



Reports of Cases

OPINION OF ADVOCATE GENERAL
CAMPOS SÁNCHEZ-BORDONA
delivered on 5 July 2016¹

Case C-321/15

ArcelorMittal Rodange et Schifflange SA
v
Grand Duchy of Luxembourg

(Request for a preliminary ruling from the Cour constitutionnelle (Constitutional Court, Luxembourg))

(Environment — Scheme for greenhouse gas emissions allowance trading — Directive 2003/87 — Articles 3(a), 11 and 12 — Cessation of activities of an installation — Breach of duty to notify changes to an installation — Erroneous allocation — Removal from the register — Surrender of unused allowances — Lack of compensation — Expropriation)

1. Greenhouse gas emission allowance trading, established by Directive 2003/87/EC,² is the cornerstone of the EU's initiative to reduce the presence in the atmosphere of greenhouse gases which are largely responsible for global warming. Attributing a financial value to those allowances and turning them into an instrument of exchange in a genuine market acts as an incentive to reduce pollutant emissions. The reliability and solvency of this market call for a rigorous and trustworthy mechanism for the allocation and distribution of emission allowances, for which purpose the coordinated action of the EU and the Member States is essential.

2. The legal nature of emissions allowances has been widely debated by commentators. In the absence of a definition in EU law, some Member States have opted to frame such allowances as administrative authorisations, while others classify them as assets which may form the subject matter of property rights.

3. The Luxembourg authorities, which erroneously allocated certain emissions trading allowances to an undertaking for a specified period, ordered that undertaking to surrender those allowances. In the ensuing proceedings brought by that undertaking, the dispute before the national courts relates to whether the conduct of the Luxembourg authorities is tantamount to an act of expropriation which is therefore subject to compensation.

4. The referring court has uncertainties regarding the compatibility with Directive 2003/87 of the national provision which, in the circumstances of the case, requires the surrender of emissions trading allowances. The referring court also asks whether those allowances may be considered to be 'property' for the purposes of the constitutional guarantee of property rights.

¹ — Original language: Spanish.

² — Directive of the European Parliament and of the Council of 13 October 2003 establishing a scheme for greenhouse gas emission allowance trading within the Community and amending Council Directive 96/61/EC (OJ 2003 L 275, p. 32). The main proceedings concern the second period of the emissions allowance trading scheme, meaning that the applicable version of Directive 2003/87 is the version preceding amendment by Directive 2009/29/EC of the European Parliament and of the Council of 23 April 2009 (OJ 2009 L 140, p. 63).

5. I shall propose to the Court an interpretation of the emissions allowance trading scheme which entails the compatibility of the national legislation with that scheme. I shall also argue that the reply to the question of whether those allowances are ‘property’ or merely ‘administrative authorisations’ cannot be found in EU law and that it will be sufficient for the Court to determine whether the allocation of and the order to surrender those allowances complied with Directive 2003/87.

I – Legislative framework

A – EU law

1. Charter of Fundamental Rights of the European Union

6. Under Article 17(1) of the Charter, ‘everyone has the right to own, use, dispose of and bequeath his or her lawfully acquired possessions. No one may be deprived of his or her possessions, except in the public interest and in the cases and under the conditions provided for by law, subject to fair compensation being paid in good time for their loss. The use of property may be regulated by law in so far as is necessary for the general interest’.

2. Directive 2003/87

7. Article 1 of Directive 2003/87 provides that the directive ‘establishes a scheme for greenhouse gas emission allowance trading within the Community ... in order to promote reductions of greenhouse gas emissions in a cost-effective and economically efficient manner’.

8. Article 3 includes the following definitions:

‘(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;

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

...’

9. In accordance with Article 7, ‘the operator shall inform the competent authority of any changes planned in the nature or functioning, or an extension, of the installation which may require updating of the greenhouse gas emissions permit. Where appropriate, the competent authority shall update the permit. Where there is a change in the identity of the installation’s operator, the competent authority shall update the permit to include the name and address of the new operator’.

10. Under the heading ‘National allocation plan’ (‘NAP’), Article 9 provides:

‘1. For each period referred to in Article 11(1) and (2), each Member State shall develop a national plan stating the total quantity of allowances that it intends to allocate for that period and how it proposes to allocate them. The plan shall be based on objective and transparent criteria, including those listed in Annex III, taking due account of comments from the public. ...

...

3. Within three months of notification of [an NAP] by a Member State under paragraph 1, the Commission may reject that [NAP], or any aspect thereof, on the basis that it is incompatible with the criteria listed in Annex III or with Article 10. The Member State shall only take a decision under Article 11(1) or (2) if proposed amendments are accepted by the Commission. Reasons shall be given for any rejection decision by the Commission.’

11. Under Article 10, ‘for the three-year period beginning 1 January 2005 Member States shall allocate at least 95% of the allowances free of charge. For the five-year period beginning 1 January 2008, Member States shall allocate at least 90% of the allowances free of charge’.

12. Article 11 of Directive 2003/87 provides:

‘...

2. For the five-year period beginning 1 January 2008, and for each subsequent five-year period, each Member State shall decide upon the total quantity of allowances it will allocate for that period and initiate the process for the allocation of those allowances to the operator of each installation. This decision shall be taken at least 12 months before the beginning of the relevant period and be based on the Member State’s [NAP] developed pursuant to Article 9 and in accordance with Article 10, taking due account of comments from the public.

...

4. The competent authority shall issue a proportion of the total quantity of allowances each year of the period referred to in paragraph 1 or 2, by 28 February of that year.’

13. Article 12 provides:

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

- (a) persons within the Community;
- (b) persons within the Community 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.

...

3. Member States shall ensure that, by 30 April each year at the latest, the operator of each installation surrenders a number of allowances equal to the total emissions from that installation during the preceding calendar year as verified in accordance with Article 15, and that these are subsequently cancelled.

...’

14. Article 13 reads as follows:

‘1. Allowances shall be valid for emissions during the period referred to in Article 11(1) or (2) for which they are issued.

2. Four months after the beginning of the first five-year period referred to in Article 11(2), allowances which are no longer valid and have not been surrendered and cancelled in accordance with Article 12(3) shall be cancelled by the competent authority.

Member States may issue allowances to persons for the current period to replace any allowances held by them which are cancelled in accordance with the first subparagraph.

...’

15. According to Article 14:

‘1. The Commission shall adopt guidelines for monitoring and reporting of emissions resulting from the activities listed in Annex I of greenhouse gases specified in relation to those activities ... by 30 September 2003. ...

2. Member States shall ensure that emissions are monitored in accordance with the guidelines.

3. Member States shall ensure that each operator of an installation reports the emissions from that installation during each calendar year to the competent authority after the end of that year in accordance with the guidelines.’

16. Article 15 provides:

‘Member States shall ensure that the reports submitted by operators pursuant to Article 14(3) are verified in accordance with the criteria set out in Annex V, and that the competent authority is informed thereof.

Member States shall ensure that an operator whose report has not been verified as satisfactory in accordance with the criteria set out in Annex V by 31 March each year for emissions during the preceding year cannot make further transfers of allowances until a report from that operator has been verified as satisfactory.’

17. In accordance with Article 19:

‘1. Member States shall provide for the establishment and maintenance of a registry in order to ensure the accurate accounting of the issue, holding, transfer and cancellation of allowances. Member States may maintain their registries in a consolidated system, together with one or more other Member States.

2. Any person may hold allowances. The registry shall be accessible to the public and shall contain separate accounts to record the allowances held by each person to whom and from whom allowances are issued or transferred.

...’

3. *Regulation (EC) No 2216/2004*³

18. In accordance with Article 34a:

‘1. If an account holder or a registry administrator acting on behalf of the account holder unintentionally or erroneously initiated a transaction under Articles 52, 53, 58 or 62(2), it may propose to its registry administrator to carry out a manual reversal of the transaction in a written request ... posted within five working days of the finalisation of the transaction or the entry into force of this Regulation whichever is the later. The request shall contain a statement indicating that the transaction was initiated erroneously or unintentionally.

2. The registry administrator may notify the Central Administrator of the request and its intention to carry out a specific manual intervention in its database in order to reverse the transaction, within 30 calendar days of its decision on reversing the transaction, but not later than 60 calendar days of the finalisation of the transaction or the entry into force of this Regulation, whichever is the later.

...

2a. If a registry administrator unintentionally or erroneously initiated an allocation under Article 46 that resulted in allocating allowances to an installation that was not operating anymore at the time of the allocation transaction, the competent authority may notify its request to the Central Administrator to carry out a manual intervention in order to reverse the transaction within the deadlines set out in paragraph 2.

...’

B – National law

19. Under Article 16 of the Luxembourg Constitution, ‘no one shall be deprived of his possessions except in the public interest and in return for fair compensation, in accordance with the law’.

20. Directive 2003/87 was transposed into Luxembourg law by the amended Law of 23 December 2004 establishing a scheme for greenhouse gas emission allowance trading (‘the Law of 2004’).

21. Article 12 of the Law of 2004 provides:

‘...

2. For the five-year period beginning on 1 January 2008, and for each subsequent five-year period, the Minister shall decide upon the total quantity of allowances to be allocated for that period and initiate the process for the allocation of those allowances to the operator of each installation. The Minister shall do so at least 12 months before the beginning of the period concerned, on the basis of the national allocation plan drawn up in accordance with Article 10.

...

4. The Minister shall issue a proportion of the total quantity of allowances each year of the period referred to in paragraph 1 or 2, by 28 February of the year in question at the latest.’

³ — Commission Regulation of 21 December 2004 for a standardised and secured system of registries pursuant to Directive 2003/87 of the European Parliament and of the Council and Decision No 280/2004/EC of the European Parliament and of the Council (OJ 2004 L 386, p. 1), as amended by Commission Regulation (EC) No 916/2007 of 31 July 2007 (OJ 2007 L 200, p. 5), and Commission Regulation (EU) No 920/2010 of 7 October 2010 (OJ 2010 L 270, p. 1).

22. Under Article 13(6) of the Law of 2004, ‘any full or partial cessation of the operations of an installation must immediately be notified to the Minister. The Minister shall decide on the full or partial surrender of unused allowances’.

23. In accordance with Article 9 of Directive 2003/87, Luxembourg drew up its NAP for the period 2008 to 2012, which was approved by decisions adopted by the Commission on 29 November 2006 and 13 July 2007. The NAP provides that, in the event of the closure or suspension of activities of an installation, no emissions allowances will be granted for the following year.

II – Facts

24. On 2 February 2008, the Luxembourg Minister for the Environment allocated to ArcelorMittal Rodange and Schifflange SA (‘ArcelorMittal’), free of charge, for its Schifflange steel plant, a total of 405 365 greenhouse gas emission quotas⁴ applicable to the period 1 January 2008 to 31 December 2012.

25. On 19 October 2011, the general meeting of ArcelorMittal decided to suspend activities at the steel plant. The Luxembourg authorities were not informed of that decision.

26. On 22 February 2012, ArcelorMittal received the quotas it had been allocated for 2012.

27. On 19 March 2012, the general meeting of ArcelorMittal resolved to extend the cessation of activities at the steel plant for an indefinite period.

28. On 23 April 2012, ArcelorMittal applied to the Luxembourg authorities for a suspension of environmental monitoring on the grounds that the steel plant was inactive for an indefinite period.

29. Since 61 days had elapsed from the date of that application (23 April 2012) and the date of receipt of the quotas allocated (22 February 2012), the national authorities were unable to submit the relevant request for cancellation of the allocation of those quotas to the Central Administrator of the Registry of Transactions.⁵

30. On 21 December 2012, the Minister with responsibility for Sustainable Development and Infrastructure (‘the Minister’) notified his decision to: (a) retroactively amend the NAP for 2008 to 2011 and (b) require the surrender of the quotas allocated for 2012.⁶

31. By decree of 6 June 2013, the Minister required ArcelorMittal to surrender 80 922 greenhouse gas emission allowances by 31 July 2013.

32. ArcelorMittal brought an action against that decree before the Tribunal Administratif (Administrative Court, Luxembourg).

33. By decision of 17 December 2014, the Tribunal Administratif (Administrative Court) referred a question to the Cour constitutionnelle (Constitutional Court, Luxembourg) regarding the constitutionality of Article 13(6) of the Law of 2004, in so far as that provision makes it possible to order, without compensation, the total or partial surrender of emissions allowances allocated but not used.

4 — The Luxembourg authorities and courts use the term ‘quotas’. See footnote 11.

5 — In accordance with Article 34a(2) of Regulation No 2216/2004, a provision inserted by Regulation No 916/2007, such a request must be submitted ‘not later than 60 calendar days [after] the finalisation of the transaction’.

6 — The account to which ArcelorMittal was ordered to refund the quotas was not the account stipulated for the surrender of quotas for the purposes of cancellation but a different account held by the authorities.

34. During the constitutionality proceedings, the Cour constitutionnelle (Constitutional Court) made the present reference to the Court for a preliminary ruling.

III – The question referred

35. The question, which was referred for a preliminary ruling on 29 June 2015, is worded as follows:

‘Is Article 13(6) of the amended Law of 23 December 2004 establishing a scheme for greenhouse gas emission allowance trading, in so far as it allows the competent minister to order the surrender, without full or partial compensation of allowances issued in accordance with Article 12(2) and (4) of that law, but not used, compatible with 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, and more particularly with the broad logic of the emissions trading scheme provided for by that directive, that question encompassing the issue of the legal validity of the surrender of allowances which have been issued but not used, and, if that question is answered in the affirmative, of their classification, as well as that of the possible classification of such allowances as property?’

36. According to the Cour constitutionnelle (Constitutional Court), in order to determine whether Article 13(6) of the Law of 2004 is compatible with Article 16 of the Luxembourg Constitution, it is necessary to legally classify emissions allowances issued but not used and the surrender provided for by the national legislature; this will make it possible to determine whether, as goods, those allowances could have been subject to an expropriation for the purposes of Article 16 of the Constitution.

37. The Cour constitutionnelle (Constitutional Court) considers that in order to provide the Tribunal Administratif (Administrative Court) with a helpful answer, it is necessary to establish first whether the Law which is the subject of a question of constitutionality is compatible with EU law, specifically with Directive 2003/87, which that law transposed into national law.

IV – The procedure before the Court of Justice and the submissions of the parties

38. Written observations were lodged in the proceedings by ArcelorMittal, the Luxembourg Government and the Commission; none of those parties requested a hearing.

39. ArcelorMittal contends that the emissions allowances must be treated as property and not administrative authorisations. That follows from the fact that, in accordance with Directive 2003/87, they are freely transferrable and negotiable instruments which are, moreover, identifiable and available in limited quantities. On that basis, ArcelorMittal submits that emissions allowances become the property of their holder with effect from the date on which they are issued and entered in the register. The surrender provided for in Article 13(6) of the Law of 2004 has the effect of an expropriation which is contrary to Article 17 of the Charter and also infringes Directive 2003/87, to the extent that: (a) the only surrender of allowances authorised by that directive is the surrender provided for in Article 12(3), and (b) the ‘compulsory’ surrender of unused allowances prevents operators from keeping those allowances in reserve in order to trade them at a later date.

40. The Luxembourg Government submits that the emissions allowances allocated to ArcelorMittal for 2012 were allocated only because that company did not inform the competent authorities, at the appropriate time, about the suspension of its activities at the Schiffflange plant at the end of 2011. Even accepting that Directive 2003/87 does not enable the surrender of allowances already allocated to be required solely because the operator later chose to reduce his activities, the Luxembourg Government submits that the national authorities are entitled to take action in a situation in which

allowances have been wrongly allocated. Directive 2003/87 does not preclude Article 13(6) of the Law of 2004, if that law is interpreted as meaning that the surrender of emissions allowances definitively allocated and registered may be required where it was decided to cease, totally or partially, the activities of an installation before those allowances were allocated for the current year.

41. As regards the second part of the question, the Luxembourg Government submits that the legal classification of emissions allowances for the purposes of Article 16 of the Luxembourg Constitution involves the interpretation of national law and not EU law, meaning that the answer to that question does not fall within the jurisdiction of the Court of Justice.

42. The Commission agrees with the Luxembourg Government that the Law of 2004 is compatible with Directive 2003/87. Luxembourg's NAP — approved by the Commission — stipulates that, for each year in the period 2008 to 2012, the allocation of emissions allowances is conditional on the installation concerned being operational. Article 13(6) of the Law of 2004 is based on that rule and, according to the Commission, it does not conflict with Directive 2003/87. The stipulation in Article 11(4) of the Directive that the allocation of allowances must be made, at the latest, by 28 February each year of the period concerned is specifically intended to take account of the possible cessation of activities after the allocation. Moreover, compliance with the conditions for allocation of allowances is the rationale for the duty, imposed on operators, to inform the competent authority of any changes occurring in the nature, functioning or size of the installation.

43. The Commission contends that Article 12(3) of Directive 2003/87 does not preclude a Member State from requiring the surrender of emissions allowances in a situation of the kind referred to in Article 13(6) of the Law of 2004. Admittedly, that provision of the directive provides that the allowances to be surrendered are those relating to verified emissions; however, the term 'surrender' as used by the directive does not have the same meaning as it does in the national provision. So, whilst the latter refers to unused allowances, the allowances to which Article 12(3) of the directive refers are surrendered so that they can be cancelled and, therefore, must have been used.

44. As regards the second part of the question referred for a preliminary ruling, the Commission agrees with the Luxembourg Government: the Court lacks jurisdiction to rule on whether the obligation to surrender allowances is compatible with Article 16 of the Luxembourg Constitution. Nevertheless, and despite the fact that, in the Commission's opinion, the surrender of unused allowances provided for in the Law of 2004 is not an instance of the application of EU law, the Commission suggests that the Court take the opportunity in these preliminary ruling proceedings to clarify the legal nature of emissions allowances.

V – Assessment

45. The uncertainty raised by the Cour constitutionnelle (Constitutional Court) can be divided into two questions, which must be answered separately. The first is concerned with the compatibility of Article 13(6) of the Law of 2004 with Directive 2003/87. Should that question warrant an affirmative reply, the second question relates to the 'classification' of emissions allowances.

A – *The first question*

46. The Cour constitutionnelle (Constitutional Court) asks, first, whether Article 13(6) of the Law of 2004 is compatible with Directive 2003/87, 'and more particularly with the broad logic of the emissions trading scheme provided for by that directive'.

47. The referring court does not explicitly identify the specific provisions of the directive to which its uncertainties regarding the compatibility of Article 13(6) of the Law of 2004 relate. However, since that provision allows the Minister to decide ‘on the full or partial surrender of unused allowances’ in the event of the total or partial cessation of the operations of the installation in respect of which those allowances were issued, the provisions of Directive 2003/87 to which the question relates must be deemed to be, essentially, those governing the arrangements for the allocation, transfer, surrender and cancellation of emissions allowances (Articles 9, 11 and 12 of the directive) and the conditions for the validity of those allowances (Article 13 of the directive).

48. Although it will not be necessary to conduct an examination of emissions allowance trading in its entirety,⁷ it seems to me to be appropriate to summarise the reasons behind the creation of that trading scheme and the objectives it pursues. There is an economic logic underlying the spirit of the system, which explains the exchange value of those allowances and is, at the same time, at the origin of the debate surrounding their legal nature.⁸

1. Emissions allowance trading as a market instrument in the fight against pollution

49. Within the framework of the Kyoto Protocol,⁹ the European Union and the Member States undertook to reduce their greenhouse gas emissions by 8% between 2008 and 2012, compared with 1990 levels. To that end, the emissions allowance trading scheme was adopted in October 2003 and was conceived as a cap-and-trade system in accordance with which each Member State is assigned a cap on emissions of such gases¹⁰ which is distributed between national installations which generate greenhouse gases. The distribution is effected by allocating so-called ‘emissions allowances’,¹¹ defined by Article 3(a) of Directive 2003/87 as allowances ‘to emit one tonne of carbon dioxide equivalent during a specified period’.

50. Since emissions not supported by emissions allowances are penalised,¹² and given that the aim is gradually to reduce the cap on authorised emissions,¹³ the mechanism constitutes an incentive for installations to reduce their polluting activities.

7 — For an overall approach to the subject, see Pâques, M., ‘La directive 2003/87/CE et le système d’échange de quotas d’émission de gaz à effet de serre dans la Communauté européenne’, *Revue trimestrielle de droit européen* 40 (2), 2004, pp. 249 to 282.

8 — There is an updated account of the different stances of legal commentators in Rotoullié, J.C., *L’utilisation de la technique de marché en droit de l’environnement. L’exemple du système européen d’échange des quotas d’émission de gaz à effet de serre*, Thèse de doctorat, Université Panthéon Assas, 2015, pp. 136 to 153.

9 — Approved by Council Decision 2002/358/EC of 25 April 2002 concerning the approval, on behalf of the European Community, of the Kyoto Protocol to the United Nations Framework Convention on Climate Change and the joint fulfilment of commitments thereunder (OJ 2002 L 130, p. 1). On the background to and negotiation process for the Kyoto Protocol, see Freestone, D., ‘The International Climate Change Legal and Institutional Framework: An Overview’, in Freestone, D., and Streck, C., *Legal Aspects of Carbon Trading*, Oxford University Press, New York, 2009, pp. 3 to 32.

10 — The greenhouse gases listed in Annex II to Directive 2003/87 are carbon dioxide (CO₂), methane (CH₄), nitrous oxide (N₂O), hydrofluorocarbons (HFC), perfluorocarbons (PFC) and sulphur hexafluoride (SF₆). The system applies to emissions from power plants, a wide range of energy-intensive industry sectors and commercial airlines (European Commission: *The EU Emissions Trading System (EU ETS)*, October 2013, at http://ec.europa.eu/clima/publications/docs/factsheet_ets_en.pdf).

11 — While being unsure as to whether this is its cause or effect, the fact is that the heterogeneous nature of national approaches with regard to the legal nature of emissions allowances is reflected in the variety of names which the different language versions of Directive 2003/87 use to refer to such allowances. For example, whilst the Spanish and Dutch versions use the terms ‘derechos de emisión’ and ‘emissierecht’, respectively, the Italian and French versions refer to ‘quota di emissioni’ and ‘quota’, the English version prefers the term ‘allowance’ and the German version the term ‘Zertifikat’ while, lastly, the Portuguese version opts for ‘licença de emissão’.

12 — Article 16(3) of Directive 2003/87 provides for a fine for excess emissions, set at EUR 100 for each tonne of carbon dioxide equivalent emitted by that installation for which the operator has not surrendered emissions allowances.

13 — With effect from 2013, the cap on emissions for power plants and other installations was reduced by 1.74% annually (Article 9 of Directive 2003/87 as amended by Directive 2009/29), which means that, in 2020, greenhouse gas emissions should be 20% lower than in 1990. In that connection, see the recent judgment of 28 April 2016 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, paragraph 81). The amounts are different in the field of aviation.

51. As the Court has observed, ‘while the ultimate objective of the allowance trading scheme is the protection of the environment by means of a reduction of greenhouse gas emissions, the scheme does not of itself reduce those emissions but encourages and promotes the pursuit of the lowest cost of achieving a given amount of emissions reductions’.¹⁴ The benefit for the environment of the scheme is the result of ‘the stringency of the total quantity of allowances allocated, which represents the overall limit on emissions allowed by the scheme’.¹⁵

52. In addition to the gradual reduction in their number, emissions allowances will also gradually cease to be free of charge,¹⁶ so that, in order to cover all the actual emissions of an installation, it is necessary either to use unused allowances from previous years or to acquire additional emissions allowances offered by other operators. That is where the trade dimension of the system lies, for emissions allowances are ‘transferable’, in accordance with Article 3(a) of Directive 2003/87, and this, in the light of their scarcity, gives them economic value.

53. The economic value of emissions allowances is a significant incentive to reduce emissions,¹⁷ for, on the one hand, an installation which succeeds in reducing emissions may sell the allowances it has left over; on the other hand, those who initially prefer to buy additional allowances to satisfy their needs will ultimately find it more cost-effective, based on the gradual increased cost of allowances,¹⁸ to invest in more energy-efficient technology or to migrate to energy sources which release fewer pollutant gases.

54. As the Commission observed in the Green Paper on greenhouse gas emissions trading within the European Union,¹⁹ although in 2000 there were no major applications of tradable allowances under EU environmental policy, the concept of tradable allowances was not totally unfamiliar. Examples already existed of mechanisms for partially transferable allowances, such as the quotas for Ozone Depleting Substances under the Montreal Protocol²⁰ and the quotas under the Common Fisheries

14 — Judgment of 16 December 2008 in *Arcelor Atlantique et Lorraine and Others* (C-127/07, EU:C:2008:728, paragraph 31).

15 — Loc. cit.

16 — In accordance with Article 10 of Directive 2003/87, for the three-year period beginning 1 January 2005, Member States were required to allocate at least 95% of the allowances free of charge; that percentage was to be reduced to 90% for the period 2008 to 2012. From the period starting in 2013, the main method of allocation is auctioning. A summarised account of the different stages of the system in that regard can be found in European Commission: *The EU Emissions Trading System (EU ETS)*, pp. 3 to 4. It should be noted that, in any event, the Court has held that ‘the allocation of emission allowances free of charge under Article 10 of Directive 2003/87 was not intended as a way of granting subsidies to the producers concerned, but of reducing the economic impact of the immediate and unilateral introduction by the European Union of an emission allowances market, by preventing a loss of competitiveness in certain production sectors covered by that directive’ (judgment of 17 October 2013 in *Iberdrola and Others*, C-566/11, C-567/11, C-580/11, C-591/11, C-620/11 and C-640/11, EU:C:2013:660, paragraph 39). The fact that competitive pressure was not sufficient ‘to limit the extent to which the value of emission allowances is passed on in electricity prices’ led electricity producers to make windfall profits which it was sought to eliminate by providing that, with effect from 2013, emission allowances are to be allocated by means of a full auctioning mechanism (judgment of 17 October 2013 in *Iberdrola and Others*, C-566/11, C-567/11, C-580/11, C-591/11, C-620/11 and C-640/11, EU:C:2013:660, paragraph 40).

17 — As the Court observed in the judgment of 16 December 2008 in *Arcelor Atlantique et Lorraine and Others* (C-127/07, EU:C:2008:728, paragraph 32), the economic logic of the scheme consists in ensuring that the reductions take place at the lowest cost: ‘By allowing the allowances that have been allocated to be sold, the scheme is intended to encourage a participant in the scheme to emit quantities of greenhouse gases that are less than the allowances originally allocated him, in order to sell the surplus to another participant who has emitted more than his allowance’. The Court took the same view in the judgment of 7 April 2016 in *Holcim (Romania) v Commission* (C-556/14 P, EU:C:2016:207, paragraph 65).

18 — Ten years after the scheme entered into force, the controversy surrounding the effectiveness of emissions allowance trading continues, prompted by the low prices of allowances since 2008. A summary of the controversy may be found in *Schrödinger’s emissions trading system. Europe’s carbon-trading system is better than thought, and could be better still*, available at <http://www.economist.com/node/21683960>.

19 — COM(2000) 87 final, paragraph 3 *in fine*.

20 — The relevant legislation consisted at that time of Council Regulation (EEC) No 594/91 of 4 March 1991 on substances that deplete the ozone layer (OJ 1991 L 67, p. 1), as amended by Council Regulation (EEC) No 3952/92 of 30 December 1992 (OJ 1992 L 405, p. 41) and by Council Regulation (EC) No 3093/94 of 15 December 1994 on substances that deplete the ozone layer (OJ 1994 L 333, p. 1).

Policy²¹ and the common milk policy.²² The experiment in market-based environmental policy instruments, of which there were very few at that time²³ (the reason why the scheme laid down in Directive 2003/87 was perceived at the beginning as a risky experiment), was gradually extended and, after only a few years in operation, became the ‘flagship’ of EU climate policy.²⁴

55. In that context, the importance of the procedure for allocation of emissions allowances, converted into the ‘currency’ of a formidably sized market, is particularly noticeable. I shall now go on to look at that procedure, setting out the conditions under which, in accordance with Directive 2003/87, allowances must be allocated, may be transferred and are required to be surrendered or cancelled.

2. The emissions allowance scheme laid down in Directive 2003/87

56. Emissions allowances must be allocated on the basis of a plan (the NAP) drawn up by each Member State for each of the two periods originally referred to in Directive 2003/87 (2005 to 2007 and 2008 to 2012). The NAP must state the total quantity of allowances which the Member State intends to allocate in the period concerned and how it proposes to allocate them.

57. The NAP, which must be based on objective, transparent criteria and take account of comments from the public (Article 9(1)), must be notified to the Commission and the other Member States before the beginning of the relevant period (*loc. cit.*).²⁵ Within three months of notification of a plan, the Commission may reject that plan, in whole or in part, giving reasons, on the basis that it is incompatible with the criteria listed in Annex III to the directive or with Article 10 thereof, as regards the percentage of emissions allowances to be allocated free of charge (Article 9(3)).

58. Applications for greenhouse gas emissions permits must be made to the competent authority established by the Member State and must contain a description of the installation and its activities, materials the use of which is likely to cause emissions of greenhouse gases, existing sources of emissions from the installation and the measures planned to monitor and report emissions (Article 5 of Directive 2003/87).

59. If the competent authority is satisfied that the operator is capable of monitoring and reporting emissions, it ‘shall issue a greenhouse gas emissions permit granting authorisation to emit greenhouse gases from all or part of an installation’ (Article 6(1) of Directive 2003/87). That permit must contain, *inter alia* other particulars, ‘an obligation to surrender allowances equal to the [duly verified] total emissions of the installation in each calendar year ... within four months following the end of that year’ (Article 6(2)(e) of Directive 2003/87).

60. In any event, the holder of the permit has a duty to inform the competent authority of any changes which may require the updating of the permit, including a change in the identity of the installation’s operator (Article 7 of Directive 2003/87).

21 — The basic legislative framework at the time was contained in Council Regulation (EEC) No 3760/92 of 20 December 1992 establishing a Community system for fisheries and aquaculture (OJ 1992 L 389, p. 1).

22 — The main legislative components at that time were Council Regulation (EEC) No 856/84 of 31 March 1984 amending Regulation (EEC) No 804/68 on the common organisation of the market in milk and milk products (OJ 1984 L 90, p. 10), Council Regulation (EEC) No 3950/92 of 28 December 1992 establishing an additional levy in the milk and milk products sector (OJ 1992 L 405, p. 1), and Commission Regulation (EEC) No 536/93 of 9 March 1993 laying down detailed rules on the application of the additional levy on milk and milk products (OJ 1993 L 57, p. 12).

23 — Basically limited to the US Clean Air Act of 1990 and the Californian Regional Clean Air Incentives Market of 1994.

24 — The expression is used by Pohlmann, M., ‘The European Union Emissions Trading Scheme’, in Freestone, D., and Streck, C., *Legal Aspects of Carbon Trading*, *op. cit.*, p. 339.

25 — By 31 March 2004 at the latest for plans relating to the period 2005 to 2007, and at least 18 months before the beginning of the 2008 to 2012 and subsequent periods.

61. Emissions allowances, which are valid for emissions produced during the period for which they are issued (Article 13(1) of Directive 2003/87), must be able to be transferred within the European Union and between persons in the European Union and in third countries where such allowances are recognised (Article 12(1) of Directive 2003/87).

62. Directive 2003/87 provides for the cancellation of emissions allowances: (a) when the holder of allowances *surrenders* a number of allowances equal to the total emissions from his installation (Article 12(3) of Directive 2003/87) and (b) when allowances are no longer valid (because they have not been used during the period for which they were issued) and have not been surrendered. In the first situation, cancellation takes place after surrender; in the second, cancellation takes place four months after the beginning of the 2008 to 2012 or subsequent periods (Article 13 of Directive 2003/87).

63. It is of paramount importance to the market created by Directive 2003/87 that there is complete certainty for operators in that market regarding current emission allowances in each Member State and in relation to all other Member States. In accordance with Article 12(2) of Directive 2003/87, ‘Member States shall ensure that allowances issued by a competent authority of another Member State are recognised for the purpose of meeting an operator’s obligations’ as regards the surrender of used emissions allowances.

64. This is why Article 19(1) of Directive 2003/87 requires Member States to ‘provide for the establishment and maintenance of a registry in order to ensure the *accurate accounting* of the issue, holding, transfer and cancellation of allowances’.²⁶ With that same aim, Article 20(1) of Directive 2003/87 provides that the Commission must ‘designate a Central Administrator to maintain an independent transaction log recording the issue, transfer and cancellation of allowances’.²⁷

65. Concern about the *accuracy* of the quantity and circumstances of emissions allowances reflects the EU’s ambition of improving the way the market operates by preventing distortions which are caused by any uncertainty as to whether allowances are valid and in force, in view of their role as a unit of exchange on that market. Further, in addition to the purely economic or commercial interest in maintaining the reliability and solvency of the market, there is also the purpose served by the market itself: its mission as a mechanism for combating pollution. The correlation between actual emissions and those authorised by emissions allowances is, therefore, an essential priority of the system as a whole.

3. The provisions of Luxembourg legislation and their compatibility with Directive 2003/87

66. Directive 2003/87 was transposed into Luxembourg law by the Law of 2004. In so far as is important for the present purposes, Article 12(2) of that law conferred on the Minister the power to determine the total quantity of emissions allowances to be allocated for the period 2008 to 2012 and to initiate the process for the allocation of those allowances. Both measures were to be adopted in accordance with the NAP at least 12 months before the beginning of that period.²⁸

67. As regards the issue of the emissions allowances attributable to each year within the five-year period, Article 12(4) of the Law of 2004 provided — again in accordance with Article 11(4) of Directive 2003/87 — that a proportion of the total quantity of allowances should be issued by 28 February of the year in question at the latest.

26 — Emphasis added.

27 — See, in general, on the registry system, Molina Hernández, C., ‘El registro de derechos de emisión de los gases de efecto invernadero de la Unión Europea’, in *Revista de Derecho Comunitario Europeo*, No 56, 2016, pp. 157 to 197.

28 — The Law of 2004 accordingly complied with Article 11(2) of Directive 2003/87.

68. In compliance with Directive 2003/87 and the Law of 2004, Luxembourg duly drew up its NAP for the period 2008 to 2012, which received the required approval of the Commission. That NAP stipulates that, if an installation closes or suspends its activities, no emissions allowances will be allocated for the following year.

69. Article 13(6) of the Law of 2004 provides that the full or partial cessation of the operations of an installation must immediately be notified to the Minister. Again, that stipulation reflects Article 7 of Directive 2003/87, pursuant to which the competent authority must be notified of any changes which may require the updating of the emissions permit.

70. It seems to me that, up to this point, the national legislation complies scrupulously with Directive 2003/87. More particularly, the statement in the NAP to the effect that, in the event of the closure or suspension of activities of an installation, no emissions allowances will be allocated to that installation for the following year is compatible with the directive. My view, which accords with that of the Commission, is that it is compatible with Directive 2003/87 for Member States to make the allocation of emissions allowances conditional on the requirement that the installation to which the allowances are allocated must be operational. Further, a requirement of that nature must be deemed to be implicit in Directive 2003/87. Since the rationale for the scheme is to ensure that authorised emissions are equivalent to emissions actually produced, the quantity of the former must be calculated on the basis of forecasts regarding the latter, and that figure will be deduced from all installations presumed to be operational in the year for which the allowances are to be allocated.

71. Nevertheless, the hypothetical incompatibility of the Luxembourg legislation with Directive 2003/87, to which the Cour constitutionnelle (Constitutional Court) refers, concerns the approach laid down by the national legislature for the situation where there are unused emissions allowances following the notification of the total or partial cessation of the operations of an installation. That is the situation which is provided for, in the abstract, in Article 13(6) of the Law of 2004 and which, in particular, led to the main proceedings.

72. Therefore, it is not a question of examining the compatibility with Directive 2003/87 of the requirement, laid down in the national legislation, that installations which are allocated emissions allowances must be operational. I repeat that, in my opinion, that condition cannot be objected to from the perspective of the directive and is even implicitly provided for therein. Rather, the question is whether, where emissions allowances have been allocated to an installation which is subsequently confirmed to have ceased operations, the competent authority may order that those allowances be surrendered as unused allowances.

73. Accordingly, this case does not concern an application for emissions allowances which has been rejected because it relates to inactive installations but rather allowances which were actually allocated to a steel plant which should not have received those allowances because it was not operational. To be more precise, the wrongful allocation is due to an error regarding the situation of the steel plant operated by ArcelorMittal, an error for which that company, which failed to comply with its obligation to notify the competent authority that it had ceased production, may be blamed.

74. In a situation like that, Article 13(6) of the Law of 2004 provides that ‘the Minister shall decide on the full or partial surrender of unused allowances’. The issue therefore comes down to establishing the terms under which the Minister *may decide* on the surrender of those allowances, and, more specifically, whether the decision adopted (the Minister decided to ask ArcelorMittal to surrender unused emissions allowances since it was not possible, *ratione temporis*, to seek the removal of the allocation from the register kept by the Central Administrator of the scheme) complied with Directive 2003/87.

75. I believe that the decision of the Minister to apply the stipulation laid down in the Law of 2004 does not infringe Directive 2003/87. Once ArcelorMittal had suspended operations at the Schiffange steel plant on 19 October 2011, it was its duty, under Article 7 of Directive 2003/87 and Article 13(6) of the Law of 2004, to notify the competent authority of this fact. Had it done so, it would not have been allocated emissions allowances (in respect of that installation) for 2012, in line with the Luxembourg NAP. However, emissions allowances were allocated to it on 22 February 2012, while the competent authority was unaware of the cessation of activities until, on 23 April 2012, ArcelorMittal requested the suspension of environmental monitoring because operations at the steel plant had come to a standstill.

76. If there had been timely notification of that cessation, the competent authority would have been able to avoid erroneously allocating allowances which were clearly inappropriate. Further, if, once it had committed the error, the competent authority had received notice of the cessation within 60 calendar days, it would have been able to make a request to the Central Administrator for reversal of 'the transaction',²⁹ for that is the procedure for such situations laid down in Article 34a(2a) of Regulation No 2216/2004.

77. To my mind, a request by the Minister, in the event of late notification of the cessation of operations at an installation, to the Central Administrator for reversal of the 'transaction' whereby the emissions allowances were allocated does not render Article 13(6) of the Law of 2004 incompatible with Directive 2003/87. What if that reversal is impossible because the time limits set in the provisions governing the registry have been exceeded? My view, again in line with that of the Commission, is that in those circumstances, the Ministry would be entitled to require surrender of the allowances allocated in error.

78. It is true that Directive 2003/87 deals only with the 'surrender' of emissions allowances equal to emissions produced (Article 6(2)(e) and Article 12(3) of the Directive). The design of the scheme does not appear to be compatible in principle with the *ex post* alteration of the total quantity of allowances allocated or the quantity issued to each installation.³⁰ However, the situation at issue in this case concerns the *surrender* of emissions allowances which should never have been allocated because of non-compliance with the conditions of the NAP within the framework of Directive 2003/87. Accordingly, this is not a case of a readjustment to correct a simple error in calculating the quantity of emissions allowances (that is the situation to which the Commission refers in its Communication COM(2006) 725 final)³¹ but rather a case of enforcing the rules governing the operation of the scheme in order to prevent the distortion of the market in emissions allowances and indirectly facilitate the objective of environmental protection which that market serves.

79. In short, I believe that Directive 2003/87 does not preclude the Law of 2004 in so far as that law requires the surrender of emissions allowances wrongly allocated as a result of the failure by the operator of the recipient plant to comply with its duty to notify the competent authority, at the appropriate time, of the cessation of operations at the plant. The order to surrender emissions allowances is lawful if, in the light of the timing, it is no longer possible to make a request to the Central Administrator for cancellation of the allocation, following expiry of the time limit laid down in the provisions governing the registration of transactions, a matter which it is for the national court to determine.

29 — According to Article 2(v) of the Regulation, 'transaction' means 'the issue, transfer, acquisition, surrender, cancellation and replacement of allowances and the issue, transfer, acquisition, cancellation and retirement of ERUs, CERs, AAUs and RMUs and carry-over of ERUs, CERs and AAUs'.

30 — Section 2, point 2.2 of the Communication from the Commission to the Council and to the European Parliament on the assessment of [NAPs] for the allocation of greenhouse gas emission allowances in the second period of the EU Emissions Trading Scheme (COM(2006) 725 final) explains that 'such *ex post* adjustments contradict the essential concept of a "cap-and-trade" system as conceived by the Directive' and that 'there is no administrative need or any other justification' for these, while 'Member States are required to use the best data available when deciding on allocations up-front'.

31 — That communication includes as one of the situations in which *ex post* adjustment is nonetheless allowed the closure of an installation during the current year, in which case 'there is no longer an operator to whom allowances will be issued' (loc. cit.).

B – *The second question*

1. *Preliminary considerations regarding admissibility*

80. The referring court's second question concerns the legal nature or classification of emissions allowances. This issue is of particular interest to the Cour constitutionnelle (Constitutional Court) because the answer may mean that the order to surrender emissions allowances is to be treated as a compulsory expropriation under Luxembourg law.

81. The Commission and the Luxembourg Government have both raised objections regarding the admissibility of the second question. The Commission maintains that the obligation to surrender allowances reflects a rule laid down by Luxembourg in the exercise of the power to approve its NAP and that it is not an obligation imposed by EU law or, therefore, an instance of the application of EU law.

82. On the same lines, the Luxembourg Government submits that the question does not call for an interpretation of Directive 2003/87 but national law; specifically, it is an issue of national (constitutional) law which has been brought before the Cour constitutionnelle (Constitutional Court) and on which that court alone may rule within the limits of its jurisdiction. The Luxembourg Government contends that the Cour constitutionnelle (Constitutional Court) must confine itself to examining the compatibility of Luxembourg laws with the national constitution and may not, therefore, go so far as to examine the compatibility of those laws with the Convention for the Protection of Human Rights and Fundamental Freedoms or the Charter, a task which falls solely within the jurisdiction of the ordinary courts.

83. The Commission acknowledges that, although EU law is not applicable to the subject matter of the question, the Court is entitled to clarify the features of emissions allowances in the context of EU law 'in order to enable the referring court to draw its own conclusions'.³² The Luxembourg Government, on the other hand, categorically refuses to accept the jurisdiction of the Court of Justice to give a ruling on the second question, so much so that it has not made any submissions thereon.

84. The Luxembourg Government's objection relates to the (possible) lack of jurisdiction of the Court on account of the absence of any link between the subject matter of the question and EU law. However, as a preliminary matter, it also relates to the (again, possible) lack of jurisdiction of the Cour constitutionnelle (Constitutional Court) to adjudicate on the dispute beyond the limits of its jurisdiction.

2. *The jurisdiction of the referring court to refer the question*

85. The authority of the Cour constitutionnelle (Constitutional Court) to refer questions for a preliminary ruling under Article 267 TFEU is derived from its unquestionable status as a court or tribunal. That being so, and in the light of the position adopted by the Luxembourg Government, the Cour constitutionnelle (Constitutional Court) has deemed it appropriate to seek a preliminary ruling from the Court of Justice on the grounds that, in order to give a ruling on the compatibility of Article 13(6) of the Law of 2004 with Article 16 of the Constitution — in other words, in order to adjudicate on an indisputably constitutional matter — it must first establish the legal nature of emissions allowances in the light of EU law.

³² — Paragraph 49 of its written observations.

86. In my opinion, since the Cour constitutionnelle (Constitutional Court) states that, in order to determine the substance of a national provision (in this case, Article 16 of the Luxembourg Constitution, taken as a criterion for assessing the validity of the Law of 2004), it needs to resolve its uncertainties concerning the classification of emissions allowances as ‘property’ in accordance with EU law, it may — and must, under Article 267 TFEU — seek a preliminary ruling from the Court. The question of whether or not it is essential to rely on legislative provisions which are not in keeping with the wording of the Constitution raises an issue of national law in which the Court may not intervene. The Court may only confirm the judicial nature of the referring court and answer its questions on the basis of the principle that it is for the national court — before which the dispute has been brought, and which must assume responsibility for adjudicating on it — to determine in the light of the particular circumstances of the case both the need for a preliminary ruling and the relevance of the questions which it submits to the Court.³³

3. *The jurisdiction of the Court of Justice*

87. It is common knowledge that those considerations are not enough to determine that the Court must provide an answer to a question referred to it. It is also essential that the question must concern the interpretation of a provision of EU law relevant to the outcome of the dispute in the main proceedings.³⁴

88. The Luxembourg Government and the Commission both maintain that that situation does not arise in the present case but I do not agree with that view.

89. As I explained in relation to my proposed reply to the first question, the rules governing emissions allowances laid down in Directive 2003/87 lead, in a case like this one, to the surrender of allowances which have been erroneously allocated.

90. However, it is true that EU law does not resolve unequivocally the question of the legal nature of emissions allowances and that it is for the Member States to define the nature of such allowances, in accordance with the principle of subsidiarity. The approaches adopted are very diverse and range from the classification of emissions allowances as administrative authorisations (quotas granted, licences, permits, concessions) to their classification as property which may be acquired (with absolute title or through rights of use or other atypical rights *jura in re*) or merely as financial instruments, and, in nearly all cases, there is no shortage of reservations and precautions.³⁵

91. However, before legally classifying emissions allowances (as, *inter alia*, property, administrative authorisations or financial instruments), there is a prior issue which needs to be addressed: whether the allowances in question have been properly constituted as ‘emissions allowances’ in accordance with Directive 2003/87.

92. Therefore, regardless of the legal nature attributed to emissions allowances by the respective national legal systems, these allowances may only be allocated or granted in accordance with EU law. In this case, the difficulty raised before the national courts concerns — as I have already indicated — the surrender of emissions allowances, which is required where it is established that allowances have been wrongly allocated. Since it is necessary to refer to Directive 2003/87 in order to decide whether surrender is appropriate, this is an instance of the application of EU law and, therefore, it falls within the jurisdiction of the Court.

33 — In that connection, see, *inter alia*, judgment of 26 June 2007 in *Ordre des barreaux francophones et germanophone and Others* (C-305/05, EU:C:2007:383, paragraph 18).

34 — For example, judgment of 21 December 2011 in *Cicala* (C-482/10, EU:C:2011:868, paragraphs 16 to 19).

35 — On this subject, see *La régulation des marchés du CO₂*, Rapport de la mission confiée à Michel Prada, 2010, pp. 60 to 61, which may be accessed at <http://www.ladocumentationfrancaise.fr/rapports-publics/104000201/>.

93. In other words, prior to determining whether, under Luxembourg law, emissions allowances are property or administrative authorisations — which it is for the national court to decide in accordance with domestic legal provisions — it is necessary to ascertain whether, in the instant case, the object to be legally classified has been properly created. This assessment must be carried out in accordance with EU law, as interpreted by the Court.

4. *The substance*

94. The creation of emissions allowances — first — and their classification as property or administrative authorisations — second — represent two distinct processes, each covered by a different legislative sphere: EU law, in the case of the first; national law, in the case of the second.

95. Where, in a Member State, emissions allowances are defined as property which may be owned (property rights or related rights) by the operator, the confiscation of that property by the public authorities might amount to expropriation, if that is what the relevant courts decide. On the other hand, where emissions allowances are classified as mere administrative licences or authorisations, the revocation of those licences or authorisations will certainly warrant different treatment which, again, would be that provided for in national law, as interpreted by the courts of the Member State concerned.

96. The dispute before the Cour constitutionnelle (Constitutional Court) concerns the creation of emissions allowances in the context of Directive 2003/87. It therefore relates to a time before the legal classification of those allowances but after they have been constituted as such. At that stage it is not yet possible to refer, in the strict sense, to property which may be owned or to a valid administrative authorisation, meaning that the *surrender* of emissions allowances wrongly allocated cannot be treated as expropriation or as the irregular reversal of an administrative act. To put it simply, because under the EU provisions — which hold the answer regarding such *surrender* — emissions allowances are not necessarily either property or an authorisation but simply the prerequisite for something which may later be either one thing or the other (or something completely different) in each Member State.

97. The *surrender* of unused emissions allowances on the basis that they were allocated as a result of an error caused by the operator which cannot be rectified through removal from the register (in other words, the surrender at issue in the main proceedings) is a consequence derived from Directive 2003/87. This guarantees the proper operation of the emissions trading scheme established by the European Union as a key instrument of its environmental protection policy. I therefore believe that Article 17 of the Charter is not applicable because surrender in these conditions does not amount to the expropriation of property which already forms part of the operator's assets but rather the revocation of the act of allocating emissions allowances because of the failure to satisfy the requirements applicable to such an allocation under Directive 2003/87.

98. Accordingly, I suggest that the answer to the second question should be that emissions allowances allocated in breach of Directive 2003/87 cannot be classified as property forming part of the assets of an operator for the purposes of the guarantees inherent in the fundamental right to property recognised in Article 17 of the Charter.

VI – Conclusion

99. In the light of the considerations set out, I propose that the Court reply as follows to the questions referred for a preliminary ruling by the Cour constitutionnelle (Constitutional Court), Luxembourg:

- (1) 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 does not preclude national legislation, like that applicable to the main proceedings, which imposes the obligation to surrender emissions allowances allocated as a result of an error caused by the operator of the installation, where it is no longer possible to request the Central Administrator of the registry to cancel that allocation, a matter which it is for the national court to determine.
- (2) Emissions allowances allocated in breach of the conditions laid down in Directive 2003/87 cannot be classified as property forming part of the assets of an operator for the purposes of the guarantees inherent in the fundamental right to property recognised in Article 17 of the Charter of Fundamental Rights of the European Union.