



Reports of Cases

OPINION OF ADVOCATE GENERAL

HOGAN

delivered on 23 September 2021¹

Case C-165/20

ET, acting as insolvency administrator of Air Berlin plc & Co. Luftverkehrs KG (AB KG)

v

Bundesrepublik Deutschland

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

(Reference for a preliminary ruling – Environment – Directive 2003/87/EC – Scheme for greenhouse gas emission allowance trading – Directive 2008/101/EC – Inclusion of aviation activities – Free allocation of aviation emission allowances for 2013-2020 trading period to aircraft operators – Cessation of aviation activities in 2017 due to insolvency of aircraft operator – Withdrawal of emission allowances for the years 2018-2020 – Principle of legal certainty – Regulation (EU) No 389/2013 – Article 10(5), Article 29, Article 55(1)(a) and (3) and Article 56 – Validity – Allocation request not awarded at the end of a trading period – Shift to next trading period)

I. Introduction

1. The present request for a preliminary ruling from the Verwaltungsgericht Berlin (Administrative Court, Berlin, Germany) of 30 March 2020, which was lodged at the Registry of the Court on 16 April 2020, arose in the context of proceedings between ET (acting as insolvency administrator of Air Berlin plc & Co. Luftverkehrs KG (AB KG) ('Air Berlin') and the Bundesrepublik Deutschland (Federal Republic of Germany) ('the defendant') (which is represented by the Deutsche Emissionshandelsstelle im Umweltbundesamt (the German Emissions Trading Authority at the Federal Environment Agency; the 'Trading Authority')). In essence, the questions referred for a preliminary ruling relate to how greenhouse gas emission allowances previously allocated to an aircraft operator should be treated in the course of insolvency proceedings once that operator has ceased to trade.

2. Those proceedings relate, inter alia, to the decision of the Trading Authority of 28 February 2018 to withdraw part of the free allocation of greenhouse gas emission allowances which had previously been granted to Air Berlin, a commercial aircraft operator. These allowances related to the 2013-2020 emissions trading period. The withdrawal, which related specifically to the years 2018-2020, was based on the fact that in October 2017, Air Berlin ceased its aviation activities due to insolvency.

¹ Original language: English.

3. The Court is accordingly asked to interpret certain provisions 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,² as amended, in particular, by Directive 2008/101/EC of the European Parliament and of the Council of 19 November 2008 amending Directive 2003/87/EC so as to include aviation activities in the scheme for greenhouse gas emission allowance trading within the Community³ and Commission Regulation (EU) No 389/2013 of 2 May 2013 establishing a Union Registry pursuant to Directive 2003/87/EC of the European Parliament and of the Council, Decisions No 280/2004/EC and No 406/2009/EC of the European Parliament and of the Council and repealing Commission Regulations (EU) No 920/2010 and No 1193/2011.⁴

4. This reference for a preliminary ruling thus raises the broader question as to the extent to which such allowances which were allocated free of charge may be regarded as a form of intangible asset which may be traded irrespective of the present circumstances of the aircraft operator to which they were originally allocated.

II. Legal framework

A. *EU law*

1. *Directive 2003/87*

5. Recitals 5 and 7 of Directive 2003/87 state:

‘(5) The [European Union] and its Member States have agreed to fulfil their commitments to reduce anthropogenic greenhouse gas emissions under the Kyoto Protocol jointly, in accordance with Decision 2002/358/EC. This Directive aims to contribute to fulfilling the commitments of the European Community and its Member States more effectively, through an efficient European market in greenhouse gas emission allowances, with the least possible diminution of economic development and employment.

...

(7) [Union] provisions relating to allocation of allowances by the Member States are necessary to contribute to preserving the integrity of the internal market and to avoid distortions of competition.

...’

² OJ 2003 L 275, p. 32. Directive 2003/87 was last 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). As regards the validity of Directive 2008/101, see judgment of 21 December 2011, *Air Transport Association of America and Others* (C-366/10, EU:C:2011:864).

³ OJ 2009 L 8, p. 3.

⁴ OJ 2013 L 122, p. 1.

6. Recital 20 of Directive 2008/101 amending Directive 2003/87 and which concerns aviation activities states:

‘In order to avoid distortions of competition, a harmonised allocation methodology should be specified for determining the total quantity of allowances to be issued and for distributing allowances to aircraft operators. A proportion of allowances will be allocated by auction in accordance with rules to be developed by the Commission. A special reserve of allowances should be set aside to ensure access to the market for new aircraft operators and to assist aircraft operators which increase sharply the number of tonne-kilometres that they perform. *Aircraft operators that cease operations should continue to be issued with allowances until the end of the period for which free allowances have already been allocated.*’

7. I pause at this point to stress that the last sentence of recital 20 – which I have taken the liberty of highlighting – is the subject of some controversy in the present case in that the Commission maintains that it was included and retained in Directive 2003/87 in error. I will naturally return to this later in the Opinion, but for the moment it may be convenient to continue to set out the relevant legal materials.

8. Article 1 of Directive 2003/87, entitled ‘Subject matter’, provides:

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

9. Article 2 of that directive entitled ‘Scope’ provides:

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

...’

10. Article 3 of that directive entitled ‘Definitions’, provides:

‘For the purposes of this Directive the following definitions shall apply:

...

(b) “emissions” means the release of greenhouse gases into the atmosphere from sources in an installation or the release from an aircraft performing an aviation activity listed in Annex I of the gases specified in respect of that activity;

...

(o) “aircraft operator” means the person who operates an aircraft at the time it performs an aviation activity listed in Annex I or, where that person is not known or is not identified by the owner of the aircraft, the owner of the aircraft;

...’

11. Article 3a was inserted by Directive 2008/101 in a chapter of that directive entitled ‘Aviation’. Article 3a is entitled ‘Scope’, and provides:

‘The provisions of this Chapter shall apply to the allocation and issue of allowances in respect of aviation activities listed in Annex I.’

12. Article 3c entitled ‘Total quantity of allowances for aviation’, provides:

‘1. For the period from 1 January 2012 to 31 December 2012, the total quantity of allowances to be allocated to aircraft operators shall be equivalent to 97% of the historical aviation emissions.

2. For the period referred to in Article 13 beginning on 1 January 2013, and, in the absence of any amendments following the review referred to in Article 30(4), for each subsequent period, the total quantity of allowances to be allocated to aircraft operators shall be equivalent to 95% of the historical aviation emissions multiplied by the number of years in the period.

...

3a. Any allocation of allowances for aviation activities to and from aerodromes located in countries outside the European Economic Area (“EEA”) after 31 December 2023 shall be subject to the review referred to in Article 28b.

...’

13. Article 3d of Directive 2003/87 entitled ‘Method of allocation of allowances for aviation through auctioning’, provides:

‘1. In the period referred to in Article 3c(1), 15% of allowances shall be auctioned.

2. From 1 January 2013, 15% of allowances shall be auctioned. The Commission shall undertake a study on the ability of the aviation sector to pass on the cost of CO₂ to its customers, in relation to the EU ETS and to the global market-based measure developed by the International Civil Aviation Organisation (“ICAO”). The study shall assess the ability of the aviation sector to pass on the cost of required emission units, comparing this to industries and to the power sector, with the intention of making a proposal to increase the percentage of auctioning pursuant to the review referred to in Article 28b(2), taking into account the analysis of costs passed on and considering alignment with other sectors and the competitiveness between different modes of transport.

3. The Commission is empowered to adopt delegated acts in accordance with Article 23 to supplement this Directive concerning the detailed arrangements for the auctioning by Member States of aviation allowances in accordance with paragraphs 1 and 2 of this Article or with Article 3f(8). The number of allowances to be auctioned in each period by each Member State shall be proportionate to its share of the total attributed aviation emissions for all Member States for the reference year reported pursuant to Article 14(3) and verified pursuant to Article 15. For the period referred to in Article 3c(1), the reference year shall be 2010, and for each subsequent period referred to in Article 3c, the reference year shall be the calendar year ending 24 months before the start of the period to which the auction relates. The delegated acts shall ensure that the principles set out in the first subparagraph of Article 10(4) are respected.

...’

14. Article 3e of Directive 2003/87 entitled ‘Allocation and issue of allowances to aircraft operators’, provides:

‘1. For each period referred to in Article 3c, each aircraft operator may apply for an allocation of allowances that are to be allocated free of charge. An application may be made by submitting to the competent authority in the administering Member State verified tonne-kilometre data for the aviation activities listed in Annex I performed by that aircraft operator for the monitoring year. For the purposes of this Article, the monitoring year shall be the calendar year ending 24 months before the start of the period to which it relates in accordance with Annexes IV and V or, in relation to the period referred to in Article 3c(1), 2010. Any application shall be made at least 21 months before the start of the period to which it relates or, in relation to the period referred to in Article 3c(1), by 31 March 2011.

2. At least 18 months before the start of the period to which the application relates or, in relation to the period referred to in Article 3c(1), by 30 June 2011, Member States shall submit applications received under paragraph 1 to the Commission.

3. At least 15 months before the start of each period referred to in Article 3c(2) or, in relation to the period referred to in Article 3c(1), by 30 September 2011, the Commission shall calculate and adopt a decision setting out:

- (a) the total quantity of allowances to be allocated for that period in accordance with Article 3c;
- (b) the number of allowances to be auctioned in that period in accordance with Article 3d;
- (c) the number of allowances in the special reserve for aircraft operators in that period in accordance with Article 3f(1);
- (d) the number of allowances to be allocated free of charge in that period by subtracting the number of allowances referred to in points (b) and (c) from the total quantity of allowances decided upon under point (a); and
- (e) the benchmark to be used to allocate allowances free of charge to aircraft operators whose applications were submitted to the Commission in accordance with paragraph 2.

The benchmark referred to in point (e), expressed as allowances per tonne-kilometre, shall be calculated by dividing the number of allowances referred to in point (d) by the sum of the tonne-kilometre data included in applications submitted to the Commission in accordance with paragraph 2.

4. Within three months from the date on which the Commission adopts a decision under paragraph 3, each administering Member State shall calculate and publish:

- (a) the total allocation of allowances for the period to each aircraft operator whose application it submitted to the Commission in accordance with paragraph 2, calculated by multiplying the tonne-kilometre data included in the application by the benchmark referred to in paragraph 3(e); and

(b) the allocation of allowances to each aircraft operator for each year, which shall be determined by dividing its total allocation of allowances for the period calculated under point (a) by the number of years in the period for which that aircraft operator is performing an aviation activity listed in Annex I.

5. By 28 February 2012 and by 28 February of each subsequent year, the competent authority of the administering Member State shall issue to each aircraft operator the number of allowances allocated to that aircraft operator for that year under this Article or Article 3f.'

15. Article 3f of Directive 2003/87 entitled 'Special reserve for certain aircraft operators', provides:

'1. In each period referred to in Article 3c(2), 3% of the total quantity of allowances to be allocated shall be set aside in a special reserve for aircraft operators:

(a) who start performing an aviation activity falling within Annex I after the monitoring year for which tonne-kilometre data was submitted under Article 3e(1) in respect of a period referred to in Article 3c(2); or

(b) whose tonne-kilometre data increases by an average of more than 18% annually between the monitoring year for which tonne-kilometre data was submitted under Article 3e(1) in respect of a period referred to in Article 3c(2) and the second calendar year of that period;

and whose activity under point (a), or additional activity under point (b), is not in whole or in part a continuation of an aviation activity previously performed by another aircraft operator.

2. An aircraft operator who is eligible under paragraph 1 may apply for a free allocation of allowances from the special reserve by making an application to the competent authority of its administering Member State. Any application shall be made by 30 June in the third year of the period referred to in Article 3c(2) to which it relates.

An allocation to an aircraft operator under paragraph 1(b) shall not exceed 1 000 000 allowances.

...

8. Any unallocated allowances in the special reserve shall be auctioned by Member States.

...'

16. Article 10a(19) of Directive 2003/87, provides:

'No free allocation shall be given to an installation that has ceased its operations, unless the operator demonstrates to the competent authority that this installation will resume production within a specified and reasonable time. Installations for which the greenhouse gas emissions permit has expired or has been withdrawn and installations for which the operation or resumption of operation is technically impossible shall be considered to have ceased operations.'

17. Article 12 of Directive 2003/87 entitled ‘Transfer, surrender and cancellation of allowances’, provides:

‘1. Member States shall ensure that allowances can be transferred between:

- (a) persons within the Union;
- (b) persons within the Union and persons in third countries, where such allowances are recognised in accordance with the procedure referred to in Article 25 without restrictions other than those contained in, or adopted pursuant to, this Directive.

...

2a. Administering Member States shall ensure that, by 30 April each year, each aircraft operator surrenders a number of allowances equal to the total emissions during the preceding calendar year from aviation activities listed in Annex I for which it is the aircraft operator, as verified in accordance with Article 15. Member States shall ensure that allowances surrendered in accordance with this paragraph are subsequently cancelled.

...’

18. Article 13 of Directive 2003/87 entitled ‘Validity of allowances’, provides:

‘Allowances issued from 1 January 2013 onwards shall be valid indefinitely. Allowances issued from 1 January 2021 onwards shall include an indication showing in which ten-year period beginning from 1 January 2021 they were issued, and be valid for emissions from the first year of that period onwards.’

19. Article 19 of that directive entitled ‘Registries’, provides:

‘1. Allowances issued from 1 January 2012 onwards shall be held in the Union registry for the execution of processes pertaining to the maintenance of the holding accounts opened in the Member State and the allocation, surrender and cancellation of allowances under the Commission Acts referred to in paragraph 3.

...

3. The Commission is empowered to adopt delegated acts in accordance with Article 23 to supplement this Directive by laying down all necessary requirements concerning the Union Registry for the trading period commencing on 1 January 2013 and subsequent periods, in the form of standardised electronic databases containing common data elements to track the issue, holding, transfer and cancellation, as applicable, of allowances, and to provide for public access and confidentiality, as appropriate. Those delegated acts shall also include provisions to put into effect rules on the mutual recognition of allowances in agreements to link emission trading systems.

4. The Acts referred to in paragraph 3 shall contain appropriate modalities for the Union registry to undertake transactions and other operations to implement arrangements referred to in Article 25(1b). These Acts shall also include processes for the change and incident management for the Union registry with regard to issues in paragraph 1 of this Article. It shall contain

appropriate modalities for the Union registry to ensure that initiatives of the Member States pertaining to efficiency improvement, administrative cost management and quality control measures are possible.’

20. Article 20 of Directive 2003/87 entitled ‘Central Administrator’, provides:

‘1. The Commission shall designate a Central Administrator to maintain an independent transaction log recording the issue, transfer and cancellation of allowances.

2. The Central Administrator shall conduct an automated check on each transaction in registries through the independent transaction log to ensure there are no irregularities in the issue, transfer and cancellation of allowances.

...’

21. Article 28a of that directive entitled ‘Derogations applicable in advance of the implementation of the ICAO's global market-based measure’, provides:

1. By way of derogation from Articles 12(2a), 14(3) and Article 16, Member States shall consider the requirements set out in those provisions to be satisfied and shall take no action against aircraft operators in respect of:

- (a) all emissions from flights to and from aerodromes located in countries outside the EEA in each calendar year from 1 January 2013 to 31 December 2023, subject to the review referred to in Article 28b;
- (b) all emissions from flights between an aerodrome located in an outermost region within the meaning of Article 349 of the Treaty on the Functioning of the European Union and an aerodrome located in another region of the EEA in each calendar year from 1 January 2013 to 31 December 2023, subject to the review referred to in Article 28b.

...

2. By way of derogation from Articles 3e and 3f, aircraft operators benefiting from the derogations provided for in points (a) and (b) of paragraph 1 of this Article shall be issued, each year, with a number of free allowances reduced in proportion to the reduction of the surrender obligation provided for in those points.

By way of derogation from Article 3f(8), allowances that are not allocated from the special reserve shall be cancelled.

From 1 January 2021, the number of allowances allocated to aircraft operators shall be subject to the application of the linear factor referred to in Article 9, subject to the review referred to in Article 28b.

As regards activity in the period from 1 January 2017 to 31 December 2023, Member States shall, before 1 September 2018, publish the number of aviation allowances allocated to each aircraft operator.

3. By way of derogation from Article 3d, Member States shall auction a number of aviation allowances reduced in proportion to the reduction in the total number of allowances issued.

4. By way of derogation from Article 3d(3), the number of allowances to be auctioned by each Member State in respect of the period from 1 January 2013 to 31 December 2023 shall be reduced to correspond to its share of attributed aviation emissions from flights which are not subject to the derogations provided for in points (a) and (b) of paragraph 1 of this Article.

...'

22. Article 28b entitled 'Reporting and review by the Commission concerning the implementation of the ICAO's global market-based measure' provides:

' ...

2. Within 12 months of the adoption by the ICAO of the relevant instruments, and before the global market-based measure becomes operational, the Commission shall present a report to the European Parliament and to the Council in which it shall consider ways for those instruments to be implemented in Union law through a revision of this Directive. ...

...'

23. Annex I to Directive 2003/87 entitled 'Categories of activities to which this Directive applies', provides in respect of the category 'Aviation':

' ...

This activity shall not include :

...

(j) flights which, but for this point, would fall within this activity, performed by a commercial air transport operator operating either:

- fewer than 243 flights per period for three consecutive four-month periods, or
- flights with total annual emissions lower than 10 000 tonnes per year.'

2. Regulation 389/2013

24. Article 6 of Regulation No 389/2013 entitled 'European Union transaction log,' provides:

'1. A European Union Transaction Log (EUTL), to take the form of a standardised electronic database, is established, pursuant to Article 20 of Directive 2003/87/EC, for transactions within the scope of this Regulation. The EUTL shall also serve to record all information relating to the holdings and transfers of Kyoto units made available in accordance with Article 6(2) of Decision No 280/2004/EC.

2. The central administrator shall operate and maintain the EUTL in accordance with the provisions of this Regulation.

...’.

25. Article 9 of that regulation entitled ‘Accounts’, provides:

‘1. Member States and the central administrator shall ensure that each KP registry and the Union Registry contain accounts as specified in Annex I.

...’.

26. Article 10 of the regulation entitled ‘Account status’, provides:

‘1. Accounts shall be in one of the following status: open, blocked, excluded or closed.

...

3. No processes may be initiated from closed accounts. A closed account may not be re-opened, and may not acquire units.

5. Upon notification from the competent authority that an aircraft operator's flights are no longer included in the Union scheme in accordance with Annex I to Directive 2003/87/EC in a given year, the national administrator shall set the corresponding aircraft operator holding account to excluded status, after giving prior notice to the aircraft operator concerned and until notification from the competent authority that an aircraft operator's flights are again included in the Union scheme.

6. No processes may be initiated from excluded accounts, except for the processes specified in Articles 25 and 68 and the processes specified in Articles 35 and 67 corresponding to the period where the account status was not set to excluded..

27. Article 29 of Regulation No 389/2013 entitled ‘Closure of aircraft operator holding accounts’, provides:

‘Aircraft operator holding accounts shall only be closed by the national administrator if instructed by the competent authority to do so because the competent authority has discovered that the aircraft operator merged into another aircraft operator or the aircraft operator has ceased all its operations covered by Annex I [to] Directive 2003/87/EC, either through a notification by the account holder or through other evidence.’

28. Article 32 of that regulation entitled ‘Positive balance on accounts under closure’, provides:

‘1. If there is a positive balance of allowances or Kyoto units on an account which an administrator is to close in accordance with Articles 27, 28 and 29, the administrator shall request the account holder to specify another account to which such allowances or Kyoto units shall be transferred. If the account holder has not responded to the administrator’s request within 40 working days, the administrator shall transfer the allowances and Kyoto units to its national holding account.

...’.

29. Article 40 of the regulation entitled ‘Nature of allowances and finality of transactions’, provides:

‘1. An allowance or Kyoto unit shall be a fungible, dematerialised instrument that is tradable on the market.

2. The dematerialised nature of allowances and Kyoto units shall imply that the record of the Union Registry shall constitute *prima facie* and sufficient evidence of title over an allowance or Kyoto unit, and of any other matter which is by this Regulation directed or authorised to be recorded in the Union Registry.

...

4. A purchaser and holder of an allowance or Kyoto unit acting in good faith shall acquire title to an allowance or Kyoto unit free of any defects in the title of the transferor.’

30. Article 41 of the regulation entitled ‘Creation of allowances’, provides

‘1. The central administrator may create an EU Total Quantity Account, an EU Aviation Total Quantity Account, an EU Auction Account, an EU Aviation Auction Account, an EU Credit Exchange Account and an EU International Credit Account as appropriate, and shall create or cancel accounts and allowances as made necessary by acts of Union law, including as may be required by Articles 3e(3), 9, 9a, 10a(8) and 11a of Directive 2003/87/EC, Article 10(1) of Regulation (EU) No 1031/2010 [(OJ 2010 L 302, p. 1)], or Article 41(1) of Regulation (EU) No 920/2010 [(OJ 2010 L 270, p. 1)].

...’

31. Article 46 of Regulation No 389/2013 entitled ‘Transfer of aviation allowances to be allocated free of charge’, provides:

‘1. The central administrator shall, in a timely manner, transfer aviation allowances from the EU Aviation Total Quantity Account to the EU Aviation Allocation Account in a quantity corresponding to the number of aviation allowances to be allocated free of charge determined by the Commission's decision adopted on the basis of Article 3e(3) of Directive 2003/87/EC.

2. If the number of aviation allowances to be allocated free of charge is increased by a decision pursuant to Article 3e(3) of Directive 2003/87/EC, the central administrator shall transfer further aviation allowances from the EU Aviation Total Quantity Account to the EU Aviation Allocation Account in a quantity corresponding to the increase of the number of aviation allowances to be allocated free of charge.

3. If the number of aviation allowances to be allocated free of charge is decreased by a decision pursuant to Article 3e(3) of Directive 2003/87/EC, the central administrator shall delete aviation allowances on the EU Aviation Allocation Account in a quantity corresponding to the decrease of the number of aviation allowances to be allocated free of charge.’

32. Article 50 of that regulation entitled ‘Deletion of aviation allowances’, provides:

‘The central administrator shall ensure that, at the end of each trading period, all allowances remaining on the EU Aviation Allocation Account shall be transferred to the Union allowance deletion account.’

33. Article 54 of the regulation entitled ‘Entry of national aviation allocation tables into the EUTL’, provides:

‘1. Each Member State shall notify its national aviation allocation table for the period 2013-2020 to the Commission by 30 September 2012. Member States shall ensure that national aviation allocation tables include the information set out in Annex XI.

2. The Commission shall instruct the central administrator to enter the national aviation allocation table into the EUTL if it considers that the national aviation allocation table is in conformity with Directive 2003/87/EC, in particular with the allocations calculated and published by Member States under Article 3e(4) of that Directive. It shall otherwise reject the national aviation allocation table within a reasonable period and inform the Member State concerned without delay, stating its reasons and setting out criteria to be fulfilled for a subsequent notification to be accepted. That Member State shall submit a revised national aviation allocation table to the Commission within three months.’

34. Article 55 of the regulation entitled ‘Changes to the national aviation allocation tables’, provides:

1. The national administrator shall carry out changes to the national aviation allocation table in the EUTL where:

(a) an aircraft operator ceased all its operations covered by Annex I [to] Directive 2003/87/EC

...

2. A Member State shall notify the Commission of changes to its national aviation allocation table, concerning:

(a) any allocation from the special reserve pursuant to Article 3f of Directive 2003/87/EC;

(b) any adjustment following the adoption of measures pursuant to Article 25a of Directive 2003/87/EC;

(c) any other change not referred to in paragraph 1.

3. The Commission shall instruct the central administrator to make the corresponding changes to the national aviation allocation table held in the EUTL if it considers that the change to the national aviation allocation table is in accordance with Directive 2003/87/EC, in particular with the allocations calculated and published pursuant to Article 3f(7) of that Directive in case of allocations from the special reserve. It shall otherwise reject the changes within a reasonable period and inform the Member State without delay, stating its reasons and setting out criteria to be fulfilled for a subsequent notification to be accepted.

...’

35. Article 56 of Regulation No 389/2013 entitled ‘Free allocation of aviation allowances’, provides:

‘1. The national administrator shall indicate for each aircraft operator and for each year whether or not the aircraft operator should receive an allocation for that year in the national aviation allocation table.

2. From 1 February 2013 the central administrator shall ensure that the Union Registry transfers aviation allowances automatically from the EU Aviation Allocation Account to the relevant open or blocked aircraft operator holding account in accordance with the relevant allocation table, having regard to the modalities of the automatic transfer specified in the data exchange and technical specifications provided for in Article 105.

3. Where an excluded aircraft operator holding account does not receive allowances under paragraph 2, those allowances shall not be transferred to the account should it be subsequently set to open status.’

B. German law

1. Law on greenhouse gas emissions trading (TEHG)

36. Paragraph 2 of the Treibhausgas-Emissionshandelsgesetz (Law on greenhouse gas emissions trading) of 21 July 2011 (BGBl. 2011 I, p. 1475; ‘the TEHG’) entitled ‘Scope of application’⁵ is worded as follows:

‘...’

(6) With respect to aviation activities, the scope of this Act extends to all emissions from an aircraft that result from fuel consumption. Fuel consumption of auxiliary engines is also part of the fuel consumption of an aircraft. This Act applies only to aviation activities conducted:

1. by aircraft operators who hold a German operating licence ...; or

2. by aircraft operators which have been allocated Germany as the administering Member State ... and which do not hold a valid operating licence issued by another State party to the Agreement on the European Economic Area.

...’

37. Paragraph 9 of the TEHG entitled ‘Allocation of emission allowances free of charge to operators of installations’, provides:

‘...’

⁵ Version of 13 July 2017.

(6) The allocation decision shall be withdrawn if, as a result of a legal act of the European Union, it has to be amended retrospectively. Paragraphs 48 and 49 of the *Verwaltungsverfahrensgesetz* [(Law on Administrative Procedure; “the VwVfG”)] remain unaffected.’

38. Paragraph 11 entitled ‘General allocation of allowances to aircraft operators free of charge’⁶ provides:

‘(1) The aircraft operator shall be allocated a number of aviation allowances free of charge for a trading period which corresponds to the product of the transport performance in the base year, expressed in tonne-kilometres, and the benchmark which is calculated in accordance with Article 3e(3), first sentence, point (e), and Article 3e(3), second sentence, of Directive 2003/87.

(2) The reference year for the transport performance shall be the calendar year ending 24 months before the start of the period to which the allocation relates. For the 2012 trading period and the 2013-2020 trading period, the base year shall be 2010.

(3) In order to obtain an allocation for a trading period, the aircraft operator shall submit an application to the competent authority at least 21 months before the start of the period to which it relates. Once this period has elapsed, the aircraft operator shall lose its entitlement to the free aviation allowance. The first and second sentences shall not apply to the 2012 trading period or the 2013-2020 trading period.

(4) In its application, the aircraft operator shall specify the transport performance achieved in the reference year through its aviation activities. These shall be determined in accordance with the requirements of Commission Regulation [(EU) No 601/2012 of 21 June 2012] on the monitoring [and reporting of greenhouse gas emissions under Directive 2003/87 (OJ 2012 L 181, p. 30)]. If the aircraft operator has submitted a distance and payload report in accordance with Paragraph 5(1), first sentence, of the *Datenerhebungsverordnung 2020* [(2020 Data Collection Regulation)], this report shall be considered an application for an allocation for the 2012 trading period and the 2013-2020 trading period, unless the aircraft operator objects within one month after the entry into force of this Act. In the event of an objection, the aircraft operator shall not be entitled to request a free allocation under paragraph 1. The transport performance information must have been verified by an inspection body in accordance with Article 21. This rule shall not apply where a distance and payload declaration has already been checked in accordance with Paragraph 11 of the 2020 Data Collection Regulation.

(5) At least 18 months before the start of the trading period, the competent authority shall submit the application to the [Commission]. The competent authority shall verify the information on transport performance provided by the applicant and shall transmit to the [Commission] only that information which is sufficiently reliable at the time of the expiry of the deadline set for the transmission of the application. Where the competent authority requires additional information or supporting documentation in order to assess the application and the information provided therein, the aircraft operator shall, upon request of the competent authority, provide such information within the time limit to be set by the authority.

⁶ Version of 15 July 2013.

(6) The competent authority shall allocate allowances free of charge within three months of the date of publication by the [Commission] of the benchmark pursuant to Article 3e(3) of Directive 2003/87. The competent authority shall publish a list with the names of the aircraft operators and the number of allowances allocated in the *Bundesanzeiger* (German Official Journal).’

39. Paragraph 11 of the TEHG entitled ‘Allocation of allowances free of charge to aircraft operators’,⁷ provides:

‘(1) For an aircraft operator that has received an allocation of emission allowances free of charge for the 2013-2020 trading period pursuant to Paragraphs 11 or 12, in the version applicable until 24 January 2019, the allocation shall continue to apply for the years 2021 to 2023 pursuant to Article 28a(2) of Directive 2003/87, up to the number of allowances allocated for the year 2020. The linear reduction factor provided for in Article 9 of Directive 2003/87 should be applied to the allocation for the years from 2021 onwards.

...

(6) The allocation decision shall be revoked if it has to be amended a posteriori due to a legal act of the European Union and in particular following the review provided for in Article 28b of Directive 2003/87, or if an aircraft operator ceases its aviation activities. Paragraphs 48 and 49 of [the VwVfG] remain unaffected.’

40. Paragraph 30 of the TEHG entitled ‘Implementation of Surrender Obligation’ provides:

‘...

(3) The operator shall continue to be obliged to surrender any missing allowances by 31 January of the following year at the latest; if emissions have been estimated in accordance with subparagraph 2, the allowances shall be surrendered in accordance with the estimate made. If the operator does not surrender the missing allowances by 31 January of the following year at the latest, the allowances that the operator is entitled to be allocated or issued shall be applied to the obligation imposed on it in accordance with the first sentence.’

2. *The Law on Administrative Procedure (VwVfG)*

41. Paragraph 48 of the VwVfG, entitled ‘Withdrawal of an unlawful administrative act’, provides:

‘(1) An unlawful administrative act may, even after it has become non-appealable, be withdrawn wholly or in part either retrospectively or with effect for the future. An administrative act which gives rise to a right or an advantage relevant in legal proceedings or confirms such a right or advantage (beneficial administrative act) may only be withdrawn subject to the restrictions of subparagraphs 2 to 4.

(2) An unlawful administrative act which provides for a one-time or continuing payment of money or a divisible material benefit, or which is a prerequisite for these, may not be withdrawn so far as the beneficiary has relied upon the continued existence of the administrative act and his [or her] reliance deserves protection relative to the public interest in a withdrawal. Reliance is in general deserving of protection when the beneficiary has utilised the contributions made or has

⁷ Version from Article 1 No. 11 of the Act of 18 January 2019 with effect from 25 January 2019.

made financial arrangements which he [or she] can no longer cancel, or can cancel only by suffering a disadvantage which cannot reasonably be asked of him [or her]. The beneficiary cannot claim reliance when:

1. he [or she] obtained the administrative act by false pretences, threat or bribery;
2. he obtained the administrative act by giving information which was substantially incorrect or incomplete;
3. he was aware of the illegality of the administrative act or was unaware thereof due to gross negligence.

In the cases provided for in sentence 3, the administrative act shall in general be withdrawn with retrospective effect.

(3) If an unlawful administrative act not covered by subparagraph 2 is withdrawn, the authority shall upon application make good the disadvantage to the person affected deriving from his reliance on the existence of the act to the extent that his reliance merits protection having regard to the public interest. Subparagraph 2, third sentence shall apply. However, the disadvantage in financial terms shall be made good to an amount not to exceed the interest which the person affected has in the continuance of the administrative act. The financial disadvantage to be made good shall be determined by the authority. A claim may only be made within a year, which period shall commence as soon as the authority has informed the person affected thereof.

(4) If the authority learns of facts which justify the withdrawal of an unlawful administrative act, the withdrawal may only be made within one year from the date of gaining such knowledge. This shall not apply in the case of subparagraph 2, third sentence, point 1.

(5) Once the administrative act has become non-appealable, the decision concerning withdrawal shall be taken by the authority competent under Paragraph 3. This shall also apply when the administrative act to be withdrawn has been issued by another authority.'

42. Paragraph 49 of the VwVfG entitled 'Revocation of a legal administrative act', provides:

(1) A lawful, non-beneficial administrative act may, even after it has become non-appealable, be revoked wholly or in part with effect for the future, except when an administrative act of like content would have to be issued or when revocation is not permissible for other reasons.

(2) A lawful, beneficial administrative act may, even when it has become non-appealable, be revoked in whole or in part with effect for the future only when:

1. revocation is permitted by law or the right of revocation is reserved in the administrative act itself;
2. the administrative act is combined with an obligation which the beneficiary has not complied with fully or has not complied with it within the time limit set;
3. the authority would be entitled, as a result of a subsequent change in circumstances, not to issue the administrative act and if failure to revoke it would be contrary to the public interest;

4. the authority would be entitled, as a result of an amendment to a legal provision, not to issue the administrative act where the beneficiary has not availed himself of the benefit or has not received any benefits derived from the administrative act and when failure to revoke would be contrary to the public interest,

5. in order to prevent or eliminate serious harm to the common good. Paragraph 48(4) applies *mutatis mutandis*.

(3) A lawful administrative act which provides for a one-time or a continuing payment of money or a divisible material benefit for a particular purpose, or which is a prerequisite for these, may be revoked even after such time as it has become non-appealable, either wholly or in part and with retrospective effect,

1. if, once this payment is rendered, it is not put to use, or is not put to use either without undue delay or for the purpose for which it was intended in the administrative act;

2. if the administrative act had an obligation attached to it which the beneficiary either fails to satisfy or does not satisfy within the stipulated period. Paragraph 48(4) applies *mutatis mutandis*.

(4) The revoked administrative act shall become null and void with the coming into force of the revocation, except where the authority fixes some other date.

(5) Once the administrative act has become non-appealable, decisions as to revocation shall be taken by the authority competent under Paragraph 3. This shall also apply when the administrative act to be revoked has been issued by another authority.

(6) In the event of a beneficial administrative act being revoked in cases covered by subparagraph 2, points 3 to 5, the authority shall upon application make good the disadvantage to the person affected deriving from his [or her] reliance on the continued existence of the act to the extent that his [or her] reliance merits protection. Paragraph 48(3), third to fifth sentences shall apply as appropriate. Disputes concerning compensation shall be settled by the ordinary courts.'

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

43. Air Berlin was a commercial aircraft operator until the second half of 2017 and during this period it was subject to the EU emissions trading system obligations ('EU ETS obligations'). By decision of 12 December 2011, the Trading Authority allocated a total of 28 759 739 aviation allowances to Air Berlin for the 2012 and 2013-2020 allocation periods. A total of 3 174 922 aviation allowances per year were allocated for the years 2013-2020. By decision of 15 January 2015, the Trading Authority partly withdrew the allocation decision of 12 December 2011 and set the allocation at 18 779 668 aviation allowances. The withdrawal arose due to the moratorium which was introduced by Regulation (EU) No 421/2014⁸, on the inclusion of the international flights referred to in that regulation in the emissions trading obligation for the years 2013-2016. That withdrawal decision was described as final.

⁸ Regulation of the European Parliament and of the Council of 16 April 2014 amending Directive 2003/87 establishing a scheme for greenhouse gas emission allowance trading within the Community, in view of the implementation by 2020 of an international agreement applying a single global market-based measure to international aviation emissions (OJ 2014 L 129, p. 1).

44. On 15 August 2017, Air Berlin filed a request for insolvency proceedings to be opened in relation to its assets. The competent insolvency court ordered a preliminary self-administration ('vorläufige Eigenverwaltung') of Air Berlin. On 28 October 2017, Air Berlin officially ceased flight operations. The main insolvency proceedings were opened by order of the insolvency court of 1 November 2017. ET ('the applicant') was appointed as the insolvency administrator on 16 January 2018.

45. On 28 February 2018, the Trading Authority issued a six-point decision to the applicant in his capacity as insolvency administrator. In point 1, the Trading Authority partly withdrew, on grounds of unlawfulness, the decision of 12 December 2011, as amended by the partial withdrawal decision of 15 January 2015, and adjusted the allocation for the years 2013-2020 to 12 159 960 allowances. In point 2, the Trading Authority partly withdrew the allocation for the 2013-2020 allocation period to the extent that it exceeded 7 599 975 aviation allowances after deducting the aviation allowances allocated for the 2012 allocation period. The Trading Authority stated that the adjusted allocation for the years 2013-2017 had already been issued in full, and indicated that there would be no allocation for the years 2018-2020. The Trading Authority ordered the immediate execution of the partial withdrawal on grounds of unlawfulness referred to in points 1 and 2 as a precautionary measure (point 3). In addition, the status of the account in the Union Register was changed to that of 'excluded', with immediate effect (points 4 and 5), and the revocation of the withdrawal and the revocation of the status of the account to that of 'excluded account' were reserved (point 6).

46. The Trading Authority stated that the withdrawal in point 1 of the decision of 28 February 2018 was based on Regulation (EU) 2017/2392 of the European Parliament and of the Council of 13 December 2017 amending Directive 2003/87 to continue current limitations of scope for aviation activities and to prepare to implement a global market-based measure from 2021⁹ and thus maintained for the years 2017-2020 the exclusion of certain international flights from the EU ETS obligations.¹⁰ The withdrawal referred to in point 2 arose due to the fact that, according to its own statements, Air Berlin ceased flight operations on 28 October 2017 after insolvency proceedings had been initiated.¹¹

47. The opposition filed by the applicant against the decision of 28 February 2018 was rejected by the Trading Authority by decision of 19 June 2018. The Trading Authority considered that the applicant could not rely on the principle of legitimate expectations as, in accordance with Article 10(5) of Regulation No 389/2013, aviation allowances may no longer be issued where the aircraft operator in question no longer carries out flights subject to EU ETS obligations. In addition, it considered that the fourth sentence of recital 20 of Directive 2008/101 should not be taken into account, as its contents are not reflected in the substantive provisions of EU legislation and it has not been implemented by the EU legislature.

48. On 23 July 2018, the applicant applied for legal aid in order to appeal against parts of the decision of the Trading Authority. By order of 16 December 2019, the Oberverwaltungsgericht Berlin-Brandenburg (Higher Administrative Court, Berlin-Brandenburg, Germany) granted the applicant legal aid for the proceedings at first instance. In that order, the national court in

⁹ OJ 2017 L 350, p. 7.

¹⁰ The legal basis for the withdrawal was the first sentence of Paragraph 48(2) of the VwVfG, Regulation 2017/2392 and Article 28a(2) of Directive 2003/87.

¹¹ According to the request for a preliminary ruling, only 23 flights took place in November 2017 and Air Berlin's EU operating licence expired on 1 February 2018. The legal basis for the withdrawal was the first sentence of Paragraph 48(2) of the VwVfG read in conjunction with certain provisions of the TEHG.

question held, in essence, that both the objective and the scheme of Directive 2008/101 suggest that the cessation of aircraft activities does not justify the withdrawal of the allocation decision. Such a result – which also appears unconvincing to that court – is mainly supported by the fact that it is not possible to allocate aviation allowances to new market entrants pursuant to Article 3f(1) of Directive 2003/87 if new or increased aviation activity is, in whole or in part, a continuation of an aviation activity previously carried out by another aircraft operator. The very limited possibility of allocating allowances from the reserve for new aircraft operators would result in a significant reduction of the total number of available aviation allowances if the allocation should at the same time be withdrawn when aviation activities cease.

49. The referring court accordingly questions whether this is compatible with the intention of the EU legislature as it was originally intended to allocate 100% of the historical emissions of the aviation sector and that this amount was finally reduced to 97% and 95% respectively (Article 3c(1) and (2) of Directive 2003/87). The Oberverwaltungsgericht Berlin-Brandenburg (Higher Administrative Court, Berlin-Brandenburg) adds that the EU legislature, which in Article 10a(19) and (20) 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,¹² had already enacted specific rules on the allocation of allowances to fixed installations in cases of cessation or a significant reduction of activities amended the rule in Article 10a(20) when Directive 2003/87 was amended by Directive 2018/410, without taking the opportunity to regulate the procedure in the event of partial or complete cessation of an aircraft operator's activities.

50. By decision of 26 April 2019, addressed to the applicant, the Trading Authority found that as of 30 April 2018, the applicant had returned a total of 795 754 allowances fewer than the number owed and was accordingly required to pay the amount of EUR 82 806 161 and 24 cents. The Trading Authority has not yet ruled on the complaint filed against this decision.

51. In its appeal of 2 January 2020 before the referring court, the applicant submits that the partial withdrawal of allowances in point 2 of the decision of the Trading Authority of 28 February 2018 has no legal basis. It could not be based on Paragraphs 48 and 49 of the VwVfG (withdrawal of an unlawful administrative act or revocation of a lawful administrative act) as neither Paragraph 11 of the TEHG nor the other provisions of the TEHG contained a provision for the withdrawal of a decision allocating allowances to an aircraft operator once it had been adopted. The intention of the EU legislature also militated against the withdrawal of the allocation as recital 20 of Directive 2008/101 unequivocally stated that the entitlement to allocation continued to exist. This was also appropriate, as the total quantity of emission allowances allocated remain unchanged.

52. In any event, Air Berlin had legitimate expectations regarding the continued existence of the allocation decision and had already sold the majority of the aviation allowances issued to it in 2017 in the spring/summer of 2017. This was done in expectation of and in reliance upon the emission allowances to be issued in the following years of the emissions trading period. The insolvency could not have been foreseen when the aviation allowances issued in 2017 were sold.

53. Accordingly, on the information currently available to the applicant, Air Berlin was denied financing on 11 August 2017. This refusal of further credit facilities was unexpected and thus led to Air Berlin's insolvency. Even if insolvency was already foreseeable at the time of the sale, Air Berlin's legitimate expectations would have been worthy of protection.

¹² OJ 2009 L 140, p. 63.

54. All the aircraft in Air Berlin's fleet were leased from various lessors. In the course of the provisional insolvency proceedings and also after the insolvency proceedings had been opened, the slots allocated to Air Berlin were sold to other airlines in connection with the sale of assets. The applicant was not aware of whether these undertakings actually used the slots they had taken over in the same way as Air Berlin had or whether they served other routes. The slots sold were for short-and medium-haul operations.

55. The applicant considers that the continuation of aviation activities within the meaning of Article 3f(1) of Directive 2003/87 is not relevant to the question of the continuation of the allocation for aircraft operators. Moreover, the question of 'when' there is a continuation of aviation activity within the meaning of the aforementioned provision has not yet been clarified in the case-law.

56. In addition, the applicant considers that the conditions for the application of Paragraph 49(2)(3) of the VwVfG are not fulfilled. It cannot understand why the public interest in the functioning of the EU ETS would be jeopardised if the allocation decision were not annulled and why Air Berlin would be given an unfair advantage to the detriment of other market participants. There was no threat of a distortion of competition because Air Berlin no longer competed on the market.

57. The defendant argues that Paragraphs 48 and 49 of the VwVfG constituted a sufficient basis for the withdrawal of the allocation for the years 2018-2020. The allocation was originally made for the years 2013-2020 on the basis that Air Berlin would perform its aviation activities subject to the EU ETS obligation until 2020. From the point at which it definitively ceased flight operations, Air Berlin was no longer subject to the EU ETS and therefore no longer fell within the scope of the TEHG. Air Berlin's status as an aircraft operator ceased to exist upon the expiry of its operating licence. Pursuant to the TEHG, the entitlement to an allocation was linked to the existence of the EU ETS obligations. This was not precluded by EU law. In its judgment of 28 February 2018, *Trinseo Deutschland* (C-577/16, EU:C:2018:127), the Court expressly stated that an installation fell within the scope of the greenhouse gas emission allowance trading scheme only if it generated direct CO₂ emissions. According to that judgment, only installations whose activities fell, under Article 2(1) of Directive 2003/87, within the scope of the EU ETS were eligible for the allocation of such free allowances. These statements apply *mutatis mutandis* to aviation activities.

58. Article 10(5) of Regulation No 389/2013 thus provides that the account of an aircraft operator which no longer operates flights covered by the EU ETS must be set to 'excluded status'. Pursuant to Article 10(6) of Regulation No 389/2013, no processes may be initiated from such an account, except in respect of the period during which the account status was not yet set to 'excluded'. Article 56(1) of Regulation No 389/2013 provides that the national administrator shall indicate for each aircraft operator and for each year whether or not the aircraft operator should receive an allocation for that year in the national aviation allocation table. The inclusion of those provisions in Regulation No 389/2013 demonstrates that the withdrawal of allocation decisions is certainly legal.

59. Recital 20 of Directive 2008/101 conflicts with the EU ETS. That recital was drafted before the adoption of Regulation No 389/2013 – which clearly conflicted with it – and that recital was not reiterated in Regulation No 421/2014 and Regulation 2017/2392, by which Directive 2003/87 was amended in respect of aviation.

60. The applicant also cannot invoke a legitimate expectation worthy of protection. Neither the allocation rules nor the defendant's conduct provided a basis for such an assumption. The withdrawal was also in the public interest. The principle of emissions trading law would be undermined if the allowances were to be placed on the market. It would distort the market price.

61. According to the defendant, maintaining the allocation after aviation activities ceased would be incompatible with the prohibition of State aid pursuant to Article 107 TFEU, the principle of an open market economy with free competition under Article 119(1) TFEU, the right to property Article 17 of the Charter of Fundamental Rights of the European Union ('the Charter') and the principle of equality under Article 20 of the Charter.

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

'(1) Having regard to recital 20 of Directive [2008/101], are Directive [2003/87] and Directive [2008/101] to be interpreted as precluding the withdrawal of the free allocation of aviation allowances to an aircraft operator for the years 2018 to 2020 if the allocation for the years 2013 to 2020 has been made and the aircraft operator ceased its aviation activities in 2017 due to insolvency?

Is Article 3f(1) of Directive 2003/87/EC to be interpreted as meaning that the withdrawal of the allocation decision after aviation activities have been ceased due to insolvency is dependent on whether there has been a continuation of the aviation activities by other air transport operators? Is Article 3f(1) of Directive [2003/87] to be interpreted as meaning that there has been a continuation of aviation activities if landing rights at so-called coordinated airports (slots) have been sold in part (for the insolvent air carrier's short- and medium-haul operations) to three other air transport operators?

(2) If Question 1 is answered in the affirmative:

Are the provisions in Article 10(5), Article 29, Article 55(1)(a) and (3) and Article 56 of Regulation [No 389/2013] compatible with Directive [2003/87] and Directive [2008/101] and valid if they preclude, in the event that the air transport operator has ceased flight operations due to insolvency, the issuing of free aviation allowances that have been allocated but not yet issued?

(3) If Question 1 is answered in the negative:

Are Directives 2003/87/EC and 2008/101/EC to be interpreted as meaning that an annulment of the decision on the free allocation of aviation allowances is mandatory under EU law?

(4) In the event that Question 1 is answered in the affirmative and in the event that Question 3 is answered in the negative:

Are Article 3c(3a), Article 28a(1) and (2) and Article 28b(2) of Directive [2003/87]/, as amended by Directive [2018/410], to be interpreted as meaning that, for aircraft operators, the third trading period does not end at the end of 2020, but rather continues until 2023?

(5) If Question 4 is answered in the negative:

Can entitlements to a further free allocation of emission allowances for aircraft operators for the third trading period be met after the end of the third trading period with allowances of the fourth trading period where the existence of the allowance entitlement is established by a court only after expiry of the third trading period, or do allowance entitlements that have not yet been met lapse on expiry of the third trading period?’

IV. The procedure before the Court

63. Written observations were submitted by the applicant, the defendant, the German Government and the Commission.

64. A number of questions to be answered in writing and a number of questions to be answered orally at the hearing were addressed to the parties and the interested persons referred to in Article 23 of the Statute of the Court of Justice of the European Union. Answers to the written questions were submitted by the applicant, the defendant, the German Government and the Commission. They also submitted oral observations at the hearing of the Court on 10 June 2021.

V. Assessment

A. The first question

1. First part

65. By the first part of its first question, the referring court asks, in essence, whether Directive 2003/87, as amended, precludes the withdrawal¹³ of the free allocation of aviation allowances to an aircraft operator for the years 2018-2020 if the allocation for the years 2013- 2020 has been made and the aircraft operator ceased its aviation activities in 2017 due to insolvency. In that regard, the referring court questions, in particular, what weight must be attributed to the fourth sentence of recital 20 of Directive 2008/101 which provides, *inter alia*, that ‘aircraft operators that cease operations should continue to be issued with allowances until the end of the period for which free allowances have already been allocated’.

(a) Preliminary observations

66. The allowances in question in the first question relate to the trading period beginning on 1 January 2013 and ending on 31 December 2020. As a result of the incorporation of aviation activities into Directive 2003/87 by Directive 2008/101, aircraft operators are subject, in principle, to the EU ETS and, pursuant to Article 12(2a) of Directive 2003/87, they must surrender annually a number of allowances equal to their total emissions during the preceding calendar year from aviation activities listed in Annex I to that directive.¹⁴

¹³ The term ‘withdrawal’ appears to come from the German law (see Paragraph 9(6) of the TEHG). See also Paragraphs 48 and 49 of the VwVfG. That term does not feature in Directive 2003/87 in respect of aviation.

¹⁴ Failure to do so will give rise to penalties in accordance with Article 16 of Directive 2003/87.

67. In accordance with the procedure laid down in Article 3e of Directive 2003/87 which concerns both the allocation and issue of allowances to aircraft operators, aircraft operators could apply¹⁵ for an allocation of allowances to be allocated free of charge *inter alia* for the trading period beginning on 1 January 2013.¹⁶ Pursuant to Article 3e(4)(a) of Directive 2003/87 the *total allocation* of free allowances for, *inter alia*, the period 2013-2020 is calculated by the administering Member State for each aircraft operator according to the methodology laid down therein.¹⁷

68. Moreover, in accordance with Article 3e(4)(b) of that directive, the *annual allocation* of allowances to an aircraft operator is determined by the administering Member State by dividing its total allocation for, *inter alia*, 2013-2020 by the ‘number of years in the period for which the aircraft operator is *performing an aviation activity* listed in Annex I’.¹⁸

69. It is clear from Article 3e(4) of Directive 2003/87 that the total allocation and the annual allocation of allowances to each aircraft operator are established at the beginning of each trading period, namely, within three months from the date on which the Commission adopts a decision pursuant to Article 3e(3) of that directive laying down, *inter alia*, the total quantity of allowances to be allocated during the trading period.

70. By contrast, Article 3e(5) of Directive 2003/87 provides that allowances *allocated* under Article 3e of that directive and also Article 3f thereof, which sets up a special reserve for certain aircraft operators, are *issued* on a yearly basis on 28 February.

71. Directive 2003/87 does not specifically regulate the manner in which the free allocation of allowances must be treated when an aircraft operator to whom they have been allocated ceases its activity. This is in stark contrast to Article 10(a)(19) of Directive 2003/87 which was inserted by Directive 2009/29.¹⁹ This provides, so far as fixed installations are concerned, that ‘no free allowance shall be given to an installation that has ceased its operations’.²⁰

(b) Arguments

72. The applicant considers that this difference in approach results from a deliberate choice by the EU legislature, as is evidenced by the fourth sentence of recital 20 to Directive 2008/101. According to the applicant, it is evident from the legislative procedure which resulted in the inclusion of the aviation sector in Directive 2003/87 that a ‘design choice’ was made pursuant to which new entrants must in principle acquire the necessary emission allowances for a fee, either

¹⁵ To the competent authority in the administering Member State, that is the Member State responsible for administering the EU ETS in respect of an aircraft operator in accordance with Article 18a of Directive 2003/87.

¹⁶ Pursuant to Article 3c(2) of Directive 2003/87, a cap or limit on aviation allowances per year for the period from 1 January 2013 was set at 95% of historical aviation emissions. In accordance with Article 3(s) of Directive 2003/87, ‘historical aviation emissions’ is ‘the mean average of annual emissions in the calendar years 2004, 2005 and 2006 from aircraft performing an aviation activity listed in Annex I’ Under Article 3e(1) of Directive 2003/87, aircraft operators could apply to the competent authority of the administering Member State for an allocation of free allowances, which were in turn submitted to the Commission, pursuant to Article 3e(2) of that directive, which calculated a benchmark in accordance with Article 3e(3)(e) in order to determine the number of free allowances to be allocated to those who had applied for them. In accordance with Article 3e(3)(a) of Directive 2003/87, the Commission was obliged to calculate and adopt a decision on the total quantity of allowances to be allocated for the period 2013-2020, 15 months in advance.

¹⁷ Using, *inter alia*, the benchmark determined by the Commission.

¹⁸ Emphasis added.

¹⁹ It must be noted that this was subsequent to the incorporation of aviation into Directive 2003/87.

²⁰ See also Article 26 of Commission Delegated Regulation (EU) 2019/331 of 19 December 2018 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 2019 L 59, p. 8).

at auction or on the market, and in the event of cessation of activity, the allowances already allocated continue to be issued until the end of the trading period. The withdrawal of such allowances would otherwise result in an artificial reduction of the total quantity of allowances and would disrupt the balance sought by the legislature, as stated in recital 5 of Directive 2003/87, between climate protection and economic considerations. Article 3c(2) of Directive 2003/87 thus provides, in essence, that for the trading period starting on 1 January 2013, the total quantity of allowances to be allocated is 95% of historical aviation emissions.²¹ According to the applicant, the cessation of aviation activities does not necessarily mean that the corresponding traffic volumes disappear from the market. Other operators may still increase their market share and many of the routes operated by the failed operator will be operated by other operators in the future.

73. The applicant considers that given that after the expiry of the period referred to in Article 3f(2) of Directive 2003/87 – 30 June 2015 – it is not possible to apply for a free allocation of allowances from the special reserve, operators must obtain allowances on the market. It is therefore consistent that the allocation of allowances to an operator that has ceased aviation activities is maintained. The applicant also considers that the continuation of the allocation does not depend on whether another operator continues the aviation activity, within the meaning of Article 3f(1)(b) of Directive 2003/87, as the question of ‘continuation’ of aviation activity is only relevant for exclusion from the special reserve, which is not at issue in this case. According to the applicant, Article 3f(1)(b) of Directive 2003/87 does not regulate what happens to the allowance in the event of cessation of activity, but assumes that the allowances of aircraft operators which cease their activities are generally maintained. In addition, no distinction is drawn in recital 20 as to whether the activity is continued by another undertaking or not.

74. By contrast, the German Government considers that neither Directive 2003/87 nor Directive 2008/101 preclude the withdrawal of the allowances for aircraft activity where the aircraft operator becomes insolvent. In that regard, it relies *inter alia* on Article 2(1) of Directive 2003/87 in combination with Annex I to that directive and Article 3(o), and Article 3(f) thereof. The German Government considers that the sale by the applicant of the allowances in question would benefit Air Berlin’s creditors rather than further the aim of Directive 2003/87 which is to protect the environment. It observes in particular that the number of allowances issued to Air Berlin represented approximately 30% of the total allowances issued by the Trading Authority in 2017. If such allowances were to be issued for the period 2018-2020 this would be double the number of allowances auctioned which, in accordance with Article 3d(2) of Directive 2003/87, constitutes 15% of the aviation allowance.

75. The German Government considers that as there is no equivalent provision to Article 10a(19) of Directive 2003/87 relating to fixed installations for aviation, Member States, in accordance with the principle of procedural autonomy, may provide for rules on the revocation or withdrawal of allowances in the event that an aircraft operator ceases its activities. That government claims that the provisions of Regulation No 389/2013, in particular Article 10(3), (5) and (6), Article 29, Article 55(1)(a) and Article 56(2) and (3), confirm that the cessation of aviation activity results in the loss of the right to an allocation and the right of access to allowances on an account.

²¹ This percentage may be reviewed as part of the general review of Directive 2003/87. See Article 3c(3) and Article 30(4) of Directive 2003/87.

76. The Commission considers that in the absence of EU rules on the matter it is, according to established case-law, for the domestic legal system of each Member State to determine the applicable requirements in accordance with the principle of procedural autonomy provided, however, that those requirements are not less favourable than those governing similar domestic situations (principle of equivalence) and that they do not render impossible in practice or excessively difficult the exercise of rights conferred by the EU legal order (principle of effectiveness).²² The Commission observes that if the free allocation in question is not withdrawn, the trading system would be massively distorted. The situation of Air Berlin is identical to that of more than 40 other aircraft operators that have ceased operations since 2013. In the absence of the possibility of withdrawing the allocation, these companies would have been allocated, until the end of 2023, approximately 28 million allowances free of charge, despite the termination of their flights. Moreover, the combination of free allocations and auctioning would result in a total increase of approximately 33 million allowances, an amount equal to the annual emissions of Bulgaria or Norway covered by the EU ETS (all sectors included), or 40% of all aviation emissions in 2019. The total value of these allowances exceeds EUR 700 000 000. Allocating such a large number of allowances free of charge without a corresponding obligation on the beneficiaries to surrender those allowances would have a negative impact on the emissions trading market and would massively undermine the integrity of the EU ETS.

(c) Analysis

77. In my view, and contrary to the submissions of the Commission and, to a lesser extent, of the German Government in their observations, the withdrawal of the free allocation of aviation allowances of an aircraft operator in the event of insolvency is not purely a matter of national procedural autonomy which lies within the remit of the Member States' competences where the matter is not expressly regulated by EU law in an equivalent manner to Article 10a(19) of Directive 2003/87. As I propose to demonstrate, many provisions of Directive 2003/87 preclude the issue of aviation allowances allocated free of charge to an aircraft operator upon the cessation of aviation activity by that operator.

78. Given that the allowances in question were allocated free of charge pursuant to an EU legislative scheme and do not derive from the assets or occupational activity of an aviation operator, in this case Air Berlin, they do not constitute property rights which must be safeguarded by the Union legal order pursuant, inter alia, to Article 17 of the Charter.²³ The emissions trading scheme is simply a mechanism designed to incentivise certain economic behaviour (namely, the reduction of greenhouse gases). While the allowances could be and were traded,²⁴ this was permitted in the context of undertakings otherwise engaging in economic activity (such as aviation) which perforce was liable to contribute to environmental pollution. It was never envisaged that these allowances could themselves be monetised independently of this economic activity or that they would be regarded as tantamount to a form of quasi-currency which could then be treated as a liquid asset in an insolvency.

79. Nonetheless, provided that an aviation operator continues to comply with the conditions for the allocation and issue of such free allowances, it would be contrary to the principle of legal certainty which requires, in particular, that rules involving negative consequences for individuals

²² Judgment of 22 February 2018, *INEOS Köln* (C-572/16, EU:C:2018:100, paragraph 42 and the case-law cited).

²³ See by analogy, judgment of 24 March 1994, *Bostock* (C-2/92, EU:C:1994:116, paragraph 19).

²⁴ See, for example, Article 40 of Regulation No 389/2013.

or undertakings should be clear and precise and their application predictable for those subject to them²⁵ and, indeed, the right to equality before the law set out in Article 20 of the Charter²⁶ if those aviation allowances were not issued in accordance with Article 3e(5) of Directive 2003/87.

80. All of this is to say that trading schemes of this kind – whether it be milk quotas of an earlier generation or emissions trading schemes in this one – tend to give rise a peculiar species of asset. While these assets have a certain monetary value – they are, after all, capable of being traded – they differ from ordinary monetised assets which form the basis of traditional understandings of property rights recognised by the Charter, the European Convention of Human Rights and the constitutions of the Member States in that they are intrinsically bound up with the economic activity itself and the legislative rules governing their allocation, issuing and duration. Accordingly, those who claim that their legal entitlements in respect of trading scheme assets have been infringed must generally look to the principle of legitimate expectations rather than property rights as such.

81. That is the case here, as the applicant has also relied on the principle of legitimate expectations. In my view, while the principles of legal certainty and legitimate expectations are linked to a certain extent, the latter principle is based, inter alia, on the existence of certain assurances. Thus, for example, in its judgment of 5 March 2019, *Eesti Pagar* (C-349/17, EU:C:2019:172, paragraph 97), the Court stated that the right to rely on the principle of the protection of legitimate expectations presupposes that precise, unconditional and consistent assurances originating from authorised, reliable sources have been given to the person concerned by the competent authorities of the European Union. That right applies to any individual in a situation in which an EU institution, body or agency, by giving that person precise assurances, has led him or her to entertain well-founded expectations. Information which is precise, unconditional and consistent, in whatever form it is given, constitutes such assurances.²⁷ Given that there is no indication in the file before the Court that Air Berlin was given any such assurances, in particular by an EU institution or, indeed, by the Trading Authority, that principle would appear not to be relevant to the present case.

82. It is now necessary to look at the relevant legislative provisions in order to assess such compliance.²⁸ As I have already indicated, considerable reliance has been placed by the applicant in its observations on the fourth sentence of recital 20 to Directive 2008/101. That sentence expressly states that aircraft operators that cease operations and thus go into insolvency are nonetheless entitled to be ‘issued with allowances until the end of the period for which free allowances have already been allocated’.

83. Despite the fact that the wording of that sentence of recital 20 is clear and unambiguous, there is, however, no substantive provision in Directive 2003/87 or, indeed, Directive 2008/101 which corresponds or is in any way equivalent to this. How has this state of affairs come about?

²⁵ Judgment of 7 June 2005, *VEMW and Others* (C-17/03, EU:C:2005:362, paragraph 80 and the case-law cited). See also, judgment of 3 December 2019, *Czech Republic v Parliament and Council* (C-482/17, EU:C:2019:1035, paragraph 148).

²⁶ Equality before the law is a general principle of European Union law which requires that comparable situations should not be treated differently and that different situations should not be treated in the same way, unless such different treatment is objectively justified. See judgment of 17 October 2013, *Schaible* (C-101/12, EU:C:2013:661, paragraph 76).

²⁷ See also, judgment of 3 December 2019, *Czech Republic v Parliament and Council* (C-482/17, EU:C:2019:1035, paragraph 153).

²⁸ See point 79 of this Opinion. It is settled case-law that the proper interpretation of a provision of EU law requires account to be taken not only of its wording, but also of its context, and the objectives and purpose pursued by the act of which it forms part. The legislative history of a provision of EU law may also sometimes reveal elements that are relevant to its interpretation. Judgment of 25 June 2020, *A and Others (Wind turbines at Aalter and Nevele)* (C-24/19, EU:C:2020:503, paragraph 37 and the case-law cited).

84. In an answer to a question in writing put to it by the Court, the Commission confirmed that the wording of the fourth sentence of recital 20 of Directive 2008/101 was maintained by mistake in the final legislative text. Indeed, at the oral hearing on 10 June 2021 the representative of the Commission went so far as to say that it was embarrassed by the fact that such an error had crept into the legislative draft and that the measure had been enacted without this having been noticed.

85. The Commission insisted that this mistake resulted from several options which were presented during the legislative procedure leading up to the adoption of Directive 2008/101. The Commission's proposal provided for the purchase of allowances by new entrants which went hand in hand with the possibility for operators leaving the market of maintaining their allowances during the trading period in order to ensure the availability of sufficient allowances. According to the Commission, given that it was ultimately decided to create a special reserve pursuant to Article 3f of Directive 2003/87 for new entrants, the maintenance of allowances allocated free of charge upon cessation of activities became devoid of purpose.

86. While the text of a recital to a directive may be used to clarify a provision of that directive and is an important interpretative tool,²⁹ it is settled case-law that the recitals to an EU legislative act such as a directive have no binding legal force *in themselves*. Such recitals cannot be relied on either as a ground for derogating from the actual provisions of the directive in question or for interpreting those provisions in a manner clearly contrary to their wording (*contra legem*).³⁰ Given that a recital has no legal value in itself, it cannot be relied upon *on its own* as the basis of legal rights or obligations in the absence of equivalent or supporting provisions in the body of a directive.³¹

87. Indeed, to find otherwise would in fact itself constitute a breach of the principle of legal certainty which is an essential element of the rule of law. The EU legislature must be taken to speak through the substantive provisions of a legislative act such as a directive with the recitals thereto providing subsidiary guidance as an aid to the interpretation of the provisions. Yet if those substantive provisions are silent on a particular point, the existence of a recital (irrespective of whether this was inserted by mistake or not) which suggests otherwise cannot be invoked effectively to contradict or add to those legislative provisions.

88. In any event, a number of provisions in Directive 2003/87 clearly militate against the *issue* of aviation allowances, in accordance with Article 3e(5) of Directive 2003/87, to a former aircraft operator such as Air Berlin who is no longer performing an aviation activity pursuant to Article 3e(4)(b) of that directive.

89. First, Article 2(1) of Directive 2003/87 applies to emissions from activities listed in Annex I to that directive. Aviation is one of the activities listed in Annex I. The referring court indicated that Air Berlin officially ceased operations on 28 October 2017.³² It is thus clear that Air Berlin no longer carried out aviation activities during the relevant period 2018-2020. It follows that in accordance with Article 3a of Directive 2003/87, it fell outside the scope of Chapter II ('Aviation') of that directive and the provisions thereof which apply to the allocation and, more importantly, the issue of allowances in respect of aviation activities during that period. This is confirmed by

²⁹ Judgment of 19 December 2019, *Puppinck and Others v Commission* (C-418/18 P, EU:C:2019:1113, paragraph 75 and the case-law cited).

³⁰ Judgment of 19 June 2014, *Karen Millen Fashions* (C-345/13, EU:C:2014:2013, paragraph 31 and the case-law cited).

³¹ In that regard, I also consider that a party cannot rely on the legislative history of an EU legislative act such as a directive in order to interpret that act in a manner which is contrary to its wording (*contra legem*) or, indeed, in the absence of clear wording in the body of the directive, contrary to the express objectives of the directive in question.

³² It must be noted that despite the fact that Air Berlin ceased its activities on 28 October 2017, the dispute in the main proceedings appears to relate, subject to verification by the referring court, to the period 2018-2020 only.

the exemptions to aviation activity referred to in Annex I, Aviation, point (j) to Directive 2003/87 which stipulate that where an aircraft operator operates fewer than 243 flights per period for three consecutive four-month periods or flights with a total annual emission lower than 10 000 tonnes per year, the provisions of Chapter II of that directive do not apply to it.

90. Second, in accordance with Article 3(o) of Directive 2003/87, Air Berlin, which ceased its activities on 28 October 2017, ceased at that point in time to be an ‘aircraft operator’ ‘who operates an aircraft at the time it performs an aviation activity listed in Annex I’ to that directive.

91. Third, I consider that Article 3e(4) and (5) of Directive 2003/87, is of particular importance in the present context. As previously indicated, Article 3e(4)(a) of Directive 2003/87 provides for the calculation of the total allocation of allowances for an aircraft operator for the period *inter alia* 2013-2020 and Article 3e(4)(b) provides for the calculation of the annual allocation of free allowances to an aircraft operator. The latter provision is premised on an aircraft operator *performing* an aviation activity during a given year. In addition, Article 3e(5) of Directive 2003/87, provides that by the 28 February ‘the competent authority of the administering Member State *shall issue to each aircraft operator* the number of allowances allocated to that operator for that year’³³ under Article 3e and Article 3f of that directive.

92. It follows clearly, in my view, from the wording of Article 3e(5) of Directive 2003/87, read in conjunction in particular with Article 3e(4)(b) of that directive, that while the Trading Authority would be required to *issue* to an aircraft operator on 28 February the allowances allocated to it for that year in accordance with Article 3e and Article 3f of Directive 2003/87, it may not do so in respect of a former aircraft operator such as Air Berlin which had ceased its activities and was thus no longer performing an aviation activity, in this case, for the years 2018-2020.

93. Fourth, given that Air Berlin was not an aircraft operator and did not engage in or perform aviation activities during the period 2018-2020, it was not subject to the EU ETS obligation in accordance with Article 12(2a) of Directive 2003/87 during that period and should therefore have no entitlement to the issue of free allowances in respect of that period. It must be noted by analogy in that regard that in accordance with Article 28a(1)(a) of Directive 2003/87,³⁴ aircraft operators are not subject to EU ETS obligations in respect of emissions from flights to and from aerodromes located in countries outside the EEA. Article 28a(2) of Directive 2003/87, which derogates from Article 3e and Article 3f of that directive provides, *inter alia*, that aircraft operators benefiting from the derogation contained in Article 28a(1)(a) of that *directive shall be issued, each year, with a number of free allowances reduced in proportion to the reduction of the surrender obligation* provided for in Article 3e and Article 3f thereof.³⁵

94. I therefore consider that the *annual issue* on 28 February of a free allocation of aircraft allowances pursuant to Article 3e(5) of Directive 2003/87 is inherently linked to the continuing status of aircraft operator, the performance of aviation activity and the ongoing and current existence of EU ETS obligations. While it is unfortunate that no specific provision for aviation equivalent to that contained in Article 10(a)(19) of Directive 2003/87 in respect of fixed installations has been made by the EU legislature, the Trading Authority is nevertheless not

³³ Emphasis added.

³⁴ In its version as amended by Regulation 2017/2392.

³⁵ A similar derogation was first introduced into Directive 2003/87 by Regulation No 421/2014. It would appear from the file before the Court that, by decision dated 15 January 2015, allowances which were allocated free of charge to Air Berlin were subsequently withdrawn by the Trading Authority following the adoption of Regulation No 421/2014. That withdrawal decision has become final. See page 4 of request for a preliminary ruling. The partial withdrawal in question and the Trading Authority’s decision of 15 January 2015 was also referred to in point 1 of the Trading Authority’s decision of 28 February 2018.

entitled to issue to Air Berlin such allowances for the period 2018-2020 as it is no longer an aircraft operator, it does not perform aviation activity and is not subject to EU ETS obligations for the period in question. In that regard, given the clear and precise wording of inter alia Article 2(1), Article 3a, Article 3(o), Article 3e(1), Article 3e(5), Article 12(2a) and Article 28a(1) and (2) of and Annex I to Directive 2003/87, which ensures their predictable application, the applicant cannot rely on the principle of legal certainty in order to require the *issue* of the allowances in question.

95. That interpretation is also supported by the objectives pursued by Directive 2003/87 and by its general scheme. I consider that it would be contrary to the *effet utile* of Directive 2003/87, which seeks to reconcile environmental protection and economic devolvment, if aviation allowances allocated free of charge were issued by the Trading Authority to the applicant, the liquidator of Air Berlin, for the period 2018-2020 when that former aircraft operator has ceased its activities and is no longer subject to EU ETS obligations.³⁶ In such a situation, the entire rationale underlying the allocation and issue of free allowances to Air Berlin under the EU ETS³⁷ no longer exists and merely gives rise to a windfall gain in the hands of the applicant to the detriment of the EU ETS.³⁸

96. Therefore, and in response to the third question of the referring court, no allowances allocated free of charge may be issued pursuant to Article 3e(5) of Directive 2003/87 once an aircraft operator has ceased its activity.³⁹ To find otherwise would undermine the harmonised EU-wide rules on the allocation and issue of free allowances which is an essential element of Directive 2003/87.⁴⁰

97. The applicant has placed considerable weight on the fact that the withdrawal of the allowances would undermine the objectives of Directive 2003/87 and disrupt the balance sought by that directive between the reduction of emissions on the one hand and economic development and employment on the other.⁴¹ In that regard, it notes that the threshold or cap of 95% of historical emissions set by Article 3c(2) of Directive 2003/87 for the 2013-2020 trading period is the result of a political compromise and it represents a complex balancing act, which

³⁶ Directive 2003/87 has the purpose of establishing an emission allowance trading scheme which seeks to reduce greenhouse gas emissions into the atmosphere to a level that prevents dangerous anthropogenic interference with the climate system and the ultimate objective of which is protection of the environment. There is an economic logic underlying the scheme that encourages a participant in the scheme to emit quantities of greenhouse gases that are less than the allowances originally allocated to it, in order to sell the surplus to another participant which has emitted more than its allowance. Judgment of 3 December 2020, *Ingredion Germany* (C-320/19, EU:C:2020:983, paragraphs 38 and 39 and the case-law cited). In its judgment of 21 December 2011, *Air Transport Association of America and Others* (C-366/10, EU:C:2011:864, paragraph 138), the Court stated that the rules set out in Directive 2008/101 are intended to extend the allowance trading scheme established by Directive 2003/87 to aircraft operators. They thus pursue in particular the objective of improving environmental protection.

³⁷ Recital 14 of Directive 2008/101 states that ‘the objective of the amendments made to Directive 2003/87/EC by this Directive is to reduce the climate change impact attributable to aviation by including emissions from aviation activities in the Community scheme’.

³⁸ The Court indicated in its judgment of 28 July 2016, *Vattenfall Europe Generation* (C-457/15, EU:C:2016:613, paragraph 27) that the overall structure of Directive 2003/87 is based on the strict accounting of the issue, holding, transfer and cancellation of allowances. Where an aircraft operator ceases its activities and is no longer subject to EU ETS obligations, the whole rationale for the issue of free allowances to it ceases. The issue of free allowances in such cases would, in my view, undermine not only specific provisions of Directive 2003/87, but also its overall structure.

³⁹ Given that Air Berlin definitively ceased its aviation activities due to insolvency and thus did not resume them during the period 2018-2020, the Trading Authority, in order to ensure legal certainty and the effective implementation of Directive 2003/87 under its national legal system, may withdraw or amend in respect of that period the *initial allocation decision*. Such a withdrawal or amendment is thus permissible but not mandatory under EU law unless it is necessary to ensure legal certainty and the effective implementation of Directive 2003/87 under national law. What is mandatory is that *no allowances allocated free of charge may be issued* to Air Berlin in respect of the period 2018-2020.

⁴⁰ See by analogy, judgment of 22 June 2016, *DK Recycling und Roheisen v Commission* (C-540/14 P, EU:C:2016:469, paragraphs 51 to 54).

⁴¹ See recital 5 to Directive 2003/87.

was also influenced by the economic consequences that a reduction in allowances could have. The Commission, on the other hand, has stated that failure to withdraw the free allocation of allowances will massively distort the EU ETS.

98. I consider that while a cap or limit of 95% of historical emissions in respect of allowances to be allocated to aircraft operators is laid down in Article 3c(2) of Directive 2003/87, that percentage is not set in stone as, pursuant to the first sentence of Article 3c(2) of Directive 2003/87, it may be reviewed as part of the general review of Directive 2003/87.⁴² Moreover, the number of free allowances to be issued pursuant to Article 3e and Article 3f of Directive 2003/87 – and ultimately by implication the cap of 95% contained in Article 3c(2) of that directive – was reduced by Regulation No 421/2014 and Regulation 2017/2392 in order to adapt the EU ETS in respect of aviation by limiting its scope with a view to securing a future international agreement to control greenhouse gas emissions from aviation.⁴³ I therefore consider that any alleged threat to the balance sought by Directive 2003/87, as a result of too many or too few free allowances,⁴⁴ can and, indeed, must be assessed and ultimately resolved by the EU legislature alone.

99. I therefore propose that the answer to the first part of the first question referred should be that Article 2(1), Article 3a, Article 3(o), Article 3e(1), Article 3e(5), Article 12(2a) and Article 28a(1) and (2) of and Annex I to Directive 2003/87 preclude the annual issue of aviation allowances allocated free of charge to an aircraft operator upon the cessation of aviation activity by that operator.

2. Second part

100. By the second part of its first question, the referring court seeks to ascertain whether the withdrawal of an allocation decision after an aircraft operator has ceased its aviation activities due to insolvency is dependent on whether there has been a continuation of aviation activities by other aircraft operators. The referring court also asks, in essence, whether there is a continuation of aviation activities pursuant to Article 3f(1) of Directive 2003/87 in the event that Air Berlin sold, in part, its airport slots to other aircraft operators, namely, Deutsche Lufthansa, Easyjet and Thomas Cook.

101. Article 3f(1) of Directive 2003/87 provides for the setting up of a special reserve for the free allocation of allowances thereunder in respect of new or additional aircraft activity provided that that activity is not, in whole or in part, the continuation of such an activity performed by another aircraft operator. Despite the fact that the concept of ‘continuation’ is not defined in Directive 2003/87, I consider that the purpose of that provision is to ensure that a further or additional allocation of free allowances is not allocated in respect of essentially the same aviation activity.⁴⁵

⁴² I would note as a preliminary point that the applicant’s claim of disruption to the balance between the reduction of emissions and economic development and employment resulting from the withdrawal of allowances is merely asserted. There is no evidence in the file before the Court, even anecdotal, of such disruption.

⁴³ See also Article 3c(3) of Directive 2003/87 which provides that the Commission shall review the total quantity of allowances to be allocated to aircraft operators in accordance with Article 30(4).

⁴⁴ In addition, in the light of my answer to the fifth question, it would appear, subject to verification by the referring court, that, in reality, there is no shortage of allowances.

⁴⁵ The Commission has stated that ‘the activity or additional activity of an aircraft operator shall be considered a continuation of an aviation activity previously performed by another aircraft operator when that other aircraft operator maintains the entitlement to receive free allocation for the same aviation activities (flights on the same routes for which an initial free allocation had been made pursuant Article 3e). In these cases, the eligibility criterion [pursuant to Article 3f(1) of Directive 2003/87] would not be met’. Frequently Asked Questions Free allocation from the Special Reserve (Art 3f ETS Directive) dated 19 March 2015. Available at: https://ec.europa.eu/clima/sites/default/files/transport/aviation/docs/faq_special_reserve_en.pdf.

102. The special reserve set up pursuant to Article 3f(1) of Directive 2003/87, comprises a fixed percentage, namely, 3%, of the total quantity of allowances to be allocated.⁴⁶ In accordance with Article 3f(8) of Directive 2003/87, any unallocated allowances in the special reserve is required to be auctioned by Member States. Pursuant to Article 3d(2) of Directive 2003/87, 15% of allowances are to be auctioned.⁴⁷ It follows accordingly that 82% of aviation allowances are subject to free allocation and issue pursuant to Article 3e of Directive 2003/87.⁴⁸

103. In my view, there is no direct link between the free aviation allowances allocated under the special reserve set up pursuant to Article 3f(1) of Directive 2003/87 and the aviation allowances allocated and issued pursuant to Article 3e of that directive. I therefore consider that the withdrawal of an allocation decision after an aircraft operator has ceased its aviation activities due to insolvency is not dependent on whether there has been a continuation of aviation activities by other aircraft operators pursuant to Article 3f(1) of Directive 2003/87.

104. There was, in any event, no ‘continuation’ of aviation activities pursuant to Article 3f(1) of Directive 2003/87 when Air Berlin’s slots were sold (in part) to other aircraft operators, namely, Deutsche Lufthansa, Easyjet and Thomas Cook after Air Berlin ceased its activities in October 2017. Article 3f(1) of Directive 2003/87 is not temporally relevant in the context of the present proceedings which relate most specifically to the period 2018-2020. Any application for a free allocation from the special reserve for the 2013-2020 trading period pursuant to Article 3f of Directive 2003/87 must have been made by 30 June 2015,⁴⁹ a date which considerably predates Air Berlin’s insolvency and the cessation of its activity.

105. In addition, while it appears that slots⁵⁰ previously held by Air Berlin⁵¹ were sold to Deutsche Lufthansa, Easyjet and Thomas Cook as part of an asset sale, there is no clear indication whatsoever in the file before the Court that the Trading Authority actually intends to allocate or issue free allowances previously allocated to Air Berlin for 2018-2020 to those other aviation operators, although it considers that such a transfer may take place in certain circumstances under national law.⁵² Indeed, it would appear that any such possible transfer to Deutsche Lufthansa, Easyjet and Thomas Cook is strongly opposed by the applicant.⁵³

106. In the light of the specific circumstances in the present case, the question whether Deutsche Lufthansa, Easyjet and Thomas Cook have a right to allowances for the years 2018-2020 following the acquisition of Air Berlin’s slots is, in my view, a question beyond the scope of the present request for a preliminary ruling.

⁴⁶ Reduced in accordance with Article 28a(2) of Directive 2003/87.

⁴⁷ Reduced in accordance with Article 28a(3) of Directive 2003/87. That reduction is in proportion to the reduction in the total number of allowances issued.

⁴⁸ Reduced in accordance with Article 28a(2) of that directive.

⁴⁹ See, Article 3f(2) of Directive 2003/87.

⁵⁰ See definition in Article 2(a) of Council Regulation (EEC) No 95/93 of 18 January 1993 on common rules for the allocation of slots at Community airports (OJ 1993 L 14, p. 1) (as amended).

⁵¹ Thus Air Berlin would appear, subject to verification by the referring court, not to have been sold as a going concern but rather is in the process of being wound up and its assets sold.

⁵² According to the German Government, given that this matter is not dealt with by Directive 2003/87, it may be determined by national law. In its reply to a written question put by the Court, the German Government considers that a transfer of the right to allocation for the period 2018-2020 could take place pursuant to national company and contractual law if another operator(s) pursues Air Berlin’s activity which was subject to EU ETS. I would note that the extent to which the three aircraft operators in question pursue Air Berlin’s former activity is entirely unclear from the file before the Court. Any attempt to address this matter would therefore be highly speculative.

⁵³ I am also uncertain whether an action relating to such a transfer is even pending before the referring court.

B. The second question

107. If the first question is answered in the affirmative, the referring court by its second question seeks clarification as to the validity of the provisions of Article 10(5), Article 29, Article 55(1)(a) to 55(3) and Article 56 of Regulation No 389/2013.

108. In the light of the answer which I have proposed to the first question, I consider that there is no need to answer the second question. In any event, I consider that the provisions of Regulation No 389/2013 in question do not contradict the position I have adopted in respect of the first question.

109. Pursuant to Article 19(1) of Directive 2003/87, allowances issued from 1 January 2012 onwards shall be held in a Union registry. Regulation No 389/2013 was adopted by the Commission, as is apparent, in particular, from Article 1 thereof, in order to lay down general, operational and maintenance requirements concerning inter alia the Union Registry for allowances for the trading period commencing on 1 January 2013 and subsequent periods. The Commission was obliged, in that context, to respect the legal framework thus established by Directive 2003/87 including, in particular, its scope and the limits of the powers delegated to it.⁵⁴ It follows, furthermore, that it is necessary to interpret the provisions of Regulation No 389/2013 in the light of the requirements arising from Directive 2003/87.⁵⁵

110. Article 10(5) of Regulation No 389/2013 provides that upon notification from the competent authority that an aircraft operator's flights are no longer included in the EU ETS in accordance with Annex I to Directive 2003/87 in a given year, the national administrator, after giving prior notice to that operator shall set its holding account to *excluded status* until the operator's flights are again included in the EU ETS.⁵⁶ It would appear that such an action is, in principle, temporary in nature.

111. By contrast, pursuant to Article 29 of Regulation No 389/2013, aircraft operator holding accounts *shall only be closed* by the national administrator if instructed to do so by the competent authority because that authority has discovered that the aircraft operator has ceased its operations covered by Annex I to Directive 2003/87.⁵⁷ No processes may be initiated from closed accounts and a closed account may not be re-opened and may not acquire units.⁵⁸

⁵⁴ See, Article 19(3) of Directive 2003/87 which empowers the Commission to adopt delegated acts to supplement that directive with respect to the Union Registry for the trading period starting on 1 January 2013 and subsequent periods. See also Article 23 of Directive 2003/87 which lays down the procedures pursuant to which the Commission may exercise its delegated powers. In paragraph 47 of its judgment of 22 June 2016, *DK Recycling und Roheisen v Commission* (C-540/14 P, EU:C:2016:469), the Court stated that implementing measures adopted by the Commission cannot amend essential elements of basic legislation or supplement it by new essential elements.

⁵⁵ See by analogy, judgment of 17 May 2018, *Evonik Degussa* (C-229/17, EU:C:2018:323, paragraph 29 and the case-law cited). See also, judgment of 26 September 2014, *Romonta v Commission* (T-614/13, EU:T:2014:835, paragraphs 97 and 98).

⁵⁶ Subject to certain exceptions, no processes may be initiated from excluded accounts. See Article 10(6) of Regulation No 389/2013. In addition, it is clear from Article 56(2) and (3) of Regulation No 389/2013 that the Union Registry may not transfer aviation allowances to an excluded aircraft operator account.

⁵⁷ Or merged into another aircraft operator. Pursuant to Article 55(1)(a) of Regulation No 389/2013, the national administrator is required to carry out changes to the national aviation allocation table in the EUTL established under Article 20 of Directive 2003/87 to record the issue, transfer and cancellation of allowances where an aircraft operator has ceased its operations covered by Annex I to Directive 2003/87.

⁵⁸ See Article 10(3) of Regulation No 389/2013. In accordance with Article 32(1) of Regulation No 389/2013, if there is a positive balance on an account under closure, the account holder may specify another account to which such allowances shall be transferred. According to the Commission, given that it is impossible to reopen a closed account it would constitute an expropriation to close an account with a positive balance. The holder of an aircraft operator account about to be closed due to the permanent absence of EU ETS aviation activity can transfer the balance to another account and dispose of the allowances as it wishes, for example by selling them on the market. Regulation No 389/2013 contains no limitation on the number of accounts or account holders to which allowances can be transferred as long as the accounts are registered in the Union Registry. According to the Commission, where an aircraft operator which has ceased its activities has allowances in its account, the account is not closed but 'excluded' pursuant to Article 10(5) of Regulation No 389/2013.

112. Given that Air Berlin has definitely ceased its activities due to insolvency and is no longer subject to EU ETS obligations, its holding accounts may, in principle, be closed.⁵⁹ Moreover, no allowances may be transferred pursuant to Article 56(2) of Regulation No 389/2013 to a closed account.

113. The fact that Air Berlin's account was set to 'excluded' status⁶⁰ rather than 'closed' status is, in my view, not relevant in the context of the present proceedings given that it would appear from point 6 of the decision of the Trading Authority of 28 February 2018 that the matter is under review and that the decision has in any event been challenged before the national courts. What is important is that no allocation of aviation allowances may be transferred to an excluded account or a closed account.⁶¹

114. Moreover, while the status of an aircraft operator's account(s) pursuant to Regulation No 389/2013 is indeed of great importance as are the contents thereof for the purposes of the accurate accounting of transactions under the EU ETS, ultimately that status does not determine whether such an operator is entitled to be allocated or issued free allowances pursuant, *inter alia*, to Article 3e(4) and (5) of Directive 2003/87.

C. The third question

115. In the light of my answer to the first question, I consider that Directives 2003/87 and 2008/101 must be interpreted as meaning that no allowances allocated free of charge may be issued on an annual basis pursuant to Article 3e(5) of Directive 2003/87 to Air Berlin upon the cessation of its aviation activities. In addition, given that Air Berlin had definitively ceased its aviation activities during the period 2018-2020, it is sufficient for present purposes to say that the Trading Authority may, in order to give full effect to the provisions of Directive 2003/87 and, in particular Article 3e(5) thereof, under its national law withdraw or amend in respect of that period the initial allocation decision.

D. The fourth question

116. The referring court indicated that its fourth question is intended to clarify when the third trading period ends for aircraft operators. In other words, the question is whether that period should end on 31 December 2020 or instead on 31 December 2023. In that regard, the question specifically refers to Article 3c(3a), Article 28a(1) and (2) and Article 28b(2) of Directive 2004/87.

117. It is clear from the question itself that the referring court seeks an answer thereto only if the first question referred for a preliminary ruling receives a positive answer and the third question referred a negative answer. In the light of my answers to the first and third questions referred, I consider that there is no need to answer the fourth question. Given that Air Berlin ceased its activities in 2017, it is irrelevant in the context of the present proceedings whether the third

⁵⁹ Provided it does not have an account with a positive balance.

⁶⁰ See Article 10(1) of Regulation No 389/2013.

⁶¹ See to that effect, Article 56 of Regulation No 389/2013. See also Article 10(3) of that regulation.

trading period ends on 31 December 2020 or whether instead it extends to 31 December 2023. In my view, no free allowances allocated to Air Berlin may be issued to it pursuant to Article 3e(5) of Directive 2003/87 from 2018 onwards.⁶²

118. In any event, while there is no provision in Directive 2003/87 which *explicitly* states that the trading period beginning on 1 January 2013 ends on 31 December 2020,⁶³ I consider that it nonetheless follows from Article 13 of Directive 2003/87, which is to be found in Chapter IV of that directive and thus applies equally to aviation and stationary installations, that a new trading period commences from 1 January 2021 for a 10-year period with distinct rules concerning the temporal validity of allowances issued during the periods 1 January 2013–31 December 2020 and 1 January 2021–31 December 2030.⁶⁴

119. There are, however, a number of provisions in Directive 2003/87 which refer to 1 January 2023 in respect of allowances for aviation activity. In my view, these provisions do not have the effect of extending the trading period starting on 1 January 2013 beyond 31 December 2020 to 31 December 2023 or thereafter. They do not therefore alter the terms of Article 13 of Directive 2003/87.

120. In that regard, Article 3c(3a) of Directive 2003/87 merely provides that after 31 December 2023 certain allocations shall be subject to the review referred to in Article 28b of that directive. In addition, Article 28a(1), (2) and (4) of Directive 2003/87 reflects a reduction of the scope of Directive 2003/87 and EU ETS obligations in relation to aviation until 2023 – together with a corresponding reduction in the number of free allowances and allowances to be auctioned – in order to take account of international developments in the field.⁶⁵ While these provisions result in a certain overlap within a period of allocation in respect of aviation which extends from 1 January 2013 to 31 December 2023, they do not, however, alter the terms of Article 13 of that directive and the fact that a new trading period starts on 1 January 2021 for a 10-year period.

E. The fifth question

121. By the fifth question referred for a preliminary ruling, which is only relevant, *inter alia*, if the first question referred receives a positive answer and the third question referred a negative answer, the referring court wishes to ascertain whether entitlements to a further free allocation of emission allowances for aircraft operators for the third trading period (1 January 2013–

⁶² The German Government, in reply to a written question of the Court, indicated that Air Berlin was not mentioned in the publication referred to in Article 28a(2) of Directive 2003/87. The applicant's answer is similar, but it has knowledge of the matter in respect of Air Berlin only for 2018. In any event, the applicant, the German Government and the Commission consider that such a publication cannot in itself determine whether an aircraft operator has a right to an allocation. I can only agree.

⁶³ See however, Article 33(2) of Commission Delegated Regulation (EU) 2019/1122 of 12 March 2019 supplementing Directive 2003/87/EC of the European Parliament and of the Council as regards the functioning of the Union Registry (OJ 2019 L 177, p. 3), which specifically refers to the trading period beginning on 1 January 2021.

⁶⁴ Moreover, in accordance with Article 9 of Directive 2003/87 and the third paragraph of Article 28a(2) of that directive, from 1 January 2021, the number of allowances allocated to aircraft operators shall be subject to the application of the linear factor of 2.2%, subject however to review in accordance with Article 28b of that directive.

⁶⁵ Article 3c(3a), Article 28a(1), (2) and (4) and Article 28b of Directive 2003/87 were inserted into Directive 2003/87 by Regulation 2017/2392. As is apparent from recital 8 of that regulation, those provisions were inserted 'in order to promote momentum in the [ICAO] and to facilitate the operationalisation of the ICAO scheme, the current derogation from the EU ETS obligations for flights to and from third countries should be extended until 31 December 2023, subject to review, to allow the experience necessary for the implementation of the ICAO scheme to be gathered. As a result of the extension of the derogation, the amount of free allowances to be auctioned and issued, including from the special reserve, should remain proportional to the reduction of the surrender obligation. From 1 January 2021 onwards, the number of allowances allocated to aircraft operators should be reduced annually in line with the linear reduction factor applicable to all other sectors in the EU ETS, subject to the review in view of the implementation of the ICAO scheme'.

31 December 2020) can be met after the end of the third trading period with allowances of the fourth trading period where the existence of the allowance entitlement is established by a court only after expiry of the third trading period, or do allowance entitlements that have not yet been met lapse on the expiry of the third trading period.

122. In the light of my answers to the first and third question referred for a preliminary ruling, there is, strictly speaking, no need to answer the fifth question referred. I propose, however, briefly to answer the fifth question referred for the sake of completeness.

123. The referring court indicated that according to the case-law of the German courts, when the first and second trading periods ended, allowance entitlements outstanding at 30 April of the year following the end of the trading period could no longer be met and, as there was no explicit transitional arrangement in national law, they lapsed. Moreover, national law does not lay down a transitional arrangement in the third trading period for outstanding allowance entitlements pending before the courts. The reason given for this lack of national transitional arrangements is that the rules for the free allocation of allowances in the trading period running from 1 January 2021-31 December 2030 are laid down conclusively in Commission Delegated Regulation (EU) 2019/331⁶⁶ and it is only permitted to balance allocation entitlements across periods if so provided for in Delegated Regulation 2019/331 for the fourth trading period.⁶⁷

124. The first sentence of Article 13 of Directive 2003/87 as amended by Directive 2018/410 provides that ‘allowances issued from 1 January 2013 onwards shall be valid indefinitely’. The referring court asks specifically whether an entitlement to a further free allocation of emission allowances for the third trading period can be met with allowances in respect of the fourth trading period in such a case. According to the second sentence of Article 13 of Directive 2003/87 (as amended by Directive 2018/410), allowances issued from 2021 shall only be valid from the beginning of the 10-year period in which they were issued (that is from 1 January 2021). Therefore, a plaintiff who has been awarded a right to the allocation of free allowances would not be able to meet its obligations according to Article 12(2a) of Directive 2003/87 with allowances for the fourth trading period.

125. In order to provide a useful answer to the referring court, the question thus posed might with advantage be reformulated. The question to be answered should therefore not be limited to whether such an entitlement can be met with allowances of the fourth trading period. Thus the referring court asks essentially whether, and, if so, in what way, a possible entitlement to the free allocation of emission allowances can be met after the expiry of the third trading period in the absence of a specific provision dealing with this question.

⁶⁶ Commission Delegated Regulation of 19 December 2018 determining transitional Union-wide rules for harmonised free allocation of emission allowances pursuant to Article 10a of Directive 2003/87 (OJ 2019 L 59, p. 8).

⁶⁷ The referring court stated that according to recital 7 of Decision (EU) 2015/1814 of the European Parliament and of the Council of 6 October 2015 concerning the establishment and operation of a market stability reserve for the Union greenhouse gas emission trading scheme and amending Directive 2003/87 (OJ 2015 L 264, p. 1) allowances not allocated to installations pursuant to Article 10a(7) of Directive 2003/87 and allowances not allocated to installations because of the application of Article 10a(19) and (20) of that Directive (‘unallocated allowances’), should be placed in the reserve in 2020. The referring court considers that this recital 7 supports the view that the transition from the third to the fourth trading period does not entail the extinction of claims to additional allocation that have not been met up to that point. However, there is no explicit provision for the outcome of claims to an additional allowance that have not been satisfied by the end of the third exchange period.

126. As is evident from my answer to the fourth question referred for a preliminary ruling, the third trading period ended on 31 December 2020. However, the allocation period for free aviation allowances for the 1 January 2013-31 December 2020 trading period extends to 31 December 2023. The two periods in question thus do not seamlessly overlap. In that regard, it appears to me that the question is only relevant for the period after 31 December 2023.

127. In my view, given that Article 13 of Directive 2003/87 provides that allowances issued for the trading period shall be valid indefinitely, I consider that where an aircraft operator has a right to such an issue, that right persists and cannot lapse despite the fact that a new trading period has commenced and rights may not be satisfied on the basis of allowances issued for that period. There are, however, real practical issues as to how rights under the third trading period which persist may actually be satisfied.

128. There are two aspects to the question of how a possible entitlement to the free allocation of emission allowances for the third trading period can be met. There is, first, the procedural basis for such a change in allocation and, second, the question of the ‘origin’ of these allowances.

129. With respect to the first of these issues, any adjustment constitutes a change to the national allocation table provided for by Article 54 of Regulation No 389/2013 which,⁶⁸ according to Article 88 of Delegated Regulation 2019/1122, shall continue to apply until 1 January 2026 to all operations required in relation to the trading period between 2013 and 2020. If a court judges that an operator is entitled to a further allocation free of charge of emission allowances, the Member State concerned will inform the Commission accordingly (Article 55(2)(c) of Regulation No 389/2013) and the Commission will instruct the central administrator to make the corresponding changes to the national allocation table in the EUTL. The central administrator will then ensure that the Union Registry transfers the respective allowances from the EU Aviation Allocation Account in accordance with the adjusted national allocation table to the operator holding account according to Article 56(2) of Regulation No 389/2013.

130. As for the second aspect, namely, the origin of those allowances, the German Government stated at the hearing on 10 June 2021 that the withdrawal of the decision allocating aviation allowances in the event of insolvency of aircraft operators would not undermine the EU ETS in respect of aviation as it would not affect in any relevant manner either the number of allowances available or indeed their price. This is because ‘general allowances’⁶⁹ may be surrendered by aircraft operators. In that regard, the German Government stated that 30% of allowances surrendered by aircraft operators for the period 2013-2019 were ‘general allowances’. Moreover, the number of aviation allowances corresponds to only 2% of general allowances and surplus allowances are continually being removed under the market stability reserve referred to in Decision 2015/1814.

131. In the light of the apparent interchangeability of allowances issued to aircraft operators and the operators of stationary installations, subject to verification by the referring court, I consider that entitlement to the free allocation of emission allowances for the third trading period can be met from the market stability reserve. In that regard, I consider that points 94 to 97 of my Opinion in *ExxonMobil Production Deutschland* (C-126/20, EU:C:2021:457) should be applied by analogy to the aviation sector.

⁶⁸ See also Article 55 of Regulation No 389/2013.

⁶⁹ This would appear to refer to all allowances allocated and issued other than pursuant to Article 3c(2) of Directive 2003/87 such as allowances allocated and issued to stationary instalments pursuant to Chapter III of Directive 2003/87. See Article 3(7) and (8) of Regulation No 389/2013.

132. In light of the above, I propose to answer the fifth question of the referring court by concluding that entitlements to a further free allocation of emission allowances for the third trading period can be met after the end of the third trading period with allowances of the third trading period where the existence of the allowance entitlement is established by a court only after expiry of the third trading period. Allowances for the third trading period do not lapse on expiry of the third trading period.

VI. Conclusion

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

Article 2(1), Article 3a, Article 3(o), Article 3e(1), Article 3e(5), Article 12(2a) and Article 28a(1) and (2) of and Annex I to 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 preclude the annual issue of aviation allowances allocated free of charge to an aircraft operator upon the cessation of aviation activity by that operator.