particular, the allowances allocated to be sold, the scheme is intended to encourage a participant in the scheme to emit quantities of greenhouse gases less than the allowances originally allocated him, in order to sell the surplus to another participant who has emitted more than his allowance. (11)

2. The three main obligations imposed on operators by Directive 2003/87

38. To understand properly how the system established by Directive 2003/87 works in practice, it is helpful to describe the three main obligations imposed on operators falling within the scope of Directive 2003/87, as defined in Article 2(1) thereof.

39. First, under Article 4 of Directive 2003/87 operators of stationary installations are required to hold a permit to emit greenhouse gases, which must be issued in accordance with the procedure laid down in Articles 5 to 8 of that directive. (12)

40. Second, operators have an obligation to monitor and report their emissions in accordance with Article 14 of Directive 2003/87. (13) I note in this regard that the application for a permit must include a description of the measures planned to monitor and report emissions (14) and that the competent authority may issue the permit only if it is satisfied that the operator is capable of monitoring and reporting its emissions. (15)

41. Under Article 15 of that directive, reports by operators must also be verified by an independent verifier. (16)

42. Third, under Article 12(2a) and (3) of Directive 2003/87, operators are required, by 30 April each year

at the latest, to 'surrender' a number of allowances equal to the total emissions during the preceding calendar year as verified in accordance with Article 15 of that directive. The surrendered allowances are subsequently cancelled by the Member States.

43. This obligation forms the cornerstone of the scheme established by Directive 2003/87. (17) The surrender of emission allowances by the operator has been aptly described as embodying 'payment for an environmental debt', (18) namely payment of the environmental debt incurred by the operator during the preceding calendar year. To be precise, the operator must surrender one allowance for each tonne of carbon dioxide equivalent emitted in that period. (19)

44. I must now explain how, in practice, an operator can acquire the allowances necessary for it to meet its annual surrender obligation.

3. The three methods of acquiring emission allowances with a view to meeting the annual surrender obligation

45. While the annual surrender obligation described above creates a demand for emission allowances among operators subject to the system established by Directive 2003/87, (20) the supply of allowances can be broken down into three distinct sources. There are three methods of acquiring emission allowances, the first two of which are open to all operators and the third only to some of them.

46. The first method of acquisition is to obtain emission allowances from another person holding allowances. (21) Such transactions can, by definition, relate only to allowances previously issued by Member States. These transactions thus form the 'secondary market' for emission allowances.

47. The other two methods of acquisition, on the other hand, are connected with the two methods by which allowances are allocated by Member States pursuant to Directive 2003/87, namely allocation by auction (which can be described as the 'primary market') and free allocation. These two methods of allocation are covered by detailed legislation of a highly technical nature in that directive and its implementing measures, the main features of which can be summarised as follows.

48. First, the number of allowances allocated each year is subject to a Union-wide cap. (22) This is one of the key aspects of the '*cap and trade*' system established by Directive 2003/87. In practice, the incentive for any operator under that system to reduce greenhouse gas emissions will depend on the level of the cap. (23)

49. Pursuant to Article 9 of Directive 2003/87, the cap for emissions from stationary installations was set at slightly above two billion allowances for 2013. (24) The cap decreases each year by a linear factor of 1.74%, which was calculated so as to achieve the EU's commitment to an overall reduction in emissions of at least 20% by 2020 compared with reported 2005 levels. (25)

50. Second, the capped number of allowances to be issued each year must be split between auctioned allowances and allowances allocated free of charge. Under Article 10(1) of Directive 2003/87, from 2013 onwards, Member States must auction all allowances which are not allocated free of charge. The number of allowances to be auctioned thus depends on the number of allowances issued free of charge. (26)

51. Third, it only remains for me to describe the 'general' system (27) for free allocation of allowances under Article 10a of Directive 2003/87, which is probably the most complex aspect of the system established by the directive. Reading that article could put off even the most seasoned legal expert.

52. The Court has noted that the allocation of emission allowances free of charge was not intended as a way of granting subsidies to the producers concerned, but of reducing the economic impact of the immediate and unilateral introduction by the European Union of an emission allowances market, by preventing a loss of competitiveness in certain production sectors covered by that directive. (28)

53. Furthermore, the free allocation of allowances does not remove entirely the incentive to reduce emissions for their recipients. The Court has stated in this regard that the incentive to reduce the emissions of each installation lies in the advantage to be gained by reducing its need for emission allowances, which have a financial value that can be converted into money through their sale, whether or not they have been allocated free of charge. (29)

54. Nevertheless, free allocations provide less of an incentive to adopt practices seeking to reduce emissions, as the operators that receive them do not have to purchase all or some of the allowances which they are required to surrender each year. Consequently, and as Advocate General Kokott has stated, the decrease in the quantity of allowances allocated free of charge provides a greater incentive to reduce emissions and therefore contributes to protecting the environment and to combating climate change, as required by Article 191 TFEU. (30)

55. Article 10a(11) of Directive 2003/87 provides that there should be no free allocation in 2027 and all allowances for stationary installations will have to be auctioned. I must point out, however, that the Commission seems to have abandoned this laudable goal introduced by Directive 2009/29, as the proposal for

an amending directive for the fourth period (2021-2030) fixes the share of allowances to be auctioned at 57% of the total amount. (31)

56. Furthermore, irrespective of the eventual possibility of no free allocation, Article 10a(3) of Directive 2003/87 in any case excludes certain stationary installations from receiving those allocations, including electricity generators. Those installations must therefore purchase all the allowances needed to meet their annual surrender obligation on the primary or secondary markets. (32)

57. For installations in receipt of free allocations under Article 10a of Directive 2003/87, the procedure for determining the amount of those allocations can be broken down into three stages, which result, respectively, in the basic allocation, the preliminary allocation and the final allocation. (33)

58. The *basic* allocation, first, is not a function of the actual emissions of the recipient (like the surrender obligation (34)), but of theoretical 'benchmarks' calculated by the Commission based on emissions from the 10% most efficient installations in accordance with Article 10a(2) of Directive 2003/87. (35) Thus, for each installation or sub-installation, the basic allocation is calculated by multiplying the applicable benchmark and the historical activity level, the latter being determined from the baseline data submitted by operators in accordance with Articles 7 and 9 of Decision 2011/278. The calculation must be made by the Member States under Article 10(1) and (2) of that decision. (36)

59. The *preliminary* allocation, second, is calculated by applying a reduction coefficient to the basic allocation in accordance with Article 10a(11) of Directive 2003/87. That reduction coefficient, which is 0.8 for 2013 (20% reduction), decreases each year by equal amounts, reaching 0.3 (70% reduction) for 2020. (37)

60. It should be noted, however, that this reduction does not affect all installations receiving free allocations. Under Article 10a(12) of Directive 2003/87, free allocations to sectors with a significant risk of relocation to third countries on account of the environmental obligations imposed by the directive are not subject to a reduction. In other words, those sectors have obtained a reduction in their environmental obligations because there is a risk of relocation modestly described as 'a significant risk of carbon leakage'. In accordance with Article 10a(13) to (18) of that directive, the Commission has drawn up a long list of sectors or sub-sectors with such a risk of relocation. (38)

61. Article 11(1) of Directive 2003/87 and Article 15(1) and (2) of Decision 2011/278 require each Member State to publish and submit to the Commission the list of installations and sub-installations in its territory which are covered by the directive, specifying for each of them the amount of the *basic* allocation and the amount of the *preliminary* allocation (39) for the entire third period (2013-2020).

62. The third and last stage of the calculation consists in the possible application of a second reduction mechanism provided for in Article 10a(5) of Directive 2003/87. The *final* allocation is thus equivalent either to the preliminary allocation (if the mechanism does not have to be applied) or to the reduced preliminary allocation (otherwise).

63. On the basis of the lists submitted by the Member States, the Commission must satisfy itself that the total sum of the basic allocations – and *not of the preliminary allocations* (40) – calculated for the installations in the territory of the European Union does not exceed the sub-cap defined in Article 10a(5) of Directive 2003/87, (41) which corresponds to a proportion of the total amount defined in Article 9 of the directive. (42)

64. If that cap is actually exceeded, the Commission is required to make a proportional reduction by applying a 'cross-sectoral correction factor' to the allocations proposed by the Member States, which corresponds to the ratio between the cap and the sum of the basic allocations. (43)

65. I would point out that the Commission actually had to define a cross-sectoral correction factor for the third period (2013-2020). (44) Following that decision, Member States were able to make final allocations by applying that correction factor – or, more precisely, reduction factor – to the preliminary allocations which were not rejected by the Commission. (45)

B. The question asked by the referring court

66. I would point out, first of all, that the question referred to the Court (46) does not concern the operators' obligation to report annual emissions under Article 14 of Directive 2003/87, (47) but the collection of baseline data from operators by Member States in accordance with Article 7 of Decision 2011/278 in order to determine the historical activity level referred to in Article 9 of that decision, which will be used to calculate the basic allocation. (48)

67. The problem encountered by INEOS in the dispute in the main proceedings thus stems from its failure to submit complete baseline data for 2006 and 2007, as a consequence of which the amount of the basic allocation calculated by the competent authority and therefore the number of free allowances issued to INEOS were reduced. (49)

68. In answering the question which has been asked, I will point out, first, that Directive 2003/87 and

Decision 2011/278 do not bring about exhaustive harmonisation of the procedural requirements for applications for free allocation of allowances. Second, I will explain why I consider that the mandatory time limit and the fact that it is impossible to make corrections after that time limit has expired, the points at issue in the dispute in the main proceedings, are not contrary to the principle of effectiveness as interpreted in the Court's settled case-law.

1. No exhaustive harmonisation of the procedural requirements for applications for free allocation of allowances

69. INEOS has asserted that the EU legislation brings about exhaustive harmonisation of all aspects, including procedural aspects, relating to applications for free allocation of allowances, such that Member States do not enjoy any discretion in this regard. The German Government and the Commission have challenged this point of view.

70. I concur with the position taken by the German Government and the Commission. It is true that under Article 10a(1) of Directive 2003/87 the Commission must adopt 'Community-wide and *fully-harmonised* implementing measures for the allocation of the allowances referred to in paragraphs 4, 5, 7 and 12' (emphasis added). 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 that directive, brings about exhaustive harmonisation of the *substantive aspects* of the free allocation of allowances, (50) the main features of which I have outlined in this Opinion. (51)

71. However, those instruments do not make any express provision governing the *procedural aspects* of that allocation, in particular the time limit within which an application for free allocation must be made or the possibility of making corrections after that time limit has expired.

72. In particular, Article 7 of Decision 2011/278, which concerns baseline data collection by the Member States, does not provide any clarification in this regard. Article 7(8) of that decision states that the operator must justify any 'lack of data' and substitute 'data [that] are partly available' with conservative estimates, without laying down a procedure by which the data collected could be corrected or supplemented. Similarly, Article 8 of that decision prohibits Member States from accepting data that has not been verified as satisfactory by a verifier, but does not establish a time limit or a procedure for correcting unsatisfactory data.

73. According to settled case-law, in the absence of exhaustive harmonisation, the detailed procedural rules applicable are a matter for the domestic legal order of each Member State, under the principle of procedural autonomy of the Member States, provided that they are not less favourable than those governing similar domestic situations (principle of equivalence) and that they do not render impossible in practice or excessively difficult the exercise of rights conferred by the EU legal order (principle of effectiveness). (52)

74. With regard to the principle of equivalence, there is nothing in the documents before the Court to suggest, and it has not been claimed before the Court, that the mandatory time limit at issue in the dispute in the main proceedings is contrary to that principle. In any event, it is for the national court to give a ruling in this regard, as the Commission rightly states. (53)

75. Accordingly, I will focus hereinafter on the compatibility of the mandatory time limit at issue in the dispute in the main proceedings with the principle of effectiveness.

76. I wish to state in this regard that it does not seem possible to follow the approach suggested by INEOS consisting in 'directly' assessing the compatibility of the mandatory time limit at issue in the dispute in the main proceedings with certain provisions of Directive 2003/87 or Decision 2011/278.

77. It is clear from the abovementioned case-law that the compatibility with EU law of procedural rules adopted by the Member States must be assessed in the light of the principles of equivalence and effectiveness. Consequently, account must be taken of the content of the provisions of Directive 2003/87 or Decision 2011/278 in examining the compatibility of the mandatory time limit at issue in the dispute in the main proceedings with the principle of effectiveness. (54)

2. The compatibility of the mandatory time limit at issue in the dispute in the main proceedings

78. As a preliminary point, I note that the Commission has suggested examining separately (i) the possibility for Member States to impose a mandatory time limit for making applications for free allocation under Article 10a of Directive 2003/87 and (ii) the fact that it is impossible for operators to make corrections to their applications after that time limit has expired.

79. In my view, however, these two aspects are inseparable, as can be seen from the wording of the question asked. (55) The fact that in the dispute in the main proceedings it is impossible for INEOS to supplement or correct its application for free allocation stems from the establishment of a mandatory time limit – and not an indicative time limit – for making such application in national legislation. I will therefore examine these two aspects together below.

80. I note that, according to settled case-law, every case in which the question arises as to whether a national procedural provision renders the application of EU law impossible or excessively difficult must be analysed by reference to the role of that provision in the procedure, its conduct and its special features, viewed as a whole, before the various national bodies. In that context, it is necessary, inter alia, to take into consideration, where relevant, the protection of the rights of the defence, the principle of legal certainty and the proper conduct of the procedure. (56)

81. With regard more specifically to the imposition of mandatory time limits by a Member State, it is the Court's long-established case-law that the principle of effectiveness does not preclude such time limits where they are 'reasonable'. (57)

82. As regards the reasonableness of mandatory time limits, the Court has also held that, in respect of national legislation which comes within the scope of EU law, it is for the Member States to establish those periods in the light of, inter alia, the significance for the parties concerned of the decisions to be taken, the complexities of the procedures and of the legislation to be applied, the number of persons who may be affected and any other public or private interests which must be taken into consideration. (58)

83. Pursuant to these principles, the Court tends, in practice, to conduct a relatively short examination of relatively long time limits (59) and a relatively long examination of relatively short time limits. (60) In principle, only the latter are liable to render impossible in practice or excessively difficult the exercise of rights conferred by the EU legal order within the meaning of the case-law set out in point 73 of this Opinion, warranting a more detailed examination of their reasonableness.

84. According to the information provided by the referring court, the closing date for making applications for free allocation, which is at issue in the dispute in the main proceedings, was 23 January 2012 and that date was published officially on 20 October 2011. (61) In addition, according to the observations submitted by the German Government, that date had also been notified in an email sent to operators of installations and in a press release, both dated 20 October 2011. Accordingly, the time limit imposed on operators for making their applications for free allocation was just over three months.

85. A three-month time limit is a relatively short time limit for the purposes of the abovementioned case-law (62) and its reasonableness must therefore be subject to a more detailed examination.

86. First, the right conferred by the EU legal order at issue in the dispute in the main proceedings is the right to benefit from free allocations on the basis of Article 10a of Directive 2003/87 and Decision 2011/278. It should therefore be examined whether a three-month mandatory time limit like that at issue in this case is liable to render impossible in practice or excessively difficult the exercise of that right.

87. The documents before the Court do not contain any evidence to suggest that, in particular because it is short, such a time limit would render impossible in practice or excessively difficult the exercise of the right to benefit from free allocation. It should be borne in mind that in order to make such an application, an operator like INEOS must submit the baseline data referred to in Article 7 of Decision 2011/278 and the data must be verified in accordance with Article 8 of that decision. (63)

88. As the German Government has rightly stated, INEOS has not even claimed that the time limit was too short to submit its application. According to the request for a preliminary ruling, INEOS inadvertently omitted to submit certain data for 2006 and 2007, wrongly assuming that the DEHSt already had the data in question. (64) INEOS is not therefore criticising the length of the time limit at issue in the dispute in the main proceedings, but the fact that it is impossible, after that time limit has expired, to make corrections to the baseline data submitted in the initial application.

89. In this regard, the Court has held several times that a mandatory time limit was, in principle, compatible with the principle of effectiveness even though the expiry of the time limit is by its nature liable to prevent the persons concerned from asserting their rights in whole or in part. (65) In the context of the dispute in the main proceedings, I would add that making it possible for operators to correct or amend their application after the mandatory time limit in question has expired would permit them to circumvent the preclusive effect of that time limit.

90. Second, INEOS has relied on the Member States' obligation to use the most precise and complete baseline data possible in accordance with Directive 2003/87 and Decision 2011/278. According to INEOS, this obligation means that the competent authorities are required to reject any procedural requirement which prevents inaccurate data being corrected or missing data being supplemented, such as the mandatory time limit at issue in the dispute in the main proceedings, in order to guarantee the effective application of EU law.

91. In this regard, it is true that Article 7(7) of Decision 2011/278 requires Member States to collect 'complete and consistent' baseline data that 'presents highest achievable accuracy'. Furthermore, Article 7(8) and Article 8(1) and (4) of that decision lay down a number of obligations reinforcing the accuracy requirement

for the data used to calculate free allocations.

92. I would point out, however, that the assessment of compatibility with the principle of effectiveness within the meaning of the case-law set out in point 73 of this Opinion consists in determining whether the mandatory time limit at issue in the dispute in the main proceedings renders impossible or excessively difficult *the exercise of a right* conferred on an operator like INEOS.

93. The obligations which EU law imposes on Member States do not all create rights for individuals. (66) This is not the case, in my view, with the obligation imposed on Member States to collect the most accurate baseline data possible. On the contrary, I consider that it is clear from the wording of the abovementioned provisions of Decision 2011/278 that the accuracy requirement for baseline data is the joint responsibility of Member States and operators.

94. Consequently, an operator like INEOS is not entitled to invoke against the competent national authorities an alleged right to the accuracy of baseline data in order to evade the expiry of a mandatory time limit. In the absence of such a right, the argument put forward by INEOS that the impossibility of correcting the original application after a mandatory time limit has expired is incompatible with the principle of effectiveness must be rejected.

95. Third, I consider that making it possible for operators to supplement or correct baseline data in order to obtain a supplementary free allocation of allowances is, in fact, liable to render the exercise of the right to receive such allocations excessively difficult by reason of the legal uncertainty to which that possibility gives rise.

96. As I have explained in this Opinion, (67) advancement from the preliminary allocation to the final allocation requires the Commission to verify that the number of free allowances allocated does not exceed the cap defined in Article 10a(5) of Directive 2003/87. If the cap is exceeded, the Commission is required to define a cross-sectoral correction factor that will make it possible to reduce proportionally all the preliminary allocations proposed by the Member States and thus to determine the amount of the final allocations for each recipient installation within the EU.

97. If the Court were to adopt the position taken by INEOS, each supplementary allocation made after an operator has corrected its baseline data would require the Commission to conduct a new verification and, if necessary, to modify the correction factor. (68) Aside from the fact that such modification is not envisaged by the relevant provisions of Directive 2003/87 and Decision 2011/278, it would entail a reduction in the amount of the final allocation for *each* recipient. In other words, a recipient of a free allocation could never consider the number of allowances allocated to it to be final.

98. As the German Government and the Commission have rightly stated, it would be difficult to reconcile such a situation with the principle of legal certainty. It would thus render excessively difficult the exercise of the right to benefit from a free allocation. In that context, the effect of a mandatory time limit like that at issue in the dispute in the main proceedings is explicitly to safeguard legal certainty for all persons concerned. As the Court has held on a number of occasions, the setting of mandatory time limits satisfies the requirement of effectiveness in principle inasmuch as it constitutes an application of the fundamental principle of legal certainty which protects both the taxpayer and the authorities concerned. (69)

99. Fourth, making it possible for operators to amend their application for free allocation of allowances would not seem to be compatible with the procedure established by Article 10a of Directive 2003/87 and Decision 2011/278 for determining the existence and the extent of the right to benefit from such an allocation.

100. As I have explained in this Opinion, (70) that procedure is progressive in so far as each stage of calculation must be concluded before moving to the next stage. The approach proposed by INEOS, which would permit operators to correct or supplement their baseline data without any regard for a time limit, would, in essence, amount to keeping the first stage of calculation, namely the determination of the basic allocation from the historical activity level and the applicable benchmark, open indefinitely. (71) Thus, the preliminary allocation (second stage) and the final allocation (third stage) would require a new calculation upon any correction of baseline data.

101. In my view, such an approach would be incompatible with the proper functioning of that procedure in that it would entail a disproportionate administrative burden for Member States and the Commission. (72)

102. Fifth, and in so far as is necessary, I wish to point out that my proposed interpretation is consistent with the main objective pursued by the system established by Directive 2003/87, namely the protection of the environment by a reduction in greenhouse gas emissions.

103. This interpretation prevents operators from correcting or supplementing their baseline data in order to obtain a supplementary allocation of allowances. In practice, this interpretation will lead to situations of 'under-allocation' among operators that could have received a higher number of free allowances if their application had

been properly drawn up. As a result, those operators will have to purchase a higher number of allowances to meet their surrender obligation, which will provide them with a greater incentive to reduce their emissions. (73)

VI. Conclusion

104. In the light of the foregoing considerations, I suggest that the Court answer the question referred by the Verwaltungsgericht Berlin (Administrative Court, Berlin) as follows:

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 amended by Directive 2009/29/EC of the European Parliament and of the Council of 23 April 2009 and 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, as amended by Commission Decision 2012/498/EU of 17 August 2012, in conjunction with the principles of equivalence and effectiveness, are to be interpreted as not precluding legislation enacted by a Member State which, for the 2013-2020 trading period, prescribes a mandatory time limit for the submission of applications for free allocation of allowances, thereby making it impossible for an operator to correct or supplement that application after the time limit has expired, provided that that procedural requirement is no less favourable than procedural requirements in respect of similar actions of a domestic nature.

Original language: French.

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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').

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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 (OJ 2011 L 130 p. 1), as amended by Commission Decision 2012/498/EU of 17 August 2012 (OJ 2012 L 241, p. 52) ('Decision 2011/278').

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4 See points 19 to 21 of this Opinion.

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5 See points 78 to 103 of this Opinion.

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6 Council Decision 94/69/EC of 15 December 1993 concerning the conclusion of the United Nations Framework Convention on Climate Change (OJ 1994 L 33, p. 11). The Kyoto Protocol applied only to the period from 2008-2012 under Article 3 thereof. See 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).

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7 See, to that effect, judgment of 19 January 2017, *Schaefer Kalk* (C-460/15, EU:C:2017:29, paragraph 28).

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8 Directive 2009/29/EC of the European Parliament and of the Council of 23 April 2009 amending Directive 2003/87/EC so as to improve and extend the greenhouse gas emission allowance trading scheme of the Community (OJ 2009 L 140, p. 63).

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9 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 81).

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10 See judgment of 17 October 2013, *Iberdrola and Others* (C-566/11, C-567/11, C-580/11, C-591/11, C-620/11 and C-640/11, EU:C:2013:660, paragraph 49): 'As provided in Article 1 of that directive, the incentive to reduce emissions is to be cost-effective and economically efficient, it being understood that the producer may decide to invest in more efficient technologies emitting less greenhouse gas, or to use more emission allowances, or even to scale back production, choosing the most economically advantageous option'.

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11 Judgments of 16 December 2008, *Arcelor Atlantique et Lorraine and Others* (C-127/07, EU:C:2008:728,

paragraph 32); of 19 January 2017, *Schaefer Kalk* (C-460/15, EU:C:2017:29, paragraph 29); and of 8 March 2017, *ArcelorMittal Rodange et Schifflange* (C-321/15, EU:C:2017:179, paragraph 22).

12 See, in this regard, judgment of 28 July 2016, *Vattenfall Europe Generation* (C-457/15, EU:C:2016:613, paragraph 29). Under Article 3h of Directive 2003/87, Chapter 3 of the directive does not apply to aviation activities. This permit requirement laid down in Chapter 3 does not therefore concern such activities.

13 Article 14 of Directive 2003/87 provides for the adoption by the Commission of a regulation on the monitoring and reporting of emissions. The Commission adopted Regulation (EU) No 601/2012 of 21 June 2012 on the monitoring and reporting of greenhouse gas emissions pursuant to Directive 2003/87 (OJ 2012 L 181, p. 30), which applies from 1 January 2013 under Article 77 thereof.

14 Point (d) of the first paragraph of Article 5 of Directive 2003/87.

15 Article 6(1) of Directive 2003/87.

16 Pursuant to Article 15 of Directive 2003/87, the Commission adopted Regulation (EU) No 600/2012 of 21 June 2012 on the verification of greenhouse gas emission reports and tonne-kilometre reports and the accreditation of verifiers pursuant to Directive 2003/87 (OJ 2012 L 181, p. 1), which applies from 1 January 2013 under Article 78 thereof. The Court has held that the verification of emissions reports is an essential condition for the surrender of allowances. An operator whose report has not been verified and declared to be satisfactory may not transfer allowances until a report produced by him is declared to be satisfactory (see judgment of 29 April 2015, *Nordzucker*, C-148/14, EU:C:2015:287, paragraph 32).

17 See, to that effect, judgments of 17 October 2013, *Billerud Karlsborg and Billerud Skärblacka* (C-203/12, EU:C:2013:664, paragraph 25); of 29 April 2015, *Nordzucker* (C-148/14, EU:C:2015:287, paragraph 29); and of 19 January 2017, *Schaefer Kalk* (C-460/15, EU:C:2017:29, paragraph 30).

18 C Cheneviere, *Le système d'échange de quotas d'émission de gaz à effet de serre: Lutter contre les changements climatiques sans sacrifier l'égalité et la libre concurrence dans le marché intérieur*, thèse de doctorat, Université Catholique de Louvain, Louvain-la-Neuve, 2017, p. 24.

19 See the definition of 'allowance' in Article 3(a) of Directive 2003/87, to be read in conjunction with Article 12(2a) and (3) of that directive.

20 That demand is also fuelled by any other person wishing to make a financial investment by acquiring such allowances.

21 Under Article 12(1) of Directive 2003/87, allowances must be able to be transferred inter alia between persons within the European Union.

22 Articles 3c and 9 of Directive 2003/87 provide for two distinct caps for aviation activities and stationary installations. In the interest of clarity, I will confine the statements hereinafter to stationary installations, as aviation activities are not at issue in the dispute in the main proceedings.

23 The incentive to reduce emissions will be even greater where the number of available allowances is low. At a constant level of emissions, a drop in the number of available allowances will cause the price of the allowance to rise, which should provide operators with a greater incentive to reduce their emissions. The Court has held in this regard that the impact of the allowance trading scheme on the protection of the environment depends on the stringency of the total quantity of allowances allocated, which represents the overall limit on emissions allowed by the scheme (judgment of 17 October 2013, *Billerud Karlsborg and Billerud Skärblacka*, C-203/12, EU:C:2013:664, paragraph 26).

24 Commission Decision 2010/634/EU of 22 October 2010 adjusting the Union-wide quantity of allowances to be issued under the Union Scheme for 2013 and repealing Decision 2010/384/EU (OJ 2010 L 279, p. 34), as amended by Commission Decision 2013/448/EU of 5 September 2013 (OJ 2013 L 240, p. 27).

25 See recitals 13 and 14 of Directive 2009/29. In absolute terms, the annual decrease is in the order of 38 264 246 allowances, such that the cap will be 1 816 452 135 allowances in 2020. See Report from the Commission to the European Parliament and to the Council on the functioning of the European carbon market, of 1 February 2017, COM(2017) 48 final, p. 8.

26 When the number of allowances to be auctioned has been determined, it is divided among the Member States on the basis of the three criteria established in Article 10(2) of Directive 2003/87. The Member States decide how revenues from those auctions are used, but their leeway in this regard is restricted by Article 10(3) of the directive. In 2015, 632 725 500 allowances were auctioned in the European Union, generating a cumulative amount of EUR 4.9 billion. See Report from the Commission to the European Parliament and to the Council on the functioning of the European carbon market, 1 February 2017, COM(2017) 48 final, p. 12 and 13.

27 As they are not at issue in the main proceedings, I will not deal with the 'special' schemes for free allocation of allowances under Directive 2003/87, such as those envisaged for new entrants (Article 10a(7)), demonstration projects (Article 10a(8)) or modernisation of electricity generation (Article 10c).

28 Judgment of 17 October 2013, *Iberdrola and Others* (C-566/11, C-567/11, C-580/11, C-591/11, C-620/11 and C-640/11, EU:C:2013:660, paragraphs 39 and 45).

29 Judgment of 17 October 2013, *Iberdrola and Others* (C-566/11, C-567/11, C-580/11, C-591/11, C-620/11 and C-640/11, EU:C:2013:660, paragraph 55). On the one hand, the number of allowances that an operator receives free of charge may be insufficient to meet its annual surrender obligation, with the result that it will be obliged to purchase the shortfall of allowances on the primary market or the secondary market. On the other hand, an operator has the option to resell its surplus allowances on the secondary market, including those received free of charge.

30 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 63).

31 See Proposal for a Directive of the European Parliament and of the Council amending Directive 2003/87/EC to enhance cost-effective emission reductions and low-carbon investments, 15 July 2015, COM(2015) 337 final. It is proposed to add the following subparagraph to Article 10(1) of Directive 2003/87: 'From 2021 onwards, the share of allowances to be auctioned by Member States shall be 57%' (p. 17). It is also proposed to delete from Article 10a(11) of that directive the wording 'with a view to reaching no free allocation in 2027' (p. 20). See in this regard the explanations given in recital 6 (p. 13).

32 According to recital 19 of Directive 2009/29, that exclusion was justified because electricity generators could pass on the cost of allowances to consumers, even where those allowances were allocated free of charge. The Court has held in this regard that insufficient competitive pressure to limit the extent to which the value of emission allowances is passed on in electricity prices had led electricity producers to make windfall profits (judgment of 17 October 2013, *Iberdrola and Others*, C-566/11, C-567/11, C-580/11, C-591/11, C-620/11 and C-640/11, EU:C:2013:660, paragraph 40). Article 10c of Directive 2003/87 nevertheless establishes a derogatory system, permitting the free allocation of allowances for the modernisation of electricity generation.

33 This terminology is used inter alia by the Commission in 'Guidance Document n°2 on the harmonized free allocation methodology for the EU-ETS post 2012 – Guidance on allocation methodologies', 29 June 2011, p. 23, available at https://ec.europa.eu/clima/sites/clima/files/ets/allowances /docs/gd2_allocation_methodologies_en.pdf.

34 See points 42 and 43 of this Opinion.

35 In essence, '[t]he 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). With regard to the use of those benchmarks, see judgment of 8 September 2016, *Borealis and Others* (C-180/15, EU:C:2016:647, paragraphs 61 to 71).

36 See judgments of 8 September 2016, *Borealis and Others* (C-180/15, EU:C:2016:647, paragraph 61), and of 8 September 2016, *E.ON Kraftwerke* (C-461/15, EU:C:2016:648, paragraph 26).

37 These reduction coefficients are set out in Annex VI of Decision 2011/278 in accordance with Article 10(4) of that decision.

38 Commission Decision 2010/2/EU of 24 December 2009 determining, pursuant to Directive 2003/87, a list of sectors and subsectors which are deemed to be exposed to a significant risk of carbon leakage (OJ 2010 L 1, p. 10). That decision was repealed with effect from 1 January 2015 by Commission Decision 2014/746/EU of 27 October 2014 determining, pursuant to Directive 2003/87, a list of sectors and subsectors which are deemed to be exposed to a significant risk of carbon leakage, for the period 2015 to 2019(OJ 2014 L 308, p. 114).

39 See Article 15(2)(e) and (f) of Decision 2011/278.

40 See the second subparagraph of Article 15(3) of Decision 2011/278 ('without application of the factors referred to in Annex VI'). See also 'Guidance Document n°2 on the harmonized free allocation methodology for the EU-ETS post 2012 – Guidance on allocation methodologies', p. 23: '*Although [the basic allocation] does not necessarily reflect the preliminary amount allocated to installations, it should be included in the [national implementation measures] as it will be used for the determination of the cross-sectoral reduction factor*'. This clarification is important from an arithmetical point of view as the sum of the preliminary allocations is by definition less than the sum of the basic allocations.

41 See the first subparagraph of Article 10(9) and Article 15(3) of Decision 2011/278. See also 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, in particular points 44 to 60), and 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).

42 See point 49 of this Opinion.

43 To take a simplified numerical example, if the sum of the basic allocations is 100 and the cap is 90, the Commission is required to apply a cross-sectoral correction factor of 0.9 to the preliminary allocations projected by the Member States.

44 That factor was first established in Commission Decision 2013/448/EU of 5 September 2013 concerning national implementation measures for the transitional free allocation of greenhouse gas emission allowances in accordance with Article 11(3) of Directive 2003/87 (OJ 2013 L 240, p. 27). This first factor was, however, annulled by the Court in the 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). Further to that judgment, the Commission established a new correction factor, adopting Commission Decision (EU) 2017/126 of 24 January 2017 amending Decision 2013/448/EU as regards the establishment of a uniform cross-sectoral correction factor in accordance with Article 10a of Directive 2003/87 (OJ 2017 L 19, p. 93). That factor is 89.207101% for 2013. It will subsequently decrease each year – resulting in a greater reduction in preliminary allocations – to reach 78.009186% in 2020.

45 See, in this regard, Articles 1 and 2 and Annex I of Decision 2013/448.

46 See point 27 of this Opinion.

47 See points 40 to 42 of this Opinion. The situation of an under-statement of emissions was examined by the Court in the judgment of 29 April 2015, *Nordzucker* (C-148/14, EU:C:2015:287, paragraphs 27 et seq.).

48 See point 58 of this Opinion.

49 See points 19 to 21 of this Opinion. This under-allocation could be financially detrimental to INEOS, either because it has to purchase more allowances to meet its annual surrender obligation or because it is not

able to sell on the secondary market the surplus allowances which it could have received free of charge.

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

51 See points 51 to 65 of this Opinion.

52 See, inter alia, judgments of 7 January 2004, *Wells* (C-201/02, EU:C:2004:12, paragraph 67); of 26 November 2015, *MedEval* (C-166/14, EU:C:2015:779, paragraph 37); and of 20 October 2016, *Danqua* (C-429/15, EU:C:2016:789, paragraph 29).

53 See, to that effect, judgments of 10 July 1997, *Palmisani* (C-261/95, EU:C:1997:351, paragraphs 33 and 40), and of 8 September 2011, *Rosado Santana* (C-177/10, EU:C:2011:557, paragraphs 90 and 91).

54 See points 90 to 103 of this Opinion.

55 See point 23 of this Opinion (in particular the words 'thereby making it impossible').

56 See, inter alia, judgments of 14 December 1995, *Peterbroeck* (C-312/93, EU:C:1995:437, paragraph 14); of 20 October 2016, *Danqua* (C-429/15, EU:C:2016:789, paragraph 42); and of 21 December 2016, *TDC* (C-327/15, EU:C:2016:974, paragraph 97).

57 See, inter alia, judgments of 16 December 1976, *Rewe-Zentralfinanz and Rewe-Zentral* (33/76, EU:C:1976:188, paragraph 5); of 16 December 1976, *Comet* (45/76, EU:C:1976:191, paragraph 17); and of 29 October 2015, *BBVA* (C-8/14, EU:C:2015:731, paragraph 28).

58 Judgments of 29 October 2009, *Pontin* (C-63/08, EU:C:2009:666, paragraph 48); of 8 July 2010, *Bulicke* (C-246/09, EU:C:2010:418, paragraph 36); and of 21 December 2016, *TDC* (C-327/15, EU:C:2016:974, paragraph 98).

59 See, inter alia, judgments of 10 July 1997, *Palmisani* (C-261/95, EU:C:1997:351, paragraph 29), one-year time limit; of 15 September 1998, *Edis* (C-231/96, EU:C:1998:401, paragraph 35), three-year time limit; of 28 November 2000, *Roquette Frères* (C-88/99, EU:C:2000:652, paragraph 24), four to five-year time limit; of 24 September 2002, *Grundig Italiana* (C-255/00, EU:C:2002:525, paragraph 34), three-year time limit; of 8 May 2008, *Ecotrade* (C-95/07 and C-96/07, EU:C:2008:267, paragraph 48), two-year time limit; of 15 April 2010, *Barth* (C-542/08, EU:C:2010:193, paragraph 29), three-year time limit; of 8 September 2011, *Q-Beef and Bosschaert* (C-89/10 and C-96/10, EU:C:2011:555, paragraph 37), five-year time limit; and of 28 July 2016, *Astone* (C-332/15, EU:C:2016:614, paragraph 38), two-year time limit.

60 See, inter alia, judgments of 14 December 1995, *Peterbroeck* (C-312/93, EU:C:1995:437, paragraphs 16 to 21), 60-day time limit; of 27 February 2003, *Santex* (C-327/00, EU:C:2003:109, paragraphs 54 to 61), 60-day time limit; of 17 June 2004, *Recheio – Cash & Carry* (C-30/02, EU:C:2004:373, paragraphs 19 to 22), 90-day time limit; of 29 October 2009, *Pontin* (C-63/08, EU:C:2009:666, paragraphs 60 to 67), 15-day time limit; of 8 July 2010, *Bulicke* (C-246/09, EU:C:2010:418, paragraphs 37 to 42), two-month time limit; of 12 July 2012, *EMS-Bulgaria Transport* (C-284/11, EU:C:2012:458, paragraphs 52 to 64), three to four-month time limit; of 20 October 2016, *Danqua* (C-429/15, EU:C:2016:789, paragraphs 43 to 49), 15-day time limit; and of 21 December 2016, *TDC* (C-327/15, EU:C:2016:974, paragraphs 99 to 106), three-month time limit.

61 See point 14 of this Opinion.

62 See the case-law cited in footnote 60.

63 The baseline data verified as satisfactory by the verifier are then multiplied by the applicable benchmark to calculate the basic allocation. See point 58 of this Opinion.

64 See point 21 of this Opinion.

65 See, to that effect, judgments of 16 May 2000, *Preston and Others* (C-78/98, EU:C:2000:247, paragraph 34); of 28 November 2000, *Roquette Frères* (C-88/99, EU:C:2000:652, paragraph 25); of 18 September 2003, *Pflücke* (C-125/01, EU:C:2003:477, paragraph 35); and of 8 September 2011, *Q-Beef and Bosschaert* (C-89/10 and C-96/10, EU:C:2011:555, paragraph 36).

66 See, to that effect and with regard to the duty of sincere cooperation enshrined in Article 4(3) TEU, judgment of 15 January 1986, *Hurd* (44/84, EU:C:1986:2, paragraphs 46 to 49).

67 See points 62 to 65 of this Opinion.

68 I do not think that it is possible, in the light of the wording of Article 10a(5) of Directive 2003/87, to make such a supplementary allocation unless the Commission verifies whether the cap under that provision has been exceeded and, if necessary, modify the cross-sectoral correction factor.

69 See, inter alia, judgments of 10 July 1997, *Palmisani* (C-261/95, EU:C:1997:351, paragraph 28); of 17 June 2004, *Recheio – Cash & Carry* (C-30/02, EU:C:2004:373, paragraph 18); of 8 September 2011, *Q-Beef and Bosschaert* (C-89/10 and C-96/10, EU:C:2011:555, paragraph 36); and of 21 December 2016, *TDC* (C-327/15, EU:C:2016:974, paragraph 98).

70 See points 57 to 65 of this Opinion.

71 See point 58 of this Opinion.

72 By way of illustration, and according to figures provided by the German Government, any modification of the cross-sectoral correction factor would require the amendment of almost 9 000 allocation decisions. Similarly, in the judgment of 16 December 2008, *Arcelor Atlantique et Lorraine and Others* (C-127/07, EU:C:2008:728, paragraphs 64 to 69), the Court ruled that the difference in treatment of the steel sector – which had been included in the scheme established by Directive 2003/87 since its implementation – and the chemical sector – which had initially been excluded – was justified in the light of the administrative burden and the risk to the proper functioning of the scheme that the immediate inclusion of the latter sector would have entailed.

73 See point 54 of this Opinion.