Reports of Cases

JUDGMENT OF THE COURT (Sixth Chamber)

26 October 2016*

(Reference for a preliminary ruling — Greenhouse gas emission allowance trading scheme within the European Union — Directive 2003/87/EC — Article 10a — Method of allocating free allowances — Calculation of the uniform cross-sectoral correction factor — Decision 2013/448/EU — Article 4 — Annex II — Validity — Application of uniform cross-sectoral correction factor to facilities in sectors which are deemed to be exposed to a significant risk of carbon leakage — Determination of the product benchmark for hot metal — Decision 2011/278/EU — Article 10(9) — Annex I — Validity))

In Case C-506/14,

REQUEST for a preliminary ruling under Article 267 TFEU from the Korkein hallinto-oikeus (Administrative Supreme Court, Finland), made by decision of 7 November 2014, received at the Court on 12 November 2014, in the proceedings

Yara Suomi Oy,

Borealis Polymers Oy,

Neste Oil Oyj,

SSAB Europe Oy

v

Työ- ja elinkeinoministeriö,

THE COURT (Sixth Chamber),

composed of J.-C. Bonichot (Rapporteur), acting President of the Chamber, A. Arabadjiev and S. Rodin, Judges,

Advocate General: E. Sharpston,

Registrar: A. Calot Escobar,

having regard to the written procedure,

after considering the observations submitted on behalf of:

— Yara Suomi Oy and SSAB Europe Oy, by K. Marttinen, and T. Ukkonen, asianajajat,

— the Finnish Government, by J. Heliskoski, acting as Agent,

* Language of the case: Finnish.

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

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

— the Netherlands Government, by C. Schillemans and M. Bulterman, acting as Agents,

— the European Commission, by K. Mifsud-Bonnici, I. Koskinen and E. White, acting as Agents,

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

gives the following

Judgment

1 This request for a preliminary ruling concerns the validity of the first subparagraph of Article 10(9), Article 15(3) of, and Annex I to, Commission Decision 2011/278/EU of 27 April 2011 determining transitional Union-wide rules for harmonised free allocation of emission allowances pursuant to Article 10a of Directive 2003/87/EC of the European Parliament and of the Council (OJ 2011 L 130, p. 1), and of the validity of Article 4 of, and Annex II to, Commission Decision 2013/448/EU of 5 September 2013 concerning national implementation measures for the transitional free allocation of greenhouse gas emission allowances in accordance with Article 11(3) of Directive 2003/87/EC of the European Parliament and of the Council (OJ 2013 L 240, p. 27).

2 The request has been made in proceedings between four operators of greenhouse gas-emitting installations, namely Yara Suomi Oy, Borealis Polymers Oy, Neste Oil Oyj and SSAB Europe Oy, on the one hand, and the Työ- ja elinkeinoministeriö (Minister for Labour and the Economy, Finland), on the other, regarding the legality of the decision adopted by the Minister on 8 January 2014 on the allocation of free greenhouse gas emission allowances ('the allowances') for the trading period from 2013 to 2020, after the application of the uniform cross-sectoral correction factor ('the correction factor') provided for in Article 10a(5) of Directive 2003/87/EC of the European Parliament and of the Council of 13 October 2003 establishing a scheme for greenhouse gas emission allowance trading within the Community and amending Council Directive 96/61/EC (OJ 2003 L 275, p. 32), as amended by Directive 2009/29/EC of the European Parliament and of the Council of 23 April 2009 (OJ 2009 L 140, p. 63) ('Directive 2003/87').

Legal context

Directive 2003/87

3 Article 3 of Directive 2003/87 is worded as follows:

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

(a) "allowance" means an allowance to emit one tonne of carbon dioxide equivalent during a specified period, which shall be valid only for the purposes of meeting the requirements of this Directive and shall be transferable in accordance with the provisions of this Directive;

...

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

...

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

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

4 Article 10a of Directive 2003/87, entitled ‘Transitional Community-wide rules for harmonised free allocation’, provides:

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

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

The measures referred to in the first subparagraph shall, to the extent feasible, determine Community-wide ex-ante benchmarks so as to ensure that allocation takes place in a manner that provides incentives for reductions in greenhouse gas emissions and energy efficient techniques, by taking account of the most efficient techniques, substitutes, alternative production processes, high efficiency cogeneration, efficient energy recovery of waste gases, use of biomass and capture and storage of CO_2, where such facilities are available, and shall not provide incentives to increase emissions. No free allocation shall be made in respect of any electricity production, except for cases falling within Article 10c and electricity produced from waste gases.

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

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

...

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

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

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

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

5. The maximum annual amount of allowances that is the basis for calculating allocations to installations which are not covered by paragraph 3 and are not new entrants shall not exceed the sum of:

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

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

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

...

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

12. Subject to Article 10b, in 2013 and in each subsequent year up to 2020, installations in sectors or subsectors which are exposed to a significant risk of carbon leakage shall be allocated, pursuant to paragraph 1, allowances free of charge at 100% of the quantity determined in accordance with the measures referred to in paragraph 1.

...'

Decision 2011/278

5 Recital 8 of Decision 2011/278 is drafted in the following terms:

'For the determination of benchmark values, the Commission has used as a starting point the arithmetic average of the greenhouse gas performance of the 10% most greenhouse gas efficient installations in 2007 and 2008 for which data has been collected. In addition, the Commission has in accordance with Article 10a(1) of Directive 2003/87/EC analysed for all sectors for which a product benchmark is provided for in Annex I, on the basis of additional information received from several sources and on the basis of a dedicated study analysing most efficient techniques and reduction potentials at European and international level, whether these starting points sufficiently reflect the most efficient techniques, substitutes, alternative production processes, high efficiency cogeneration, efficient energy recovery of waste gases, use of biomass and capture and storage of carbon dioxide, where such facilities are available. Data used for determining the benchmark values has been collected from a wide range of sources in order to cover a maximum of installations producing a benchmarked product in the years 2007 and 2008. First, data on the greenhouse gas performance of ETS [emission trading scheme] installations producing benchmarked products has been collected by or on behalf of the respective European sector associations based on defined rules, so-called "sector rule books". As reference for these rule books, the Commission provided guidance on quality and verification criteria

for benchmarking data for the EU-ETS. Second, to complement the data collection by European sector associations, consultants on behalf of the European Commission collected data from installations not covered by industry's data and also competent authorities of Member States provided data and analyses.'

6 Recital 11 of that decision states:

'In case no data or no data collected in compliance with the benchmarking methodology has been available, information on present levels of emissions and consumptions and on most efficient techniques, mainly derived from the Reference Documents on Best Available Techniques (BREF) established in accordance with Directive 2008/1/EC of the European Parliament and of the Council of 15 January 2008 concerning integrated pollution prevention and control [(OJ 2008 L 24, p. 8)] has been used to derive benchmark values. In particular, due to a lack of data on the treatment of waste gases, heat exports and electricity production, the values for the product benchmarks for coke and hot metal have been derived from calculations of direct and indirect emissions based on information on relevant energy flows provided by the relevant BREF and default emission factors set out in Commission Decision 2007/589/EC of 18 July 2007 establishing guidelines for the monitoring and reporting of greenhouse gas emissions pursuant to Directive [2003/87 (OJ 2007 L 229, p. 1)]. ...'

7 Recital 32 of that decision is worded as follows:

'It is also appropriate that the product benchmarks take account of the efficient energy recovery of waste gases and emissions related to their use. To this end, for the determination of the benchmark values for products of which the production generates waste gases, the carbon content of these waste gases has been taken into account to a large extent. ...'

8 Article 10 of Decision 2011/278, headed 'Allocation at installation level', provides:

'1. Based on the data collected in accordance with Article 7, Member States shall, for each year, calculate the number of emission allowances allocated free of charge from 2013 onwards to each incumbent installation on their territory in accordance with paragraphs 2 to 8.

2. For the purpose of this calculation, Member States shall first determine the preliminary annual number of emission allowances allocated free of charge ...

...

4. For the purpose of implementing Article 10a(11) of Directive 2003/87/EC, the factors referred to in Annex VI shall be applied to the preliminary annual number of emission allowances allocated free of charge determined for each sub-installation pursuant to paragraph 2 of this Article for the year concerned where the processes in those sub-installations serve sectors or subsectors deemed not to be exposed to a significant risk of carbon leakage as determined by [Commission Decision 2010/2/EU of 24 December 2009 determining, pursuant to Directive 2003/87/EC of the European Parliament and of the Council, a list of sectors and subsectors which are deemed to be exposed to a significant risk of carbon leakage (OJ 2010 L 1, p. 10)].

Where the processes in those sub-installations serve sectors or subsectors deemed to be exposed to a significant risk of carbon leakage as determined by Decision 2010/2/EU, the factor to be applied for the years 2013 and 2014 shall be 1. The sectors or subsectors for which the factor is 1 for the years 2015 to 2020 shall be determined pursuant to Article 10a(13) of Directive 2003/87/EC.

...

7. The preliminary total annual amount of emission allowances allocated free of charge for each installation shall be the sum of all sub-installations' preliminary annual numbers of emission allowances allocated free of charge calculated in accordance with paragraphs 2, 3, 4, 5 and 6.

...

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

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

9 Article 15 of Decision 2011/278 provides:

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

...

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

After notification by all Member States of the preliminary total annual amounts of emission allowances allocated free of charge over the period from 2013 to 2020, the Commission shall determine the uniform cross-sectoral correction factor as referred to in Article 10a(5) of Directive 2003/87/EC. It shall be determined by comparing the sum of the preliminary total annual amounts of emission allowances allocated free of charge to installations that are not electricity generators in each year over the period from 2013 to 2020 without application of the factors referred to in Annex VI with the annual amount of allowances that is calculated in accordance with Article 10a(5) of Directive 2003/87/EC for installations that are not electricity generator or new entrants, taking into account the relevant share of the annual Union-wide total quantity, as determined pursuant to Article 9 of that Directive, and the relevant amount of emissions which are only included in the Union scheme from 2013 onwards.

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

...'

10 Annex VI to Decision 2011/278, entitled 'Factor ensuring the transitional system leading to a decrease of free allocation pursuant to Article 10a(11) of Directive 2003/87/EC' provides:

'Year	Value of the factor
2013	0.8000
2014	0.7286
2015	0.6571
2016	0.5857
2017	0.5143
2018	0.4429
2019	0.3714
2020	0.3000'

Decision 2013/448

11 Recital 22 of Decision 2013/448 is drafted in the following terms:

'Article 10a(5) of Directive [2003/87] limits the maximum annual quantity of allowances that is the basis for calculating allocations free of charge to installations not covered by Article 10a(3) of Directive [2003/87]. This limit is composed of two elements referred to in points (a) and (b) of Article 10a(5) of Directive [2003/87], each of which has been determined by the Commission on the basis of the quantities determined pursuant to Articles 9 and 9a of Directive [2003/87], data publicly available in the Union registry and information provided by Member States, in particular with regard to the share of emissions from electricity generators and other installations not eligible for free allocation referred to in Article 10a(3) of Directive [2003/87] …'

12 Recital 25 of that decision states:

'The limit set by Article 10a(5) of Directive 2003/87/EC is 809 315 756 allowances in 2013. In order to derive this limit, the Commission first collected from Member States and the EEA-EFTA [European Economic Area-European Free Trade Association] countries information on whether installations qualify as an electricity generator or other installation covered by Article 10a(3) of Directive 2003/87/EC. The Commission then determined the share of emissions in the period from 2005 to 2007 from the installations not covered by that provision, but included in the EU ETS [emissions trading scheme] in the period from 2008 to 2012. The Commission then applied this share of 34.78289436% to the quantity determined on the basis of Article 9 of Directive 2003/87/EC (1 976 784 044 allowances) …'

13 Article 4 of Decision 2013/448 provides:

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

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

'Year	Cross-sectoral correction factor
2013	94.272151%
2014	92.634731%
2015	90.978052%
2016	89.304105%
2017	87.612124%
2018	85.903685%
2019	84.173950%
2020	82.438204%'

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

15 By its decision of 8 January 2014, the Minister for Labour and the Economy determined the final quantity of free allowances to be allocated for the trading period 2013 to 2020. To that end, it based itself on the benchmarks laid down by Decision 2011/278 and applied the correction factor as determined in Article 4 of and Annex II to Decision 2013/448.

16 The allocation decision of 8 January 2014 was challenged by four operators of greenhouse gas-emitting installations, namely Yara Suomi, Borealis Polymers, Neste Oil and SSAB Europe, before the Korkein hallinto-oikeus (Administrative Supreme Court, Finland). In support of their action, those operators put forward a number of pleas in law alleging that Decisions 2011/278 and 2013/448 were vitiated by errors of law.

17 They submit, inter alia, that Decision 2013/448 is unlawful on the ground that it determines the correction factor. Moreover, the application of the correction factor to sectors which are exposed to a risk of carbon leakage is contrary to Directive 2003/87. Decision 2011/278 is vitiated by unlawfulness inasmuch as it laid down the benchmark for hot metal without complying with the requirements of Directive 2003/87.

18 The referring court expresses doubts as to the lawfulness of Decision 2013/448. In addition to possible disregard of procedural rules at the time of its adoption, the decision is vitiated by a number of irregularities inasmuch as it lays down the correction factor pursuant to Article 10a(5) of Directive 2003/87. Not only did the Commission use incomplete data, it failed to take account of certain emissions linked to the production of heat and electricity, inter alia through cogeneration and combustion of waste gases.

19 As regards installations in sectors or subsectors which are exposed to a significant risk of carbon leakage, it follows from Article 10a(12) of Directive 2003/87 that they are to be allocated allowances free of charge at 100% of the quantity determined in accordance with the Commission's decisions. However, those installations have not been allocated 100% of allowances because the correction factor also applies to the quantity of allowances to be allocated to them.

20 The referring court further observes that, in one of the cases before it, it has been submitted that the Commission, in laying down the benchmark for hot metal in Decision 2011/278, failed to take account of the actual carbon content of waste gases and incorrectly equated waste gases with natural gases. That approach does not encourage the use of measures such as cogeneration or efficient energy recovery of waste gases. Moreover, that benchmark was determined not on the basis of the data

provided by the industry to the Commission but, incorrectly, on the basis of the reference documents on the best available techniques for the purposes of Directive 2010/75/EU of the European Parliament and of the Council of 24 November 2010 on industrial emissions (integrated pollution prevention and control) (OJ 2010 L 334, p. 17).

21 In those circumstances, the Korkein hallinto-oikeus (Supreme Administrative Court, Finland) decided to stay the proceedings and to refer the following questions to the Court for a preliminary ruling:

'(1) Is Decision 2013/448, in so far as it is based on Article 10a(5) of [Directive 2003/87 on emissions trading], invalid and does it infringe Article 23(3) of that directive, because it was not adopted on the basis of the regulatory procedure with scrutiny, as is prescribed in Article 5a of Council Decision 1999/468/EC [of 28 June 1999 laying down the procedures for the exercise of implementing powers conferred on the Commission (OJ 1999 L 184, p. 23)] and Article 12 of Regulation (EU) No 182/2011 [of the European Parliament and of the Council of 16 February 2011 laying down the rules and general principles concerning mechanisms for control by Member States of the Commission's exercise of implementing powers (OJ 2011 L 55, p. 13)]? In the event that the answer to that question is in the affirmative, the following questions need not be answered.

(2) Does Commission Decision 2013/448 infringe Article 10a(5)(a) of the [Directive 2003/87], in so far as the Commission, when establishing the industry cap, did not take into account:
   (a) some of the verified emissions for the period 2005 to 2007 of activities and installations which for the period 2008 to 2012 were included within the scope of [Directive 2003/87], but for which in the period 2005 to 2007 there was no verification obligation and which were therefore not registered in the Community Independent Transaction Log (CITL);
   (b) new activities included for the periods 2008 to 2012 and 2013 to 2020 within the scope of [Directive 2003/87], in so far as they had not in the period 2005 to 2007 been included within the scope of that Directive and were not carried out at installations which in the period 2005 to 2007 were already within the scope of [Directive 2003/87];
   (c) emissions from installations decommissioned before 30 June 2011, although in fact in the period 2005 to 2007 and partially also in the period 2008 to 2012 there were verified emissions from those installations?

In the event that the questions 2 (a) to (c) are to any extent to be answered in the affirmative, is Commission Decision 2013/448 with respect to the application of the cross-sectoral correction factor invalid, so that it should not be applied?

(3) Is Decision 2013/448 invalid and does it infringe Article 10a(5) of [Directive 2003/87] and the objectives of that directive, in that for the calculation of the industry cap under Article 10a(5)(a) and (b) of [Directive 2003/87] no account is taken of emissions which arise when (i) electricity is generated from waste gases in installations indicated in Annex I to [Directive 2003/87] which are not "electricity generators", and (ii) heat is produced in installations indicated in Annex I to [Directive 2003/87] which are not "electricity generators", and to which installations under Article 10a(1) to (4) of [Directive 2003/87] and Decision 2011/278 allowances ought to be allocated free of charge?

(4) Is Decision 2013/448 — by itself or in conjunction with Article 10a(5) of [Directive 2003/87] — invalid and does it infringe Article 3(e) and (u) of [Directive 2003/87], since for the calculation of the industry cap under Article 10a(5)(a) and (b) of [Directive 2003/87] the emissions referred to in Question 3 above are left out of account?

(5) Does Decision 2013/448 infringe Article 10a(12) of [Directive 2003/87], in so far as [the correction factor] is extended to a sector defined in Decision 2010/2/EU in which there is a significant risk of carbon leakage?

(6) Does Decision 2011/278 infringe Article 10a(1) of [Directive 2003/87] in so far as the Commission's measures for the establishment of benchmarks should take into account incentives for energy efficient techniques, the most efficient techniques, high efficiency co-generation, and the efficient energy recovery of waste gases?

(7) Does Decision 2011/278 infringe Article 10a(2) of [Directive 2003/87], in so far as the principles for setting benchmarks should be based on the average performance of the 10% most efficient installations in a sector?'

Consideration of the questions referred

The validity of Article 15(3) of Decision 2011/278

The third and fourth questions

22 By its third and fourth questions, which it is appropriate to examine first and together, the referring court in essence asks the Court to rule on the validity of Decision 2013/448 inasmuch as, at the time the correction factor was determined, emissions from installations covered by Annex I to Directive 2003/87 which are not electricity generators were not included in the maximum annual quantity of allowances for the purposes of Article 10a(5) of Directive 2003/87 ('the maximum annual quantity of allowances') in so far as those emissions originate from the combustion of waste gases in order to generate electricity and from the generation of heat through cogeneration.

23 It is apparent from Article 3(u) of Directive 2003/87 that an installation that has produced electricity for sale to third parties and in which no activity listed in Annex I is carried out other than the combustion of fuels must be categorised as an 'electricity generator'.

24 In so far as the waste gases were combusted by electricity generators, the corresponding emissions were not taken into account when establishing the maximum annual quantity of allowances (judgment of 28 April 2016, *Borealis Polyolefine and Others*, C-191/14, C-192/14, C-295/14, C-389/14 and C-391/14 to C-393/14, EU:C:2016:311, paragraph 74).

25 Similarly, under Article 10a(3) and (5) of Directive 2003/87 emissions from the generation of heat through cogeneration were not taken into account for the purposes of determining the maximum annual quantity of allowances in so far as they originate from electricity generators (see, to that effect, judgment of 28 April 2016, *Borealis Polyolefine and Others*, C-191/14, C-192/14, C-295/14, C-389/14 and C-391/14 to C-393/14, EU:C:2016:311, paragraph 75).

26 Article 15(3) of Decision 2011/278, which was adopted in order to implement Article 10a(5) of Directive 2003/87, does not permit account to be taken of emissions from electricity generators for determining the maximum annual quantity of allowances (see, to that effect, judgment of 28 April 2016, *Borealis Polyolefine and Others*, C-191/14, C-192/14, C-295/14, C-389/14 and C-391/14 to C-393/14, EU:C:2016:311, paragraph 68).

27 There is, however, nothing in a combined reading of the provisions of Directive 2003/87 and Decision 2011/278 to indicate that the Commission, in determining the maximum annual quantity of allowances, excluded emissions other than those attributable to electricity generators (see, to that effect, judgment of 28 April 2016, *Borealis Polyolefine and Others*, C-191/14, C-192/14, C-295/14, C-389/14 and C-391/14 to C-393/14, EU:C:2016:311, paragraphs 67, 70 and 72 to 76), a point confirmed by recitals 22 and 25 of Decision 2013/448. In particular, those recitals indicate that the

Commission gathered information from the Member States and the EFTA countries participating in the EEA on whether the installations could be considered electricity generators or other installations covered by Article 10a(3) of Directive 2003/87.

28 It follows that the third and fourth questions referred by the referring court are based on an incorrect premise. There is nothing in the combined provisions of Directive 2003/87 and Decision 2011/278, or Decision 2013/448, to indicate that the Commission, in the determination of the maximum annual quantity of allowances, excluded emissions other than those attributable to electricity generators.

29 Nevertheless, in the procedure laid down by Article 267 TFEU providing for cooperation between national courts and the Court of Justice, it is for the latter to provide the national court with an answer which will be of use to it and enable it to determine the case before it. To that end, the Court may have to reformulate the questions referred to it. The Court may also find it necessary to consider provisions of EU law which the national court has not referred to in its questions (judgment of 11 February 2015, *Marktgemeinde Straßwalchen and Others*, C-531/13, EU:C:2015:79, paragraph 37).

30 In the light of the considerations set out in paragraphs 23 to 28 of this judgment, the third and fourth questions referred may be construed as meaning that the referring court in essence asks the Court to rule on the validity of Article 15(3) of Decision 2011/278 inasmuch as that provision precludes account being taken of emissions from electricity generators for the determination of the maximum annual quantity of allowances.

31 It should be noted in that regard that, in its judgment of 28 April 2016, *Borealis Polyolefine and Others* (C-191/14, C-192/14, C-295/14, C-389/14 and C-391/14 to C-393/14, EU:C:2016:311), the Court was called on to rule on an essentially identical question and the answer given in that judgment is fully transposable to the present case.

32 The Court held in that judgment that, in not permitting account to be taken of emissions from electricity generators in the determination of the maximum annual quantity of allowances, Article 15(3) of Decision 2011/278 is consistent with the wording of Article 10a(5) of Directive 2003/87, read in conjunction with Article 10a(3) of that directive (see judgment of 28 April 2016, *Borealis Polyolefine and Others*, C-191/14, C-192/14, C-295/14, C-389/14 and C-391/14 to C-393/14, EU:C:2016:311, paragraph 68).

33 That interpretation is also consistent with the broad logic of Directive 2003/87 and the objectives which it pursues (judgment of 28 April 2016, *Borealis Polyolefine and Others*, C-191/14, C-192/14, C-295/14, C-389/14 and C-391/14 to C-393/14, EU:C:2016:311, paragraph 69).

34 In those circumstances, for the same reasons as set out in paragraphs 62 to 83 of the judgment of 28 April 2016, *Borealis Polyolefine and Others* (C-191/14, C-192/14, C-295/14, C-389/14 and C-391/14 to C-393/14, EU:C:2016:311), examination of the third and fourth questions has revealed no factor of such a kind as to affect the validity of Article 15(3) of Decision 2011/278.

The validity of Annex I to Decision 2011/278

The sixth and seventh questions

35 By its sixth and seventh questions, the referring court in essence asks the Court to rule on the validity of Annex I to Decision 2011/278 inasmuch as the product benchmark for hot metal was determined in breach of the requirements under Article 10a(1) and (2) of Directive 2003/87.

36 SSAB Europe considers that it is apparent from those provisions that benchmarks must be established on the basis of the performance of 10% of the most efficient installations in the sector concerned by the benchmark. At the time that rule was implemented, the Commission considered, incorrectly, that the waste gases released during the production of hot metal could substitute as fuel for natural gas used in that same process. Moreover, nor does the benchmark determined by the Commission provide incentive for cogeneration or efficient energy recovery of waste gases, as it reduces the advantages for operators using those processes.

37 In that regard, it should be noted that the Commission has a wide discretion to determine the benchmarks in individual sectors or sub-sectors under Article 10a(2) of Directive 2003/87. That exercise entails on its part choices as well as complex technical and economic assessments. The legality of a measure adopted in that area can be affected only if the measure is manifestly inappropriate (judgment of 8 September 2016, *Borealis and Others*, C-180/15, EU:C:2016:647, paragraph 45).

38 According to recital 8 of Decision 2011/278, the Commission used, for the determination of benchmark values, as a starting point the arithmetic average of the greenhouse gas performance of the 10% most efficient greenhouse gas installations in 2007 and 2008 for which data were collected. It verified that the starting point sufficiently reflected the most efficient techniques, substitutes, alternative production processes, high efficiency cogeneration, efficient energy recovery of waste gases, use of biomass and capture and storage of CO_2, where such facilities are available. Subsequently, the Commission supplemented those data by using, in particular, the data collected by or on behalf of the various European sector associations, based on defined rules, so-called 'sector rule books'. As reference for these rule books, the Commission provided guidance on quality and verification criteria (judgment of 8 September 2016, *Borealis and Others*, C-180/15, EU:C:2016:647, paragraph 46).

39 In addition, it is clear from recital 11 of Decision 2011/278 that, where no data were available or the data collected did not comply with the benchmarking methodology, information on present levels of emissions and consumptions and on most efficient techniques, mainly derived from the Reference Documents on Best Available Techniques (BREF) established in accordance with Directive 2008/1 was used to derive benchmark values. In particular, due to a lack of data on the treatment of waste gases, heat exports and electricity production, the values for the product benchmarks for coke and hot metal were derived from calculations of direct and indirect emissions based on information on relevant energy flows provided by the relevant BREF and default emission factors set out in Decision 2007/589 (judgment of 8 September 2016, *Borealis and Others*, C-180/15, EU:C:2016:647, paragraph 47).

40 As for waste gases generated during the production of hot metal, according to recital 32 of Decision 2011/278 the product benchmarks take account of the efficient energy recovery of waste gases and emissions related to use of those gases. To that end, for the determination of the benchmark values for products of which the production generates waste gases, the carbon content of those waste gases has been taken into account to a large extent (judgment of 8 September 2016, *Borealis and Others*, C-180/15, EU:C:2016:647, paragraph 48).

41 In those circumstances it does not appear that the Commission, in determining the benchmarks according to Article 10a(2) of Directive 2003/87, exceeded the limits of its discretion (judgment of 8 September 2016, *Borealis and Others*, C-180/15, EU:C:2016:647, paragraph 49).

42 In the light of all the above considerations, examination of the sixth and seventh questions has revealed no factor of such a kind as to affect the validity of Annex I to Decision 2011/278.

The validity of the first subparagraph of Article 10(9) of Decision 2011/278

The fifth question

43 By its fifth question, the referring court asks the Court to rule on the validity of Decision 2013/448 inasmuch as the correction factor was extended to a sector which is deemed to be exposed to a significant risk of carbon leakage.

44 Yara Suomi, Borealis Polymers, Neste Oil and SSAB Europe submit that the application of the correction factor prevents installations belonging to a sector exposed to a risk of carbon leakage from receiving 100% of the allowances they require. In applying that factor to those sectors which are exposed to a risk of carbon leakage, the Commission altered the essential aspects of Directive 2003/87 in a manner contrary to Article 10a(12) of that directive.

45 As observed in paragraph 29 of this judgment, in the context of the procedure established by Article 267 TFEU providing for cooperation between national courts and the Court of Justice, it is for the latter to provide the national court with an answer which will be of use to it and enable it to determine the case before it. To that end, the Court may deem it necessary, in order to provide a satisfactory answer, to consider provisions of EU law to which the national court has not referred in its question.

46 It should be observed in that regard that, under Article 10a(11) of Directive 2003/87, the quantity of allowances allocated free of charge for 2013, under Article 10a(4) to (7), corresponds to 80% of the quantity laid down in accordance with the measures referred to in Article 10a(1). Thereafter the free allocation is to decrease each year by equal amounts, resulting in 30% free allocation in 2020, with a view to reaching no free allocation in 2027.

47 Article 10a(12) of Directive 2003/87 provides for an exception to that rule. Thus, for 2013 and each year thereafter until 2020, the installations in those sectors or subsectors which are deemed to be exposed to a significant risk of carbon leakage are to receive, under Article 10a(1) of that directive, a quantity of free allowances representing 100% of the quantity determined in accordance with the measures referred to in Article 10a(1).

48 In order to implement 10a(11) and (12) of Directive 2003/87, in Article 10(4) of Decision 2011/278 the Commission laid down two distinct rules, one for installations in sectors which are deemed to be exposed to a significant risk of carbon leakage and one for installations in sectors which are not exposed to that risk. Regarding the latter, under the first subparagraph of Article 10(4), for the purpose of implementing Article 10a(11) of Directive 2003/87, the factors referred to in Annex VI are to be applied to the preliminary annual number of emission allowances allocated free of charge. Thus, for 2013, a factor of 0.8 should be applied, which gradually decreases until reaching 0.3 for 2020. For installations in sectors or subsectors which are deemed to be exposed to a significant risk of carbon leakage, it follows from the second subparagraph of Article 10(4) of Decision 2011/278 that the factor to be applied to the preliminary annual number of emission allowances allocated free of charge is 1.

49 As regards the correction factor, whilst it is true that it is laid down in Article 4 of, and Annex II to, Decision 2013/448, the detailed rules for its application were determined by the Commission as provided for in the first subparagraph of Article 10(9) of Decision 2011/278.

50 Under the latter provision, the final total annual amount of emission allowances allocated free of charge for each incumbent installation, except for installations covered by Article 10a(3) of Directive 2003/87, is to be the preliminary total annual amount of emission allowances allocated free of charge for each installation determined in accordance with Article 10(7) of Decision 2011/278, multiplied by the correction factor as determined in accordance with Article 15(3). The application of the

correction factor is therefore provided for without any distinction whatsoever as between installations in sectors which are exposed to a significant risk of carbon leakage and those in sectors which are not exposed to that risk.

51 It follows that, by its fifth question, the referring court in essence asks the Court to rule on the validity of the first subparagraph of Article 10(9) of Decision 2011/278 inasmuch as that provision provides for the application of the correction factor to the preliminary quantity of allowances allocated to all installations not coming under Article 10a(3) of Directive 2003/87, without exempting installations in sectors or subsectors which are exposed to a significant risk of carbon leakage.

52 It is apparent from the very wording of Article 10a(12) of Directive 2003/87 that, in order to determine the final quantity of allowances to be allocated free of charge to installations in sectors or subsectors which are deemed to be exposed to a significant risk of carbon leakage, it is necessary to establish the volume of allowances corresponding to '100% of the quantity determined in accordance with the measures referred to in paragraph 1 [of that article]'.

53 Under Article 10a(1) of Directive 2003/87, the Commission is to adopt Community-wide and fully-harmonised implementing measures for the allocation of the allowances referred to in Article 10a(4), (5), (7) and (12) of Directive 2003/87, including any necessary provisions for a harmonised application of Article 10a(19). The measures referred to in Article 10a(1) thus include the application of the correction factor as provided for in Article 10a(5).

54 An interpretation of Article 10a(1) and (12) of Directive 2003/87 which precludes the application of the correction factor is contrary not only to the wording of those provisions but also to the overall scheme of that directive. Like paragraph 12 of that article, paragraph 11, which provides that, in principle, the volume of free allowances is to be gradually decreased, also refers to 'the quantity [of allowances] determined in accordance with the measures referred to in paragraph 1'. Therefore, although those measures did not include the correction factor, it cannot be applied either to installations in sectors and subsectors which are exposed to a significant risk of carbon leakage or to installations in sectors which are not exposed to that risk.

55 Therefore, the Commission was correct in not exempting, in the first subparagraph of Article 10(9) of Decision 2011/278, those installations in sectors or subsectors which are deemed to be exposed to a significant risk of carbon leakage from the application of the correction factor.

56 It is apparent from all of the above that examination of the fifth question referred has revealed no factor of such a kind as to affect the validity of the first subparagraph of Article 10(9) of Decision 2011/278.

The validity of Article 4 of, and Annex II to, Decision 2013/448

The first and second questions

57 By its first and second questions, the referring court in essence asks the Court to rule on the validity of Article 4 of, and Annex II to, Decision 2013/448 laying down the correction factor.

58 It should be noted in that regard that the Court has held previously that since the Commission did not determine the maximum annual quantity of allowances in accordance with the requirements of letter (b) of the first subparagraph of Article 10a(5) of Directive 2003/87, the correction factor laid down in Article 4 of, and Annex II to, Decision 2013/448 is also contrary to that provision (judgment of 28 April 2016, *Borealis Polyolefine and Others*, C-191/14, C-192/14, C-295/14, C-389/14 and C-391/14 to C-393/14, EU:C:2016:311, paragraph 98).

59 In those circumstances, the answer to the first and second questions referred is that Article 4 of, and Annex II to, Decision 2013/448, laying down the correction factor, are invalid (judgment of 28 April 2016, *Borealis Polyolefine and Others*, C-191/14, C-192/14, C-295/14, C-389/14 and C-391/14 to C-393/14, EU:C:2016:311, paragraph 99).

Limitation of the temporal effects

60 It is apparent from paragraph 111 of the judgment of 28 April 2016, *Borealis Polyolefine and Others* (C-191/14, C-192/14, C-295/14, C-389/14 and C-391/14 to C-393/14, EU:C:2016:311) that the Court limited the temporal effects of the declaration of invalidity of Article 4 of, and Annex II to, Decision 2013/448 so that, first, that declaration did not produce effects until 10 months following the date of delivery of that judgment so as to enable the Commission to adopt the necessary measures and, second, measures adopted during that period on the basis of the invalidated provisions could not be called into question.

Costs

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

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

1. **Examination of the third and fourth questions has revealed no factor of such a kind as to affect the validity of Article 15(3) of Commission Decision 2011/278/EU of 27 April 2011 determining transitional Union-wide rules for harmonised free allocation of emission allowances pursuant to Article 10a of Directive 2003/87/EC of the European Parliament and of the Council.**

2. **Examination of the sixth and seventh questions has revealed no factor of such a kind as to affect the validity of Annex I to Decision 2011/278.**

3. **Examination of the fifth question referred has revealed no factor of such a kind as to affect the validity of the first subparagraph of Article 10(9) of Decision 2011/278.**

4. **Article 4 of, and Annex II to, Commission Decision 2013/448/EU of 5 September 2013 concerning national implementation measures for the transitional free allocation of greenhouse gas emission allowances in accordance with Article 11(3) of Directive 2003/87/EC of the European Parliament and of the Council are invalid.**

5. **The temporal effects of the declaration of invalidity of Article 4 of, and Annex II to, Decision 2013/448 are limited so that, first, that declaration does not produce effects until 10 months following the date of delivery of the judgment in *Borealis Polyolefine and Others* (C-191/14, C-192/14, C-295/14, C-389/14 and C-391/14 to C-393/14, EU:C:2016:311), so as to enable the European Commission to adopt the necessary measures and, second, measures adopted during that period on the basis of the invalidated provisions cannot be called into question.**

[Signatures]