

## JUDGMENT OF THE COURT (Sixth Chamber)

18 January 2018 (\*)

(Reference for a preliminary ruling — Environment — Scheme for greenhouse gas emission allowance trading within the European Union — Directive 2003/87/EC — Article 10a — Transitional rules for harmonised free allocation of emission allowances — Period 2013-2020 — Decision 2011/278/EU — Article 3(h) — Concept of ‘process emissions sub-installation’ — Emissions stemming from the combustion of incompletely oxidised carbon — Liquid waste — Excluded)

In Case C-58/17,

REQUEST for a preliminary ruling under Article 267 TFEU from the Verwaltungsgericht Berlin (Administrative Court, Berlin, Germany), made by decision of 24 January 2017, received at the Court on 3 February 2017, in the proceedings

**INEOS Köln GmbH**

v

**Bundesrepublik Deutschland,**

THE COURT (Sixth Chamber),

composed of C.G. Fernlund, President of the Chamber, A. Arabadjiev and E. Regan (Rapporteur),  
Judges,

Advocate General: H. Saugmandsgaard Øe,

Registrar: A. Calot Escobar,

having regard to the written procedure,

after considering the observations submitted on behalf of:

- INEOS Köln GmbH, by S. Altenschmidt and A. Sitzer, Rechtsanwälte,
- the German Government, by T. Henze and J. Möller, acting as Agents,
- the European Commission, by A.C. Becker and C. Zadra, acting as Agents,

having decided, after hearing the Advocate General, to proceed to judgment without an Opinion,

gives the following

## Judgment

- 1 This request for a preliminary ruling concerns the interpretation of Article 3(h) of Commission Decision 2011/278/EU of 27 April 2011 determining transitional Union-wide rules for harmonised free allocation of emission allowances pursuant to Article 10a of Directive 2003/87/EC of the European Parliament and of the Council (OJ 2011 L 130, p. 1).
- 2 The request has been made in the course of proceedings between INEOS Köln GmbH ('INEOS') and the Bundesrepublik Deutschland (Federal Republic of Germany), represented by the Umweltbundesamt (Federal Environment Agency), concerning the rejection of the application made by INEOS for a free allocation of greenhouse gas emission allowances ('emission allowances'), in so far as that application concerns emissions stemming from the combustion of incompletely oxidised carbon contained in liquid waste.

### Legal context

#### *EU law*

##### *Directives 2003/87/EC and 2009/29/EC*

- 3 Directive 2003/87/EC of the European Parliament and of the Council of 13 October 2003 establishing a scheme for greenhouse gas emission allowance trading within the Community and amending Council Directive 96/61/EC (OJ 2003 L 275, p. 32), as amended by Directive 2009/29/EC of the European Parliament and of the Council of 23 April 2009 (OJ 2009 L 140, p. 63) ('Directive 2003/87') provides, in Article 10a, headed 'Transitional Community-wide rules for harmonised free allocation', as follows:

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

...

The measures referred to in the first subparagraph shall, to the extent feasible, determine Community-wide *ex-ante* benchmarks so as to ensure that allocation takes place in a manner that provides incentives for reductions in greenhouse gas emissions and energy efficient techniques, by taking account of the most efficient techniques, substitutes, alternative production processes, high efficiency cogeneration, efficient energy recovery of waste gases, use of biomass and capture and storage of CO<sup>2</sup>, where such facilities are available, and shall not provide incentives to increase emissions. ...

...

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

...’

4 According to recital 23 of Directive 2009/29:

‘Transitional free allocation to installations should be provided for through harmonised Community-wide rules (*ex-ante* benchmarks) in order to minimise distortions of competition within the Community. Those rules should take account of the most greenhouse gas and energy-efficient techniques, substitutes, alternative production processes, use of biomass, renewables and CO<sup>2</sup> capture and storage. Any such rules should not give incentives to increase emissions ... Those harmonised rules may also take into account emissions related to the use of combustible waste gases when the production of these waste gases cannot be avoided in the industrial process. In this respect, the rules may provide for allowances to be allocated for free to operators of installations combusting the waste gases concerned or to operators of the installations where these gases originate. ...’

*Decision 2011/278*

5 By Decision 2011/278, the Commission established, pursuant to Article 10a of Directive 2003/87, the harmonised bases on which the Member States are required to calculate, for each year, the number of emission allowances allocated free of charge to each installation on their territory.

6 Recitals 1, 8, 12 and 32 of that decision state:

‘(1) Article 10a of [Directive 2003/87] requires that the Community-wide and fully-harmonised implementing measures for the allocation of free emission allowances should, to the extent feasible, determine *ex-ante* benchmarks so as to ensure that the free allocation of emission allowances takes place in a manner that provides incentives for reductions in greenhouse gas emissions and energy efficient techniques, by taking account of the most efficient techniques, substitutes, alternative production processes, high efficiency cogeneration, efficient energy recovery of waste gases, use of biomass and capture and storage of carbon dioxide, where such facilities are available, and should not provide incentives to increase emissions. ...

...

(8) For the determination of benchmark values, the Commission has used as a starting point the arithmetic average of the greenhouse gas performance of the 10% most greenhouse gas efficient installations in 2007 and 2008 for which data has been collected. In addition, the Commission has in accordance with Article 10a(1) of Directive [2003/87] analysed for all sectors for which a product benchmark is provided for in Annex I, on the basis of additional information received from several sources and on the basis of a dedicated study analysing most efficient techniques and reduction potentials at European and international level, whether these starting points sufficiently reflect the most efficient techniques, substitutes, alternative production processes, high efficiency cogeneration, efficient energy recovery of waste gases, use of biomass and capture and storage of carbon dioxide, where such facilities are available. ...

...

(12) Where deriving a product benchmark was not feasible, but greenhouse gases eligible for the free allocation of emission allowances occur, those allowances should be allocated on the basis of generic fallback approaches. A hierarchy of three fallback approaches has been developed in order to maximise greenhouse gas emission reductions and energy savings for at least parts of the production processes concerned. The heat benchmark is applicable for heat consumption processes where a measurable heat carrier is used. The fuel benchmark is applicable where non-measurable heat is consumed ... For process emissions, emission allowances should be allocated on the basis of historical emissions. In order to ensure that the free allocation of emission allowances for such emissions provides sufficient incentives for reductions in greenhouse gas emissions and to avoid any difference in treatment of process emissions that are allocated on the basis of historical emissions and those within the system boundaries of a product benchmark, the historical activity level of each installation should be multiplied by a factor equal to 0.9700 to determine the number of free emission allowances.

...

(32) It is also appropriate that the product benchmarks take account of the efficient energy recovery of waste gases and emissions related to their use. To this end, for the determination of the benchmark values for products of which the production generates waste gases, the carbon content of these waste gases has been taken into account to a large extent. Where waste gases are exported from the production process outside the system boundaries of the relevant product benchmark and combusted for the production of heat outside the system boundaries of a benchmarked process as defined in Annex I, related emissions should be taken into account by means of allocating additional emission allowances on the basis of the heat or fuel benchmark. In the light of the general principle that no emission allowances should be allocated for free in respect of any electricity production, to avoid undue distortions of competition on the markets for electricity supplied to industrial installations and taking into account the inherent carbon price in electricity, it is appropriate that, where waste gases are exported from the production process outside the system boundaries of the relevant product benchmark and combusted for the production of electricity, no additional allowances are allocated beyond the share of the carbon content of the waste gas accounted for in the relevant product benchmark.'

7 Article 3 of Decision 2011/278, entitled 'Definitions', provides:

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

...

(h) "process emissions sub-installation": ... emissions stemming from the combustion of incompletely oxidised carbon produced as a result of the following activities for the purpose of the production of measurable heat, non-measurable heat or electricity provided that emissions that would have occurred from the combustion of an amount of natural gas, equivalent to the technically usable energy content of the combusted incompletely oxidised carbon, are subtracted:

...

- (iv) chemical syntheses where the carbon bearing material participates in the reaction, for a primary purpose other than the generation of heat;

...'

8 Article 6 of Decision 2011/278, entitled 'Division into sub-installations', states:

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

- (a) a product benchmark sub-installation;
- (b) a heat benchmark sub-installation;
- (c) a fuel benchmark sub-installation;
- (d) a process emissions sub-installation.

...'

9 Article 10 of Decision 2011/278, headed '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 as follows:

...

- (b) for

...

- (iii) the process emissions sub-installation, the preliminary annual number of emission allowances allocated free of charge for a given year shall correspond to the process-related historical activity level multiplied by 0.9700.'

### ***German law***

10 Paragraph 9(1) of the Treibhausgas-Emissionshandelgesetz (Law on greenhouse gas emissions trading) of 21 July 2011 (BGBl. 2011 I, p. 1475) provides that installation operators are to receive a free allocation of allowances in accordance with the principles laid down in Article 10a of Directive 2003/87 and in Decision 2011/278.

11 Paragraph 2(17) of the Verordnung über die Zuteilung von Treibhausgas-Emissionsberechtigungen

in der Handelsperiode 2013 bis 2020 (Regulation on the allocation of greenhouse gas emission allowances in the trading period 2013 to 2020) of 26 September 2011 (BGBl. 2011 I., p. 1921; ‘the ZuV 2020’) defines the concept of ‘waste gas’ as follows:

‘A mixture of gases containing incompletely oxidised carbon as a by-product of the processes referred to in Paragraph 29(b), so that its chemical energy content is sufficient for it to burn on its own, without additional fuel supply, or, in the event that it is mixed with fuels with a higher calorific value, for it to contribute significantly to the total energy.’

12 Under Paragraph 2(29) of the ZuV 2020, the concept of ‘process emissions sub-installation’ covers:

‘...’

(b) Carbon dioxide emissions which occur outside the system boundaries of an allocation component with a product benchmark, as a result of one of the following processes:

...

(dd) chemical syntheses where the carbon bearing material participates in the reaction, for a primary purpose other than the generation of heat;

...

(c) Emissions from the combustion of incompletely oxidised carbon, arising in the context of the processes referred to in point (b) and used for the production of measurable heat, non-measurable heat or electricity, provided that emissions that would have occurred from the combustion of a quantity of natural gas equivalent to the technically usable energy value of the incompletely oxidised carbon are deducted.’

### **The dispute in the main proceedings and the question referred for a preliminary ruling**

13 INEOS operates a petrochemical plant which comprises several installations manufacturing organic chemicals and which incorporates an industrial thermal power plant. The purpose of that power plant is to provide that site with steam through the combustion of, inter alia, liquid and gaseous waste materials stemming from the manufacturing processes of the site’s chemical production facilities.

14 On 23 January 2012, INEOS applied to the Deutsche Emissionshandelsstelle (German Emissions Trading Authority, ‘the DEHSt’) for a free allocation of emission allowances pursuant to Paragraph 9(1) of the Law on greenhouse gas emissions trading, for the trading period 2013 to 2020. That application included an allocation component for a sub-installation with process emissions stemming from the combustion of incompletely oxidised carbon, as a result of chemical syntheses in which the carbon-bearing material participates in the reaction but the primary purpose of which is not the generation of heat.

15 By decision of 19 February 2014, the DEHSt refused to allocate allowances free of charge for process emissions stemming from the combustion of liquid waste on the ground that

Paragraph 2(29)(c) of the ZuV 2020 applies to gaseous waste only.

16 The appeal lodged by INEOS against that decision was dismissed by the DEHSt, on the same ground, by decision of 14 September 2015.

17 On 29 September 2015, INEOS brought proceedings before the Verwaltungsgericht Berlin (Administrative Court, Berlin, Germany) against those decisions, claiming, in particular, that neither Paragraph 2(29)(c) of the ZuV 2020 nor Article 3(h) of Decision 2011/278 refers to the physical state — solid, liquid or gaseous — of incompletely oxidised carbon and that there is nothing to suggest that the provisions apply solely to waste gases, as defined in Paragraph 2(17) of the ZuV 2020. Such a limitation, it submits, also does not follow from the spirit and purpose of the national legislation at issue. In the context of sustainable management of resources, both liquid waste and waste gases, rather than being dissipated or incinerated, should be used to recover energy.

18 According to the DEHSt, by contrast, it is apparent from the first sentence of the third subparagraph of Article 10a(1) of Directive 2003/87 and from recital 23 of Directive 2009/29 that only emissions stemming from the combustion of incompletely oxidised carbon derived from waste gases confer an entitlement to the free allocation of emission allowances.

19 The referring court is thus unsure whether the combustion of incompletely oxidised carbon derived from liquid waste can give rise to the free allocation of emission allowances.

20 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:

‘Must [Decision 2011/278] ... be interpreted as meaning that the definition of “process emissions sub-installation” in Article 3(h) of [that decision] covers only incompletely oxidised carbon in a gaseous state, or does it also include incompletely oxidised carbon in a liquid state?’

### **Consideration of the question referred**

21 By its question, the referring court asks in essence whether Article 3(h) of Decision 2011/278 must be interpreted as precluding national legislation, such as that at issue in the main proceedings, which excludes from the concept of ‘process emissions sub-installation’, within the meaning of that provision, greenhouse gas emissions stemming from the combustion of incompletely oxidised carbon in a liquid state.

22 For the purpose of examining that question, it should be recalled, as a preliminary point, that Directive 2003/87 is intended to establish a scheme for greenhouse gas emission allowance trading which seeks to reduce those emissions into the atmosphere to a level that prevents dangerous anthropogenic interference with the climate and the ultimate objective of which is to protect the environment (see, inter alia, judgment of 8 March 2017, *ArcelorMittal Rodange et Schifflange*, C-321/15, EU:C:2017:179, paragraph 24).

23 That scheme is based on an economic logic which encourages a participant in the scheme to emit quantities of greenhouse gases that are less than the allowances originally allocated to him, in order to sell the surplus to another participant who has emitted more than his allowance (see, inter alia,

judgment of 8 March 2017, *ArcelorMittal Rodange et Schifflange*, C-321/15, EU:C:2017:179, paragraph 22).

24 Directive 2003/87 therefore seeks 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 (judgment of 8 September 2016, *E.ON Kraftwerke*, C-461/15, EU:C:2016:648, paragraph 23).

25 For that purpose, Article 10a of Directive 2003/87 provides, with regard to installations in certain sectors of activity, for the free allocation of emission allowances, the quantity of which, in accordance with paragraph 11 of that provision, is to decrease gradually over the period 2013 to 2020, in order to arrive at the complete abolition of free allowances in 2027 (see, to that effect, judgments of 8 September 2016, *E.ON Kraftwerke*, C-461/15, EU:C:2016:648, paragraph 24, and of 26 October 2016, *Yara Suomi and Others*, C-506/14, EU:C:2016:799, paragraph 46).

26 In accordance with Article 10a(1) of Directive 2003/87, the Commission determined, by way of Decision 2011/278, European Union-wide harmonised rules for the free allocation of emission allowances. Those harmonised rules give concrete expression to the essential requirement that distortions of competition in the internal market be kept to a minimum (judgment of 22 June 2016, *DK Recycling und Roheisen v Commission*, C-540/14 P, EU:C:2016:469, paragraph 53).

27 It follows from Article 10a(2) of Directive 2003/87 that the Commission determines, in that context, benchmarks by sector or subsector (see, to that effect, judgment of 8 September 2016, *Borealis and Others*, C-180/15, EU:C:2016:647, paragraph 60).

28 As is evident from Article 10(1) and (2) of Decision 2011/278, by multiplying those benchmarks with the level of historical activity of each sub-installation, Member States are to determine the preliminary annual number of emission allowances to be allocated free of charge. To that end, they are required to distinguish, in accordance with Article 6 of that decision, the sub-installations based on their activity, in order 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’ (judgment of 8 September 2016, *Borealis and Others*, C-180/15, EU:C:2016:647, paragraph 61).

29 In that regard, the Court has already pointed out that the definitions, set out in Article 3 of Decision 2011/278, of product benchmark sub-installations, heat benchmark sub-installations, fuel benchmark sub-installations and process emissions sub-installations are mutually exclusive (judgment of 8 September 2016, *Borealis and Others*, C-180/15, EU:C:2016:647, paragraph 62).

30 According to recital 12 of Decision 2011/278, it is only in the case where deriving a product benchmark has not been feasible, but greenhouse gases eligible for the free allocation of emission allowances occur, that those allowances should be allocated on the basis of the three other so-called ‘fallback’ approaches, in accordance with the hierarchy thus determined, in order to maximise greenhouse gas emission reductions and energy savings for at least parts of the production processes concerned (see, to that effect, judgment of 8 September 2016, *Borealis and Others*, C-180/15, EU:C:2016:647, paragraphs 67 and 68).

31 Furthermore, a ‘process emissions sub-installation’ is qualified as such with regard solely to the



generation of specific types of emissions referred to in Article 3(h)(i) to (vi) of Decision 2011/278 (judgment of 8 September 2016, *Borealis and Others*, C-180/15, EU:C:2016:647, paragraph 66).

- 32 In the present case, it is necessary to establish whether the emissions generated by the combustion of incompletely oxidised carbon contained in liquid waste can be taken into account in respect of process emissions, within the meaning of Article 3(h)(iv) of Decision 2011/278, for the purposes of the free allocation of emission allowances pursuant to Article 10 of that decision.
- 33 In this connection, it must be noted that Article 3(h)(iv) of Decision 2011/278 defines the concept of ‘process emissions sub-installation’ as covering ‘emissions stemming from the combustion of incompletely oxidised carbon produced as a result of ... chemical syntheses where the carbon bearing material participates in the reaction, for a primary purpose other than the generation of heat’, ‘provided that emissions that would have occurred from the combustion of an amount of natural gas, equivalent to the technically usable energy content of the combusted incompletely oxidised carbon, are subtracted’.
- 34 As the German Government and the Commission rightly point out, that wording does not provide any conclusive guidance as to the physical state that ‘incompletely oxidised carbon’, covered by that provision, must take in order for the emissions stemming from its combustion to be taken into account, as process emissions, for the purpose of the free allocation of emission allowances.
- 35 In those circumstances, regard must, in accordance with settled case-law, be had to the general scheme of Directive 2003/87 and of Decision 2011/278, as well as to the objectives which they pursue (see, by analogy, inter alia, judgments of 27 June 2013, *Malaysia Dairy Industries*, C-320/12, EU:C:2013:435, paragraph 26, and of 11 November 2015, *Tecom Mican and Arias Domínguez*, C-223/14, EU:C:2015:744, paragraph 35 and the case-law cited).
- 36 With regard, in the first place, to the general scheme of Directive 2003/87 and of Decision 2011/278, it must be held from the outset that the taking into account of emissions stemming from the combustion of incompletely oxidised carbon comes, as is already evident from paragraphs 25 to 31 of the present judgment, within the framework of a specific regime for two reasons, since that taking into account occurs, first, for the purpose of the application of the transitional rules relating to the free allocation of emission allowances and, second, in respect of the final so-called ‘fallback’ option represented by process emissions. It follows that Article 3(h)(iv) of Decision 2011/278 cannot be interpreted broadly (see, by analogy, judgment of 7 April 2016, *Holcim (Romania) v Commission*, C-556/14 P, not published, EU:C:2016:207, paragraph 48).
- 37 Furthermore, it must be noted that Directive 2003/87, in particular the third subparagraph of Article 10a(1), recital 23 of Directive 2009/29 and Decision 2011/278, in particular recitals 1, 8 and 32 thereof, all refer to the recovery of waste gases, as an objective pursued by the manner in which the free allocation of emission allowances takes place, solely in respect of waste gases.
- 38 In that regard, it is apparent from those provisions that, contrary to what INEOS submits, that objective is pursued in the light of the free allocation of emission allowances not only for electricity produced from waste gases but, in general, for all the products and processes which may give entitlement to such an allowance.

- 39 To that end, the Court has already held that the product benchmarks take account of the efficient energy recovery of waste gases as well as of the emissions stemming from the use of those gases and that, to that end, for the determination of the benchmark values for products the manufacture of which generates waste gases, the carbon content of those waste gases has been taken into account to a large extent (judgments of 8 September 2016, *Borealis and Others*, C-180/15, EU:C:2016:647, paragraph 48, and of 26 October 2016, *Yara Suomi and Others*, C-506/14, EU:C:2016:799, paragraph 40).
- 40 Moreover, it must be observed that, both in the document entitled ‘Guidance Document No 2 on the harmonized free allocation methodology for the EU-ETS post 2012 (Guidance on allocation methodologies)’, p. 22, of 14 April and 29 June 2011, and in the document entitled ‘Guidance Document No 8 on the harmonized free allocation methodology for the EU-ETS post 2012 — Waste gases and process emissions sub-installation’, pp. 4 to 6, of 14 April and 6 September 2011, published on the Commission’s website, the Commission deals solely with emissions generated by incompletely oxidised carbon contained in waste gases.
- 41 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, to that effect, judgment of 8 September 2016, *Borealis and Others*, C-180/15, EU:C:2016:647, paragraphs 105 and 112).
- 42 The fact remains that no provision of Directive 2003/87 or of Decision 2011/278 refers, by contrast, to the efficient recovery of energy in relation to the use of liquid waste containing incompletely oxidised carbon.
- 43 With regard, in the second place, to the objectives pursued by that legislation, it must be observed that Article 10a(1) of Directive 2003/87 and Decision 2011/278 are intended, in the context of the attainment of the objectives referred to in paragraphs 22 to 24 of the present judgment, to encourage the reduction of greenhouse gas emissions and to improve energy efficiency by taking account of the most efficient techniques, including, in particular, the fullest energy recovery from gas waste, where such facilities are available and do not provide incentives to increase emissions (see, to that effect, judgment of 8 September 2016, *Borealis and Others*, C-180/15, EU:C:2016:647, paragraph 102, and of 26 July 2017, *ArcelorMittal Atlantique et Lorraine*, C-80/16, EU:C:2017:588, paragraph 47).
- 44 Indeed, as the Court has already noted, when waste gases are a by-product inevitably emitted during production, the recovery of those gases is, from both an economic and an ecological point of view, greatly more beneficial than flaring them off (see, to that effect, judgment of 26 July 2017, *ArcelorMittal Atlantique et Lorraine*, C-80/16, EU:C:2017:588, paragraph 22).
- 45 That same consideration also appears in recital 23 of Directive 2009/29, which provides for account to be taken of emissions corresponding to the use, as a combustible product, of waste gases when those emissions cannot be avoided in the industrial process.
- 46 As follows from the written observations submitted to the Court, waste gases stemming from industrial production cannot be stored, with the result that, if they are not burned, they leak freely into the atmosphere and, thus, necessarily emit into the atmosphere the greenhouse gases that they

contain. It is common ground that the combustion of those waste gases results, generally, in a reduction of such greenhouse gases.

47 By contrast, it is not disputed that liquid waste does not, for its part, generate greenhouse gases, or, if so, then only in negligible quantities. As stated by INEOS itself, it is the combustion of that liquid waste, and not the waste itself, which generates greenhouse gas emissions in the atmosphere. Those emissions can nevertheless be avoided by having recourse to, inter alia, separation and retreatment processes.

48 It follows that, in contrast to the combustion of waste gases, the combustion of liquid waste increases greenhouse gas emissions.

49 In those circumstances, while it is fully in compliance with the objectives pursued by Directive 2003/87 and Decision 2011/278 to take into account greenhouse gases generated by the combustion of waste gases containing incompletely oxidised carbon, since those emissions cannot be avoided and the combustion of those waste gases generally results in their reduction, it would, by contrast, go against those objectives to take into account greenhouse gases generated by the combustion of liquid waste containing incompletely oxidised carbon because this would result in an increase of those emissions, even though they are avoidable.

50 Consequently, it follows both from the general scheme of Directive 2003/87 and of Decision 2011/278 and from the objectives which they pursue that the emissions generated by the combustion of incompletely oxidised carbon contained in liquid waste cannot be taken into account in respect of process emissions, within the meaning of Article 3(h)(iv) of Decision 2011/278, for the purpose of the free allocation of emission allowances pursuant to Article 10 of that decision.

51 Having regard to the foregoing, the answer to the question referred is that Article 3(h) of Decision 2011/278 must be interpreted as not precluding national legislation, such as that at issue in the main proceedings, which excludes from the concept of ‘process emissions sub-installation’, within the meaning of that provision, greenhouse gas emissions stemming from the combustion of incompletely oxidised carbon in a liquid state.

### Costs

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

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

**Article 3(h) of Commission Decision 2011/278/EU of 27 April 2011 determining transitional Union-wide rules for harmonised free allocation of emission allowances pursuant to Article 10a of Directive 2003/87/EC of the European Parliament and of the Council must be interpreted as not precluding national legislation, such as that at issue in the main proceedings, which excludes from the concept of ‘process emissions sub-installation’, within the meaning of that provision, greenhouse gas emissions stemming from the combustion of**

**incompletely oxidised carbon in a liquid state.**

[Signatures]

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\* Language of the case: German.