Reports of Cases

OPINION OF ADVOCATE GENERAL
SAUGMANDSGAARD ØE
delivered on 28 February 2019[1]

Case C-682/17

ExxonMobil Production Deutschland GmbH
v
Bundesrepublik Deutschland

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

(Reference for a preliminary ruling – Environment – Scheme for greenhouse gas emission allowance trading – Natural gas processing installation – Sulphur recovery – Production of electricity in a secondary facility – Directive 2003/87/EC – Article 2(1) – Scope – Point 6 of Annex I – Activity of 'combustion of fuels' – Article 3(t) – Concept of 'combustion' – Article 3(u) – Concept of 'electricity generator' – Article 10a(3) and (4) – Transitional arrangements for the harmonised free allocation of emission allowances – Restriction on the free allocation of emission allowances to electricity generators – Decision 2011/278/EU – Article 3(c) – Concept of 'heat benchmark sub-installation' – Article 3(h) – Concept of 'process emissions sub-installation')

I. Introduction

1. This request for a preliminary ruling from the Verwaltungsgericht Berlin (Administrative Court, Berlin, Germany) concerns the interpretation of Article 3(u) and Article 10a of, and Annex I to, Directive 2003/87/EC,[2] which establishes a scheme for greenhouse gas emission allowance trading within the European Union ('the emission trading scheme'), and of Article 3(c) and (h) of Decision 2011/278/EU,[3] providing for transitional rules relating to the harmonised allocation of free emission allowances.

2. The request has been made in proceedings between ExxonMobil Production Deutschland GmbH ('ExxonMobil') and the Federal Republic of Germany, represented by the Umweltbundesamt (Federal Office for the Environment, Germany), concerning the refusal to allocate, to a natural gas processing installation operated by ExxonMobil, some of the free emission allowances requested in respect of 2013.

1 Original language: French.

2 Directive of the European Parliament and of the Council of 13 October 2003 establishing a scheme for greenhouse gas emission allowance trading within the Community and amending Council Directive 96/61/EC (OJ 2003 L 275, p. 32), as amended by Directive 2009/29/EC of the European Parliament and of the Council of 23 April 2009 (OJ 2009 L 140, p. 63).

3 Commission Decision of 27 April 2011 determining transitional Union-wide rules for harmonised free allocation of emission allowances pursuant to Article 10a of Directive [2003/87] (OJ 2011 L 130, p. 1).

3. In accordance with the Court's request, this Opinion will focus on the referring court's first and second questions. Those questions relate to the scope of the concept of 'electricity generator' within the meaning of Article 3(u) of Directive 2003/87 and to the effect that the classification of an installation as an electricity generator has on the free allocation of emission allowances to which it is entitled under Article 10a of that directive.

II. Legal context

A. EU law

1. Directive 2003/87

4. Article 3(u) of Directive 2003/87 defines the concept of 'electricity generator' as '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. In the version in force at the material time,[4] Article 10a of that directive was worded as follows:

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

…

… 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.

…

3. Subject to paragraphs 4 and 8, and notwithstanding Article 10c, no free allocation shall be given to electricity generators …

4. Free allocation shall be given to district heating as well as to high efficiency cogeneration, as defined by Directive 2004/8/EC, [5] 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.

…'

2. Decision 2011/278

6. Article 3 of Decision 2011/278 states:

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

…

4 Certain provisions of Article 10a of Directive 2003/87 have since been amended by Directive (EU) 2018/410 of the European Parliament and of the Council of 14 March 2018 amending Directive [2003/87] to enhance cost-effective emission reductions and low-carbon investments, and Decision (EU) 2015/1814 (OJ 2018 L 76, p. 3).

5 Directive of the European Parliament and of the Council of 11 February 2004 on the promotion of cogeneration based on a useful heat demand in the internal energy market and amending Directive 92/42/EEC (OJ 2004 L 52, p. 50).

(c) "heat benchmark sub-installation" means inputs, outputs and corresponding emissions not covered by a product benchmark sub-installation relating to the production, the import from an installation or other entity covered by the Union scheme, or both, of measurable heat which is:

– consumed within the installation's boundaries for the production of products, for the production of mechanical energy other than used for the production of electricity, for heating or cooling with the exception of the consumption for the production of electricity, or

– exported to an installation or other entity not covered by the Union scheme with the exception of the export for the production of electricity;

…

(h) "process emissions sub-installation" means … carbon dioxide [CO_2] emissions, which occur outside the system boundaries of a product benchmark listed in Annex I, as a result of any of the following activities …:

…

(v) the use of carbon containing additives or raw materials for a primary purpose other than the generation of heat;

…'

B. German law

7. Paragraph 9 of the Treibhausgas-Emissionshandelsgesetz (Law on greenhouse gas emissions trading) of 21 July 2011 (BGBl. 2011 I, p. 1475; 'the TEHG'), is worded as follows:

'(1) Installation operators shall receive an allocation of free emission allowances in accordance with the principles laid down in Article 10a … of Directive [2003/87] … and with those laid down in Decision [2011/278] …

…

(6) The final amount of allowances allocated to the installation shall be equal to the product of the preliminary amount of allowances allocated to the installation calculated pursuant to paragraphs 1 to 5 and the cross-sectoral correction factor set by the European Commission in accordance with Article 15(3) of the uniform EU allocation rules. When allocating allowances in respect of the heat produced by electricity generators, the linear factor provided for in Article 10a(4) of Directive 2003/87/EC shall replace the correction factor referred to in the first sentence, with the calculation being based on the preliminary annual number of allowances to be allocated free of charge to the electricity generator in question for the year 2013.'

8. Part 2 of Annex I to the TEHG, entitled 'Activities', lists, in point 1, among the installations whose emissions fall within the scope of that law, 'combustion units intended to burn fuel with a total rated thermal input equal to or exceeding 20 [megawatts (MW)] in an installation, unless covered by one of the following points'. Part 2 of Annex I to the TEHG sets out, in points 2 to 4, various types of 'installations for the production of electricity, steam, hot water, process heat or heated waste gas' whose emissions also fall within the scope of that law.

9. Paragraph 2(21) 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 2013 to 2020 trading period) of 26 September 2011 (BGBl. I. 2011, p. 1921; 'the ZuV 2020') defines 'electricity generator' as any 'installation which, after 31 December 2004, has produced and sold electricity to third parties and in which solely one of the activities listed in points 1 to 4 of Part 2 of Annex 1 to [the TEHG] is carried out'.

10. Paragraph 2(29) and (30) of the ZuV 2020 defines the concepts 'process emissions sub-installation' and 'heat benchmark sub-installation' in terms similar to those of Article 3(h) and (c) of Decision 2011/278. Paragraph 2(29)(b)(ee) of the ZuV 2020 corresponds to Article 3(h)(v) of Decision 2011/278.

III. The dispute in the main proceedings, the questions referred and the procedure before the Court

11. Up until the end of 2013, ExxonMobil operated a natural gas processing installation ('the installation') in Steyerberg (Germany). The installation consisted of natural gas desulphurisation and dehydration facilities, sulphur recovery facilities (called 'Claus-process' facilities), waste gas purification facilities and ancillary facilities. The ancillary facilities included a steam boiler, a gas engine facility, emergency gas flaring facilities and a condensing power station.

12. That power station was connected to the public electricity network, with small amounts of electricity being continuously fed into the network in order to ensure continuity of electricity supply for the installation in the event of an outage of the Claus-process facilities, which would have resulted in the loss of quantities of steam. The order for reference contains an electricity balance report showing data relating to the production, import, export and consumption of electricity at the installation for 2005 to 2010. The report shows that, in some of those years, the installation consumed more electricity than it produced.

13. On 24 February 2014, the Deutsche Emissionshandelsstelle (German Emission Allowance Trading Authority; 'the DEHSt') allocated to ExxonMobil free of charge 1 179 523 emission allowances for the trading period 2013-2020. The allocation was based, in part, on the application of the heat benchmark and, in part, on the application of the fuel benchmark. The existence of a risk of carbon leakage in the sector concerned was taken into account in the calculation of that allocation. The DEHSt refused to allocate to ExxonMobil the further free allowances which it applied for in respect of process emissions. On the same day, the DEHSt revoked its allocation decision with effect from 1 January 2014 on the ground that ExxonMobil had declared that it had ceased operating. That revocation was not challenged.

14. ExxonMobil lodged an objection against the allocation decision of 24 February 2014. The DEHSt dismissed that objection on 12 February 2016.

15. According to the information provided by the DEHSt in its decision of 12 February 2016, the application for an allocation of allowances for process emissions concerned the emissions of CO_2 naturally present in the natural gas which occurred at the end of the process in the Claus facilities ('the Claus process'). The Claus process was an exothermic chemical reaction by which hydrogen sulphide (H_2S) was converted into elemental sulphur. The heat generated during that reaction was captured by recovery boilers before being used at the installation. The use made of that heat resulted in the free allocation of emission allowances by applying the heat benchmark. At the end of the Claus process, the CO_2 inherent in the natural gas was emitted into the atmosphere through a chimney. The Claus process did not generate additional CO_2.

16. The DEHSt considered that allowances could not be allocated free of charge in respect of a 'process emissions sub-installation' within the meaning of Paragraph 2(29)(b)(ee) of the ZuV 2020, a provision which transposes Article 3(h)(v) of Decision 2011/278 into German law. The DEHSt took the view that the condition set out in those provisions that the emissions must result from the use of a raw material containing carbon was not met. It considered that emissions of the CO_2 naturally present in the natural gas did not result from the Claus process since the CO_2 did not play a part in and was not necessary for the chemical reaction characterising the Claus process. According to the DEHSt, H_2S was the only raw material used to produce sulphur and the CO_2 cannot be regarded as anything other than an 'associated gas' of the H_2S.

17. On 10 March 2016, ExxonMobil brought an action against the decision rejecting its complaint.

18. In its action, it describes, first of all, the activities carried out at the installation, noting that it served to process natural gas extracted from gas reserves. The extracted natural gas, known in this form as sour gas, contained H_2S, water vapour, methane (CH_4) and CO_2. At the installation, that gas was desulphurised and then, after drying, fed into the gas distribution network. The H_2S and CO_2 removed from the natural gas during the desulphurisation process were fed into the Claus-process facilities where H_2S was converted into sulphur by means of an exothermic reaction consisting of two steps.

19. In the first step, approximately a third of the H_2S was burned in a furnace, with the combustion process generating sulphur dioxide (SO_2). The SO_2 was already partially reacting in that furnace with the H_2S to produce elemental sulphur and water. In order to maintain oxidation and optimise the process, heat was removed in the form of steam by means of the recovery boiler. The remaining H_2S reacted by catalysis with the SO_2 to produce elemental sulphur.

20. In the second step, additional sulphur was obtained following an exothermic reaction in two or three successive catalytic stages. The gas remaining at the end of that reaction, called 'Claus gas', still contained, inter alia, CO_2 and traces of sulphur compounds. The Claus gas was then routed to downstream waste gas purification facilities and further desulphurised and CO_2 was released into the atmosphere through the chimney.

21. Next, ExxonMobil claims that it is entitled to the free allocation of emission allowances for a process emissions sub-installation on the ground that those CO_2 emissions were the result of using a raw material containing carbon in the form of CO_2. According to ExxonMobil, the raw material used for sulphur production is the sour gas, not the H_2S viewed in isolation. If sour gas had not been used in the Claus process, the CO_2 inherently present in the natural gas would not have been released into the atmosphere. Moreover, the extraction of CO_2 from the sour gas by means of the Claus process had been necessary for the recovery of pure sulphur from that gas. It is immaterial that the CO_2 was present from the outset in the raw material and played no part in the chemical reaction in question. Nor could the CO_2 emissions have been avoided by switching fuel or by adopting more efficient techniques.

22. Furthermore, ExxonMobil submits that the free allocation of allowances through application of the heat benchmark in respect of measurable heat produced at the installation, as a side effect of the chemical reaction characterising the Claus process, does not preclude the additional allocation applied for. Although the Court held, in the judgment in *Borealis and Others*,[6] that allocation on the basis of the product benchmark takes precedence over the three fallback approaches, namely allocation on the basis of the heat benchmark, the fuel benchmark or process emissions, no hierarchy exists between those three fallback options.

6 Judgment of 8 September 2016 (C-180/15, EU:C:2016:647).

23. Lastly, ExxonMobil observes that the main action is a pilot case to settle issues surrounding the allocation of free allowances for CO_2 emissions occurring in the context of the Claus process, which also takes place in other installations operated by ExxonMobil.

24. In its defence, the DEHSt stated, for the first time, that sulphur production is not an activity subject to compulsory emission allowance trading. It argued, also for the first time, that the installation should be classified as an 'electricity generator' since electricity was produced there and sold to third parties after 31 December 2004 and only a combustion activity referred to in points 1 to 4 of Part 2 of Annex 1 to the TEHG was carried out there. According to the DEHSt, the installation applied for and received an allocation intended for electricity generators, which was reduced by applying the linear factor for electricity generators in accordance with Paragraph 9(6) of the TEHG. However, the free allocation of emission allowances to electricity generators was permissible only if the conditions laid down in Article 10a of Directive 2003/87 were complied with.

25. As to the remainder, the DEHSt reiterates its view that the free allocation of emission allowances for a process emissions sub-installation must be refused and contests the claim made by ExxonMobil that the emissions in question were unavoidable. The DEHSt relies, moreover, on the existence of a hierarchy between the factors of allocation on the basis of the heat benchmark, the fuel benchmark and process emissions.

26. In that context, the Verwaltungsgericht Berlin (Administrative Court, Berlin) considers, first of all, that the outcome of the main proceedings depends on whether the installation must be classified as an electricity generator within the meaning of Article 3(u) of Directive 2003/87. Although an answer in the affirmative seems to the referring court to follow from the wording of that provision, it is uncertain whether such an answer would broaden the scope of that provision beyond that intended by the spirit and purpose of the directive. [7]

27. Next, the referring court observes that to classify the installation as an electricity generator would, in principle, mean that the free allocation of emission allowances that it received was unlawful. That would be so since electricity generators can receive free emission allowances only in the cases set out in the third subparagraph of Article 10a(1) and Article 10a(4) of Directive 2003/87, which do not cover the emissions in question. The referring court wonders, however, whether it is possible to override that restriction on the basis of the definition of the term 'heat benchmark sub-installation' set out in Article 3(c) of Decision 2011/278, which contains no such restriction.

28. Lastly, the referring court seeks to ascertain whether the emissions resulting from the Claus process may give rise to a free allocation of emission allowances in respect of a 'process emissions sub-installation' within the meaning of Article 3(h) of Decision 2011/278. Given that the heat generated by that process can also be the subject of an allocation through application of the heat benchmark, the referring court asks whether one of those two types of allocation takes priority over the other.

29. In the light of those considerations, the Verwaltungsgericht Berlin (Administrative Court, Berlin) decided to stay the proceedings and to refer the following questions to the Court of Justice for a preliminary ruling:

'(1) Is an installation which produces a product the production of which is not one of the activities referred to in Annex I to Directive [2003/87] (such as, in this case, the production of sulphur), and which, at the same time, carries on the activity of "combustion of fuels in installations with a total rated thermal input exceeding 20 MW" that is subject to the emission trading scheme pursuant to Annex I to Directive [2003/87], an electricity generator within the meaning of Article 3(u) of

7 See point 59 and points 62 to 64 of this Opinion.

Directive [2003/87], in the case where a secondary facility within the same installation also produces electricity for that installation and a (small) proportion of that electricity is released for consideration to the public electricity network?

(2) If the first question is answered in the affirmative:

If an installation as described in Question 1 is an electricity generator within the meaning of Article 3(u) of Directive [2003/87], is that installation eligible for an allocation for heat under [Decision 2011/278] even in the case where the heat satisfies the conditions laid down in Article 3(c) of Decision [2011/278] but does not fall within any of the categories referred to in Article 10a(1), third subparagraph, and Article 10a(3) and (4) of Directive [2003/87] – heat from the combustion of waste gases for the production of electricity, district heating and high efficiency cogeneration?

(3) If, on the basis of the answers to the first two questions, the heat produced in the installation at issue is eligible for an allocation:

Does the CO_2 released into the atmosphere as part of the conditioning of natural gas (in the form of sour gas) in the "Claus process", whereby the CO_2 inherent in natural gas is separated from the gas mixture, constitute an emission which, for the purposes of the first sentence of Article 3(h) of [Decision 2011/278], occurs as a result of the process referred to in Article 3(h)(v)?

(a) For the purposes of the first sentence of Article 3(h) of [Decision 2011/278], can CO_2 emissions occur "as a result of" a process in which the CO_2 inherent in the raw material is physically separated from the gas mixture and released into the atmosphere, even though that process as such does not give rise to additional CO_2, or does that provision make it mandatory for the CO_2 released into the atmosphere to occur for the first time as a result of that process?

(b) Is a carbon-containing raw material "used" within the meaning of Article 3(h)(v) of [Decision 2011/278] where, in the "Claus process", the naturally occurring gas is used to produce sulphur and, in the course of that procedure, the CO_2 inherent in the natural gas is released into the atmosphere, even though the CO_2 inherent in the natural gas is not part of the chemical reaction taking place in that process, or does the term "use" make it mandatory for the carbon to be part of, or indeed essential to, the chemical reaction taking place?

(4) If Question 3 is answered in the affirmative, on the basis of which benchmark is the allocation of free emission allowances to be carried out in the case where an installation subject to the emission trading scheme satisfies both the defining conditions of a heat benchmark sub-installation and the defining conditions of a process emissions sub-installation? Does entitlement to an allocation on the basis of the heat benchmark take priority over entitlement to an allocation for process emissions or does entitlement to an allocation for process emissions take precedence over the heat benchmark and the fuel benchmark because the latter allocation is more specific to the case in question?'

30. ExxonMobil, the German Government and the Commission lodged written observations before the Court and were represented at the hearing on 14 November 2018.

IV. Analysis

A. Preliminary observations

31. By its request for a preliminary ruling, the referring court essentially asks the Court to determine whether and, if so, to what extent an installation such as that at issue in the main proceedings can be allocated free emission allowances under Article 10a of Directive 2003/87. The relevant facts characterising the situation of that installation and on which I will base my analysis may be summarised as follows.

32. According to the information provided in the order for reference,[8] the installation at issue in the main proceedings was engaged, inter alia, in an activity consisting in the recovery, through the Claus process, of the sulphur found, in the form of H_2S, in sour gas extracted from gas reserves.[9] That process started with the combustion of some of the sour gas, giving rise to a chemical reaction which generated heat subsequently used at the installation. The installation produced electricity at a secondary facility.[10] Although the electricity produced was largely intended for its own supply, the installation permanently fed a small proportion of it for consideration into the public network so as to ensure continuity of the electricity supply at the facility. The CO_2 naturally found in sour gas was removed from the H_2S through the Claus process. That CO_2 was released into the atmosphere after passing through the Claus facilities, downstream purification facilities and – as is apparent, subject to verification by the referring court, from the documents before the Court submitted by the referring court and from the observations of the German Government – downstream afterburners. The Claus process did not generate additional CO_2.

33. The installation was allocated free emission allowances, in respect of a 'heat benchmark sub-installation' within the meaning of Article 3(c) of Decision 2011/278, for measurable heat produced during that process.[11] By contrast, it did not receive the additional free allowances requested for a 'process emissions sub-installation' within the meaning of Article 3(h) of Decision 2011/278. ExxonMobil considers, in essence, that the allocation calculated on the basis of the heat benchmark is not sufficient to account for the unavoidable emissions of the CO_2 found in sour gas, in respect of which it had to surrender a number of allowances.[12]

34. The main action is directed against the decision by which the DEHSt rejected that application. However, the arguments put forward by the DEHSt in its defence also raise doubts as to the lawfulness of the free allocation of emission allowances received by the installation.

8 The referring court has set out the explanations provided by both ExxonMobil and the DEHSt concerning the Claus process (see points 15 to 20 of this Opinion), but without making any of its own findings of fact regarding each stage of the process. Since those explanations largely overlap, my analysis will be based on that presentation of the facts. This is the case subject to verification by that court which has exclusive jurisdiction to assess the relevant facts (see, inter alia, judgment of 6 March 2018, *SEGRO and Horváth* (C-52/16 and C-113/16, EU:C:2018:157, paragraph 98 and the case-law cited)).

9 The sour gas introduced into the Claus facilities contained, more specifically, the H_2S and CO_2 removed, by means of a prior desulphurisation process, from the natural gas in order for it to be fed into the gas network. The Claus process thus made it possible both to remove the H_2S – a corrosive and toxic gas – and to produce a product of commercial value (namely elemental sulphur).

10 According to the information before the Court submitted by the referring court, the oral observations of ExxonMobil and the written observations of the German Government, some of the heat produced during the Claus process was used to generate that electricity.

11 In addition, the installation received the free allocation of emission allowances, in respect of a 'fuel benchmark sub-installation' within the meaning of Article 3(d) of Decision 2011/278, for the production of non-measurable heat generated during activities other than sulphur recovery through the Claus process.

12 Under Article 12(3) of Directive 2003/87, the operator of each installation subject to the emission allowance trading scheme must surrender each year a number of allowances equal to the total emissions from that installation during the preceding calendar year.

35. In that context, the referring court seeks to ascertain, by its first and second questions, whether the installation must, having regard to the fact that it sold electricity to the public network, be denied any free allocation of emission allowances. If the answer is in the negative, the referring court asks the Court its third and fourth questions, in order to be able to determine whether the emissions of the CO_2 naturally present in sour gas may give rise to a free allocation of allowances for a process emissions sub-installation.

36. As demonstrated by the written and oral observations submitted to the Court, the matters at stake in the main proceedings and the usefulness of the answers to the questions referred for the purpose of resolving the dispute are, first and foremost, dependent on the applicability of Directive 2003/87 to those emissions.

37. In that regard, the Commission, supported in this regard by ExxonMobil at the hearing, submits, in essence, that the emissions of the CO_2 naturally present in sour gas, which are covered by the application for additional free allowances, do not fall within the scope of that directive. Consequently, they should not be declared or monitored, or give rise to the surrender of allowances, and therefore the free allocation of allowances for those emissions is excluded from the outset. By contrast, the German Government considers, in essence, that, since the sour gas was used as fuel in the course of the installation's activities, all the CO_2 in the composition of that fuel, released at the end of those activities, is subject to the emissions trading scheme. For the reasons set out below, I agree with the latter point of view.

B. The applicability of Directive 2003/87 to the emissions of CO_2 naturally present in sour gas

38. Under Article 2(1), Directive 2003/87 applies to emissions from the activities listed in Annex I thereto and to greenhouse gases listed in Annex II thereto, which include CO_2. Annex I covers, inter alia, in point 6, the 'combustion of fuels in installations with a total rated thermal input exceeding 20 MW'.

39. In the present case, emissions of CO_2 naturally present in the sour gas that are released from the installation are liable to fall within the scope of Directive 2003/87 only in so far as they resulted from such activity. It is common ground that the installation did not engage in any other activity listed in Annex I to that directive, which makes no mention of either sulphur recovery or natural gas processing.

40. The concept of 'combustion of fuels' in point 6 of Annex I to Directive 2003/87 must be understood in the light of Article 3(t) of that directive. That provision defines 'combustion' as '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'.

41. It seems to me that that definition covers the heat generating oxidation reaction undergone by H_2S during the Claus process. It also includes the postcombustion process for gases emerging from the Claus facilities, including the CO_2 naturally present in sour gas, as described in the file submitted to the Court by the referring court and the observations of the German Government.

42. Since that CO_2 was emitted after passing through the Claus facilities and, subject to verification by the referring court, the afterburners where those processes took place, those emissions resulted, in my opinion, from combustion activities for the purposes of point 6 of Annex I to Directive 2003/87,[13] read in the light of Article 3(t) thereof.

13 It is common ground that the capacity threshold provided for in that provision was crossed in the present instance.

43. That finding is not called into question, *in the first place*, by the fact that those processes served to produce energy only as a secondary aim, since their main purpose was to recover the sulphur contained in the sour gas and to purify that gas before releasing it into the atmosphere.

44. In that regard, as demonstrated by the preparatory documents preceding the adoption of Directive 2009/29/EC,[14] by which Article 3(t) of Directive 2003/87 was inserted, that insertion was intended to give the concept of 'combustion' a broad definition. That concept was to cover any oxidation of fuels, regardless of the objective, whether it be to generate energy for third parties or as part of a production process at the installation at issue.[15]

45. Point 3 of Annex 1 to Directive 2003/87 reflects the broad scope afforded to that concept by stating that the units in which fuels are combusted include 'all types of boilers, burners, turbines, heaters, furnaces, incinerators, calciners, kilns, ovens, dryers, engines, fuel cells, chemical looping combustion units, flares, and thermal or catalytic post-combustion units'. Some of these, in particular flares and some afterburner units, are not intended for the supply of energy.[16]

46. *In the second place*, the emissions in question cannot fall outside the scope of that directive on the ground that, as the CO_2 released into the atmosphere was already contained in the extracted sour gas, it did not itself result from an oxidation reaction produced by the activities at the installation.[17]

47. Article 3(t) of Directive 2003/87 does not restrict the concept of 'combustion' to oxidation reactions generating one of the greenhouse gases listed in Annex II to that directive. It is sufficient, in view of the wording of that provision, that any constituent element of the fuel is oxidised. In the same way, Article 2(1) of that directive does not make the applicability of that directive subject to the condition that the CO_2 released is itself the result of an activity listed in Annex I. Only greenhouse gas *emissions*, and not the gas itself, must result from such an activity.[18]

14 Directive 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. 63).

15 See Commission staff working document, accompanying document to the proposal for a directive of the European Parliament and of the Council amending Directive 2003/87/EC so as to improve and extend the EU greenhouse gas emission allowance trading system, Impact assessment, 23 January 2008, SEC(2007) 52 ('the impact assessment'), pp. 17 to 23 and pp. 160 and 161. See, in addition, proposal for a directive of the European Parliament and of the Council amending Directive [2003/87] so as to improve and extend the greenhouse gas emission allowance trading system of the Community of 23 January 2008, COM(2008) 16 final ('the Commission's proposal'), p. 3. The addition of the definition of combustion was intended to codify the interpretation already advocated by the Commission in its communication of 22 December 2005, 'Further guidance on allocation plans for the 2008 to 2012 trading period of the EU Emission Trading Scheme', COM(2005) 703 final, points 34 to 36 and Annex 8. See, also, to that effect, judgment of 28 July 2016, *Vattenfall Europe Generation* (C-457/15, EU:C:2016:613, paragraph 37).

16 See Commission, 'Guidance on interpretation of Annex I of the EU ETS Directive (excl. aviation activities)', 18 March 2010, https://ec.europa.eu/clima/sites/clima/files/ets/docs/guidance_interpretation_en.pdf, pp. 8 and 9.

17 Moreover, I would point out that the heat released during the Claus process was generated by a chemical reaction that did not produce any CO_2. Only the CO_2 present in the composition of the sour gas was released at the end of that process. If those emissions had to be excluded from the scope of the directive on the ground that the CO_2 released was naturally present in the sour gas, they would fall outside its scope even in so far as that process generated heat used at the installation.

18 I note that, while some language versions of Article 2(1) of Directive 2003/87, such as the French and Spanish versions, use the words '*résultant des activités*' ('resulting from the activities') or comparable wording, others, including the English, Danish, Italian and Dutch language versions, employ an expression corresponding to the words 'from the activities'. The reading according to which Directive 2003/87 applies to emissions of CO_2 naturally present in a gaseous fuel occurring after a combustion activity, in addition to being compatible with all those language versions, is supported by the purpose of that directive. Under Article 1, its purpose is to 'promote reductions of greenhouse gas emissions in a cost-effective and economically efficient manner'. Recital 8 of the directive highlights the need to take account of the potential for industrial process activities to reduce emissions. In the light of that purpose, as stated by the German Government the use of low CO_2 fuels must be encouraged since it helps to reduce CO_2 emissions. The fact, put forward by ExxonMobil at the hearing, that it is not always possible to know the composition of the sour gas – used as fuel in the present case – when it is extracted does not call that principle into question.

48. As pointed out by the German Government, that reading underpins Article 48(1) of Commission Regulation (EU) No 601/2012 on the monitoring and reporting of greenhouse gas emissions pursuant to Directive [2003/87].[19] In accordance with that provision, emissions of 'inherent CO_2' – defined in Article 3(40) of that regulation as 'CO_2 which is part of a fuel' – must be included in the emission factor for that fuel. In addition, Article 48(1) of that regulation refers to inherent CO_2 contained in natural gas.

49. In line with this, the Commission, in a document entitled 'Frequently Asked Questions Regarding Monitoring and Reporting in the EU ETS',[20] states that the CO_2 emissions linked to natural gas processing are subject to the obligations of the emission allowances trading scheme provided that the CO_2 emitted is, at any point during the purification process, fed into a combustion process. Those emissions must therefore be reported and monitored as emissions of inherent CO_2 pursuant to Article 48 of Regulation No 601/2012. The Commission refers therein, by way of example, to Claus facilities.[21] Although that document is not binding, the information it contains constitutes, in my view, contextual elements which may cast light on the interpretation of Directive 2003/87 and Regulation No 601/2012.[22]

50. In the light of those considerations, I take the view that the emissions of CO_2 naturally present in the sour gas that arise at the end of the Claus process, such as those at issue in the main proceedings, result from the activity of 'combustion of fuels' within the meaning of point 6 of Annex I to Directive 2003/87, read in conjunction with Article 3(t) thereof. Those emissions therefore fall within the scope of that directive, as defined in Article 2(1) thereof.

C. The concept of 'electricity generator' (first question)

51. By its first question, the referring court seeks to ascertain whether the installation is an 'electricity generator', within the meaning of Article 3(u) of Directive 2003/87, in so far as it has produced electricity in the course of its activity of 'combustion of fuels with [an] input exceeding 20 [megawatts (MW)]' within the meaning of point 6 of Annex I to that directive. The referring court asks, more specifically, whether that is so in the light of circumstances that, first, the installation, at the same time, was engaging in the activity of production of a product which does not fall within the scope of any other activity listed in that annex and, second, the electricity produced was used for that installation's own needs and only a small proportion of that electricity was fed for consideration into the public electricity network, to which, for technical reasons, the installation had to be permanently connected.

52. Following an analysis of the wording and objectives of Article 3(u) of Directive 2003/87, the general scheme of that directive and the origin of that provision,[23] I take the view that the Court should answer that question in the affirmative.

19 Regulation of 21 June 2012 (JO 2012 L 181, p. 30). See, with regard to the method of monitoring emissions from combustion processes taking place in gas processing terminals, the third subparagraph of point 1(B) of Annex IV to Regulation No 601/2012.

20 That document, in the version of 16 December 2013, is available at https://ec.europa.eu/clima/sites/clima/files/ets/monitoring/docs/faq_mmr_en.pdf (see p. 14).

21 The Commission explains: 'The H_2S enriched gas flow may still contain a significant concentration of CO_2. If this gas flow is also fed into a combustion unit (e.g. CLAUS unit), this CO_2 needs to be monitored and reported as well.'

22 See, by analogy, judgment of 18 January 2018, *INEOS* (C-58/17, EU:C:2018:19, paragraph 41).

23 See, inter alia, regarding the elements to be taken into account in the interpretation of EU law, judgment of 10 December 2018, *Wightman and Others* (C-621/18, EU:C:2018:999, paragraph 47 and the case-law cited).

1. Literal interpretation

53. In accordance with Article 3(u) of Directive 2003/87, the status of electricity generator presupposes, first, that the installation in question, 'on or after 1 January 2005, has produced electricity for sale to third parties'. Second, that status implies that in that installation 'no activity listed in Annex I is carried out other than the "combustion of fuels"'.

54. Interpreted literally, the second criterion laid down in Article 3(u) of Directive 2003/87 is, by definition, met in the situation referred to in the first question concerning an installation which carries out, in addition to a combustion activity, solely an activity not listed in Annex I to that directive.

55. As the German Government has pointed out, that reading corresponds to that adopted in a document, published by the Commission, entitled 'Guidance paper to identify electricity generators'.[24] It is maintained in that document that an installation which carries out, in addition to a combustion activity, an activity not listed in that annex meets the aforementioned criterion. That would be the case even where the electricity is generated for the installation's own consumption, for the execution of the activity not listed. That document, although not binding, provides information to clarify the meaning of the concept of 'electricity generator' in the light of the general scheme of Directive 2003/87 and Decision 2011/278.[25]

56. With regard to the first criterion set out in Article 3(u) of that directive, the expression 'for sale to third parties' may, as noted by ExxonMobil, suggest that electricity must not simply be s*old to third parties* but rather *produced for the purpose of such a sale*. However, whatever the approach taken on this point, there is nothing in the wording of that provision to indicate that the sale to third parties should be the only objective, or at least the main objective, of the electricity production. Therefore, on the basis of that wording, as submitted by the German Government and the Commission, that criterion is met where, as in the present case, an installation produces electricity for its own supply whilst planning to feed an albeit tiny proportion of that electricity for consideration into the public electricity network.

57. That reading also follows from the Guidance paper to identify electricity generators, which states that Article 3(u) of Directive 2003/87 does not contain any threshold for sales in order for an installation to be classified as an electricity generator. According to that document, that status is also not subject to the condition that the electricity is produced with the intention of sale to third parties.[26]

58. I would add that that provision does not set out any requirement relating to the continuity of electricity production and of sale of the electricity produced. It establishes a clear rule that the status of electricity generator is acquired provided that the installation has, at any time on or after 1 January 2005, produced electricity for sale to third parties, irrespective of any fluctuation over time in the ratio between the quantity of electricity sold and the quantity produced to meet the installation's own needs.

24 That document of 18 March 2010 is available at https://ec.europa.eu/clima/sites/clima/files/ets/docs/guidance_electricity_generators_en.pdf (see p. 4, points 8 and 9).

25 See, by analogy, judgment of 18 January 2018, *INEOS* (C-58/17, EU:C:2018:19, paragraph 41). With regard to the status of the Guidance paper to identify electricity generators and other guidance documents concerning the 2013-2020 trading period, see, inter alia, Commission, 'Guidance document No 1 on the harmonised free allocation methodology for the EU-ETS post 2012', 14 April 2011, https://ec.europa.eu/clima/sites/clima/files/ets/allowances/docs/gd1_general_guidance_en.pdf, pp. 3 and 4.

26 Guidance paper to identify electricity generators, p. 4, point 10.

59. Consequently, on a literal interpretation of Article 3(u) of Directive 2003/87, an installation such as that at issue in the main proceedings is an electricity generator. However, the referring court wonders whether, as ExxonMobil argues, that interpretation leads to the extension of the category of electricity generators beyond the installations intended to be classified as electricity generators by the legislature. That interpretation would then exceed what is required to achieve the objective pursued by that provision.

2. Teleological and contextual interpretation

60. As is apparent, in particular, from Article 10a(3) of Directive 2003/87, an installation's status as an electricity generator has the consequence that the principle of full emission allowance auctioning applies to it.[27] Free allowances can be allocated to electricity generators only in limited circumstances, the more precise determination of which is the subject of the second question referred.[28]

61. In that regard, ExxonMobil rightly observes that recital 19 of Directive 2009/29, which introduced Article 3(u) and Article 10a of Directive 2003/87, reveals that that restriction on free allocation was introduced in response to a trend amongst 'power sector' installations to pass on the costs associated with acquiring allowances in electricity prices. Those installations had, moreover, included the economic value of the free allowances in those prices as an 'opportunity cost', thus making 'windfall profits'.[29]

62. According to ExxonMobil, an installation's status as an electricity generator should, therefore, be assessed in the light of its ability to recover the costs of the CO_2 from customers, but the installation at issue in the main proceedings has no such ability. In that regard, the referring court is inclined to the view that the legislature intended, by the insertion of the aforementioned provisions, to cover only those installations belonging to the 'conventional electricity sector',[30] of which the installation at issue in the main proceedings is not part.

63. In that context, the referring court tends to agree with ExxonMobil that the *second criterion* set out in Article 3(u) of Directive 2003/87 requires the installation not to carry out any activity – irrespective of whether that activity is listed in Annex I to that directive – other than combustion activities.[31] The concept of 'electricity generator', it is argued, does not include installations which carry out, in addition to combustion activities, an activity not covered by that annex – such as, in the present case, sulphur recovery.

64. In addition, the referring court has doubts as to whether, as ExxonMobil has argued, the *first criterion* laid down in that provision means that the electricity produced is 'principally' for sale to third parties. That would not be so in the present case, since the electricity was produced for the installation's own supply, with a small amount of electricity being fed into the public network only for technical reasons.

27 See recital 19 of Directive 2009/29.

28 See points 88 to 98 of this Opinion. In addition, the total annual amount of the allowances allocated free of charge to electricity generators is calculated differently from that allocated to other installations (see Article 10(9) of Decision 2011/278). See, in that regard, judgment of 28 April 2016, *Borealis Polyolefine and Others* (C-191/14, C-192/14, C-295/14, C-389/14 and C-391/14 to C-393/14, EU:C:2016:311, paragraph 71).

29 See the Commission's proposal, p. 9. See, also, judgment of 17 October 2013, *Iberdrola and Others* (C-566/11, C-567/11, C-580/11, C-591/11, C-620/11 and C-640/11, EU:C:2013:660, paragraphs 33 to 36 and 40).

30 The referring court refers to recital 31 of Decision 2011/278 which mentions the ability of the 'power sector' to 'pass on the increased cost of [CO_2]'.

31 The referring court observes that the wording of the provision of German law transposing Article 3(u) of Directive 2003/87 is based on that reading (see point 9 of this Opinion).

65. ExxonMobil has stated, in that regard, that that feeding of electricity sought to synchronise the frequency and voltage of the internal electric current and of that coming from the network. In the absence of such synchronisation, the transition from stand-alone operation to network operation, necessary to ensure the continuity of the installation's supply, could have been accompanied by fluctuations in frequency and voltage causing damage. The electricity report set out in the order for reference is said to show that the sale of electricity to third parties is marginal.

66. In my view, the contention that installations which have sold to third parties a proportion of the electricity that they have produced principally for the purposes of their activity not covered in Annex I to Directive 2003/87 are not always able to recover from those third parties a significant proportion of the costs of the allowances which they have had to surrender is not unfounded. That possibility depends, it seems to me, at least in part, on the proportion of electricity supplied to third parties in relation to the total amount of electricity and heat generated at the installation. It cannot be ruled out that some of those installations, on account of the marginal nature of the sale of electricity to third parties in relation to their total production of electricity and heat, in particular where the supply of electricity to third parties was for technical reasons,[32] have not been able to pass on in their sale prices a significant proportion of the CO_2 costs related to their activities.

67. However, for the reasons set out below, those considerations do not justify a reading which departs from the wording of Article 3(u) of Directive 2003/87.

68. *In the first place*, as the Commission has pointed out, that provision must be seen in the light of the general scheme and overall purpose of Directive 2003/87 and, in particular, the arrangements for the free allocation of allowances provided for in Article 10a thereof.

69. In that regard, I observe, first, that those arrangements derogate from the principle of the auctioning of allowances,[33] which the legislature considered to be generally 'the simplest, and … the most economically efficient, system,'[34] in the light of the objective to promote 'reductions of greenhouse gas emissions in a cost-effective and economically efficient manner' set out in Article 1 of Directive 2003/87. That derogation is only a transitional measure intended to prevent undertakings from losing competitiveness pending a scheme for full emission allowance auctioning.[35] Accordingly, since 2013, the amount of allowances allocated free of charge has decreased each year, with a view to their abolition, initially envisaged in 2027.[36] Accompanying that process, any restriction on the free allocation of allowances contributes to the progressive implementation of the scheme for full emission allowance auctioning sought by the legislature. As the Commission has argued, that consideration supports a broad interpretation of the provisions restricting the free allocation of allowances, which include Article 3(u) of that directive in that it defines the concept of 'electricity generator'.

32 Of course, in a situation such as that at issue in the main proceedings, it is not the supply of electricity for consideration but rather the connection to the public electricity network which was for technical reasons. There was no technical reason precluding the installation from supplying the minimal quantity of electricity in question to the network free of charge. However, an installation's status as an electricity generator presupposes that, on or after 1 January 2005 – several years before the adoption of Directive 2009/29 – it has produced electricity for sale to third parties. The installations in question were not therefore able to anticipate the adoption of that directive by waiving, if they considered it to be to their advantage, the consideration for the electricity supplied to third parties in order to be allocated more allowances free of charge.

33 See Article 10(1) of Directive 2003/87.

34 See recital 15 of Directive 2009/29.

35 See judgment of 12 April 2018, *PPC Power* (C-302/17, EU:C:2018:245, paragraph 20 and the case-law cited).

36 Article 10a(11) of Directive 2003/87. The principle that free emission allowances are to be abolished entirely by 2027 has, however, been called into question by the amendments made to Articles 10a and 10b of Directive 2003/87 by Article 1(14)(k) and (15) of Directive 2018/410.

70. Second, defining the scope of the category of electricity generators is, pursuant to Article 10a of Directive 2003/87, of decisive importance for the purposes of calculating the free allocation of allowances granted not only to installations falling within that category but also to other installations (called, for convenience, 'industrial installations'[37]). As observed by the German Government, the definition of its scope influences the Commission's calculation of the uniform cross-sectoral correction factor, the application of which to the preliminary annual amount of allowances allocated free of charge for each industrial installation determines the final total annual amount of emission allowances which it receives.[38] That finding reinforces the need for clear rules making it possible to identify, with a sufficient degree of certainty and predictability, the installations which fall within the scope of the definition laid down in Article 3(u) of Directive 2003/87.

71. As argued by the Commission, to have made the status of electricity generator dependent on there being no activity carried out other than the production of electricity or on a requirement that the sale to third parties is the 'main objective' of the production of electricity would have made determination of that status uncertain. In particular, as the German Government has also noted, such an approach would give rise to confusion in the absence of thresholds predefined by the legislature making it possible to distinguish the main objective from the secondary objective of the production of electricity and, accordingly, to identify the installations belonging to the 'conventional electricity sector'.[39]

72. *In the second place*, the literal interpretation of Article 3(u) of Directive 2003/87 does not preclude its compliance with requirements of primary law and, in particular, the general principle of equal treatment.[40]

73. The referring court and ExxonMobil have argued, in that regard, that that interpretation results in a difference in treatment between, on the one hand, installations engaged in a combustion activity and another activity listed in Annex I to that directive and, on the other, those carrying out, in addition to a combustion activity, an activity not listed in that annex. I take the view that, contrary to ExxonMobil's contentions, such a difference in treatment does not amount to discrimination.

74. In principle, those two categories of installations are not, in my view, in objectively comparable situations in the light of the principles governing the applicability of the emissions trading scheme. As noted by the Commission, installations in the second category are subject to that scheme only in respect of emissions resulting from their combustion activities. By contrast, installations in the first category are subject to that scheme for all of their emissions, irrespective of whether they result from combustion activities.

37 See judgment of 28 April 2016, *Borealis Polyolefine and Others* (C-191/14, C-192/14, C-295/14, C-389/14 and C-391/14 to C-393/14, EU:C:2016:311, paragraph 70).

38 See Article 10a(5) of Directive 2003/87 and the first subparagraph of Article 10(9) of Decision 2011/278. Under Article 15(3) of that decision, the uniform cross-sectoral correction factor is determined by comparing, on the one hand, the sum of the preliminary total annual amounts of emission allowances allocated to industrial installations throughout the European Union with, on the other, the maximum annual amount of allowances available to be allocated free of charge to those installations calculated in accordance with Article 10a(5) of Directive 2003/87. That mechanism was described in the judgment of 28 April 2016, *Borealis Polyolefine and Others* (C-191/14, C-192/14, C-295/14, C-389/14 and C-391/14 to C-393/14, EU:C:2016:311, paragraph 60 et seq.).

39 That conclusion is not called into question by the proposition, set out in the Guidance paper to identify electricity generators (p. 5, point 11), that, in order to avoid too onerous and complex investigations, a Member State has to assume that no electricity sales took place if the total electricity consumption of the installation concerned exceeded its total electricity generation on a yearly basis. That proposition, which is, moreover, non-binding, is intended at most to establish a simple presumption that may be rebutted by the finding that the installation has sold electricity to third parties.

40 According to settled case-law, an EU measure must be interpreted, as far as possible, in such a way as not to affect its validity and in conformity with primary law as a whole. See, inter alia, judgments of 10 September 1996, *Commission* v Germany (C-61/94, EU:C:1996:313, paragraph 52); of 16 September 2010, *Chatzi* (C-149/10, EU:C:2010:534, paragraph 43); and of 15 February 2016, *N.* (C-601/15 PPU, EU:C:2016:84, paragraph 48).

75. In that regard, it is apparent from the preparatory documents preceding the adoption of Directive 2009/29 that the inclusion of activities other than the 'combustion of fuels' in Annex I to Directive 2003/87 was intended to include in its scope certain emissions – 'process emissions' – which are the result not of 'combustion' processes – even defining that concept widely – but of certain industrial processes.[41] The list of specific activities therein was adopted by the legislature in view of the magnitude of the associated process emissions.[42]

76. In any event, even assuming that the situation of an installation such as that at issue in the main proceedings is objectively comparable to that of an installation carrying out, in addition to its combustion activity, an activity listed in Annex I to Directive 2003/87,[43] the difference in treatment of those installations would appear to me to be justified.

77. As the Court has already held,[44] the legislature had a broad discretion for the purpose of establishing and restructuring the 'complex scheme' – involving political, economic and social choices underpinned by complex assessments and evaluations – that the emissions trading scheme constitutes. The legislature was entitled to have recourse for that purpose to a step-by-step approach and to proceed in the light of the experience gained. As is apparent from the judgment in *Arcelor Atlantique et Lorraine and Others*,[45] that choice had, however, to be based on objective criteria appropriate to the aim pursued and not produce results that were manifestly less appropriate than those that would have been produced by other measures that were also suitable.

78. The restriction of the free allocation of emission allowances to electricity generators is based, specifically, on a step-by-step approach aimed at the progressive implementation of the scheme for full emission allowance auctioning. In that context, the legislature decided that electricity generators, in view of the objective assessment that the CO_2 costs related to their activities may generally be passed on in electricity prices, were to be subject to the principle of full emission allowance auctioning from 2013. It also considered it necessary to determine the scope of the category of electricity generators by means of clearly defined criteria, given, in particular, the structural importance of that determination within the framework of the arrangements for the free allocation of emission allowances.[46]

79. In my view, the literal interpretation of Article 3(u) of Directive 2003/87 does not call for the conclusion that the legislature exceeded its margin of discretion by defining the concept of 'electricity generator' by means of the criteria set out therein for the purpose of achieving those objectives. This is so even if some installations falling under that definition, considered individually, would not have been able, where appropriate, to recover from customers a significant proportion of the allowance costs associated with their activities.[47]

41 See the Commission's proposal, p. 3, and Impact assessment, pp. 18 to 23 and pp. 160 and 161. See, also, Commission, 'Guidance on interpretation of Annex I of the EU ETS Directive (excl. aviation activities)', 18 March 2010, https://ec.europa.eu/clima/sites/clima/files/ets/docs/guidance_interpretation_en.pdf, p. 11.

42 See Impact assessment, p. 21 and pp. 35 and 36. The legislature did not consider it necessary to define the concept of 'process emissions' in Directive 2003/87 since that directive applies to all CO_2 emissions resulting from the specific activities listed in Annex I thereto, irrespective of whether they result from combustion processes or other industrial processes. That concept is, however, defined in Article 3(30) of Regulation No 601/2012 as 'greenhouse gas emissions other than combustion emissions occurring as a result of intentional and unintentional reactions between substances or their transformation …'. In order to avoid any confusion in this regard, I observe that the concepts of 'process emissions' within the meaning of Article 3(30) of Regulation No 601/2012 and 'process emissions sub-installation' within the meaning of Article 3(h) of Decision 2011/278 overlap only in part. 'Process emissions' are, to a large extent, covered by the product benchmarks provided for in Annex I to that decision, which are applicable to a 'product benchmark sub-installation' defined in Article 3(b).

43 Accordingly, in particular, my analysis does not prejudge the question whether emissions of inherent CO_2 occurring as a result of a combustion activity, such as those at issue in the main proceedings, may constitute 'process emissions' within the meaning of Article 3(30) of Regulation No 601/2012 and be attributed to a 'process emissions sub-installation' under Article 3(h) of Decision 2011/278. That issue is addressed in the third and fourth questions referred, which are not the focus of this Opinion.

44 Judgments of 16 December 2008, *Arcelor Atlantique et Lorraine and Others* (C-127/07, EU:C:2008:728, paragraphs 57, 60 and 61), and of 21 June 2018, *Poland* v *Parliament and Council* (C-5/16, EU:C:2018:483, paragraphs 112 and 125).

45 Judgment of 16 December 2008 (C-127/07, EU:C:2008:728, paragraphs 58, 59 and 63).

46 See point 70 of this Opinion.

47 See point 66 of this Opinion.

80. The proportionality of that legislative choice is also apparent from the fact that the status of electricity generator does not preclude the installations in question from receiving any free allocation of emission allowances, since those installations remain eligible under certain conditions aimed at ensuring greater energy efficiency. [48]

81. Furthermore, I do not agree with the argument put forward by ExxonMobil that to classify as electricity generators installations which produce electricity secondarily to meet the needs of their primary production activity not listed in Annex I to Directive 2003/87 would amount to discrimination against those installations compared with installations which obtain the electricity required for that purpose from third parties. To counter that argument, it is sufficient to note that installations which generate their own electricity for the purposes of their activity not listed in that annex do not, by that fact alone, qualify as electricity generators. They still have to sell a proportion of that electricity to third parties, which is an objective and non-discriminatory criterion.

82. *In the third place*, contrary to ExxonMobil's contentions, the classification of an installation such as that at issue in the main proceedings as an electricity generator cannot be called into question because of an alleged contradiction between that classification and the inclusion of the natural gas extraction sector in the list of sectors and subsectors exposed to a significant risk of carbon leakage, [49] set out in the annex to Decision 2010/2/EU. [50] According to ExxonMobil, the installation does not belong to the electricity sector – which, in view of its ability to recover allowance costs from its customers, is not exposed to distortions of competition resulting from the application of the emissions trading scheme. The sector to which it belongs, namely the natural gas extraction sector, is characterised, on the contrary, by the existence of such distortions accompanied by a significant risk of carbon leakage on account of its inability to pass on the CO_2 costs in its prices.

83. In my view, while it seems at first sight to be paradoxical that one and the same installation falls simultaneously within a sector regarded as capable of passing on allowance costs in the sales prices of its products and within a sector well known to be incapable of so doing, that contradiction is only apparent. The classification of a sector or subsector amongst those exposed to a significant risk of carbon leakage means that such an inability is demonstrated in the light of an overall assessment of all the activities carried out by those installations falling within it. [51] That classification does not require each of those installations to be incapable of recovering the allowance costs associated with its activities even where it produces electricity intended, at least in part, for sale to third parties.

48 See points 88 to 98 of this Opinion.

49 The concept of 'risk of carbon leakage' refers to the risk of relocation of activities emitting substantial quantities of greenhouse gases, due to the costs associated with the application of the emissions trading scheme, to third countries where there are no such constraints, thereby increasing global emissions. See recitals 24 and 25 of Directive 2009/29.

50 Commission Decision of 24 December 2009 determining, pursuant to Directive [2003/87], a list of sectors and subsectors which are deemed to be exposed to a significant risk of carbon leakage (OJ 2010 L 1, p. 10). Point 1.4 of the annex to that decision, applicable during the relevant period, refers, amongst the sectors exposed to a significant risk of carbon leakage, to the extraction of natural gas on the basis of the NACE-4 code (four-digit nomenclature). Decision 2010/2 was repealed by Commission Decision 2014/746/EU of 27 October 2014 determining, pursuant to Directive [2003/87], a list of sectors and subsectors which are deemed to be exposed to a significant risk of carbon leakage, for the period 2015 to 2019 (OJ 2014 L 308, p. 114), the annex to which again specifies, in point 1.1, the natural gas extraction sector. As ExxonMobil submitted at the hearing, the NACE-4 code corresponding to the extraction of natural gas – 1110 at the material time and from now on 0620 – includes the desulphurisation of that gas. See Eurostat's website http://ec.europa.eu/eurostat/ramon/nomenclatures/index.cfm?TargetUrl=LST_NOM_DTL&StrNom=NACE_REV2&StrLanguageCode=EN&IntPcKey= 18495674&StrLayoutCode= and https://ec.europa.eu/eurostat/documents/1965800/1978760/CORRESPONDENCETABLENACEREV.1.1-NACEREV.2.pdf/e8200936-c2f0-4202-8bda-99fbbfc422b4.

51 Article 10a(14) of Directive 2003/87 provides that in order to determine the sectors or subsectors exposed to a significant risk of carbon leakage, 'the Commission shall assess, at [EU] level, the extent to which it is possible for the sector or subsector concerned … to pass on the direct cost of the required allowances and the indirect costs from higher electricity prices resulting from the implementation of this Directive into product prices without significant loss of market share to less carbon efficient installations outside the [European Union]'.

84. With that in mind, it is apparent from Article 10a(12) of Directive 2003/87, read in conjunction with Article 10a(1) and (3), that the inclusion of a sector or subsector in the annex to Decision 2010/2 does not exempt the installations falling within it from the application of the principle that, pursuant to the third subparagraph of Article 10a(1), no free allocation is to be made in respect of any electricity production (with some exceptions) – irrespective of whether those installations are classified as electricity generators. Nor does such inclusion exempt installations classified as electricity generators from the associated consequences under Article 10a(3).[52]

85. Thus, in accordance with Article 10a(12) of Directive 2003/87, the fact that an installation belongs to a sector or subsector exposed to a significant risk of carbon leakage has the sole consequence, from the point of view of allocation under that article, that the 'leakage risk factor' is applied to historical activity data to be taken into account when calculating the preliminary free allocation of allowances, thus allowing a more generous preliminary allocation.[53] The fact of belonging to such a sector or subsector does not require that account be taken, amongst those data, of data relating to electricity production which have to be excluded pursuant to the third subparagraph of Article 10a(1) of that directive.[54] Nor, so far as concerns electricity generators, does it have the effect of requiring the inclusion, in their historical activity data, of information relating to their heat production beyond what is provided for by Article 10a(3) of that directive.[55]

86. *In the fourth place*, the origin of Article 3(u) of Directive 2003/87 supports the literal interpretation. The preparatory documents preceding the adoption of Directive 2009/29 show that the legislature opted for wording conferring a broad scope on the concept of 'electricity generator' despite the more restrictive wording proposed during the legislative process by the European Parliament Committee on Industry, Research and Energy. The latter had tabled an amendment, referred to by the German Government, aimed at conferring the status of electricity generator only on installations 'which predominantly deliver … to the public electricity grids'.[56] The fact that the proposed amendment remained a dead letter provides, in my view, a further indication that the position adopted by ExxonMobil conflicts with the intention of the legislature.

87. In the light of all the foregoing, I conclude that the concept of 'electricity generator', within the meaning of Article 3(u) of Directive 2003/87, covers an installation, such as that at issue in the main proceedings, which, after 1 January 2005, has sold to the public electricity network small amounts of the electricity which it has produced – in the context of its activity of combustion of fuels – principally to meet the needs relating to its activity of producing a product, which activity is not listed in Annex I to that directive.

52 See points 88 to 98 of this Opinion.

53 That factor is applied in the calculation, by the Member States, of the preliminary annual amount of emission allowances allocated free of charge to each installation established on their territory (the final allocation is determined by the Commission at a later stage). For the purposes of that calculation, first of all, the historical activity level of each sub-installation of the installation in question is multiplied either by the product benchmark, the heat benchmark or the fuel benchmark applicable, or by a factor of 0.97 if it is a process emissions sub-installation (see Article 10(2) of Decision 2011/278). Next, the value thus obtained is multiplied either by a factor equal to 0.8 in 2013 and decreasing each year to 0.3 in 2020, *or by a factor of 1 where the activities of the sub-installation in question fall within a sector exposed to a significant risk of carbon leakage* (see Article 10a(11) and (12) of Directive 2003/87). Lastly, the sum of the results obtained for each sub-installation constitutes the preliminary total annual amount of emission allowances allocated free of charge for the installation (see Article 10(7) of Decision 2011/278).

54 Under Article 9(4) and (5) of Decision 2011/278, the historical activity level of heat benchmark sub-installations or fuel benchmark sub-installations is determined without taking account of measurable heat or fuel consumed in the production of electricity.

55 See points 88 to 98 of this Opinion.

56 Opinion of the Committee on Industry, Research and Energy, Amendment 22, attached to the Report of the Committee on the Environment, Public Health and Food Safety of 15 October 2008, European Parliament Document A6-0406/2008, p. 105. That amendment was justified as follows: '… Industry other than public electricity producers must [retain] the possibility to run their own energy facilities already invested. … Autoproducers, as defined in the Directive 96/92/EC of the European Parliament and of the Council of 19 December 1996 concerning common rules for the internal market in electricity as "a natural or legal person generating electricity essentially for his own use" should not be excluded from free allocation'.

D. The implications of the status of electricity generator for the free allocation of emission allowances (second question)

88. The second question is referred to the Court in the event that it adopts, as I am advocating, an interpretation of Article 3(u) of Directive 2003/87 under which an installation such as that at issue in the main proceedings is an electricity generator. The referring court asks whether, pursuant to Article 3(c) of Decision 2011/278, such an installation would nevertheless be eligible for the free allocation of emission allowances in respect of the heat which it produces and uses for purposes other than the production of electricity, even outside the cases, irrelevant in the present instance, envisaged in the third subparagraph of Article 10a(1) and Article 10a(4) of Directive 2003/87.

89. The referring court's doubts are due to the fact that Article 3(c) of Decision 2011/278 makes the status of 'heat benchmark sub-installation' conditional upon the heat produced not being used for the production of electricity, without generally excluding a heat benchmark sub-installation from being established within an installation that produces electricity. In other words, while that provision precludes the free allocation of emission allowances for heat generated for the purposes of *electricity production*, it does not state to what extent the heat generated for other purposes by *electricity generators* is excluded from such allocation.

90. It is apparent, in my view, from a literal, systematic and teleological interpretation of Article 10a of Directive 2003/87 and Article 3(c) of Decision 2011/278 that the second question should be answered in the negative.

91. First, the third subparagraph of Article 10a(1) of Directive 2003/87 precludes any free allocation of emission allowances for *electricity production*, except where it is obtained from waste gases. ExxonMobil does not claim, in the present instance, to be entitled to the free allocation of emission allowances for the installation's electricity production.

92. Second, moreover, Article 10a(3) of that directive establishes the rule that no free allocation is to be given to *electricity generators* outside the cases set out in Article 10a(4) and (8).[57] Article 10a(4) concerns the production of heating and cooling intended for district heating services or obtained by high efficiency cogeneration.[58]

93. As the Court has already held, Article 10a(4) of Directive 2003/87 thus derogates from the rule of principle, set out in Article 10a(3), according to which electricity generators are not eligible for the free allocation of allowances.[59] Electricity generators are, therefore, in principle, denied the free allocation of allowances for their emissions resulting not only from their production of electricity but also, as the case may be, contrary to the contentions of ExxonMobil and the German Government, from their heat production activities. Only the cases provided for in Article 10a(4) and (8) of that directive can justify the free allocation of allowances for heat produced by electricity generators.

94. An interpretation to the contrary would render Article 10a(3) of Directive 2003/87 redundant, since the free allocation of allowances for the production of electricity – whether or not the installation producing it can be classified as an electricity generator – is already excluded by the third subparagraph of Article 10a(1) of that directive.

57 The third subparagraph of Article 10a(1) and Article 10a(3) of Directive 2003/87 also allow the free allocation of emission allowances in the cases falling within Article 10c of that directive. That provision authorises the Member States to allocate emission allowances free of charge for projects to modernise the production of electricity in certain situations. As pointed out by the Commission, Germany is not one of the Member States eligible to make use of that derogation. See Report from the Commission and the European Parliament and the Council on the functioning of the European carbon market, 1 February 2017, COM(2017) 48 final, p. 14.

58 Article 10a(8) of Directive 2003/87 relates to the encouragement of certain projects that aim at the capture and geological storage of CO_2, as well as of demonstration projects concerning innovative renewable energy technologies.

59 Judgment of 28 April 2016, *Borealis Polyolefine and Others* (C-191/14, C-192/14, C-295/14, C-389/14 and C-391/14 to C-393/14, EU:C:2016:311, paragraph 66).

95. The approach that I am advocating is also in line with the objective, set out in Article 10a(3), of establishing the principle of the full auctioning of allowances for electricity generators from 2013. As set out above, since that principle is to be gradually extended to other installations, a broad interpretation of the provisions limiting the possibilities of free allocation of allowances is, in my view, justified. [60]

96. Moreover, I would point out that the legislature had a broad discretion in the drawing up of the emissions trading scheme. [61] I take the view that it did not exceed the limits of that discretion in deciding to apply that principle, initially, only to electricity generators, classified as such on the basis of objective criteria appropriate to the aim pursued. In the exercise of its discretion, the legislature ensured that, in order to prevent distortions of competition in relation to other heat producers, [62] electricity generators are eligible for the free allocation of allowances, in respect of the heat produced, under certain conditions aimed at ensuring greater energy efficiency. [63]

97. That reading of Article 10a(3) of Directive 2003/87 cannot be called into question on the basis of Article 3(c) of Decision 2011/278. As the Commission has argued, given the normative hierarchy between the implementing measure which that decision represents and the enabling provisions set out in Article 10a of that directive, [64] Article 3(c) of that decision must be interpreted, where possible, in accordance with Article 10a(3) of that directive. [65]

98. Such an interpretation in accordance with the directive means that Article 3(c) of Decision 2011/278 permits the allocation of allowances to a heat benchmark installation and the corresponding free allocation of allowances within an installation classified as an electricity generator only where Article 10a(3) of Directive 2003/87 authorises such an allocation – that is to say only in the cases envisaged in Article 10a(4) and (8) of the directive. [66]

99. In the light of my proposed answers to the first and second questions, there is no need to answer the third and fourth questions, which the referring court has asked only in the event that the Court's answers to the first and second questions mean that the installation is eligible for the free allocation of allowances in respect of the heat that it has produced.

E. The limitation in time of the effects of the judgment to be delivered

100. In the event that the Court gives to the second question the answer that I propose, ExxonMobil asks the Court to limit in time the effects of the judgment to be delivered.

101. According to settled case-law, limitation of the temporal effects of a judgment in which the Court gives a preliminary ruling interpreting a provision of EU law constitutes an exceptional measure which requires two essential criteria to be fulfilled, namely that those concerned should have acted in good faith and that there should be a risk of serious difficulties. [67] The Court has taken that step 'only in quite specific circumstances, notably where there was a risk of serious economic repercussions owing in particular to the large number of legal relationships entered into in good faith on the basis of rules

60 See point 69 of this Opinion.

61 See point 76 of this Opinion.

62 As set out in recital 19 of Directive 2009/29, 'in order to avoid distortions of competition, electricity generators may receive free allowances for district heating and cooling and for heating and cooling produced through high efficiency cogeneration … where such heat produced by installations in other sectors would be given free allocations'.

63 See the Commission's proposal, pp. 8 and 24. See, also, Article 1 and recitals 1 and 5 of Directive 2004/8.

64 See, to that effect, judgments of 28 February 2018, *Trinseo Deutschland* (C-577/16, EU:C:2018:127, paragraph 68), and of 17 May 2018, *Evonik Degussa* (C-229/17, EU:C:2018:323, paragraph 29).

65 See, to that effect, judgments of 24 June 1993, *Dr Tretter* (C-90/92, EU:C:1993:264, paragraph 11); of 26 February 2002, *Commission* v *Boehringer* (C-32/00 P, EU:C:2002:119, paragraph 53); and of 19 July 2012, *Pie Optiek* (C-376/11, EU:C:2012:502, paragraph 34).

66 Without prejudice to Article 10c of Directive 2003/87 (see footnote 57 of this Opinion).

67 See, inter alia, judgment of 19 October 2017, *Paper Consult* (C-101/16, EU:C:2017:775, paragraph 65 and the case-law cited).

considered to be validly in force and where it appeared that individuals and national authorities had been led to adopt practices which did not comply with EU law by reason of objective, significant uncertainty regarding the implications of European Union provisions, to which the conduct of other Member States or the Commission may even have contributed'. [68]

102. In the present case, ExxonMobil has put forward no specific matter capable of establishing that those criteria have been met.

103. As regards, first, the presence of a risk of serious economic difficulties, ExxonMobil has merely submitted that the German authorities have, since 2013, allocated emission allowances free of charge to a large number of electricity- generating installations in respect of their production of heat. It has not provided any details of those installations or the harmful consequences that they would suffer if the interpretation of Article 10a(3) of Directive 2003/87 suggested above were adopted.

104. Second, that interpretation is, in my view, sufficiently clear from the wording of that provision and of Article 3(c) of Decision 2011/278, read in conjunction with that provision. Moreover, ExxonMobil relies only on a divergent interpretation adopted by the German authorities, without indicating in what way the conduct of the Commission or other Member States contributed to objective and significant uncertainty surrounding the scope of Article 10a(3) of Directive 2003/87. In those circumstances, no such uncertainty could have led to the adoption in good faith of conduct contrary to EU law.

105. Consequently, I propose that the Court should reject the application seeking limitation of the temporal effects of the judgment to be delivered.

V. Conclusion

106. In the light of all the foregoing considerations, I propose that the Court should answer the first and second questions referred for a preliminary ruling by the Verwaltungsgericht Berlin (Administrative Court, Berlin, Germany) as follows:

(1) Article 3(u) of Directive 2003/87/EC of the European Parliament and of the Council of 13 October 2003 establishing a scheme for greenhouse gas emission allowance trading within the Community and amending Council Directive 96/61/EC, as amended by Directive 2009/29/EC of the European Parliament and of the Council of 23 April 2009, must be interpreted as meaning that an installation which carries out both the activity of 'combustion of fuels with a rated thermal input exceeding 20 [megawatts (MW)]', within the meaning of point 6 of Annex I to Directive 2003/87, and an activity for producing a product which does not fall within any of the other activities referred to in that annex constitutes an 'electricity generator' where that installation has, on or after 1 January 2005, produced electricity principally to meet its own supply needs and, in part, to be fed for consideration into the public electricity network.

(2) Article 10a(3) of Directive 2003/87 and Article 3(c) 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] must be interpreted as meaning that an installation which has the status of 'electricity generator', within the meaning of Article 3(u) of that directive, is eligible for a free allocation of greenhouse gas emission allowances in respect of the heat that it produces only in the cases envisaged in Article 10a(4) and (8) of that directive, without prejudice to the application of Article 10c of that directive.

68 See, inter alia, judgments of 20 September 2001, *Grzelczyk* (C-184/99, EU:C:2001:458, paragraph 53), and of 19 October 2017, *Paper Consult* (C-101/16, EU:C:2017:775, paragraph 66 and the case-law cited).