Reports of Cases

ORDER OF THE COURT (Sixth Chamber)

26 March 2020*

(Reference for a preliminary ruling — Environment — Scheme for greenhouse gas emission allowance trading — Directive 2003/87/EC — Penalty for excess emissions — No exculpatory cause in the event of actual holding of non-surrendered allowances, unless *force majeure* — No possibility of varying the amount of the penalty — Proportionality — Articles 20, 41, 47 and Article 49(3) of the Charter of Fundamental Rights of the European Union — Principle of the protection of legitimate expectations)

In Case C-113/19,

REQUEST for a preliminary ruling under Article 267 TFEU from the Cour administrative (Higher Administrative Court, Luxembourg), made by decision of 7 February 2019, received at the Court on 12 February 2019, in the proceedings

Luxaviation SA

v

Ministre de l'Environnement,

THE COURT (Sixth Chamber),

composed of M. Safjan, President of the Chamber, J.-C. Bonichot (Rapporteur), President of the First Chamber, and C. Toader, Judge,

Advocate General: J. Kokott,

Registrar: A. Calot Escobar,

having regard to the written procedure,

after considering the observations submitted on behalf of:

– Luxaviation SA, by N. Bannasch and M. Zins, avocats,

– the Luxembourg Government, by D. Holderer and T. Uri, acting as Agents,

– the Netherlands Government, by M.K. Bulterman and J. Langer, acting as Agents,

– the European Parliament, by L. Darie, C. Ionescu Dima and A. Tamás, acting as Agents,

– the Council of the European Union, by K. Michoel and A. Westerhof Löfflerová, acting as Agents,

* Language of the case: French.

– the European Commission, by J.-F. Brakeland and A.C. Becker, acting as Agents,

having decided, after hearing the Advocate General, to rule by reasoned order, in accordance with Article 99 of the Rules of Procedure of the Court,

makes the following

Order

1 This request for a preliminary ruling concerns the interpretation of Article 16(3) 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').

2 The request has been made in proceedings between Luxaviation SA and the ministre de l'Environnement (Minister for the Environment, Luxembourg) regarding compliance by Luxaviation with its obligations in relation to the surrender of CO_2 emission allowances for 2015.

Legal context

EU law

Directive 2003/87

3 Recitals 5 to 7 of Directive 2003/87 state:

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

(6) Council Decision 93/389/EEC of 24 June 1993 for a monitoring mechanism of Community CO_2 and other greenhouse gas emissions [(OJ 1993 L 167, p. 31)] established a mechanism for monitoring greenhouse gas emissions and evaluating progress towards meeting commitments in respect of these emissions. This mechanism will assist Member States in determining the total quantity of allowances to allocate.

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

4 Article 4 of that directive is worded as follows:

'Member States shall ensure that, from 1 January 2005, no installation carries out any activity listed in Annex I resulting in emissions specified in relation to that activity unless its operator holds a permit issued by a competent authority in accordance with Articles 5 and 6 …'

5 Under Article 6(2) of that directive:

‘Greenhouse gas emissions permits shall contain the following:

…

(e) an obligation to surrender allowances, other than allowances issued under Chapter II, equal to the total emissions of the installation in each calendar year … within four months following the end of that year.’

6 Article 11(2) of that directive provides:

‘By 28 February of each year, the competent authorities shall issue the quantity of allowances that are to be allocated for that year …’

7 Article 12 of Directive 2003/87, which relates to transfers, surrenders and cancellations of allowances, provides, in paragraph 3 thereof:

‘… Member States shall ensure that, by 30 April each year, the operator of each installation surrenders a number of allowances, other than allowances issued under Chapter II, that is equal to the total emissions from that installation during the preceding calendar year …, and that those allowances are subsequently cancelled. …’

8 The penalty for failure to comply with that obligation, in addition to the publication of the names of non-compliant operators provided for in Article 16(2) of Directive 2003/87, is a fine provided for in Article 16(3) thereof, under which:

‘Member States shall ensure that any operator or aircraft operator who does not surrender sufficient allowances by 30 April of each year to cover its emissions during the preceding year shall be held liable for the payment of an excess emissions penalty. The excess emissions penalty shall be EUR 100 for each tonne of carbon dioxide equivalent emitted for which the operator or aircraft operator has not surrendered allowances. Payment of the excess emissions penalty shall not release the operator or aircraft operator from the obligation to surrender an amount of allowances equal to those excess emissions when surrendering allowances in relation to the following calendar year.’

9 Under Article 16(1) of Directive 2003/87:

‘Member States shall lay down the rules on penalties applicable to infringements of the national provisions adopted pursuant to this Directive and shall take all measures necessary to ensure that such rules are implemented. The penalties provided for must be effective, proportionate and dissuasive. …’

Regulation (EU) No 389/2013

10 Article 67(1) and (2) of Commission Regulation (EU) No 389/2013 of 2 May 2013 establishing a Union Registry pursuant to Directive 2003/87, Decisions No 280/2004/EC and No 406/2009/EC of the European Parliament and of the Council and repealing Commission Regulations (EU) No 920/2010 and No 1193/2011 (OJ 2013 L 122, p. 1) states:

'1. An operator or aircraft operator shall surrender allowances by proposing to the Union Registry to:

(a) transfer a specified number of allowances created for compliance in the same trading period from the relevant operator holding account or aircraft operator holding account into the Union allowance deletion account;

(b) record the number and type of transferred allowances as surrendered for the emissions of the operator's installation or the emissions of the aircraft operator in the current period.

2. Aviation allowances may only be surrendered by aircraft operators.'

Luxembourg law

11 Directive 2003/87 was transposed into Luxembourg law by the loi du 23 décembre 2004, établissant un système d'échange de quotas d'émission de gaz à effet de serre … (Law of 23 December 2004, establishing a scheme for greenhouse gas emission allowance trading …) (*Mémorial* A 2004, p. 3792).

12 Article 13(*2bis*) of that law, in its version applicable to the decree of 31 October 2016 at issue in the main proceedings (*Mémorial* A 2012, p. 4410) ('the Law of 23 December 2004') provides:

'The Minister shall ensure that, by 30 April each year, each aircraft operator surrenders a number of allowances equal to the total emissions during the preceding calendar year from aviation activities listed in Annex I for which it is the aircraft operator, as verified in accordance with Article 16. The allowances surrendered shall subsequently be cancelled by the Minister.'

13 Article 15 of that law states:

'Each operator of an installation or aircraft operator shall monitor and report the emissions from that installation or, from 1 January 2010, the aircraft which it operates, during each calendar year, to the Minister after the end of that year in accordance with Regulation (EU) No 601/2012 [of 21 June 2012 on the monitoring and reporting of greenhouse gas emissions pursuant to Directive 2003/87 (OJ 2012 L 181, p. 30)] referred to above.'

14 Under Article 20(3) and (7) of that law:

'3. Any operator or aircraft operator which does not surrender sufficient allowances by 30 April each year to cover its emissions during the preceding year shall be held liable for the payment of an excess emissions penalty. The excess emissions penalty shall be EUR 100 for each tonne of carbon dioxide equivalent emitted for which the operator or aircraft operator has not surrendered allowances. Payment of the excess emissions penalty shall not release the operator or aircraft operator from the obligation to surrender an amount of allowances equal to those excess emissions when surrendering allowances in relation to the following calendar year.

…

7. Without prejudice to the foregoing provisions, the names of the operators and aircraft operators which are in breach of the requirement to surrender sufficient allowances pursuant to Article 13(2*bis*) or (3) shall be published.'

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

15 Luxaviation belongs to an air transport group which claims to have a fleet of 260 aircraft and to employ around 1 700 people. It began trading in 2013 and has been part of the scheme for greenhouse gas emission allowance trading since that year, with the identification number 234154. It is apparent from the order for reference that Luxaviation correctly surrendered its greenhouse gas emission allowances for 2013 and 2014, and that the present case relates to 2015.

16 With regard to that year, Luxaviation drew up its greenhouse gas emission report on 5 February 2016.

17 On 30 March 2016, it received from 'CLIMA-EU-ETS-REGISTRY-PROD@ec.europa.eu' electronic notification that that report had been verified, in the following terms:

'Subject: Emissions approved

The emissions entered for:

23415 (Monitoring Plan for Annual Emissions)

Year(s) 2015

.. have been VERIFIED'.

18 Luxaviation states that, on 19 April 2016, it registered the allowances with the Luxembourg Registry before transferring them, after having carried out the checks required. On the same date, it made the payments required and released the corresponding certificates to European account EU-100-5023942.

19 Luxaviation maintains that it was thus convinced that it had completed the allowance surrender procedure in relation to emissions for 2015, a conviction which was strengthened by the receipt, on 19 April 2016, of an email from 'CLIMA-EU-ETS-REGISTRY-PROD@ec.europa.eu', which read:

'The transaction EU341482 of type 10-00 Internal Transfer between:

EU-100-5023709

And:

EU-100-5023942

Involving:

Unit Type: Aviation, Unit Amount: 6428

…has ended with a status Completed.'

20 However, as the European Commission confirms in its written observations, without being contradicted, that electronic confirmation of completion in reality pertained to the acquisition by Luxaviation of allowances from a Slovenian company, and not to the transfer of allowances to the Union Registry.

21 By letter of 27 June 2016, the Minister for the Environment indicated to Luxaviation that it had failed to carry out the surrender required in the time allowed, namely before 30 April of that year, invited it to submit any observations and attached a draft decree setting out the number of emission allowances assumed not to have been surrendered for 2015 and the amount of the penalty imposed on that basis.

22 In response, Luxaviation asserted that it had found out about that failure to meet the deadline only from the Minister for the Environment's letter. It denied that it had intended deliberately to escape its obligations and invoked 'a failure by one of its employees or a computer malfunction'. It stated that it had relied on the email of 19 April 2016 and firmly believed, at the time, that it had properly carried out the surrender procedure. It added that, in any event, it did not cause any damage to the environment.

23 By decree of 31 October 2016, the Minister for the Environment imposed on Luxaviation a penalty of EUR 100 per allowance not surrendered by the statutory deadline, being EUR 642 800 to be paid before 30 November 2016. That decision ordered the publication of Luxaviation's name on the website of the administration de l'Environnement (Environment Agency).

24 Luxaviation brought an action against that decree on 29 November 2016 before the tribunal administratif (Administrative Court, Luxembourg), which was dismissed by judgment of 28 February 2018, then appealed to the Cour administrative (Higher Administrative Court, Luxembourg) on 6 April 2018.

25 Before that court, Luxaviation maintains inter alia that it was convinced, in good faith, that it had completed the surrender procedure. It argues, in addition, that the penalty threatens its economic survival.

26 It also invokes a breach of the principles of equality and of free competition, on the ground that French operators are supported by the competent national authorities in the performance of their surrender obligation.

27 Finally, it raises the issue of whether the flat-rate penalty complies with the principle of proportionality. It argues that the absence of warning, reminder and advance-surrender mechanisms in Luxembourg law is contrary to the principle of proportionality, inasmuch as no intermediate stage is put in place by the Luxembourg authorities to support operators in connection with their obligations, and inasmuch as the flat-rate penalty is applied 'automatically, immediately and without consideration of the specific circumstances' leading to the non-surrender of allowances.

28 It is in those circumstances that the Cour administrative (Higher Administrative Court) decided to stay the proceedings and to refer the following questions to the Court for a preliminary ruling:

'(1) Is Article 12(3) of Directive 2003/87, which provides that Member States must ensure the surrender by their operators of the allowances issued, to be interpreted, in conjunction with Article 41 of the [Charter of Fundamental Rights of the European Union ('the Charter')], which enshrines the principle of sound administration, as requiring the competent national authority to carry out individual monitoring of surrender obligations, before the deadline of 30 April of the year concerned, where that same administration is responsible for monitoring a small number of operators, in this case 25 operators at national level?

(2) (a) Should it be considered that an incomplete allowance surrender operation, like the one in the present case, in which the operator relied on the receipt of electronic confirmation that the transfer procedure had been finalised, could reasonably have generated in the mind of the operator acting in good faith a legitimate expectation that it had completed the surrender operation provided for in Article 6(2)(e) of Directive 2003/87?

(b) Bearing in mind the answer given to the second question, can the legitimacy of that expectation be presumed to be more firmly established in the mind of an operator acting in good faith if, during the previous surrender, it was voluntarily contacted by the national administration in order to remind it, a few days before expiry of the time limits laid down in Article 6(2)(e) of Directive 2003/87, that the allowance surrender procedure had not yet been completed, thereby allowing that operator reasonably to assume that it had met its surrender obligations for the current year in the absence of any direct contact by that same administration the following year?

(c) In the light of the answers given to the two previous questions, whether analysed individually or together, can the principle of protection of legitimate expectations be interpreted as constituting a case of *force majeure* partially or wholly exempting the operator acting in good faith from the penalty provided for in Article 16(3) of Directive 2003/87?

(3) (a) Does Article 49(3) of the Charter, which enshrines the principle of proportionality, preclude the fixing of a flat-rate fine to penalise non-surrender of emissions allowances, as provided for in Article 16(3) of Directive 2003/87, where that provision does not allow the imposition of a penalty proportionate to the infringement committed by the operator?

(b) If the answer to the previous question is in the negative, must the principle of equal treatment enshrined in Article 20 of the Charter, the general principle of good faith and the principle "*fraus omnia corrumpit*" be interpreted as precluding — as regards the flat-rate penalty to be imposed pursuant to Article 16(3) of Directive 2003/87, to which the publication provided for in Article 20(7) [of the Law of 23 December 2004] is automatically added — an operator acting in good faith, which is simply negligent and which furthermore believed that it had fulfilled its obligations to surrender emissions allowances by the relevant deadline of 30 April, from being treated in the same way as an operator which behaved fraudulently?

(c) If the answer to the previous question is in the negative, is the application of the flat-rate penalty, without any possibility of a variation by the national court, other than in cases of *force majeure*, [and] the automatic penalty of publication consistent with Article 47 of the Charter, which guarantees the existence of an effective remedy?

(d) If the answer to the previous question is in the negative, is it the case that the ratification of a financial penalty fixed on the basis of the EU legislature's intention thus expressed [and] the automatic penalty of publication, without the involvement of the principle of proportionality, except in the case of *force majeure* as strictly interpreted, amounts to an abdication by the national court before the supposed intention of the EU legislature and to an improper lack of judicial review in the light of Article 47 and Article 49(3) of the Charter?

(e) Bearing in mind the answer given to the previous question, is it the case that the lack of judicial review by the national court of the flat-rate penalty provided for in Article 16(3) of Directive 2003/87 [and] the automatic penalty of publication provided for in Article 20(7) [of the Law of 23 December 2004] amounts to shutting off essentially fruitful channels of communication between the [Court] and the national Supreme Courts under the influence of a pre-determined solution endorsed by the [Court], except in the case of *force majeure* as strictly viewed, which means that the national Supreme Court, which can only ratify the penalty once it is deemed that *force majeure* has not been established, is unable to enter into an effective dialogue?

(4) Bearing in mind the answers given to the previous questions, can the concept of *force majeure* be interpreted as taking into account the individual hardship of an operator acting in good faith where payment of the flat-rate penalty provided for in Article 16(3) of Directive 2003/87 [and] the automatic penalty of publication provided for in Article 20(7) [of the Law of 23 December 2004] constitute a considerable financial risk and loss of credit which could lead to its staff being made redundant or even bankruptcy?'

Consideration of the questions referred

29 Under Article 99 of the Rules of Procedure of the Court, where the reply to the question referred to the Court for a preliminary ruling may be clearly deduced from existing case-law or where the answer to the question referred for a preliminary ruling admits of no reasonable doubt, the Court may, at any time, on a proposal from the Judge-Rapporteur and after hearing the Advocate General, rule by reasoned order.

30 It is necessary to apply that provision in the present case.

31 It is appropriate to recall, as a preliminary point, the interpretation adopted by the Court in its judgment of 17 October 2013, *Billerud Karlsborg and Billerud Skärblacka* (C-203/12, EU:C:2013:664; 'the judgment in *Billerud*').

32 The Court found, in paragraph 32 of that judgment, that Article 16(3) and (4) of Directive 2003/87 must be interpreted as precluding operators who have not surrendered, by 30 April of the current year, the carbon dioxide equivalent allowances equal to their emissions for the preceding year, from avoiding the imposition of the penalty for excess emissions for which it provides, even where they hold a sufficient number of allowances on that date. That interpretation is based, in particular, on the fact that the obligation imposed by Directive 2003/87 must be regarded not as a mere obligation to hold the allowances covering the emissions for the preceding year on 30 April of the current year, but as an obligation to surrender those allowances by 30 April in order to have them cancelled in the Union Registry, which is intended to ensure that an accurate accounting record is kept of the allowances (the judgment in *Billerud*, paragraph 30), as the overall scheme of the directive is based on the strict accounting of the issue, holding, transfer and cancellation of allowances, which requires the establishment of a system of standardised registries through a separate Commission regulation (the judgment in *Billerud*, paragraph 27).

33 In the light of those features, the Court found that the flat-rate penalty for excess emissions provided for by Directive 2003/87 cannot be considered to be contrary to the principle of proportionality on the ground that there is no possibility for the amount to be varied by a national court. In a context of urgency in addressing serious environmental concerns, the EU legislature viewed the surrender obligation provided for in Article 12(3) of Directive 2003/87 and the flat-rate penalty enforcing that obligation provided for in Article 16(3) thereof as necessary in the pursuit of the objective of establishing an efficient carbon dioxide equivalent allowance trading scheme, in order to prevent certain operators or market intermediaries from being tempted to circumvent or manipulate the scheme by speculating abusively on prices, quantities, time limits or complex financial products which tend to come about in any market. It also follows from the directive that operators have four months in which to prepare to surrender the allowances from the preceding year, which gives them a reasonable amount of time to comply with their surrender obligation (the judgment in *Billerud*, paragraphs 38 to 40).

34 It is in the light of that case-law that the questions raised in the present case must be addressed.

Third question

35 By its third question, which it is appropriate to examine first, the referring court asks, in essence, whether Articles 20 and 47 and Article 49(3) of the Charter must be interpreted as precluding there being no possibility for the flat-rate penalty provided for in Article 16(3) of Directive 2003/87 to be varied by a national court.

36 With regard, first of all, to Article 20 of the Charter, it should be recalled that the equality before the law which is set out therein is a general principle of EU law which requires that comparable situations must not be treated differently and different situations must not be treated alike unless such treatment is objectively justified (see, to that effect, judgment of 11 July 2006, *Franz Egenberger*, C-313/04, EU:C:2006:454, paragraph 33).

37 According to the case-law of the Court, a difference in treatment is justified if it is based on an objective and reasonable criterion, that is, if the difference relates to a legally permitted aim pursued by the legislation in question, and it is proportionate to the aim pursued by the treatment (judgment of 16 December 2008, *Arcelor Atlantique et Lorraine and Others*, C-127/07, EU:C:2008:728, paragraph 47).

38 As was recalled in paragraph 33 above, Article 16(3) of Directive 2003/87 makes a distinction, which is objective and reasonable in view of the aim of introducing an efficient common allowance scheme, between, on the one hand, operators which have satisfied their surrender obligation and, on the other, those which have failed to do so.

39 Thus, allowing a national court to vary the amount of the penalty imposed on the operators in that second category and, consequently, to treat differently operators which are all objectively in the same situation of having failed to comply with their surrender obligation, not only in no way follows from the principle of equality before the law, but would even be contrary to that principle.

40 With regard, next, to Article 47 of the Charter, assuming that the referring court considers that that article should allow the validity of Directive 2003/87 to be called into question inasmuch as that directive prevents the persons concerned from challenging the amount of the penalty imposed on them, it must be recalled that the Court has already ruled on that issue in the judgment in *Billerud*, and subsequently in the order of 17 December 2015, *Bitter* (C-580/14, EU:C:2015:835), and held that the penalty system devised in Article 16 of that directive was not contrary to the principle of proportionality.

41 With regard, finally, to Article 49(3) of the Charter, according to which the severity of penalties must not be disproportionate to the criminal offence, in that respect too it is sufficient to refer, in any event, to the assessment in the light of the principle of proportionality already carried out by the Court in the judgment in *Billerud*.

42 Thus, the answer to the third question is that Articles 20 and 47 and Article 49(3) of the Charter must be interpreted as not precluding there being no possibility for the flat-rate penalty provided for in Article 16(3) of Directive 2003/87 to be varied by a national court.

First question

43 By its first question, the referring court asks, in essence, whether Article 41 of the Charter must be interpreted as precluding it being merely optional for Member States, and not obligatory for them, to introduce warning, reminder and advance-surrender mechanisms allowing operators acting in good faith to be fully informed of their surrender obligation and thus not to run any risk of a penalty under Article 16(3) of Directive 2003/87.

44 It should be recalled at the outset that Article 41(1) of the Charter, that article being headed ‘Right to good administration’, states that every person has the right to have his or her affairs handled impartially, fairly and within a reasonable time by the institutions, bodies, offices and agencies of the Union.

45 It is clear from the wording of that article that it is addressed not to the Member States but solely to the institutions, bodies, offices and agencies of the European Union (see, to that effect, judgment of 21 December 2011, *Cicala*, C-482/10, EU:C:2011:868, paragraph 28).

46 Consequently, an operator which is the subject of a penalty provided for in Article 16(3) of Directive 2003/87 cannot, in any event, derive from Article 41(2) of the Charter a right to be supported in the administrative procedure for the annual surrender of allowances (see, to that effect, judgment of 17 July 2014, *YS and Others*, C-141/12 and C-372/12, EU:C:2014:2081, paragraph 67).

47 Admittedly, the right to good administration, enshrined in that provision, reflects a general principle of EU law (judgment of 8 May 2014, *N.*, C-604/12, EU:C:2014:302, paragraph 49). However, by its first question, the referring court does not ask for an interpretation of that general principle but seeks to establish whether Article 41 of the Charter can establish an obligation for the competent authority of a Member State to carry out individual monitoring of surrender obligations.

48 Paragraph 41of the judgment in *Billerud* stated, however, that the Member States remain free to introduce mechanisms for warnings, reminders and advance surrender to allow operators acting in good faith to be fully informed of their surrender obligation and not to run any risk of a penalty. As evidenced by the information submitted to the Court in the case which gave rise to the judgment in *Billerud*, certain national legislative schemes provide for such mechanisms and entrust the competent authorities with the task of supporting operators in their steps regarding the scheme for greenhouse gas emission allowance trading.

49 The answer to the first question is therefore that Article 41 of the Charter must be interpreted as not applying to the issue of whether it is obligatory for Member States, and not merely optional for them, to introduce warning, reminder and advance-surrender mechanisms allowing operators acting in good faith to be fully informed of their surrender obligation and thus not to run any risk of a penalty under Article 16(3) of Directive 2003/87.

Second question

50 By its second question, the referring court asks, in essence, whether the principle of the protection of legitimate expectations must be interpreted as precluding the imposition of the penalty provided for in Article 16(3) of Directive 2003/87 in a situation where the competent authorities did not warn the operator prior to the expiry of the time limit for surrender, whereas they had done so, without being obliged to, the previous year.

51 It should be recalled, in that regard, that the principle of the protection of legitimate expectations is a corollary of the principle of legal certainty, which requires, inter alia, that rules of law be clear, precise and predictable in their effect, especially where they may have negative consequences on individuals and undertakings. A person can rely on that corollary where a relevant authority has, in giving that person precise assurances, caused him or her to entertain expectations which are justified (see, to that effect, judgment of 17 October 2018, *Klohn*, C-167/17, EU:C:2018:833, paragraphs 50 and 51).

52 However, it is not apparent from the file before the Court that the Luxembourg authorities gave the applicant in the main proceedings precise assurances within the meaning of the case-law referred to in the preceding paragraph. In that regard, the fact that, the previous year, those authorities reminded the operator, as they were free to do, that it had not yet surrendered its allowances even though the time limit for surrender was about to expire cannot, in itself, constitute such precise assurances.

53 As a result, the answer to the second question is that the principle of the protection of legitimate expectations must be interpreted as not precluding the imposition of the penalty provided for in Article 16(3) of Directive 2003/87 in a situation where the competent authorities did not warn the operator prior to the expiry of the time limit for surrender, whereas they had done so, without being obliged to, the previous year.

Fourth question

54 By its fourth question, the referring court asks, in essence, whether the concept of 'circumstances constituting *force majeure*', within the meaning of paragraph 31 of the judgment in *Billerud*, applies to a situation such as that at issue in the main proceedings.

55 In that regard, it should be recalled that, even in the absence of specific provisions, recognition of circumstances constituting *force majeure* presupposes that the external cause relied on by individuals has consequences which are inexorable and inevitable to the point of making it objectively impossible for the persons concerned to comply with their obligations (the judgment in *Billerud*, paragraph 31).

56 The Court also stated, in that same paragraph, that it is for the domestic court to determine whether the operator, despite all due care having been exercised in order to comply with time limits, was faced with unusual and unforeseeable circumstances which were beyond its control and went beyond mere internal breakdown.

57 It therefore falls to the referring court to carry out such an assessment in the case pending before it. However, it should be pointed out, in order to provide the referring court with a useful answer, that the circumstances to which Luxaviation refers, which are recalled in paragraph 22 above, cannot, alone, be sufficient to amount to circumstances constituting *force majeure*.

58 The answer to the fourth question is therefore that it is for the referring court to assess whether the concept of 'circumstances constituting *force majeure*', within the meaning of paragraph 31 of the judgment in *Billerud*, applies to a situation such as that at issue in the main proceedings.

Costs

59 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. **Articles 20 and 47 and Article 49(3) of the Charter of Fundamental Rights of the European Union must be interpreted as not precluding there being no possibility for the flat-rate penalty provided for in Article 16(3) of Directive 2003/87/EC of the European Parliament and of the Council of 13 October 2003 establishing a scheme for greenhouse gas emission allowance trading within the Community and amending Council Directive 96/61/EC, as amended by Directive 2009/29/EC of the European Parliament and of the Council of 23 April 2009, to be varied by a national court.**

2. **Article 41 of the Charter of Fundamental Rights of the European Union must be interpreted as not applying to the issue of whether it is obligatory for Member States, and not merely optional for them, to introduce warning, reminder and advance-surrender mechanisms**

allowing operators acting in good faith to be fully informed of their surrender obligation and thus not to run any risk of a penalty under Article 16(3) of Directive 2003/87, as amended by Directive 2009/29.

3. **The principle of the protection of legitimate expectations must be interpreted as not precluding the imposition of the penalty provided for in Article 16(3) of Directive 2003/87, as amended by Directive 2009/29, in a situation where the competent authorities did not warn the operator prior to the expiry of the time limit for surrender, whereas they had done so, without being obliged to, the previous year.**

4. **It is for the referring court to assess whether the concept of 'circumstances constituting *force majeure*', within the meaning of paragraph 31 of the judgment of 17 October 2013, *Billerud Karlsborg and Billerud Skärblacka* (C-203/12, EU:C:2013:664), applies to a situation such as that at issue in the main proceedings.**

[Signatures]