JUDGMENT OF THE COURT (Second Chamber)

28 April 2016 (*)

(References for a preliminary ruling — Scheme for greenhouse gas emission allowance trading in the European Union — Directive 2003/87/EC — Article 10a(5) — Method for allocating allowances — Free allocation of allowances — Method for calculating the uniform cross-sectoral correction factor — Decision 2011/278/EU — Article 15(3) — Decision 2013/448/EU — Article 4 — Annexe II — Validity)

In Joined Cases C-191/14, C-192/14, C-295/14, C-389/14 and C-391/14 to C-393/14,

REQUESTS for a preliminary ruling under Article 267 TFEU from the Landesverwaltungsgericht Niederösterreich (Regional Administrative Court, Lower Austria, Austria), the Raad van State (Council of State, the Netherlands) and the Tribunale amministrativo regionale per il Lazio (Regional Administrative Court, Lazio, Italy), made by decisions of 10 April 2014 (Cases C-191/14 and C-192/14), 11 June 2014 (Case C-295/14) and 3 July 2014 (Cases C-389/14 and C-391/14 to C-393/14), received at the Court on 17 April, 16 June and 18 August 2014 respectively, in the proceedings

Borealis Polyolefine GmbH

v

Bundesminister für Land- und Forstwirtschaft, Umwelt und Wasserwirtschaft (C-191/14),

OMV Refining & Marketing GmbH

v

Bundesminister für Land- und Forstwirtschaft, Umwelt und Wasserwirtschaft (C-192/14),

DOW Benelux BV and Others

v

Staatssecretaris van Infrastructuur en Milieu (C-295/14),

Esso Italiana Srl,

Eni SpA,

Linde Gas Italia Srl

v

Comitato nazionale per la gestione della direttiva 2003/87/CE e per il supporto nella gestione

delle attività di progetto del protocollo di Kyoto,

Ministero dell'Ambiente e della Tutela del Territorio e del Mare,

Ministero dell'Economia e delle Finanze,

Presidenza del Consiglio dei Ministri,

intervening parties:

Edison SpA (C-389/14),

Api Raffineria di Ancona SpA

v

Comitato nazionale per la gestione della direttiva 2003/87/CE e per il supporto nella gestione delle attività di progetto del protocollo di Kyoto,

Ministero dell'Ambiente e della Tutela del Territorio e del Mare,

Ministero dello Sviluppo economico,

intervening parties:

Edison SpA (C-391/14),

Lucchini in Amministrazione Straordinaria SpA

v

Comitato nazionale per la gestione della direttiva 2003/87/CE e per il supporto nella gestione delle attività di progetto del protocollo di Kyoto,

Ministero dell'Ambiente e della Tutela del Territorio e del Mare,

Ministero dello Sviluppo economico,

intervening parties:

Cofely Italia SpA (C-392/14),

and

Dalmine SpA

v

Comitato nazionale per la gestione della direttiva 2003/87/CE e per il supporto nella gestione delle attività di progetto del protocollo di Kyoto,

Ministero dell'Ambiente e della Tutela del Territorio e del Mare,

Ministero dello Sviluppo economico,

intervening parties:

Cofely Italia SpA,

Buzzi Unicem SpA (C-393/14),

THE COURT (Second Chamber),

composed of R. Silva de Lapuerta, President of the First Chamber, acting as President of the Second Chamber, J.L. da Cruz Vilaça, A. Arabadjiev, C. Lycourgos and J.-C. Bonichot (Rapporteur), Judges,

Advocate General: J. Kokott,

Registrar: K. Malacek, Administrator,

having regard to the written procedure and further to the hearing on 3 September 2015,

after considering the observations submitted on behalf of:

– Borealis Polyolefine GmbH, by B. Windisch-Altieri, Rechtsanwältin, and G. van Thuyne, advocaat,

– OMV Refining & Marketing GmbH, by B. Windisch-Altieri, Rechtsanwältin, and G. van Thuyne, advocaat,

– DOW Benelux BV, by G.J. Maas-Cooymans and B. Ebben, advocaten,

– Esso Nederland BV and ExxonMobil Chemical Holland BV, by P. Wytinck, V.Y. van't Lam, A. ten Veen and B. Hoorelbeke, advocaten,

– Yara Sluiskil BV and Others, by L. Spaans, H. van Geen and G. van Thuyne, advocaten,

– BP Raffinaderij Rotterdam BV and Others, by N.H. van den Biggelaar and I.F. Kieft, advocaten,

– Esso Italiana Srl, by A. Capria, E. Gardini and A. Lirosi, avvocati,

– Eni SpA, by L. Torchia, V. Vecchione and G. Fortuna, avvocati,

– Linde Gas Italia Srl, by L. Biamonti, P. De Caterini and A. Lo Gaglio, avvocati,

– Api Raffineria di Ancona SpA, by F. Carabba Tettamanti and G. Zurlo, avvocati,

– Lucchini in Amministrazione Straordinaria SpA and Dalmine SpA, by F. Bucchi and V. La Rosa, avvocati,

– Buzzi Unicem SpA, by M. Protto and C. Vivani, avvocati,

– the Netherlands Government, by M. Bulterman, C.S. Schillemans, M. de Ree and by J. Langer, acting as Agents,

– the German Government, by T. Henze and K. Petersen, acting as Agents,

– the Spanish Government, by A. Gavela Llopis and L. Banciella Rodríguez-Miñón, acting as Agents,

– the European Commission, by E. White, C. Hermes, K. Mifsud-Bonnici, E. Manhaeve and L. Pignataro-Nolin, acting as Agents,

after hearing the Opinion of the Advocate General at the sitting on 12 November 2015,

gives the following

Judgment

1 These requests for a preliminary ruling concern, first, the validity of Article 15(3) 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) and, second, the validity of Article 4 of, and Annex II to, 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/EC of the European Parliament and of the Council (OJ 2013 L 240, p. 27).

2 The requests have been made in proceedings between greenhouse gas-emitting undertakings and the national authorities entrusted with allocating greenhouse gas emission allowances (‘allowances’) free of charge in Italy, the Netherlands and Austria concerning the validity of national decisions on the allocation of allowances for the period from 2013 to 2020, which were adopted to implement the uniform cross-sectoral correction factor (‘the correction factor’) provided for in Article 10a(5) 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 (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’).

Legal context

Directive 2003/87

3 Article 2(1) of Directive 2003/87 states:

‘This Directive shall apply to emissions from the activities listed in Annex I and greenhouse gases listed in Annex II.’

4 Article 3(e), (f), (t) and (u) of that directive provides the following definitions:

‘(e) “installation” means a stationary technical unit where one or more activities listed in Annex I are carried out, and any other directly associated activities which have a technical connection with the activities carried out on that site and which could have an effect on

emissions and pollution;

(f) “operator” means any person who operates or controls an installation or, where this is provided for in national legislation, to whom decisive economic power over the technical functioning of the installation has been delegated;

…

(t) “combustion” means any oxidation of fuels, regardless of the way in which the heat, electrical or mechanical energy produced by this process is used, and any other directly associated activities, including waste gas scrubbing;

(u) “electricity generator” means an installation that, on or after 1 January 2005, has produced electricity for sale to third parties, and in which no activity listed in Annex I is carried out other than the “combustion of fuels”.’

5 Article 9 of Directive 2003/87, entitled ‘Community-wide quantity of allowances’, states:

‘The Community-wide quantity of allowances issued each year starting in 2013 shall decrease in a linear manner beginning from the mid-point of the period from 2008 to 2012. The quantity shall decrease by a linear factor of 1,74% compared to the average annual total quantity of allowances issued by Member States in accordance with the Commission Decisions on their national allocation plans for the period from 2008 to 2012.

The Commission shall, by 30 June 2010, publish the absolute Community-wide quantity of allowances for 2013, based on the total quantities of allowances issued or to be issued by the Member States in accordance with the Commission Decisions on their national allocation plans for the period from 2008 to 2012.

…’

6 Article 9a of that directive, entitled ‘Adjustment of the Community-wide quantity of allowances’, reads as follows:

‘1. In respect of installations that were included in the Community scheme during the period from 2008 to 2012 pursuant to Article 24(1), the quantity of allowances to be issued from 1 January 2013 shall be adjusted to reflect the average annual quantity of allowances issued in respect of those installations during the period of their inclusion, adjusted by the linear factor referred to in Article 9.

2. In respect of installations carrying out activities listed in Annex I, which are only included in the Community scheme from 2013 onwards, Member States shall ensure that the operators of such installations submit to the relevant competent authority duly substantiated and independently verified emissions data in order for them to be taken into account for the adjustment of the Community-wide quantity of allowances to be issued.

Any such data shall be submitted, by 30 April 2010, to the relevant competent authority in accordance with the provisions adopted pursuant to Article 14(1).

If the data submitted are duly substantiated, the competent authority shall notify the Commission thereof by 30 June 2010 and the quantity of allowances to be issued, adjusted by the linear factor referred to in Article 9, shall be adjusted accordingly. In the case of installations emitting

greenhouse gases other than CO_2, the competent authority may notify a lower amount of emissions according to the emission reduction potential of those installations.

3. The Commission shall publish the adjusted quantities referred to in paragraphs 1 and 2 by 30 September 2010.

…’

7 Article 10(1) of the directive provides:

‘From 2013 onwards, Member States shall auction all allowances which are not allocated free of charge in accordance with Article 10a and 10c. By 31 December 2010, the Commission shall determine and publish the estimated amount of allowances to be auctioned.’

8 Article 10a of Directive 2003/87, entitled ‘Transitional Community-wide rules for harmonised free allocation’, states the following:

‘1. By 31 December 2010, the Commission shall adopt Community-wide and fully-harmonised implementing measures for the allocation of the allowances referred to in paragraphs 4, 5, 7 and 12, including any necessary provisions for a harmonised application of paragraph 19.

Those measures, designed to amend non-essential elements of this Directive by supplementing it, shall be adopted in accordance with the regulatory procedure with scrutiny referred to in Article 23(3).

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_2, where such facilities are available, and shall not provide incentives to increase emissions. No free allocation shall be made in respect of any electricity production, except for cases falling within Article 10c and electricity produced from waste gases.

For each sector and subsector, in principle, the benchmark shall be calculated for products rather than for inputs, in order to maximise greenhouse gas emissions reductions and energy efficiency savings throughout each production process of the sector or the subsector concerned.

In defining the principles for setting ex-ante benchmarks in individual sectors and subsectors, the Commission shall consult the relevant stakeholders, including the sectors and subsectors concerned.

The Commission shall, upon the approval by the Community of an international agreement on climate change leading to mandatory reductions of greenhouse gas emissions comparable to those of the Community, review those measures to provide that free allocation is only to take place where this is fully justified in the light of that agreement.

2. In defining the principles for setting ex-ante benchmarks in individual sectors or subsectors, the starting point shall be the average performance of the 10% most efficient installations in a sector or subsector in the Community in the years 2007-2008. The Commission shall consult the relevant stakeholders, including the sectors and subsectors concerned.

The regulations pursuant to Articles 14 and 15 shall provide for harmonised rules on monitoring, reporting and verification of production-related greenhouse gas emissions with a view to determining the ex-ante benchmarks.

3. Subject to paragraphs 4 and 8, and notwithstanding Article 10c, no free allocation shall be given to electricity generators, to installations for the capture of CO_2, to pipelines for transport of CO_2 or to CO_2 storage sites.

4. Free allocation shall be given to district heating as well as to high efficiency cogeneration, as defined by Directive 2004/8/EC, for economically justifiable demand, in respect of the production of heating or cooling. In each year subsequent to 2013, the total allocation to such installations in respect of the production of that heat shall be adjusted by the linear factor referred to in Article 9.

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:

(a) the annual Community-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

(b) 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 … correction factor shall be applied if necessary.

…

7. Five percent of the Community-wide quantity of allowances determined in accordance with Articles 9 and 9a over the period from 2013 to 2020 shall be set aside for new entrants, as the maximum that may be allocated to new entrants in accordance with the rules adopted pursuant to paragraph 1 of this Article …

Allocations shall be adjusted by the linear factor referred to in Article 9.

No free allocation shall be made in respect of any electricity production by new entrants.

…

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.

…’

9 Article 11(2) of Directive 2003/87 provides:

‘By 28 February of each year, the competent authorities shall issue the quantity of allowances that

are to be allocated for that year, calculated in accordance with Articles 10, 10a and 10c.'

10 Article 23(3) of that directive states:

'Where reference is made to this paragraph, Article 5a(1) to (4) and Article 7 of Decision 1999/468/EC shall apply, having regard to the provisions of Article 8 thereof.'

Directive 2009/29/EC

11 Recitals 3, 5, 13, 14, 19 and 21 of Directive 2009/29/EC of the European Parliament and of the Council of 23 April 2009 amending Directive [2003/87] so as to improve and extend the greenhouse gas emission allowance trading scheme of the Community (OJ 2009 L 140, p. 3) state:

'(3) The European Council of March 2007 made a firm commitment to reduce the overall greenhouse gas emissions of the Community by at least 20% below 1990 levels by 2020, and by 30% provided that other developed countries commit themselves to comparable emission reductions and economically more advanced developing countries contribute adequately according to their responsibilities and respective capabilities. By 2050, global greenhouse gas emissions should be reduced by at least 50% below their 1990 levels …

…

(5) In order to contribute to achieving those long-term objectives, it is appropriate to set out a predictable path according to which the emissions of installations covered by the Community scheme should be reduced. To achieve cost-effectively the commitment of the Community to at least a 20% reduction in greenhouse gas emissions below 1990 levels, … allowances allocated in respect of those installations should be 21% below their 2005 emission levels by 2020.

…

(13) The Community-wide quantity of allowances should decrease in a linear manner calculated from the mid-point of the period from 2008 to 2012, ensuring that the [emissions trading scheme] delivers gradual and predictable reductions of emissions over time. The annual decrease of allowances should be equal to 1,74% of the allowances issued by Member States pursuant to Commission Decisions on Member States' national allocation plans for the period from 2008 to 2012, so that the Community scheme contributes cost-effectively to achieving the commitment of the Community to an overall reduction in emissions of at least 20% by 2020.

(14) … Once the issue of allowances for the period from 2008 to 2012 has taken place, the Commission will publish the Community-wide quantity of allowances. Adjustments should be made to the Community-wide quantity in relation to installations which are included in, or excluded from, the Community scheme during the period from 2008 to 2012 or from 2013 onwards.

…

(19) Consequently, full auctioning should be the rule from 2013 onwards for the power sector, taking into account its ability to pass on the increased cost of CO_2, and no free allocation should be given for the capture and storage of CO_2 as the incentive for this arises from

allowances not being required to be surrendered in respect of emissions which are stored …

…

(21) For other sectors covered by the Community scheme, a transitional system should be put in place for which free allocation in 2013 would be 80% of the amount that corresponded to the percentage of the overall Community-wide emissions throughout the period from 2005 to 2007 that those installations emitted as a proportion of the annual Community-wide total quantity of allowances. Thereafter, the free allocation should decrease each year by equal amounts resulting in 30% free allocation in 2020, with a view to reaching no free allocation in 2027.'

Decision 2011/278

12 Recitals 21 and 32 of Decision 2011/278 are worded as follows:

'(21) Where measurable heat is exchanged between two or more installations, the free allocation of … allowances should be based on the heat consumption of an installation and take account of the risk of carbon leakage. Thus, to ensure that the number of free … allowances to be allocated is independent from the heat supply structure, … allowances should be allocated to the heat consumer.

…

(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 … allowances on the basis of the heat or fuel benchmark. In the light of the general principle that no … 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.'

13 Article 10 of Decision 2011/278 is worded as follows:

'…

2. For the purpose of this calculation, Member States shall first determine the preliminary annual number of … allowances allocated free of charge for each sub-installation separately as follows:

(a) for each product benchmark sub-installation, the preliminary annual number of … allowances allocated free of charge for a given year shall correspond to the value of this product benchmark as referred to in Annex I multiplied by the relevant product-related

historical activity level;

(b) for:

(i) the heat benchmark sub-installation, the preliminary annual number of emission allowances allocated free of charge for a given year shall correspond to the value of the heat benchmark for measurable heat as referred to in Annex I multiplied by the heat-related historical activity level for the consumption of measurable heat;

(ii) the fuel benchmark sub-installation, the preliminary annual number of … allowances allocated free of charge for a given year shall correspond to the value of the fuel benchmark as referred to in Annex I multiplied by the fuel-related historical activity level for the fuel consumed;

(iii) the process emissions sub-installation, the preliminary annual number of … allowances allocated free of charge for a given year shall correspond to the process-related historical activity level multiplied by 0,9700.

…

9. The final total annual amount of … 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 … allowances allocated free of charge for each installation determined in accordance with paragraph 7 multiplied by the … correction factor as determined in accordance with Article 15(3).

For installations covered by Article 10a(3) of Directive [2003/87] and eligible for the allocation of free … allowances, the final total annual amount of … allowances allocated free of charge shall correspond to the preliminary total annual amount of … allowances allocated free of charge for each installation determined in accordance with paragraph 7 annually adjusted by the linear factor referred to in Article 10a(4) of Directive [2003/87], using the preliminary total annual amount of … allowances allocated free of charge for the installation concerned for 2013 as a reference.'

14 Article 15 of Decision 2011/278, entitled 'National implementation measures', provides:

'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 … allowances allocated free of charge.

After notification by all Member States of the preliminary total annual amounts of … allowances allocated free of charge over the period from 2013 to 2020, the Commission shall determine the … correction factor as referred to in Article 10a(5) of Directive [2003/87]. It shall be determined by comparing the sum of the preliminary total annual amounts of … allowances allocated free of charge to installations that are not electricity generators in each year over the period from 2013 to 2020 without application of the factors referred to in Annex VI with the annual amount of

allowances that is calculated in accordance with Article 10a(5) of Directive [2003/87] for installations that are not electricity generator or new entrants, taking into account the relevant share of the annual Union-wide total quantity, as determined pursuant to Article 9 of that Directive, and the relevant amount of emissions which are only included in the Union scheme from 2013 onwards.

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

…'

Decision 2013/448

15 Recitals 22, 23 and 25 of Directive 2013/448 are worded as follows:

'(22) Article 10a(5) of Directive [2003/87] limits the maximum annual quantity of allowances that is the basis for calculating allocations free of charge to installations not covered by Article 10a(3) of Directive [2003/87]. This limit is composed of two elements referred to in points (a) and (b) of Article 10a(5) of Directive [2003/87], each of which has been determined by the Commission on the basis of the quantities determined pursuant to Articles 9 and 9a of Directive [2003/87], data publicly available in the Union registry and information provided by Member States, in particular with regard to the share of emissions from electricity generators and other installations not eligible for free allocation referred to in Article 10a(3) of Directive [2003/87] as well as verified emissions in the period from 2005 to 2007 from installations only included in the [EU emissions trading scheme] from 2013 onwards, where available, taking into account the latest scientific data with regard to the global warming potential of greenhouse gases.

(23) The limit set by Article 10a(5) of Directive [2003/87] may not be exceeded, and this is ensured by the application of an annual [correction factor] which, if necessary, reduces the number of free allowances in all installations eligible for free allocation in a uniform manner. Member States have to take this factor into account when deciding on the basis of preliminary allocations and this Decision on the final annual amounts of allocation to installations. Article 15(3) of Decision 2011/278/EU requires the Commission to determine the [correction factor], which is done through comparing the sum of the preliminary total annual amounts of free allocation submitted by Member States to the limit set by Article 10a(5) in the manner set out in Article 15(3) of Decision 2011/278/EU.

…

(25) The limit set by Article 10a(5) of Directive [2003/87] is 809 315 756 allowances in 2013. In order to derive this limit, the Commission first collected from Member States and the EEA-EFTA countries information on whether installations qualify as an electricity generator or other installation covered by Article 10a(3) of Directive [2003/87]. The Commission then determined the share of emissions in the period from 2005 to 2007 from the installations not covered by that provision, but included in the [EU emissions trading scheme] in the period from 2008 to 2012. The Commission then applied this share of 34,78289436% to the quantity determined on the basis of Article 9 of Directive [2003/87] (1 976 784 044 allowances). To the result of this calculation, the Commission then added 121733050 allowances, based on

the average annual verified emissions in the period from 2005 to 2007 of relevant installations taking into account the revised scope of the [EU emissions trading scheme] as of 2013. In this respect, the Commission used information provided by Member States and the EEA-EFTA countries for the adjustment of the cap. Where annual verified emissions for the period 2005-2007 were not available, the Commission extrapolated, to the extent possible, the relevant emission figures from verified emissions in later years by applying the factor of 1,74% in reverse direction. The Commission consulted and obtained confirmation from Member States' authorities on information and data used in this respect. The limit set by Article 10a(5) of Directive [2003/87] compared to the sum of the preliminary annual amounts of free allocation without application of the factors referred to in Annex VI to Decision 2011/278/EU gives the annual [correction factor] as set out in Annex II to this Decision.'

16 Article 4 of Decision 2013/448 provides:

'The [correction factor] referred to in Article 10a(5) of Directive [2003/87] and determined in accordance with Article 15(3) of Decision 2011/278/EU is set out in Annex II to this Decision.'

17 Annex II to Decision 2013/448 sets out the following:

'Year	Cross-sectoral correction factor
2013	94,272151%
2014	92,634731%
2015	90,978052%
2016	89,304105%
2017	87,612124%
2018	85,903685%
2019	84,173950%
2020	82,438204%'

The disputes in the main proceedings and the questions referred for a preliminary ruling

Cases C-191/14 and C-192/14

18 Borealis Polyfine GmbH ('Borealis') and OMV Refining & Marketing GmbH ('OMV') are eligible for a free allocation of allowances for the period from 2013 to 2020. The Bundesminister für Land-, Forst-, Umwelt und Wasserwirtschaft (Federal Minister for Agriculture, Forestry, environment and water) adopted, by applying the correction factor, decisions determining the final quantity of allowances to be allocated to Borealis and OMV for that period.

19 Borealis and OMV brought actions against those decisions before the Landesverwaltungsgericht Niederösterreich (Regional Administrative Court, Lower Austria). In support of their actions, they submit, inter alia, that Decisions 2011/278 and 2013/448 are in part invalid. In their view,

Article 15(3) of Decision 2011/278, which sets out the method of calculation of the correction factor, and Article 4 of Decision 2013/448, by which the Commission determined that factor, modify key elements of Directive 2003/87 and, in particular, Article 10a(5) thereof. Accordingly, those two provisions are unlawful and the national decisions in which that correction factor is applied are also unlawful.

20 In those circumstances the Landesverwaltungsgericht Niederösterreich (Regional Administrative Court, Lower Austria) decided to stay the proceedings and to refer the following questions to the Court of justice for a preliminary ruling:

‘1. Is Decision 2013/448/EU invalid and does it infringe Article 10a(5) of Directive [2003/87] in so far as it excludes from the basis of calculation pursuant to subparagraphs (a) and (b) of Article 10a(5) of that directive emissions associated with waste gases produced by installations falling within Annex I to Directive [2003/87] and heat used by installations falling within Annex I to Directive [2003/87] and which comes from combined heat and power installations, for which a free allocation is granted pursuant to Article 10a(1) and 10a(4) of Directive [2003/87] and Decision 2011/278/EU?

2. Is Decision 2013/448 invalid and does it infringe Article 3e and 3u of Directive [2003/87], alone and/or in conjunction with Article 10a(5) of Directive [2003/87], in so far as it provides that CO_2 emissions associated with waste gases — which are produced by installations falling within Annex I to Directive [2003/87] — and heat used in installations falling within Annex I to Directive [2003/87] and which was acquired by combined heat and power installations are emissions from “electricity generators”?

3. Is Decision 2013/448 invalid and does it infringe the objectives of Directive [2003/87] in so far as it creates an asymmetry by excluding emissions associated with the combustion of waste gases and with heat produced in cogeneration from the basis of calculation in subparagraphs (a) and (b) of Article 10a(5), whereas free allocation with regard to them is due in accordance with Article 10a(1) and 10a(4) of Directive [2003/87] and Decision 2011/278?

4. Is Decision 2011/278 invalid and does it infringe Article 290 TFEU and Article 10a(5) of Directive [2003/87] in so far as Article 15(3) of that decision amends subparagraphs (a) and (b) of Article 10a(5) of Directive [2003/87] to the effect that it replaces the reference to “installations which are not covered by paragraph 3” by the reference to “installations that are not electricity generators”?

5. Is Decision 2013/448 invalid and does it infringe Article 23(3) of Directive [2003/87] in so far as that decision was not adopted on the basis of the regulatory procedure with scrutiny which is laid down in Article 5a of Council Decision 1999/468/EC [of 28 June 1999 laying down the procedures for the exercise of implementing powers conferred on the Commission (OJ 1999 L 184, p. 23),] and Article 12 of Regulation (EU) No 182/2011 [of the European Parliament and of the Council of 16 February 2011 laying down the rules and general principles concerning mechanisms for control by Member States of the Commission’s exercise of implementing powers (OJ 2011 L 55, p. 13)]?

6. Is Article 17 of the European Charter of Fundamental Rights [(“the Charter”)] to be understood as precluding the retention of free allocations on the basis of the wrongful calculation of a … correction factor?

7. Is Article 10a(5) of Directive [2003/87], on its own and/or in conjunction with Article 15(3) of Decision 2011/278, to be understood as precluding the application of a provision of national law which provides for the application of the wrongfully calculated … correction factor, as determined in Article 4 of Decision 2013/448 and in Annex II thereto, to the free allocations in a Member State?

8. Is Decision 2013/448 invalid and does it infringe Article 10a(5) of Directive [2003/87] in so far as it includes only emissions from installations which were contained in the Community scheme from 2008, with the result that it excludes those emissions which are associated with activities which were contained in the Community scheme from 2008 (in the amended Annex I to Directive [2003/87]) if those activities took place in installations which were already contained in the Community scheme prior to 2008?

9. Is Decision 2013/448 invalid and does it infringe Article 10a(5) of Directive [2003/87] in so far as it includes only emissions from installations which were contained in the Community scheme from 2013, with the result that it excludes those emissions which are associated with activities which were contained in the Community scheme from 2013 (in the amended Annex I to Directive [2003/87]) if those activities took place in installations which were already contained in the Community scheme prior to 2013?'

Case C-295/14

21 By provisional decision of 2 July 2012, the Staatssecretaris van Infrastructuur en Milieu (Secretary of State for infrastructure and the environment) allocated free allowances to various undertakings for the period from 2012 to 2020. He amended that decision by a decision of 29 October 2013 by applying the correction factor provided for in Article 10a(5) of Directive 2003/87.

22 An action was brought before the Raad van State (Council of State) against that latter decision. In support of their action, the applicants in the main proceedings in Case C-295/14 submit, inter alia, that Decision 2013/448 is unlawful in so far as it determines the correction factor in disregard of the requirements laid down in Directive 2003/87. Moreover, they dispute the validity of Article 15(3) of Decision 2011/278 which sets out the rules regarding the determination of the correction factor provided for in Article 10a(5) of that directive.

23 The Raad van State (Council of State) considers that some of the arguments raised by the applicants in the main proceedings in Case C-295/14 to challenge the validity of Decisions 2013/448 and 2011/278 are potentially well founded. However, it points out that it is apparent from the judgment in *TWD Textilwerke Deggendorf* (C-188/92, EU:C:1994:90) that an individual cannot plead before a national court the illegality of a Commission decision where it could, undoubtedly, have sought the annulment of that decision before the General Court of the European Union. In the case at hand, it cannot be ruled out that those applicants are individually concerned, since they form part of a limited class of economic operators.

24 As regards the substance, the Raad van State (Council of State) harbours doubts as to whether Decision 2013/448 constitutes an implementing measure, within the meaning of Article 10a(1) of Directive 2003/87, which should have been adopted in accordance with the regulatory procedure with scrutiny referred to in Article 23(3) of that directive. However, that court explains that it does not rule out that Article 15(3) of Decision 2011/278, which was adopted in accordance with that procedure, may constitute the legal basis for Decision 2013/448.

25 In so far as concerns the interpretation of Article 10a(5) of Directive 2003/87, the Raad van State (Council of State) considers that it cannot be ruled out that that provision requires, when determining the correction factor, that account be taken of emissions associated, first, with electricity generation from waste gases and, second, with heat produced in cogeneration. If that is indeed the case, that provision would preclude Article 15(3) of Decision 2011/278 and, consequently, Article 4 of Decision 2013/448 also. In its submission, it is apparent from Article 15(3) of Decision 2011/278 that only emissions from installations which do not generate electricity are taken into account when determining the correction factor.

26 Moreover, the Raad van State (Council of State) considers that the determination of the maximum quantity of allowances which may be allocated free of charge on an annual basis from 2013 could be contrary to subparagraph (b) of Article 10a(5) of Directive 2003/87. However, that court decided not to refer a question for a preliminary ruling in that respect. It considers that the Kingdom of the Netherlands communicated to the Commission all the data necessary for it to be able to calculate that quantity. In its view, it is apparent from that provision, read in conjunction with Article 9a(2) of Directive 2003/87, that it refers only to emissions of installations which have been part of the allowance trading scheme since 2013. By contrast, the applicants in the main proceedings consider that emissions generated by installations which were already part of the allowance trading scheme before that date are relevant for the determination of the maximum number of allowances which may be allocated free of charge.

27 According to the Raad van State (Council of State), Decision 2013/448 could also be unlawful as a result of the fact that the data submitted to the Commission in accordance with the second subparagraph of Article 9a(2) of Directive 2003/87, read in conjunction with Article 14(1) thereof, was not gathered in accordance with Commission Regulation (EU) No 601/2012 of 21 June 2012 on the monitoring and reporting of greenhouse gas emissions pursuant to Directive [2003/87] of the European Parliament and of the Council (OJ 2012 L 181, p. 30).

28 As for the question whether sufficient grounds were provided for Decision 2013/448, the Raad van State (Council of State) considers that, on the one hand, that decision does not contain all the relevant information for the calculation of the correction factor and that, on the other hand, the applicants in the main proceedings in Case C-295/14 were not in a position to become aware of all of the relevant data.

29 In those circumstances the Raad van State (Council of State) decided to stay the proceedings and to refer the following questions to the Court of Justice for a preliminary ruling:

‘1. Must the fourth paragraph of Article 263 TFEU be interpreted as meaning that operators of installations to which, as from the beginning of 2013, the emissions-trading rules laid down in Directive [2003/87] have been applicable, with the exception of operators of the installations referred to in Article 10a(3) of that directive and of newcomers, could undoubtedly have brought an action before the General Court seeking the annulment of Decision 2013/448, in so far as the … correction factor is determined by that decision?

2. Is Decision 2013/448, in so far as the … correction factor is determined thereby, invalid because that decision was not adopted in accordance with the regulatory procedure with scrutiny referred to in Article 10a(1) of Directive [2003/87]?

3. Is Article 15 of Commission Decision 2011/278 contrary to Article 10a(5) of Directive [2003/87] because the former article precludes emissions from electricity generators from being taken into account in the determination of the … correction factor? If so, what are the

consequences of that conflict for Decision 2013/448?

4. Is Decision 2013/448, in so far as the … correction factor is determined thereby, invalid because that decision is based on, inter alia, data submitted pursuant to Article 9a(2) of Directive [2003/87] without the provisions to be adopted pursuant to Article 14(1), referred to in Article 9a(2), having been established?

5. Is Decision 2013/448, in so far as the … correction factor is determined thereby, contrary to, in particular, Article 296 TFEU or Article 41 of [the Charter] on the ground that the quantities of emissions and emission allowances which determined the calculation of the correction factor are set out only partially in that decision?

6. Is Decision 2013/448, in so far as the … correction factor is determined thereby, contrary to, in particular, Article 296 TFEU or Article 41 of [the Charter] on the ground that that correction factor was determined on the basis of data of which the operators of the installations involved in emissions trading could not have become aware?'

Cases C-389/14 and C-391/14 to C-393/14

30 A number of actions were brought before the Tribunale amministrativo regionale per il Lazio (Regional Administrative Court, Lazio) concerning, inter alia, the validity of Decisions Nos 29/2013, 10/2014 and 16/2014 of the Comitato nazionale per la gestione della direttiva 2003/87/CE e per il supporto nella gestione delle attività di progetto del protocollo di Kyoto (National Committee for the management of Directive 2003/87 and for support in the management of project activities under the Kyoto Protocol), adopted pursuant to Decision 2013/448.

31 It is submitted before that court, in essence, that those decisions of the National Committee for the management of Directive 2003/87 and for support in the management of project activities under the Kyoto Protocol are unlawful in so far as the correction factor was applied which, itself, is not consistent with Article 10a(5) of that directive.

32 In that regard, the Tribunale amministrativo regionale per il Lazio (Regional Administrative Court, Lazio) considers that, by adopting Decision 2013/448, the Commission modified key elements of Directive 2003/87. In its view, pursuant to Article 10a(5) of that directive, the correction factor must be determined by taking account of the emissions of installations which are not covered by Article 10a(3). It is apparent from the reference to that latter provision that the Commission should have taken account, when determining the correction factor, of emissions generated by all activities not referred to therein. This would include emissions associated, first, with the generation of electricity from waste gases and, second, with heat produced in cogeneration. The Commission's approach created an asymmetrical relationship between emissions capable of benefitting from an allocation of free allowances and allowances actually allocated. Such asymmetry, it submits, is contrary to the objectives of Directive 2003/87, as set out, inter alia, in Article 10a thereof.

33 The Tribunale amministrativo regionale per il Lazio (Regional Administrative Court, Lazio) further considers that the application of the correction factor is likely to adversely affect the legitimate expectations of operators ultimately to be able to use the allowances allocated to them on a provisional basis before the correction factor was applied.

34 The Tribunale amministrativo regionale per il Lazio (Regional Administrative Court, Lazio) considers the statement of reasons for Decision 2013/448 to be inadequate. Given that those reasons do not provide information on the actual data used by the Commission, it is not possible to

infer from them the reasons why it was necessary to apply a correction factor as high as that laid down in Decision 2013/448.

35 Moreover, that decision does not take into account the changes in the interpretation of the term ‘combustion plant’ made at the end of the first phase of trading (2005 to 2007). It is true that the Commission stated that the emissions generated by certain types of combustion taking place in installations which were not assimilated to ‘combustion installations’ by certain Member States had to be regarded as such and taken into account as from 2008. However, the Commission determined the correction factor on the basis only of the emissions registered in the independent journal of transactions between 2005 and 2007, which did not include the emissions generated by those installations.

36 According to the Tribunale amministrativo regionale per il Lazio (Regional Administrative Court, Lazio), the broadening of the scope of Directive 2003/87 during 2013 was also the root of an error capable of affecting the validity of Decision 2013/448. The data provided by the Member States in accordance with Article 9a(2) of that directive and used by the Commission to determine the sum referred to in subparagraph (b) of Article 10a(5) of that directive were incoherent. The Kingdom of the Netherlands, in particular, provided the Commission with only data relating to the emissions from installations which were subject to Directive 2003/87 for the first time from 2013 onwards. In addition to that data, the Kingdom of Belgium and the French Republic also submitted data relating to emissions from installations previously covered by Directive 2003/87, which result from activities which have fallen within the scope of that directive since 2013. Furthermore, the Tribunale amministrativo regionale per il Lazio (Regional Administrative Court, Lazio) states that Decision 2013/448 was not adopted in accordance with the regulatory procedure with scrutiny referred to in Article 10a(1) and Article 23(3) of Directive 2003/87 and could be invalid on that basis.

37 In those circumstances the Tribunale amministrativo regionale per il Lazio (Regional Administrative Court, Lazio) decided to stay the proceedings and to refer the following questions to the Court of Justice for a preliminary ruling:

‘1. Is Decision 2013/448 invalid for not having taken into account, in the calculation of the allowances to be allocated free of charge, the percentage of emissions associated with waste gas combustion — or steel processing gas — or of emissions associated with the heat produced by cogeneration, thereby infringing Article 290 TFEU and Article 10a(1),(4) and (5) of Directive [2003/87], going beyond the limits of the powers conferred by that directive and at variance with its objectives (to encourage more energy-efficient techniques and to protect the needs of economic development and employment)?

2. Is Decision 2013/448 invalid, in the light of Article 6 TEU, on grounds of its inconsistency with Article 1 of the Additional Protocol to the European Convention for the Protection of Human Rights and Fundamental Freedoms[, signed in Rome on 4 November 1950] (“the ECHR”) and Article 17 of the ECHR, owing to undue failure to respect the applicant companies’ legitimate expectation of remaining in possession of a good consisting of the number of the allowances allocated to them on a preliminary basis and to which they are entitled on the basis of Directive [2003/87], thereby depriving those companies of the economic benefit associated with that good?

3. Furthermore, is Decision 2013/448 invalid as regards its definition of the cross-sectoral correction factor, given that the decision infringes the second paragraph of Article 296 TFEU and Article 41 of [the Charter] owing to its failure to provide an adequate statement of

reasons?

4. Is Decision 2013/448 invalid as regards its definition of the cross-sectoral correction factor, given that the decision infringes Article 10a(5) of Directive [2003/87], fails to respect the principle of proportionality enshrined in Article 5(4) TEU and is also vitiated by failure to carry out a proper inquiry and error of assessment, in the light of the fact that the calculation of the maximum number of allowances to be allocated free of charge (relevant for the purposes of defining a uniform cross-sectoral correction factor) did not take into account the effects of the changes in the interpretation of the term "combustion plant" between the first phase (2005 to 2007) and the second phase (2008 to 2012) of the implementation of Directive [2003/87]?

5. Is Decision 2013/448 invalid as regards its definition of the cross-sectoral correction factor, on grounds of infringement of Articles 10a(5) and 9a(2) of Directive [2003/87], and also on account of the failure to carry out a proper inquiry and error of assessment, in view of the fact that the calculation of the maximum number of allowances to be allocated free of charge (relevant for the purposes of defining a uniform cross-sectoral correction factor) was made on the basis of data, provided by the Member States, which are mutually inconsistent because based on different interpretations of Article 9a(2) of Directive [2003/87]?

6. Is Decision 2013/448 invalid as regards its definition of the cross-sectoral correction factor, on grounds of infringement of the procedural rules under Articles 10a(1) and 23(3) of Directive [2003/87]?'

Joinder for the purposes of the judgment

38 Given that all of the questions referred are connected, as was confirmed during the oral procedure, it is appropriate to join all of the cases for the purposes of the judgment, in accordance with Article 54 of the Rules of Procedure of the Court of Justice.

Application to reopen the oral procedure

39 Following the delivery of the Opinion of the Advocate General on 12 November 2015, BP Raffinaderij Rotterdam BV and Others requested, by a document lodged at the Registry of the Court of Justice on 7 March 2016, that the Court order that the oral part of the procedure be reopened. In support of their application, those undertakings essentially submit that the interpretation of Article 10a(5)(b) of Directive 2003/87 given in that Opinion is erroneous.

40 It should be pointed out that the Court may, at any time, after hearing the Advocate General, order the reopening of the oral part of the procedure, under Article 83 of its Rules of Procedure, in particular if it considers that it lacks sufficient information or where the case must be decided on the basis of an argument which has not been debated between the parties or the interested persons referred to in Article 23 of the Statute of the Court of Justice (judgment in *Nordzucker*, C-148/14, EU:C:2015:287, paragraph 24).

41 That is not the case in this instance. Like the other intervening parties, BP Raffinaderij Rotterdam BV and Others made known, during the written and oral stages of the procedure, their arguments relating to the interpretation of Article 10a(5)(b) of Directive 2003/87. Accordingly, the Court considers, after hearing the Advocate General, that it has sufficient information to be able to adjudicate and that the present case does not need to be decided on the basis of arguments that have

not been discussed.

42 In the light of the foregoing considerations, the Court considers that it is not necessary to order that the oral part of the procedure be reopened.

Consideration of the questions referred

Admissibility

43 By its first question, the Raad van State (Council of State) harbours doubts as to the admissibility of the requests for a preliminary ruling on the validity of Decision 2013/448 in the light of the judgment of the Court of Justice in *TWD Textilwerke Deggendorf* (C-188/92, EU:C:1994:90).

44 Moreover, the Netherlands Government considers that greenhouse gas-emitting undertakings are directly concerned by Article 4 of Decision 2013/448 determining the correction factor. That factor, it submits, leads to a reduction in free allowances to be allocated and the Member States have no discretion when applying it. Moreover, those undertakings are also individually concerned by that decision, within the meaning of the judgment in *Stichting Woonpunt and Others* v *Commission* (C-132/12 P, EU:C:2014:100). As holders of emissions allowances they form part of a limited class of economic operators. As such, they had been allocated temporary allowances by the national authorities free of charge. Given that the application of the correction factor leads to a reduction in those allowances, Decision 2013/448 modifies the rights previously acquired by those undertakings.

45 Consequently, the Netherlands Government takes the view that, since the applicants in the main proceedings have not contested Decision 2013/448 before the General Court in accordance with Article 263 TFEU, they cannot indirectly call the validity of that decision into question by seeking a preliminary ruling.

46 The Court points out, in that regard, that the possibility for a litigant to plead before the court hearing its action the invalidity of provisions in European Union acts presupposes that the party in question had no right of direct action under Article 263 TFEU by which it could challenge those provisions (see judgments in *TWD Textilwerke Deggendorf*, C-188/92, EU:C:1994:90, paragraph 23, and *Valimar*, C-374/12, EU:C:2014:2231, paragraph 28).

47 However, it follows from the same case-law that, for an action seeking invalidity to be able to be brought, the admissibility of such an action by that party must be beyond any doubt.

48 It should be recalled that, under the fourth paragraph of Article 263 TFEU, ‘any natural or legal person may, under the conditions laid down in the first and second paragraphs, institute proceedings against an act addressed to that person or which is of direct and individual concern to them, and against a regulatory act which is of direct concern to them and does not entail implementing measures’.

49 The applicability of the first and third conditions of that provision must be dismissed from the outset. First, Decision 2013/448 is an act of general application the addressees of which are the Member States and, second, it is for the latter, in accordance with Articles 15(4) and 10(9) of Decision 2011/278, to adopt implementing measures within the meaning of the fourth paragraph of Article 263 TFEU so as to implement the correction factor determined in Article 4 of Decision

2013/448, read in conjunction with Annex II to that decision.

50 Consequently, the applicants in the main proceedings would have had standing to bring an action for the annulment of Decision 2013/448 only if it had been of direct and individual concern to them.

51 As regards the second of the conditions laid down in the fourth paragraph of Article 263 TFEU, that is to say, being individually concerned by the act in question, it is settled case-law that persons other than those to whom a decision is addressed may claim to be individually concerned only if that decision affects them by reason of certain attributes which are peculiar to them or by reason of circumstances in which they are differentiated from all other persons and by virtue of these factors distinguishes them individually just as in the case of the person addressed (judgments in *Plaumann* v *Commission*, 25/62, EU:C:1963:17, 223, and *T & L Sugars and Sidul Açúcares* v *Commission*, C-456/13 P, EU:C:2015:284, paragraph 63).

52 The mere possibility of determining more or less precisely the number or even the identity of the persons to whom a measure applies by no means implies that the measure must be regarded as being of individual concern to them, as long as it is established that such application takes effect by virtue of an objective legal or factual situation defined by the measure in question (judgment in *Stichting Woonpunt and Others* v *Commission*, C-132/12 P, EU:C:2014:100, paragraph 58).

53 It is, however, clear from settled case-law that where the decision affects a group of persons who were identified or identifiable when that measure was adopted by reason of criteria specific to the members of the group, those persons might be individually concerned by that measure inasmuch as they form part of a limited class of traders and that that can be the case particularly when the decision alters rights acquired by the individual prior to its adoption (judgment in *Stichting Woonpunt and Others* v *Commission*, C-132/12 P, EU:C:2014:100, paragraph 59).

54 In the present case, Decision 2013/448, in so far as it determines the correction factor, affects the applicants in the main proceedings in their objective capacity as operators of greenhouse gas-emitting installations, without taking account of their individual situation.

55 Moreover, the fact that Decision 2013/448 determines the correction factor does not, of itself, modify the rights acquired by those applicants prior to the adoption of that decision, since the final allocation of free allowances requires that the correction factor be determined first of all. In accordance with Articles 10a(5) and 11(2) of Directive 2003/87, in conjunction with the first paragraph of Article 10(9) of Decision 2011/278, it is by applying that correction factor that the Member States determine the final total amount of allowances to be granted free of charge.

56 Those considerations relating to Decision 2013/448 apply *mutatis mutandis* to Article 15(3) of Decision 2011/278, the validity of which is also at issue. That provision, which is addressed to both the Member States and the Commission, essentially reproduces the detailed rules for determining the correction factor as set out in Article 10a(5) of Directive 2003/87.

57 In the light of those considerations, it cannot be considered that a direct action, for the purposes of Article 263 TFEU, of the applicants in the main proceedings against Decisions 2011/278 and 2013/448 would have been admissible beyond any doubt.

58 In those circumstances, the requests for a preliminary ruling must be declared admissible in so far as they concern both the examination of the validity of Decision 2013/448 and that of Decision

2011/278.

Validity of Decision 2011/278

59 By the first four questions in Cases C-191/14 and C-192/14, the third question in Case C-295/14 and the first question in Cases C-389/14 and C-391/14 to C-393/14, the referring courts essentially request the Court of Justice to adjudicate on the validity of Article 15(3) of Decision 2011/278 in so far as that provision precludes emissions from electricity generators from being taken into account in the determination of the maximum annual amount of allowances within the meaning of Article 10a(5) of Directive 2003/87 ('the maximum annual amount of allowances').

60 In so far as that amount is decisive for the correction factor, the invalidity of Article 15(3) of Decision 2011/278 would, consequently, affect the validity of Article 4 of Decision 2013/448 and Annex II to that decision, in which the Commission determined that factor.

61 The applicants in the main proceedings consider that it is apparent from Article 10a(5) of Directive 2003/87 that, when determining the correction factor, the Commission should have included emissions from certain electricity generators in the maximum annual amount of allowances. They submit, more specifically, that the exclusion of emissions associated with the generation of electricity and with heat produced in cogeneration is contrary to that provision.

62 The Court notes, in that regard, that the correction factor is determined when required by the result of the arithmetic provided for in Article 10a(5) of Directive 2003/87. It is apparent from that provision, read in the light of Article 15(3) of Decision 2011/278, that the Commission is required to compare, first, the preliminary amount of allowances allocated free of charge to installations not covered by Article 10a(3) of that directive and, second, the maximum annual amount of allowances. The latter amount corresponds to the total amount of the allowances referred to in subparagraphs (a) and (b) of Article 10a(5) of Directive 2003/87.

63 It is not until the preliminary amount of allowances allocated free of charge to installations not covered by Article 10a(3) of Directive 2003/87 exceeds the maximum annual amount of allowances that the Commission determines the correction factor in accordance with the result of that comparison.

64 So far as concerns the exclusion of the emissions from electricity generators from the maximum annual amount of allowances, that exclusion results from the scope of Article 10a(5) of Directive 2003/87 which is limited to 'installations which are not covered by [Article 10a(3)]'. Article 10a(3) of Directive 2003/87 refers to electricity generators, to installations for the capture of CO_2, to pipelines for transport of CO_2 or to CO_2 storage sites and states that such installations are, in principle, excluded from the free allocation of allowances.

65 Consequently, the reference in Article 10a(5) of Directive 2003/87 to 'installations which are not covered by paragraph 3' must be understood as referring to installations which are neither electricity generators, installations for the capture of CO_2, pipelines for transport of CO_2 nor CO_2 storage sites.

66 The fact that the prohibition provided for in Article 10a(3) of Directive 2003/87 applies subject to the rules laid down in other provisions cannot invalidate that finding. As stated by the Advocate General in point 73 of her Opinion, the exclusion of the installations referred to in Article 10a(3) from the free allocation of allowances results directly from that rule of principle, from which it is

permissible to derogate on the basis of other provisions.

67 Moreover, the values referred to in Article 10a(5) of Directive 2003/87 are based on historical data. As pointed out by the Commission at the hearing, during the reference periods, unlike electricity generators, installations for the capture of CO_2, pipelines for transport of CO_2 and CO_2 storage sites, referred to in Article 10a(3) of that directive, did not exist. Consequently, with a view to adopting implementing measures within the meaning of Article 10a(1) of Directive 2003/87 so as to implement Article 10a(5) of the directive, the Commission could validly interpret the reference in that latter provision to 'installations which are not covered by paragraph 3' as referring only to those which are not electricity generators.

68 As a consequence, by not permitting the taking into account of the emissions of electricity generators in determining the maximum annual amount of allowances, Article 15(3) of Decision 2011/278 is consistent with the wording of Article 10a(5) of Directive 2003/87, read in conjunction with Article 10a(3) of that directive.

69 That interpretation is also consistent with the broad logic of Directive 2003/87 and the objectives which it pursues.

70 Article 15(3) of Decision 2011/278 reflects the dichotomy laid down, inter alia, in Article 10a(1), third subparagraph, and (3) to (5) of Directive 2003/87. In accordance with those provisions, a distinction needs to be made between the installations covered by Article 10a(3) of that directive and other installations which generate greenhouse gases ('industrial installations'). Electricity generators, inter alia, within the meaning of Article 3(u) of that directive fall within the first group.

71 In accordance with that distinction, pursuant to the first subparagraph of Article 10(9) of Decision 2011/278, the correction factor is applied only to the preliminary amount of allowances allocated free of charge to industrial installations. So far as concerns the installations falling within Article 10a(3) of Directive 2003/87 which, nonetheless, satisfy the conditions for the free allocation of allowances, the second subparagraph of Article 10(9) of Decision 2011/278 provides that the final total amount of allowances allocated free of charge results from the adjustment of the preliminary total annual amount by only the linear factor provided for in Article 9 of Directive 2003/87.

72 Despite the clear distinction between electricity generators and industrial installations, the latter may receive free allowances for certain emissions which are related to electricity generation. However, those emissions are not taken into account in the maximum annual amount of allowances.

73 As regards the generation of electricity from waste gases, it is apparent from recital 32 of Decision 2011/278 that, pursuant to the third subparagraph of Article 10a(1) of Directive 2003/87, the Commission took account of emissions which are related to the efficient energy recovery of waste gases. As noted by the Advocate General in point 68 of her Opinion, the Commission adapted, to that end, certain product benchmarks, namely those for coke, hot metal and sintered ore. It thereby seeks to encourage undertakings to reuse or sell the waste gases generated during the manufacture of those products. It is further apparent from recital 32 of Decision 2011/278 that their reuse, in another process by an industrial installation, results, in principle, in the entitlement to additional free allowances. Although the combustion of those gases by electricity generators does not benefit from such additional allowances, their sale to such electricity generators enables producers of waste gases to save on allowances.

74 Since the preliminary annual number of allowances granted free of charge to industrial installations corresponds, in accordance with Article 10(2) of Decision 2011/278, inter alia, to the value of the benchmarks referred to in Annex I of that decision, including those for coke, hot metal and sintered ore, multiplied by the relevant product-related historical activity level, that number increased in accordance with the adaptations made by the Commission. However, in so far as the waste gases were combusted by electricity generators, the corresponding emissions were not taken into account when establishing the maximum annual amount of allowances.

75 As regards the production of heat produced in cogeneration, it is apparent from Article 10a(3) and (5) of Directive 2003/87 that the emissions from electricity generators, including those emitted by cogeneration installations which generate electricity, are not taken into account for the purposes of determining the maximum annual amount of allowances. By contrast, the third subparagraph of Article 10a(1) of Directive 2003/87 provides that the manner of allocating allowances encourages the use of effective techniques to reduce greenhouse gas emissions and improve energy efficiency, by taking account, inter alia, of high efficiency cogeneration. In that respect, recital 21 of Decision 2011/278 states that, to ensure that the number of allowances to be allocated free of charge is independent from the heat supply structure, allowances should be allocated to the heat consumer.

76 As stated by the Advocate General in point 87 of her Opinion, the fact that installations which generate heat themselves and installations which obtain heating from cogeneration installations are treated in the same way facilitates the management of use of heat in the context of the free allocation of allowances. In principle, it is not necessary to verify how much heating individual installations obtain and from which sources to be able to allocate allowances to those installations. Moreover, that mechanism contributes to the attainment of the objective of promoting the use of techniques such as cogeneration since, by procuring heating from cogeneration installations, industrial installations save allowances which they can sell.

77 That asymmetrical taking into account of emissions related to electricity production from waste gas and of heat produced in cogeneration leads to an increase in the correction factor which, as has been noted in paragraphs 62 and 63 above, results from a comparison between, first, the preliminary total amount of allowances allocated free of charge to industrial installations and, second, the maximum annual amount of allowances.

78 It is true that, as a result of those asymmetries, the correction factor is likely to diminish the effects of the measures taken by the Commission pursuant to the third subparagraph of Article 10a(1) of Directive 2003/87. However, contrary to what is claimed by some of the applicants in the main proceedings, the Commission was not required to adopt a symmetrical approach to dealing with those emissions when establishing the maximum annual amount of allowances. On the contrary, it is apparent from paragraphs 62 to 68 above that the exclusion, for the purposes of determining that amount, of emissions from electricity generators results from Article 10a(5) of that directive, which does not grant the Commission any discretion in that regard.

79 Furthermore, such asymmetrical treatment of emissions is consistent with the main objective of Directive 2003/87, which is to protect the environment by means of a reduction of greenhouse gas emissions (see, to that effect, judgment in *Arcelor Atlantique and Lorraine and Others*, C-127/07, EU:C:2008:728, paragraph 31).

80 In that regard, it can be seen from the second paragraph of Article 1 of Directive 2003/87 that the directive provides for greater reductions of greenhouse gas emissions so as to contribute to the levels of reductions that are considered scientifically necessary to contribute to limiting climate change.

81 To that end, as is apparent, inter alia, from recitals 3 and 5 of Directive 2009/29, Directive 2003/87 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. In order to attain that objective, the EU legislature devised two mechanisms. The first, put in place by Article 9 of Directive 2003/87, consists, pursuant to recitals 13 and 14 of Directive 2009/29, in the reduction in the number of allowances available by the application of a linear factor of 1.74% compared to the average annual total quantity of allowances issued by Member States in accordance with the Commission Decisions on their national allocation plans for the period from 2008 to 2012. The second mechanism is the auctioning of allowances, which also aims to facilitate the reduction of greenhouse gas emissions in an economically efficient manner.

82 In accordance with recital 19 of Directive 2009/29, it is clear from Articles 10(1) and 10a(3) of Directive 2003/87 that full auctioning of allowances has been the rule for electricity generators since 2013. So far as concerns the installations which receive allowances free of charge after that date, in accordance with Article 10a(11) of Directive 2003/87, read in the light of recital 21 of Directive 2009/29, the quantity of such allowances allocated is to decrease gradually, with a view to reaching no free allocation in 2027.

83 As pointed out by the Advocate General in points 57 and 58 of her Opinion, the correction factor contributes to the attainment of those objectives. First, that factor gives effect to the linear reduction of available allowances provided for in Article 9 of Directive 2003/87. Second, since the maximum annual amount of allowances does not take account of emissions related to electricity generation, it ensures that the final amount of free allowances to be allocated free of charge to industrial installations does not include those emissions. In doing so, the correction factor seeks to compensate the taking into account of emissions associated with electricity generation from waste gases and of heating produced in cogeneration when determining the preliminary amount of allowances to be allocated free of charge.

84 The considerations set out in paragraphs 62 to 83 above are also valid for Decision 2013/448 in so far as the correction factor in that decision was determined in accordance with Article 15(3) of Decision 2011/278.

85 It follows from all of the foregoing considerations that the examination of the first four questions in Cases C-191/14 and C-192/14, the third question in Case C-295/14 and the first question in Cases C-389/14 and C-391/14 to C-393/14 has disclosed nothing to affect the validity of Article 15(3) of Decision 2011/278 in so far as that provision precludes emissions from electricity generators from being taken into account in the determination of the maximum annual amount of allowances.

Validity of Decision 2013/448

86 By the ninth question in Cases C-191/14 and C-192/14 and the fifth question in Cases C-389/14 and C-391/14 to C-393/14, the Landesverwaltungsgericht Niederösterreich (Regional Administrative Court, Lower Austria) and the Tribunale amministrativo regionale per il Lazio (Regional Administrative Court, Lazio) seek, in essence, a ruling from the Court of Justice on the validity of Article 4 of, and Annex II to, Decision 2013/448 in so far as the correction factor determined therein is based on incoherent data.

87 The applicants in the main proceedings consider that the Commission committed errors in determining the maximum annual amount of allowances. Those errors result from divergent

interpretations of subparagraph (b) of Article 10a(5) of Directive 2003/87, which, in their view, refers to all emissions 'which are only included in the Community scheme from 2013 onwards' by the Member States.

88 The applicants in the main proceedings relied on the same errors before the Raad van State (Council of State). However, that court has not referred a question in that respect to the Court of Justice. It considers that the data relating to the emissions of Netherlands installations which were communicated to the Commission are compliant with the requirements of Article 10a(5) of Directive 2003/87. That provision requires that only the emissions from installations which have been subject to the allowance trading scheme only since 2013 be taken into account to determine the maximum annual amount of allowances.

89 It should be pointed out, in that respect, that the different language versions are not consistent with one another. Whereas the French version of subparagraph (b) of Article 10a(5) of Directive 2003/87 refers to 'emissions … which are only included in the Community scheme from 2013 onwards', other language versions, such as the Spanish, Danish, German, English, Italian, Netherlands, Polish, Portuguese, Romanian, Slovene and Swedish language versions, refer to 'emissions from installations … which are only included in the Community scheme from 2013 onwards'.

90 It is settled case-law of the Court that the need for a uniform interpretation of a provision of EU law means that, where there is divergence between the various language versions of the provision, the latter must be interpreted by reference to the context and purpose of the rules of which it forms part (judgment in *Nike European Operations Netherlands*, C-310/14, EU:C:2015:690, paragraph 17).

91 The fact that subparagraph (b) of Article 10a(5) of Directive 2003/87 refers only to 'emissions from installations … which are only included in the Community scheme from 2013 onwards' and not to all of the emissions included as from that date is apparent from the general scheme of that directive. Article 9a(2) of Directive 2003/87, inserted into the directive pursuant to Article 1, point 10 of Directive 2009/29, seeks to ensure, as is apparent from recital 14 of the latter directive, that adjustments are made to the Community-wide quantity in relation to emissions from installations which are included in the allowance trading scheme from 2013 onwards.

92 As stated by the Advocate General in point 50 of her Opinion, the scope of Directive 2003/87 has been broadened from 1 January 2013 onwards so as to include, inter alia, emissions from the production of aluminium and from certain sectors of the chemicals industry. To that end, Annex I to Directive 2003/87, which lists the categories of activities which fall within the scope of that directive was amended by Directive 2009/29. Consequently, the quantity of allowances to be allocated EU-wide was adapted, in accordance with Article 9a(2) of Directive 2003/87, to include emissions from 'installations carrying out activities listed in Annex I [to that directive], which are only included in the Community scheme from 2013 onwards'.

93 Subparagraph (b) of Article 10a(5) of Directive 2003/87 takes account of the adaptation of the amount of allowances allocated Community-wide so as to reflect, in the maximum annual amount of allowances, the increase corresponding to the preliminary amounts of allowances allocated free of charge to industrial installations. Thus, given the interplay between that provision and Article 9a(2) of the directive, it would be incoherent to use different data.

94 It is apparent from the foregoing considerations that, when establishing the maximum annual amount of allowances, the Commission was required, in accordance with subparagraph (b) of

Article 10a(5) of Directive 2003/87, to take account only of the emissions from the installations included in the Community system from 2013 onwards. Thus, that provision precludes the taking into account of emissions resulting from the activities listed in Annex I to Directive 2003/87 as from 2013 in so far as those emissions were generated by installations covered by the allowance trading scheme prior to that date.

95 However, the written observations submitted to the Court and the explanations provided by the Commission during the oral part of the procedure show that the Commission took account, at least in part, of the emissions of installations covered by the allowance trading scheme before 2013 in determining the maximum annual amount of allowances. Consequently, that amount does not meet the requirements of subparagraph (b) of Article 10a(5) of Directive 2003/87 in that it is too high.

96 That finding cannot be invalidated by the Commission's argument that Directive 2003/87 does not authorise it to amend the data with which the Member States provided it pursuant to Article 9a(2) of that directive.

97 That provision contains a double obligation. First, the Member States are to collect emissions data from the installations which form part of the allowance trading scheme only from 2013 onwards and, second, that data is to be communicated to the Commission so that it can adopt any measures required by Directive 2003/87. Thus, the Commission should have ensured that the Member States communicated the relevant data to it, so as to enable it to comply with its own obligations. At the very least, in so far as that data did not enable it to determine the maximum annual amount of allowances and, consequently, the correction factor, it should have requested the Member States to make the necessary corrections.

98 Since, as has been found in paragraph 95 above, the Commission did not determine the maximum annual amount of allowances in accordance with the requirements of subparagraph (b) of Article 10a(5) of Directive 2003/87, the correction factor laid down in Article 4 of, and Annex II to, Decision 2013/448 is also contrary to that provision.

99 It follows from all of the foregoing considerations that the answer to the ninth question in Cases C-191/14 and C-192/14 and to the fifth question in Cases C-389/14 and C-391/14 to C-393/14 must be that Article 4 of, and Annex II to, Decision 2013/448 are invalid.

The other questions

100 In the light of the answer given to the ninth question in Cases C-191/14 and C-192/14 and to the fifth question in Cases C-389/14 and C-391/14 to C-393/14, it is not necessary to answer the other questions relating to the validity of Article 4 of, and Annex II to, Decision 2013/448.

Limitation of the temporal effects of this judgment

101 In the event that the Court considers that Article 4 of, and Annex II to, Decision 2013/448 determining the correction factor are invalid, the Commission requests that the temporal effects of the judgment be limited.

102 That request also overlaps with the concerns expressed by the Landesverwaltungsgericht Niederösterreich (Regional Administrative Court, Lower Austria) in the sixth and seventh questions which it refers, and in the second question referred by the Tribunale amministrativo regionale per il Lazio (Regional Administrative Court, Lazio), by which those courts seek to

ascertain the consequences which a declaration of invalidity of Article 4 of, and Annex II to, Decision 2013/448 would entail.

103 The Court points out, in that regard, that where it is justified by overriding considerations of legal certainty, the second paragraph of Article 264 TFEU, which is also applicable by analogy to a reference under Article 267 TFEU for a preliminary ruling on the validity of acts of the European Union, confers on the Court a discretion to decide, in each particular case, which specific effects of the act in question must be regarded as definitive (judgment in *Volker und Markus Schecke and Eifert*, C-92/09 and C-93/09, EU:C:2010:662, paragraph 93).

104 In the present case, the determination of the correction factor and the application thereof by the Member States constitute necessary stages in the implementation of the allowance trading scheme established by Directive 2003/87. As is apparent from paragraph 83 above, that factor contributes to the attainment of the objectives pursued by the directive, in particular the reduction in the number of allowances available. Moreover, as can be seen from paragraph 55 above, it is the task of the Member States to determine the total final amount of allowances to be allocated free of charge by applying the correction factor.

105 Consequently, first, the annulment of the correction factor is capable of calling into question all of the final allocations made prior to this judgment in the Member States on the basis of legislation deemed to be valid. Thus, the declaration of invalidity of Article 4 of, and Annex II to, Decision 2013/448 risks having serious repercussions on a large number of legal relations established in good faith. Those overriding considerations of legal certainty are capable of justifying the limitation of the temporal effects of that declaration.

106 Second, it must be found that the declaration of invalidity of Article 4 of, and Annex II to, Decision 2013/448 would pose an obstacle, in the absence of an applicable correction factor, to the allocation of allowances during the period following the delivery of this judgment. The temporary legal vacuum which would be brought about could jeopardise the implementation of the allowance trading scheme put in place by Directive 2003/87 and, consequently, the attainment of the objectives pursued by it. Indeed, any interruption of the allowance trading scheme would go against the main objective of that directive, namely to protect the environment by reducing greenhouse gases (see, by analogy, judgment in *Inter-Environnement Wallonie and Terre wallonne*, C-41/11, EU:C:2012:103, paragraph 61).

107 It should be noted, however, that where the Court rules, in proceedings under Article 267 TFEU, that a measure adopted by an EU authority is invalid, its decision has the legal effect of requiring the competent EU institutions to take the necessary measures to remedy that illegality (see, to that effect, judgment in *Régie Networks*, C-333/07, EU:C:2008:764, paragraph 124).

108 Third, it is true that it is for the Court, where it makes use of the possibility of limiting the effect on past events of a declaration in preliminary ruling proceedings that an EU act is invalid, to decide whether an exception to that temporal limitation of the effect of its judgment may be made in favour of the party to the main proceedings which brought the action before the national court against the national measures implementing the EU act, or whether, conversely, a declaration of invalidity applicable only to the future is an adequate remedy even for that party (see, to that effect, judgment in *Roquette Frères*, C-228/92, EU:C:1994:168, paragraph 25).

109 Since the invalidity found in paragraph 99 above will require the Commission to revise the correction factor in accordance with Article 10a(1) and (5) of Directive 2003/87, it cannot be ruled

out that the Commission will lower the maximum annual amount of allowances and, as a result, increase the correction factor.

110 Therefore, it is not necessary to except the parties in the main proceedings from the limitation of the temporal effects of the declaration of invalidity of Article 4 of, and Annex II to, Decision 2013/448.

111 It follows from all of the foregoing considerations that it is appropriate to limit the temporal effects of the declaration of invalidity of Article 4 of, and Annex II to, Decision 2013/448 so that, first, that declaration does not produce effects until 10 months following the date of delivery of this judgment so as to enable the Commission to adopt the necessary measures and, second, measures adopted during that period on the basis of the invalidated provisions cannot be called into question.

Costs

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

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

1. **The examination of the first four questions in Cases C-191/14 and C-192/14, the third question in Case C-295/14 and the first question in Cases C-389/14 and C-391/14 to C-393/14 has disclosed nothing to affect the validity of Article 15(3) 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 in so far as that provision precludes emissions from electricity generators from being taken into account in the determination of the maximum annual amount of allowances.**

2. **Article 4 of, and Annex II to, 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/EC of the European Parliament and of the Council are invalid.**

3. **The temporal effects of the declaration of invalidity of Article 4 of, and Annex II to, Decision 2013/448 are to be limited so that, first, that declaration does not produce effects until 10 months following the date of delivery of this judgment so as to enable the European Commission to adopt the necessary measures and, second, measures adopted during that period on the basis of the invalidated provisions cannot be called into question.**

[Signatures]

* Languages of the case: German, Dutch and Italian.