Reports of Cases

OPINION OF ADVOCATE GENERAL
MENGOZZI
delivered on 8 March 2016[1]

Cases C-540/14 P, C-551/14 P, C-564/14 P and C-565/14 P

DK Recycling und Roheisen GmbH
v
European Commission (C-540/14 P),
and
Arctic Paper Mochenwangen GmbH
v
European Commission (C-551/14 P),
and
Raffinerie Heide GmbH
v
European Commission (C-564/14 P),
and
Romonta GmbH
v

European Commission (C-565/14 P),

(Appeal — Environment — Directive 2003/87/EC — Scheme for greenhouse gas emission allowance trading — Transitional rules for harmonised free allocation of emission allowances — Decision 2011/278/EU — National implementing measures submitted by the Federal Republic of Germany — Rejection of the inscription of certain installations on the lists of installations which are allocated emission allowances free of charge — Hardship clause — Essential element of a basic act — Implementing powers — Sub-objective of the preservation of conditions of competition)

1. The four appeals which I am examining in this Opinion have been brought by four German undertakings - DK Recycling und Roheisen GmbH (appellant in Case C-540/14 P, 'DK Recycling'), Arctic Paper Mochenwangen GmbH (appellant in Case C-551/14 P, 'Arctic Paper'), Raffinerie Heide GmbH (appellant in Case C-564/14 P, 'Raffinerie Heide') and Romonta GmbH (appellant in Case C-565/14 P, 'Romonta', together 'the appellants') — which operate installations subject to the scheme for greenhouse gas emission allowance trading established by Directive 2003/87/EC.[2] The appellants all applied to the German authorities for free allocation of emission allowances for their installations on the basis of a clause laid down in the national implementing measures adopted in Germany which permits free allocation of supplementary allowances to undertakings for which participation in the allowance trading scheme would entail 'undue hardship' ('the hardship clause').

1 — Original language: French.

2 — Directive of the European Parliament and of the Council of 13 October 2003 establishing a scheme for greenhouse gas emission allowance trading within the Community (OJ 2003 L 275, p. 32), 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 (OJ 2009 L 140, p. 63, 'Directive 2003/87').

2. The four appeals concern four judgments [3] (together 'the judgments under appeal') by which the General Court of the European Union essentially dismissed the applications for partial annulment made by the appellants against Decision 2013/448/EU [4] ('the contested decision'). By that decision the European Commission rejected the inscription of the appellants' installations on the list of installations covered by Directive 2003/87 for the purposes of free allocation of allowances which the German authorities had proposed on the basis of the hardship clause.

3. The main question raised in these cases, which the Court will be required to settle as a preliminary point, concerns the scope of the Commission's power to adopt implementing measures for Directive 2003/87 in order to establish harmonised rules for free allocation of allowances for the third trading period, namely from 2013. More specifically, the fundamental question in these appeals is whether or not, in the light of the objectives of the scheme for greenhouse gas emission allowance trading, Directive 2003/87, as amended by Directive 2009/29, [5] permitted the Commission to provide for a hardship clause in those implementing measures.

I – **Legislative framework**

A – *Directive 2003/87*

4. As part of the action taken to fulfil the commitments under the Kyoto Protocol, [6] Directive 2003/87 established a scheme for greenhouse gas emission allowance trading within the European Union in order to promote reductions of greenhouse gas emissions. That scheme pursues that objective in a cost-effective and economically efficient manner. [7] To that end, the directive provides for a linear reduction in the total quantity of allowances issued each year throughout the Union. [8]

5. According to recital 5, Directive 2003/87 aims to contribute to fulfilling the commitments of the Union 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. Recital 7 of Directive 2003/87 states that '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'.

7. Articles 10, 10a and 10c of Directive 2003/87, which were introduced into that directive by Directive 2009/29, contain rules for the distribution of the total quantity of allowances issued each year throughout the Union for the third trading period. A proportion of those allowances is auctioned by the Member States from 2013 onwards [9] and another decreasing proportion [10] is allocated free of charge on the basis of the rules contained in Articles 10a and 10c of Directive 2003/87.

3 — Judgments of 26 September 2014 in *DK Recycling und Roheisen* v *Commission* (T-630/13, EU:T:2014:833); *Arctic Paper Mochenwangen* v *Commission* (T-634/13, EU:T:2014:828); *Romonta* v *Commission* (T-614/13, EU:T:2014:835), and *Raffinerie Heide* v *Commission* (T-631/13, EU:T:2014:830).

4 — Commission Decision of 5 September 2013 concerning national implementation measures for the transitional free allocation of greenhouse gas emission allowances in accordance with Article 11(3) of Directive 2003/87/EC (OJ 2003 L 240, p. 27).

5 — See footnote 2 of this Opinion.

6 — 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).

7 — Article 1 of Directive 2003/87.

8 — First paragraph of Article 9 of Directive 2003/87.

9 — See Article 10 of Directive 2003/87 and recital 15 of Directive 2009/29.

10 — Article 10a(11) of Directive 2003/87.

8. With specific regard to the transitional arrangement for free allocation of allowances, which is intended to expire in 2027,[11] according to recital 23 of Directive 2009/29 '[t]ransitional free allocation to installations should be provided for through harmonised Community-wide rules (ex-ante benchmarks) in order to minimise distortions of competition with the Community'.

9. Article 10a of Directive 2003/87, which was introduced by Directive 2009/29, lays down '[t]ransitional Community-wide rules for harmonised free allocation'. Under the first to fifth subparagraphs of Article 10a(1) and Article 10a(2):

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

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

The measures referred to in the first subparagraph shall, to the extent feasible, determine Community-wide ex-ante benchmarks so as to ensure that allocation takes place in a manner that provides incentives for reductions in greenhouse gas emissions and energy efficient techniques, by taking account of the most efficient techniques, substitutes, alternative production processes, high efficiency cogeneration, efficient energy recovery of waste gases, use of biomass and capture and storage of CO_2, where such facilities are available, and shall not provide incentives to increase emissions …

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

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

…

2. In defining the principles for setting ex-ante benchmarks in individual sectors or subsectors, the starting point shall be the average performance of the 10% most efficient installations in a sector or subsector in the Community in the years 2007-2008. …'

10. Under Article 11(1) of Directive 2003/87, each Member State had to publish and submit to the Commission, by 30 September 2011, the list of installations covered by the directive in its territory and any free allocation to each installation in its territory.[12] Article 11(3) provides that Member States may not issue allowances free of charge to installations whose inscription in the list referred to in paragraph 1 has been rejected by the Commission.

B – *Decision 2011/278/EU*

11. Pursuant to its obligation under Article 10a(1) of Directive 2003/87 to adopt fully harmonised implementing measures within the Union for the harmonised free allocation of allowances, on 27 April 2011, the Commission adopted Decision 2011/278.[13] In that decision it established transitional Union-wide rules for the allocation of those allowances.

11 — See Article 10a(11) of Directive 2003/87 and recital 21 of Directive 2009/29.

12 — See also Article 15 of Commission Decision 2011/278/EU of 27 April 2011 determining transitional Union-wide rules for harmonised free allocation of emission allowances pursuant to Article 10a of Directive 2003/87 (OJ 2011 L 130, p. 1).

13 — Cited in footnote 12 above.

12. To that end, the Commission developed, to the extent feasible, a benchmark for each product.[14] Where deriving a product benchmark was not feasible, but greenhouse gases eligible for the free allocation of emission allowances occur, the Commission established a hierarchy of three fallback approaches.[15] First, the heat benchmark was applicable for heat consumption processes where a measurable heat carrier is used. Second, the fuel benchmark was applicable where non-measurable heat is consumed. Third, for process emissions, emission allowances were allocated on the basis of historical emissions.

C – *German law*

13. In Germany, Decision 2011/278 was implemented, inter alia, by the Law on greenhouse gas emissions trading (Treibhausgas-Emissionshandelsgesetz, TEHG) of 21 July 2011. Article 9(5) of the TEHG contains a hardship clause, which provides as follows:

'If the allocation of allowances … entails undue hardship for the operator of the installation and for a connected undertaking which, for reasons relating to commercial law and company law, is liable for the economic risks of that operator, the competent authority shall allocate, at the request of the operator, supplementary allowances in the amount required for fair compensation, provided the European Commission does not reject that allocation on the basis of Article 11(3), of Directive 2003/87.'

II – **Background to the dispute**

14. The appellants are four German undertakings operating installations which have been subject to the scheme for greenhouse gas emission allowance trading since 1 January 2005. They all applied to the competent German authorities for free allocation of allowances for their installations, in particular on the basis of the hardship clause in Article 9(5) of the TEHG.

15. On 7 May 2012, the Federal Republic of Germany sent the Commission the list of installations covered by Directive 2003/87 in its territory and any free allocation to each installation in its territory. For the appellants' installations, the Federal Republic of Germany calculated the preliminary number of emission allowances to be allocated free of charge, inter alia, on the basis of the hardship clause in Article 9(5) of the TEHG. With regard to the application of that clause, the competent German authority found that free allocation of emission allowances on the basis of the Union-wide and fully-harmonised allocation rules alone would entail a risk that the appellants' economic growth would be blocked.

16. On 5 September 2013, the Commission adopted the contested decision by which it rejected the inscription of the appellants' installations on the lists of installations covered by Directive 2003/87 and the preliminary total annual amounts of emission allowances allocated free of charge to those installations.

17. In recital 11 of the contested decision, the Commission gave the following reason for that rejection:

'The Commission notes that Germany has proposed that seven installations receive an increase in the level of free allocation of emission allowances because it considers this would avoid undue hardship. In accordance with Article 10a of Directive 2003/87/EC and Decision 2011/278/EU, the preliminary amounts of free allocation to be submitted as part of the [national implementing measures] are calculated on the basis of harmonised Union-wide rules. Decision 2011/278/EU does not provide for

14 — See recital 4 of and Annex I of Decision 2011/278.

15 — See recital 12 of Decision 2011/278.

the adjustment which Germany would wish to make on the basis of Article 9(5) [of the TEHG]. Whereas until 2012, free allocation of emission allowances was organised nationally, for the period as of 2013 the legislator intentionally established fully-harmonised rules for free allocation to installations, so that all installations are treated in the same manner. Any unilateral change to the preliminary amounts of free allocation calculated by Member States on the basis of Decision 2011/278/EU would undermine this harmonised approach. Germany has not substantiated that the allocation for the installations in question calculated on the basis of Decision 2011/278/EU was manifestly inappropriate having regard to the objective of full harmonisation of allocations to be achieved. Assigning more free allowances to some installations would distort or threaten to distort competition and has cross-border effects given Union-wide trade in all sectors covered by Directive 2003/87/EC. In the light of the principle of equal treatment of installations under the [scheme for greenhouse gas emission allowance trading] of the European Union and the Member States, the Commission finds that it is therefore appropriate to object to the preliminary amounts of free allocation to certain installations contained in the German [national implementing measures] and listed in point A of Annex I.'

III – **Procedure before the General Court and the judgments under appeal**

18. The appellants brought actions before the General Court seeking the annulment of the contested decision in so far as it concerned the rejection of the inscription of their installations on the list of installations covered by Directive 2003/87.

19. On 26 September 2014, the General Court delivered the judgments under appeal, by which it dismissed the actions brought by Arctic Paper, Raffinerie Heide and Romonta in their entirety. On the other hand, the General Court upheld in part the action brought by DK Recycling.[16] However, it rejected the pleas in law raised by DK Recycling concerning the rejection of free allocation of emission allowances based on the hardship clause.[17]

IV – **Procedure before the Court of Justice and the forms of order sought**

20. By applications lodged at the Registry of the Court of Justice on 27 November and 2, 8 and 9 December 2014, the appellants brought the present appeals.

21. By separate documents lodged at the Court Registry on 27 November 2014, 2 December and 8 December 2014, respectively, DK Recycling, Arctic Paper and Romonta requested that the Court apply an expedited procedure to their cases.

22. By orders of 2 February 2015,[18] the President of the Court of Justice refused the requests for an expedited procedure.

16 — In the judgment in *DK Recycling und Roheisen* (T-630/13, EU:T:2014:833), the General Court upheld in part the action brought by DK Recycling in so far as it concerned the rejection by the Commission in the contested decision of the free allocation of emission allowances for its installations on the basis of a process emissions sub-installation for the production of zinc in the blast furnace and related processes. That part of the judgment is not covered by the appeal lodged by DK Recycling in Case C-540/14.

17 — These were the first and second grounds of appeal. See specifically paragraphs 39 to 101 of the judgment in *DK Recycling und Roheisen* (T-630/13, EU:T:2014:833).

18 — Orders of the President of the Court in *DK Recycling und Roheisen* v *Commission* (C-540/14 P, EU:C:2015:58); *Arctic Paper Mochenwangen* v *Commission* (C-551/14 P, EU:C:2015:107), and *Romonta* v *Commission* (C-565/14 P, EU:C:2015:56).

23. Each of the appellants claims that the Court should set aside the judgment under appeal in so far as it concerns it,[19] rule on the merits of the case and annul the contested decision in so far as it concerns it. In the alternative, DK Recycling, Arctic Paper, and Romonta also each claims, that the Court should set aside the judgment under appeal in so far as it concerns it and refer the case back to the General Court. All the appellants claim that the Court should order the Commission to pay the costs.

24. In all four cases, the Commission claims that the Court should dismiss the appeal and order the appellants to pay the costs.

V – **Analysis**

A – *Preliminary remarks*

25. In support of their appeals, the appellants rely on a number of grounds of appeal which broadly overlap. All the appellants rely, in particular, on grounds of appeal alleging that the General Court infringed fundamental rights in its analysis of the free allowances allocation scheme established in Decision 2011/278 and made errors in the analysis of the proportionality of Decision 2011/278.

26. The Commission claims, however, that all the appeals should be dismissed on a ground which it describes as 'more fundamental' and which, in its view, invalidates all the arguments put forward by the appellants in their appeals. The Commission argues, in essence, that, contrary to what was held by the General Court in the judgments under appeal, Directive 2003/87, and in particular Article 10a thereof, did not permit it to provide, in the implementing measures introduced on the basis of that provision - namely in Decision 2011/278 — for free allocation of allowances on the basis of a hardship clause.

27. The Commission disputes the analysis by the General Court in this regard, but requests the Court to uphold the operative parts of the judgments under appeal. It thus essentially claims that the Court should substitute the grounds. As that claim by the Commission is a preliminary issue to the consideration of the grounds of appeal raised in all the appeals, it should be examined first.

B – *The existence of discretion on the part of the Commission to introduce a hardship clause in Decision 2011/278*

1. The judgments under appeal

28. In all the judgments under appeal, in the analysis of the applicants' pleas in law and arguments concerning the infringement of the principle of proportionality and of fundamental rights by Decision 2011/78, the General Court held as a preliminary point that:[20]

'An infringement of fundamental rights and of the principle of proportionality by reason of the absence of a hardship clause in the rules on free allocation of emission allowances laid down in Decision 2011/278 cannot be ruled out a priori, since Article 10a of Directive 2003/87, which constitutes the legal basis of that decision, does not exclude free allocation of allowances on the basis of such a clause by the Commission. First, under the first and second paragraphs of Article 10a(1) of Directive

19 — DK Recycling claims that the Court should set aside the judgment under appeal in so far as the action is dismissed as to the remainder.

20 — See judgments in *DK Recycling und Roheisen* v *Commission* (T-630/13, EU:T:2014:833, paragraph 50); *Arctic Paper Mochenwangen* v *Commission* (T-634/13, EU:T:2014:828, paragraph 49); *Romonta* v *Commission* (T-614/13, EU:T:2014:835, paragraph 53), and *Raffinerie Heide* v *Commission* (T-631/13, EU:T:2014:830, paragraph 51).

2003/87, the Commission had to adopt Union-wide and fully-harmonised implementing measures for the free allocation of emission allowances which were designed to amend non-essential elements of Directive 2003/87 by supplementing it. The introduction by the Commission of a hardship clause applicable to all Member States would have respected the requirement of Union-wide and fully-harmonised implementing measures. In addition, in so far as such a clause would have applied only in exceptional cases and, consequently, would not have undermined the scheme established by Directive 2003/87, it would not have been designed to amend essential elements of that directive. Second, under the third subparagraph of Article 10a(1) of Directive 2003/87, the Commission was required, to the extent feasible, to determine *ex ante* benchmarks. Where deriving a product benchmark was not feasible, but greenhouse gases eligible for the free allocation of emission allowances occur, the Commission had discretion to lay down rules, which it did by developing a hierarchy of three fallback approaches. Within the scope of that discretion, therefore, the Commission could also, in principle, have provided for free allocation of allowances on the basis of a hardship clause.'

2. Arguments of the parties

29. The Commission disputes that analysis by the General Court and argues that Directive 2003/87 did not confer on it any discretion to introduce a hardship clause in Decision 2011/278.

30. First of all, contrary to the view taken by the General Court, where Article 10a(1) of Directive 2003/87 uses the expressions 'to the extent feasible' or 'in principle', it gives the Commission freedom only with regard to the regulatory approach to adopt for different sectors or subsectors, permitting it, where necessary, to establish benchmarks not for products, but on the basis of other criteria, as was done in Decision 2011/278, which established heat and fuel benchmarks and a criterion for process emissions.

31. Second, the requirement mentioned in recital 23 of Directive 2009/29, according to which the rules on free allocation of allowances should be adopted on the basis of a specific sectoral approach and should be 'Community-wide and fully-harmonised' in order to minimise distortions of competition and avoid incentives being provided to increase emissions, constitutes an essential aspect of Article 10a(1) of Directive 2003/87. A rule which permits more allowances to be allocated to one installation than another which is comparable in every way except that the application of those rules would entail, for the first installation, 'excessive financial difficulties' for the latter is not consistent with that requirement and amends essential aspects of the basic act, namely Directive 2003/87.

32. In those circumstances, in the Commission's view, as the appellants have not claimed that Directive 2003/87 is illegal, their arguments are ineffective and this finding is sufficient in itself to dismiss all the appeals.

33. In their replies, DK Recycling, Arctic Paper and Romonta submit that the General Court did not err in ruling that Directive 2003/87 did not preclude the Commission inserting a hardship clause in Decision 2011/278. More specifically, Romonta claims that neither the sectoral approach adopted by that directive nor the requirement of Union-wide and harmonised allocation justify an interpretation to the effect that the Commission was not able to insert such a clause in Decision 2011/278. Lastly, should the Court consider the General Court's analysis in this regard to be incorrect, DK Recycling and Arctic Paper claim, in the alternative, that Directive 2003/87 is incompatible with the Charter of Fundamental Rights of the European Union ('the Charter') and with the principle of proportionality.

3. Legal assessment

a) Admissibility of the Commission's request for substitution of grounds

34. It should be noted, first of all, that, according to settled case-law, for a request for substitution of grounds to be admissible, the appellant must have an interest in bringing proceedings, in so far as the request must be capable, if successful, of procuring an advantage to the party making it. That may be the case where the request for substitution of grounds amounts to a defence to one of the applicant's pleas. [21]

35. In this case, the request for substitution of grounds seeks a declaration from the Court of Justice that the General Court made an error in law in ruling that under Article 10a(1) of Directive 2003/87 the Commission was entitled to introduce in Decision 2011/278 a rule on free allocation of allowances in cases of undue hardship. If the Court were to grant that request, all the grounds of appeal raised by the appellants alleging that the General Court failed to criticise the absence of such a rule in Decision 2011/278 would become ineffective. If Article 10a of Directive 2003/87 did not entitle the Commission to provide for such a rule in that decision, the appellants cannot complain that the Commission failed to insert that rule or, therefore, that the General Court did not accept their pleas alleging infringements of law on account of the absence of such a clause in Decision 2011/278.

36. In these circumstances, in so far as the Commission's request for substitution of grounds has a bearing on a number of the grounds of appeal raised, it must, in my view, be considered admissible.

b) Substance

i) Overview of case-law on determination of the essential or non-essential character of elements of a basic act

37. In order to assess the arguments put forward by the Commission in its request for substitution of grounds, it is first necessary briefly to recall the principles identified in case-law concerning determination of the essential character of elements of an enabling act.

38. According to settled case-law, the adoption of rules essential to the subject-matter envisaged is reserved to the legislature of the European Union. Those rules must be laid down in the basic legislation and may not be delegated. [22]

39. In *Parliament* v *Council* (C-355/10, EU:C:2012:516), which concerned an enabling provision which was drafted in very similar terms to Article 10a(1) of Directive 2003/87 [23] and which had itself been adopted before the entry into force of the Treaty of Lisbon, the Court stated that provisions which, in order to be adopted, require political choices falling within the responsibilities of the EU legislature cannot be delegated. It follows from this that implementing measures cannot amend essential elements of basic legislation or supplement it by new essential elements. [24]

21 — Judgments in *Ziegler* v *Commission* (C-439/11 P, EU:C:2013:513, paragraph 42) and *Iride* v *Commission* (C-329/09 P, EU:C:2011:859, paragraphs 48 to 51).

22 — Judgment in *Parliament* v *Council* (C-355/10, EU:C:2012:516, paragraph 64 and the case-law cited).

23 — Namely Article 12(5) of Regulation (EC) No 562/2006 of the European Parliament and of the Council of 15 March 2006 establishing a Community Code on the rules governing the movement of persons across borders (Schengen Borders Code) (OJ 2006 L 105, p. 1), as amended by Regulation (EC) No 296/2008 of the European Parliament and of the Council of 11 March 2008 (OJ 2008 L 97, p. 60).

24 — Judgment in *Parliament* v *Council* (C-355/10, EU:C:2012:516, paragraphs 65 and 66); see also, more recently, judgment in *Parliament* v *Council* (C-363/14, EU:C:2015:579, paragraph 46).

40. In the same judgment, the Court also held that ascertaining which elements of a matter must be categorised as essential must be based on objective factors amenable to judicial review and that, in that connection, it is necessary to take account of the characteristics and particularities of the domain concerned. [25]

41. In my Opinion in *Parliament* v *Council* (EU:C:2012:207), I had stated that it followed from the analysis of the Court's relevant case-law [26] that the determination of the essential or non-essential character of the basic legislation introduced or amended by the implementing act must result from an assessment carried out in the light of a number of factors. Those factors include the characteristics of the policy in question, the greater or lesser latitude enjoyed by the Commission in implementing that policy, the wording of the delegating provisions, the content and purpose of the basic act, and the overall scheme thereof. [27]

42. It should also be pointed out that it is settled case-law that the limits of the Commission's implementing power must be determined by reference amongst other things to the essential general aims of the legislative act in question. [28]

ii) The requirement of the preservation of conditions of competition in connection with the scheme for greenhouse gas emission allowance trading and, specifically, the transitional rules on free allocation

43. The Commission claims that the requirement to minimise distortions of competition constitutes an essential element of the provision which entitled it to adopt the transitional rules on free allocation of allowances, namely Article 10a of Directive 2003/87.

44. In that regard, it must be noted that the Court has stated that while the declared principal objective of Directive 2003/87 is to reduce greenhouse gas emissions substantially in order to fulfil the commitments of the European Union and its Member States under the Kyoto Protocol, that objective must, however, be achieved in compliance with a series of sub-objectives and through recourse to certain instruments, the principal instrument being the EU scheme for greenhouse gas emissions trading. [29] The other sub-objectives to be fulfilled by that scheme are, inter alia, as set out in recitals 5 and 7 of the directive, the safeguarding of economic development and employment and the preservation of the integrity of the internal market and of conditions of competition. [30]

45. It is thus clear from that case-law that the preservation of conditions of competition in the internal market is a sub-objective of Directive 2003/87 with which the scheme for greenhouse gas emission allowance trading must comply. The main environmental objective of that scheme must be pursued in compliance with, inter alia, that specific sub-objective.

46. The fundamental importance of the requirement of preservation of conditions of competition in the internal market in the context of the scheme for greenhouse gas emission allowance trading, as established by Directive 2003/87 and amended by Directive 2009/29, is also evident from the fact that this sub-objective is mentioned several times in the recitals of those directives.

25 — Judgments in *Parliament* v *Council* (C-355/10, EU:C:2012:516, paragraphs 67 and 68) and *Parliament* v *Council* (C-363/14, EU:C:2015:579, paragraph 47).

26 — See the analysis of case-law I conducted in points 26 to 28 of my Opinion in *Parliament* v *Council* (C-355/10, EU:C:2012:207).

27 — See my Opinion in *Parliament* v *Council* (C-355/10, EU:C:2012:207, point 29).

28 — See judgment in *Parliament* v *Commission* (C-65/13, EU:C:2014:2289, paragraph 44 and the case-law cited).

29 — See, to that effect, judgments in *Commission* v *Poland* (C-504/09 P, EU:C:2012:178, paragraph 77); *Commission* v *Estonia* (C-505/09 P, EU:C:2012:179, paragraph 79), and *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 43).

30 — Judgments in *Commission* v *Poland* (C-504/09 P, EU:C:2012:178, paragraph 77); *Commission* v *Estonia* (C-505/09 P, EU:C:2012:179, paragraph 79), and *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 43).

47. First, recital 7 of Directive 2003/87 expressly mentions the requirement to avoid distortions of competition in the adoption of EU provisions relating to allocation of allowances. Second, reference is made to the need to respect this sub-objective throughout Directive 2009/29, whether as a general requirement [31] or as the rationale for certain specific rules. [32]

48. With specific regard to the transitional rules for free allocation of allowances at issue in the present cases, recital 23 of Directive 2009/29 explicitly provides that, in order to minimise distortions of competition, allocation of those allowances should be provided through harmonised Union-wide rules by determining 'ex-ante benchmarks'.

49. The need to respect that requirement is reflected in the approach taken by the legislature in Article 10a(1) of Directive 2003/87. That provision authorises the Commission to adopt Union-wide and fully-harmonised implementing measures for the free allocation of allowances and lays down criteria with which the Commission must comply in adopting such implementing measures.

50. More specifically, the third subparagraph of Article 10a(1) provides that such implementing measures must, to the extent feasible, determine Union-wide ex-ante benchmarks. Those ex-ante benchmarks represent a certain volume of CO_2 emissions which the Commission recognises to be necessary for the manufacture of a certain quantity of the product concerned. [33] A benchmark is used to calculate the free allocation to each installation in a sector or in a subsector by multiplying it by the level of historic activity of the installation for the relevant product, [34] subject to the application of the uniform cross-sectoral correction factor provided for in Article 10a(5) of Directive 2003/87. [35] Those benchmarks therefore constitute objective parameters which are used to determine the free allocation to each installation.

51. The fourth subparagraph of Article 10a(1) of Directive 2003/87 provides the Commission with additional guidance for determining *ex ante* benchmarks. Under that provision, for each sector and subsector, in principle, the benchmark is to be calculated for products rather than for inputs, in order to maximise greenhouse gas emissions reductions and energy efficiency savings throughout each production process of the sector or the subsector concerned. That provision therefore stipulates that the *ex ante* benchmarks must be determined for *each sector and subsector*, consequently using an approach which can be described, as the Commission states, as a 'sectoral' approach, and also that those benchmarks must in principle be determined for each product and not for inputs.

31 — Recital 8 of Directive 2009/29 mentions the objective 'to avoid distortions in the internal market' as one of the imperative requirements of the new trading scheme introduced by that directive. In this regard, see also judgment in *Commission* v *Poland* (C-504/09 P, EU:C:2012:178, paragraph 82).

32 — Thus, recital 15 of Directive 2009/29 mentions the need to guarantee 'the same competitive footing' for new entrants as a fundamental requirement of the auctioning system introduced by that directive. The same requirement is mentioned in recital 16 of that directive in respect of the need to harmonise the rules on new entrants. Recital 17 of Directive 2009/29 mentions the objective of eliminating distortions to intra-Community competition as one of the reasons not to treat economic sectors differently in individual Member States. Recital 19 also refers to this objective in relation to the rules applicable to electricity generators. Recital 28 mentions this objective in connection with the need to harmonise the use of credits for emission reductions outside the Union. With this in mind, it can be noted that the Court has held that it was the objective of shielding the allowance trading scheme from distortions of competition that had inspired the legislature to introduce a predefined penalty on excess emissions under Article 16(3) and (4) of Directive 2003/87. See judgment in *Billerud Karlsborg and Billerud Skärblacka* (C-203/12, EU:C:2013:664, paragraph 27).

33 — Opinion of Advocate General Kokott in *Borealis Polyolefine, OMV Refining & Marketing, DOW Benelux and Others and Esso Italiana and Others* (C-191/14, C-192/14, C-295/14 and C-389/14, EU:C:2015:754, point 40).

34 — See, in particular, Article 10 of Decision 278/2011. As is stated in point 12 of this Opinion, where deriving a product benchmark was not feasible, the Commission calculated heat and fuel benchmarks which are multiplied by the historical activity relating to measurable heat and fuel consumed respectively. For process emissions, see Article 10(2)(b)(iii) of Decision 2011/278.

35 — See Articles 10(9) and 15(3) of Decision 2011/278.

52. The requirement of adopting a 'sectoral' approach in determining *ex ante* benchmarks [36] is also confirmed by the fifth subparagraph of Article 10a(1), which imposes on the Commission an obligation to consult the relevant stakeholders, including the sectors and subsectors concerned, in defining the principles for setting *ex ante* benchmarks in *the various sectors and subsectors*. Similarly, Article 10a(2) of Directive 2003/87 refers explicitly to '*ex ante* benchmarks in individual sectors and subsectors'.

iii) Determination of *ex ante* benchmarks using a sectoral approach as an expression of the sub-objective of preservation of conditions of competition

53. The harmonised approach chosen by the legislature in Article 10a of Directive 2003/87, under which the free allocation is calculated using *ex ante* benchmarks on a sectoral basis, is an expression of the requirement, laid down explicitly in recital 23 of Directive 2009/29, to minimise distortions of competition resulting from the free allocation of allowances. [37]

54. Determination of *ex ante* benchmarks on a sectoral basis is intended to found free allocation of allowances on objective parameters which apply without distinction and in an equivalent manner to installations run by the operators active in a certain sector or subsector. In that way, by providing that all installations in the sector or subsector concerned are subject to the same objective parameters, Directive 2003/87 ensures that free allocation of allowances has the least possible impact on competition. Furthermore, such an approach is consistent with the characterisation of the allowance trading scheme as a market economy system. [38]

55. It should be noted in this regard that Directive 2003/87, as amended by Directive 2009/29, utilises a 'sectoral' approach at several points as an expression of the requirement to avoid distortions of competition, such that it could almost be said that that approach is characteristic of the entire make-up of the scheme for greenhouse gas allowance trading. [39] For example, only in the special provisions contained in Article 10a of Directive 2003/87 with a view to reducing the risk of carbon leakage, did the legislature adopt an approach on a sectoral basis. [40] Recital 17 of Directive 2009/29 also mentions such an approach in connection with the objective of 'eliminating distortions to intra-Community competition' when it provides that it is inappropriate to treat *economic sectors* differently in individual Member States. [41]

36 — See also, in this regard, judgment in *Poland* v *Commission* (T-370/11, EU:T:2013:113. paragraph 85).

37 — It is interesting to note in this respect that, according to the Report of the Committee on the Environment, Public Health and Food Safety of the European Parliament on the Proposal for a directive of the European Parliament and of the Council amending Directive 2003/87 so as to improve and extend the greenhouse gas emission allowance trading system of the Community (COM(2008) 16 final — COD 2008/0013), during the legislative procedure which led to the adoption of Directive 2009/29 it had been envisaged to draft both recital 23 of that directive and Article 10a to be inserted into Directive 2003/87 with a reference to *ex ante* benchmarks '*in individual sectors*' (see, for example, amendment 14 on pages 18 and 19, amendment 48 on pages 48 and 49 and amendment 33 on pages 113 and 114 of the Report).

38 — See recital 5 of Directive 2003/87.

39 — In this regard I consider the argument put forward by Romonta in its reply that certain provisions of Decision 2011/278 are not compatible with the abovementioned 'sectoral approach' to be irrelevant. In particular, Romonta refers to the three fallback approaches defined in Articles 6(1), 3(c) and 10(3) of Decision 2011/278. However, none of those provisions can call into question the sectoral approach adopted by the Commission in Decision 2011/278, in accordance with Article 10a of Directive 2003/87.

40 — See Article 10a(6) and (12) of Directive 2003/87 and Commission Decision 2010/2/EU of 24 December 2009 determining, pursuant to Directive 2003/87, a list of sectors and subsectors which are deemed to be exposed to a significant risk of carbon leakage (OJ 2010 L 1, p. 10). See also paragraphs 82 and 83 of the judgment in *DK Recycling und Roheisen* v *Commission* (T-630/13, EU:T:2014:833).

41 — My emphasis. See, with regard to that recital, judgment in *Poland* v *Commission* (T-370/11, EU:T:2013:113, paragraph 42).

56. In the context of an approach based on the determination of *ex ante* objective parameters applied without distinction to all installations in the sector concerned, the needs and specific situations of the individual installations cannot be taken into consideration. It would be in manifest contradiction with the choice of such an approach if free allocation of allowances could be influenced by the specific situation of an individual installation. In such a case, the requirement of objective and equivalent treatment of different installations, which was mentioned in point 54 above, could not be guaranteed and the objective of avoiding distortions of competition could not therefore be achieved.

iv) The possibility of introducing a hardship clause in Decision 2011/278

57. All the above considerations allow me to draw a number of conclusions regarding the question raised in the Commission's request for substitution of grounds, namely the possible existence of discretion for the Commission to introduce a hardship clause in Decision 2011/278.

– The requirement of preservation of competition as an essential element of Directive 2003/87

58. First, it is evident from the statements made in points 44 to 47 of this Opinion that the requirement that the scheme for greenhouse gas emission allowance trading be introduced whilst preserving conditions of competition is an explicit sub-objective of Directive 2003/87. The need for the allowance trading scheme to satisfy such a requirement therefore necessarily stems from a political choice by the Union legislature. In those circumstances, in the light of the case-law mentioned in points 38 to 40 of this Opinion, that requirement must be considered to constitute an essential element of Directive 2003/87 which could not be amended by implementing measures adopted by the Commission.

59. In addition, it is apparent from points 48 to 52 of this Opinion that the requirement of avoiding distortions of competition is a specific and explicit characteristic of the transitional rules for free allocation of allowances laid down by Article 10a(1) of Directive 2003/87 and that that requirement is reflected in the choice by the legislature to authorise the Commission, in the implementing measures establishing those rules, to determine *ex ante* benchmarks on the basis of a sectoral approach.

60. In those circumstances, the Commission was not able to adopt, in the implementing measures provided for in Article 10a(1) of Directive 2003/87, rules on free allocation of allowances which run counter to that requirement without exceeding the limits of its implementing power and without infringing the enabling provision.

61. I must further note in this regard that I consider the General Court's argument that, in so far as a provision of an implementing measure applies only in exceptional cases, it cannot amend essential elements of the enabling act to be incorrect.[42] Even a provision applying only to exceptional cases may affect the general scheme of the enabling act[43] and be incompatible with essential objectives of that act stemming from a political choice by the legislature.[44]

42 — See point 28 of this Opinion.

43 — See, in this regard, judgment in *Parliament* v *Council* (C-417/93, EU:C:1995:127, paragraphs 30 to 33) and point 28 of my Opinion in *Parliament* v *Council* (C-355/10, EU:C:2012:207).

44 — See points 38 to 40 of this Opinion.

– Incompatibility of a hardship clause with the sub-objective of preservation of competition

62. Second, it is not disputed that the introduction of a hardship clause would result in free allocation of supplementary allowances only to some installations in a certain sector or subsector.[45] Free allocation of allowances on the basis of such a clause would not be done on the basis of *ex ante* objective parameters using a sectoral approach applicable to all the installations in a sector, but by reference to the individual circumstances of the operator of a certain installation, specifically his financial difficulties. As the Commission claims, such a clause would therefore permit one installation to be allocated more allowances than another installation even though the two installations manufacture the same product and are entirely comparable. It must be stated that such allocation would therefore cause a distortion of competition.

63. A rule of this kind would follow an individual approach which is contrary to the abovementioned sectoral approach, which, as I have shown in points 53 to 56 of this Opinion, constitutes the expression of the requirement of preservation of competition. Such a rule would therefore be incompatible with the sub-objective of protection of competition, which is an essential element of Directive 2003/87 in general and of the rules on free allocation of allowances laid down in Article 10a of that directive in particular.

64. In this regard, the argument put forward by Romonta in its reply that such a clause would not give rise to discrimination resulting in a distortion of competition, as throughout Europe any person who has shown that he satisfies the conditions laid down by the Commission would be able to rely on it, must also be rejected. It is sufficient to note in this connection that a distortion of competition exists on a certain market and not on an inter-sectoral basis. A difference in treatment, in respect of free allocation of allowances, of comparable installations producing the same product and operating on the same market would therefore necessarily give rise to a distortion of competition on the market in question.

65. In the light of those considerations, I take the view that the General Court made an error in law when it ruled that the introduction of a hardship clause is not incompatible with the objectives of Directive 2003/87.[46] The fact, highlighted by the General Court, that such a clause can possibly seek to achieve another sub-objective of Directive 2003/87, namely safeguarding economic development and employment, does not detract from the fact that, as it is incompatible with an essential sub-objective of Directive 2003/87, such a clause could not be inserted into the implementing measures for that directive. It should be observed in this regard that in the judgments under appeal the General Court itself stressed that the legislature established other special rules so that the introduction of the scheme for greenhouse gas emission allowance trading results in the least possible diminution of economic development and employment, without those rules, which follow the sectoral approach mentioned below, giving rise to distortions of competition.[47]

– The discretion enjoyed by the Commission

66. Third, it must follow from the above considerations that the discretion which Article 10a(1) of Directive 2003/87 confers on the Commission cannot extend as far as permitting it, by introducing a hardship clause in Decision 2011/278, to adopt rules which are contrary to one of the sub-objectives of the directive and an essential element of the enabling provision.

45 — See, in this regard, paragraph 78 of the judgment in *DK Recycling und Roheisen* v *Commission* (T-630/13, EU:T:2014:833).

46 — See judgments in *DK Recycling und Roheisen* v *Commission* (T-630/13, EU:T:2014:833, paragraph 77); *Arctic Paper Mochenwangen* v *Commission* (T-634/13, EU:T:2014:828, paragraph 76); *Romonta* v *Commission* (T-614/13, EU:T:2014:835, paragraph 80), and *Raffinerie Heide* v *Commission* (T-631/13, EU:T:2014:830, paragraph 79).

47 — Judgments in *DK Recycling und Roheisen* v *Commission* (T-630/13, EU:T:2014:833, paragraph 81 et seq.); *Arctic Paper Mochenwangen* v *Commission* (T-634/13, EU:T:2014:828, paragraph 80 et seq.); *Romonta* v *Commission* (T-614/13, EU:T:2014:835, paragraph 83 et seq.), and *Raffinerie Heide* v *Commission* (T-631/13, EU:T:2014:830, paragraph 82 et seq.).

67. That interpretation of Article 10a(1) of Directive 2003/87, which is contrary to the interpretation adopted by the General Court in the judgments under appeal, is confirmed, moreover, by the wording of the third and fourth subparagraphs of that provision, which do accord the Commission a degree of discretion in laying down rules for free allocation of allowances.

68. However, where the third subparagraph of Article 10a(1) of that directive provides that the implementing measures determine *ex ante* benchmarks 'to the extent feasible', it must be understood as giving the Commission discretion to determine other criteria solely where it is not feasible to determine such benchmarks (on a sectoral basis). That provision cannot be interpreted as conferring general, generic discretion on the Commission in determining rules for free allocation of allowances. Similarly, no such discretion could be inferred from the use of the expression 'in principle' in the fourth subparagraph of that provision.

– The incompatibility of a hardship clause with the principle that the polluter should pay

69. Lastly, for the sake of completeness, I would like to highlight what seems to me to be a contradiction in the General Court's reasoning. In the judgments under appeal the General Court ruled, correctly, in my view, that the introduction of a hardship clause is not compatible with the principle that the polluter should pay. [48]

70. It should be noted in this regard that the legal basis for Directive 2003/87 is Article 175(1) EC (now, after amendment, Article 192 TFEU). Under that provision, the Council was authorised to decide what action is to be taken by the Community in order to achieve the objectives referred to in Article 174 EC (now, after amendment, Article 191 TFEU). Under the second sentence of paragraph 2 of the latter article, Union policy on the environment is based, inter alia, on the principle that the polluter should pay.

71. If the enabling act, namely Directive 2003/87, as an act based on Article 175(1) EC, could not contain provisions which were incompatible with the principle that the polluter should pay, then a fortiori implementing measures for that directive could not contain such provisions. It follows that, having found that the introduction of a hardship clause was incompatible with the principle that the polluter should pay, the General Court should have ruled that the Commission could not provide for such a clause in Decision 2011/278.

v) Inadmissibility of the plea of illegality of Directive 2003/87

72. In their replies DK Recycling and Arctic Paper claim in the alternative the illegality of Directive 2003/87. They argue that that directive is incompatible with the Charter and breaches the principle of proportionality. It must be stated, however, that this plea constitutes a new plea which was not raised before the General Court and which therefore changes the subject-matter of the proceedings before the General Court. In those circumstances, it is manifestly inadmissible. [49]

vi) Conclusion

73. In the light of all the above considerations, I propose that the Court grant the Commission's request for substitution of grounds.

48 — Judgments in *DK Recycling und Roheisen* v *Commission* (T-630/13, EU:T:2014:833, paragraph 78); *Arctic Paper Mochenwangen* v *Commission* (T-634/13, EU:T:2014:828, paragraph 77); *Romonta* v *Commission* (T-614/13, EU:T:2014:835, paragraph 81), and *Raffinerie Heide* v *Commission* (T-631/13, EU:T:2014:830, paragraph 80).

49 — See the second sentence of Article 170(1) of the Rules of Procedure of the Court of Justice. See, in this regard, judgment in *Alliance One International* v *Commission* (C-668/11 P, EU:C:2013:614, paragraph 68 and the case-law cited).

74. If the Court were to follow my proposal and take the view that Directive 2003/87 did not authorise the Commission to introduce a hardship clause in Decision 2011/278, as is stated in the point 35 of this Opinion, the grounds of appeal alleging that the General Court failed to criticise the absence of such a clause in Decision 2011/278 should be rejected as ineffective. Consequently, in the statements made below, in so far as those grounds of appeal are concerned, I will confine myself to very brief considerations in the alternative in case the Court were not to follow my proposal.

C – *The appeals brought by DK Recycling (Case C-540/14 P) and Arctic Paper (Case C-551/14)*

75. DK Recycling and Arctic Paper brought two almost identical appeals, in which they raise two grounds of appeal.

1. The first ground of appeal alleging infringement of fundamental rights

76. In a first limb, DK Recycling and Arctic Paper complain that the General Court failed to declare that, in the absence of a hardship clause, Decision 2011/278 does not adequately ensure respect for fundamental rights as it does not take account of situations where operators of installations have to face exceptional costs. According to the Court's case-law,[50] the General Court should have reviewed respect for fundamental rights in each case by examining whether or not the costs generated in their specific cases could be borne. The General Court placed greater value on the general objectives envisaged by the emissions trading scheme than on individual fundamental rights.

77. In a second limb, DK Recycling and Arctic Paper claim that the General Court did not give sufficient consideration to the Court's case-law according to which the principle of proportionality requires the adoption of transitional measures to reduce costs in order to avoid the imposition on certain individual actors on the market, in the context of the harmonisation process, of costs threatening their existence.[51] In the absence of a hardship clause, Decision 2011/278 does not take into account the situation of undertakings for which the allowance trading scheme gives rise to disproportionate economic burdens and does not contain any measure such as to guarantee adequate individual protection against intolerable interferences with fundamental rights.

78. In a third limb, DK Recycling and Arctic Paper claim that the hardship clause is an expression of a constitutional tradition common to the Member States in accordance with Article 6(3) TEU and Article 52(4) of the Charter. The General Court thus erred in law by ignoring the appellants' arguments concerning the need, recognised in German law by the Bundesverfassungsgericht (German Federal Constitutional Court), to provide for such a clause.

79. By the three limbs of this ground of appeal, DK Recycling and Arctic Paper argue, in essence, that the General Court infringed their fundamental rights by failing to criticise the absence of a hardship clause in Decision 2011/278. In the light of considerations set out in points 35, 72 and 74 of this Opinion, I take the view that this ground of appeal must be rejected as ineffective in its entirety. In the considerations below, I will briefly explain, in the alternative, why I believe that the three limbs are in any event unfounded.

80. As regards the first limb, I note that in the relevant judgments under appeal the General Court ruled that the absence of a hardship clause in Decision 2011/278 constituted interference with fundamental rights which was, however, justified under Article 52(1) of the Charter. In its analysis, the General Court weighed the interests involved, taking full account of both the objectives pursued

50 — Judgments in *Schmidberger* (C-112/00, EU:C:2003:333, paragraph 81) and *Agrarproduktion Staebelow* (C-504/04, EU:C:2006:30, paragraph 37).

51 — Judgment in *T. Port* (C-68/95, EU:C:1996:452, paragraphs 37, 38 and 43).

by the legislation and the fundamental rights of operators of installations. It even made specific reference to the particular situation of the appellants.[52] In addition, the case-law relied on by DK Recycling cannot, in my view, form the basis for the argument that in its analysis the General Court failed to have regard to the substance and the level of protection of the fundamental rights guaranteed in Articles 16 and 17 of the Charter.[53]

81. As regards the second limb, I have doubts as to the relevance to the present case of the case-law mentioned by DK Recycling and Arctic Paper. The judgment in *T. Port* (C-68/95, EU:C:1996:452) concerned a case in which a Community regulation explicitly contained a rule relating to cases of undue hardship.[54] That is manifestly not the case here with the result that the case-law relied on cannot call into question the analysis by the General Court.

82. As regards the third limb, it would seem sufficient to state that there is nothing in the documents before the Court to suggest that an undue hardship rule like that adopted by the German legislature is the expression of a constitutional tradition common to the Member States. DK Recycling and Arctic Paper do not offer any evidence to show the existence of a 'predominant trend' in the legal orders of the Member States in support of the interpretation purportedly adopted by the Bundesverfassungsgericht (German Federal Constitutional Court).[55]

2. The second ground of appeal alleging errors in the analysis of the proportionality of Decision 2011/278

83. In a first limb, DK Recycling and Arctic Paper challenge the General Court's conclusion concerning the appropriateness of Decision 2011/278 despite the absence of a hardship clause.[56] They complain that the General Court failed to determine whether that decision was capable of guaranteeing adequate individual protection against disproportionate infringements of fundamental rights. In addition, the General Court failed to have regard to the individual dimension of the protection of economic development and employment as expressed in recital 5 of Directive 2003/87.

84. In a second limb, DK Recycling and Arctic Paper challenge the General Court's conclusion that the allocation scheme under Decision 2011/278 is not disproportionate in the strict sense, despite the absence of a hardship clause. First, the General Court failed to examine the exceptional constraints that can arise in specific cases and thus failed to consider the need for adequate protection of individual rights in weighing the interests involved. This led it to an incorrect assessment of the fair balance between those interests. Second, DK Recycling and Arctic Paper dispute: (i) that the allocation scheme gives less of an incentive to reduce emissions through economic or technical adjustment measures, (ii) that the hardship clause is incompatible with the principle that the polluter should pay and (iii) that Article 10a(6) of Directive 2003/87 should be seen as a provision the effect of which is to mitigate the constraint imposed by the allowance trading scheme.[57]

52 — See, with regard to DK Recycling, paragraph 88 of the judgment in *DK Recycling und Roheisen* v *Commission* (T-630/13, EU:T:2014:833) and, with regard to Arctic Paper, paragraph 87 of the judgment in *Arctic Paper Mochenwangen* v *Commission* (T-634/13, EU:T:2014:828).

53 — With specific regard to limitations of the fundamental right of freedom to conduct a business (Article 16 of the Charter), see judgment in *Sky Österreich* (C-283/11, EU:C:2013:28, paragraph 46 et seq.) and judgment in *Deutsches Weintor* (C-544/10, EU:C:2012:526, paragraphs 56 to 59); with regard to limitations of the right to property (Article 17 of the Charter) specifically in order to promote protection of the environment, see judgment in *ERG and Others* (C-379/08 and C-380/08, EU:C:2010:127, paragraph 80 et seq.).

54 — Specifically, Article 30 of Council Regulation (EC) No 404/93 of 13 February 1993 on the common organisation of the market in bananas (OJ 1993 L 47, p. 1).

55 — See, in this regard, judgment in *Akzo Nobel Chemicals and Akcros Chemicals* v *Commission* (C-550/07 P, EU:C:2010:512, paragraph 74); Opinion of Advocate General Kokott in *Akzo Nobel Chemicals and Akcros Chemicals* v *Commission* (C-550/07 P, EU:C:2010:229 points 93 to 96), and Opinion of Advocate General Bot in *Melloni* (C-399/11, EU:C:2012:600, footnote 29).

56 — Paragraph 70 of the judgment in *DK Recycling und Roheisen* v *Commission* (T-630/13, EU:T:2014:833) and paragraph 69 of the judgment in *Arctic Paper Mochenwangen* v *Commission* (T-634/13, EU:T:2014:828).

57 — See, respectively, paragraphs 89, 78 and 82 of the judgment in *DK Recycling und Roheisen GmbH* v *Commission* (T-630/13, EU:T:2014:833) and paragraphs 88, 77 and 81 of the judgment in *Arctic Paper Mochenwangen* v *Commission* (T-634/13, EU:T:2014:828).

85. This ground of appeal is essentially seeking to challenge the General Court's conclusion that the interference with fundamental rights as a result of the absence of a hardship clause in Decision 2011/278 is not disproportionate in the light of the aims pursued by the allowance trading scheme. As this ground of appeal concerns the absence of a hardship clause in Decision 2011/278, it follows from the considerations set out in points 35, 72 and 74 of this Opinion that it must be rejected as ineffective. In the alternative, I consider this ground of appeal to be unfounded. [58]

86. As regards the first limb, in my view the General Court did not err in examining the ability of Decision 2011/278 to achieve the objectives of the scheme for greenhouse gas allowance trading. The General Court identified, on the basis of case-law, both the objectives and sub-objective of that scheme and the ability of the rules on free allocation contained in Decision 2011/278 to achieve those objectives in the absence of a hardship clause. [59] Contrary to the claim made in the appeals, I believe that the sub-objective mentioned in recital 5 of Directive 2003/87 aims at the protection of economic development and employment as a whole and does not require individual protection of each installation in a specific case, in particular in the case of financial difficulties.

87. As regards the second limb, the fact that the rules for free allocation of allowances, which are based on generally applicable objective parameters determined on a sectoral basis and which do not take account of the particular circumstances relating to specific individual situations, [60] do not include a hardship clause certainly does not mean that the burdens imposed by those rules are disproportionate in relation to the aims pursued. Established case-law also shows that protection of the environment is one of the objectives of general interest which may justify limitations of fundamental rights [61] and that the attainment of that aim depends on the stringency with which the general rules in respect of that objective are applied. [62] As was rightly held by the General Court, a hardship clause which takes individual circumstances into consideration could relax that stringency. [63] On the other hand, the fact that general rules of this nature may affect some undertakings more severely than others does not make them disproportionate. It is inherent to such general rules that they have a greater impact on some installations than others. [64] Lastly, in my view, both the analysis by the General Court in relation to the principle that the polluter should pay [65] and the reference by the General Court to special rules, including Article 10a(12) of Directive 2003/87, are free from error.

88. In conclusion, as the two grounds of appeal put forward by DK Recycling and Arctic Paper in their appeals are, in my view, ineffective, I propose that the Court dismiss the appeals as unfounded.

58 — With regard to examining the proportionality of an established interference with fundamental rights, see judgment in *Digital Rights Ireland and Others* (C-293/12 and C-594/12, EU:C:2014:238, paragraph 46 et seq.) and Opinion of Advocate General Kokott in *Philip Morris Brands and Others* (C-547/14, EU:C:2015:853, point 146 et seq. and the case-law cited).

59 — See, respectively, paragraphs 63 to 65 and 66 to 68 of the judgment in *DK Recycling und Roheisen* v *Commission* (T-630/13, EU:T:2014:833) and paragraphs 62 to 64 and 65 to 67 of the judgment in *Arctic Paper Mochenwangen* v *Commission* (T-634/13, EU:T:2014:828).

60 — See point 54 of this Opinion.

61 — Judgment in *ERG and Others* (C-379/08 and C-380/08, EU:C:2010:127, paragraph 81 and the case-law cited).

62 — See, to that effect, with regard to the scheme for greenhouse gas emission allowance trading, judgment in *Billerud Karlsborg and Billerud Skärblacka* (C-203/12, EU:C:2013:664, paragraph 26).

63 — See judgment in *DK Recycling und Roheisen* v *Commission* (T-630/13, EU:T:2014:833, paragraph 89) and judgment in *Arctic Paper Mochenwangen* v *Commission* (T-634/13, EU:T:2014:828, paragraph 88).

64 — See judgment in *Poland* v *Commission* (T-370/11, EU:T:2013:113, paragraphs 85 and 105). Any disproportionality of those rules could possibly result from an inappropriate calculation of *ex ante* benchmarks. However, such an argument has not been raised in the appeals under consideration.

65 — It cannot under any circumstances be called into question by paragraph 52 of the judgment in *Standley and Others* (C-293/97, EU:C:1999:215), relied on in the appeals.

D – *The appeal brought by Raffinerie Heide (Case C-564/14 P)*

1. The first ground of appeal alleging that the General Court infringed the right to be heard and its duty to state reasons

89. Raffinerie Heide alleges that the General Court failed to take a position on its ground of appeal claiming that the Commission wrongly declined to exercise its discretion to examine, in the light of fundamental rights, the 'hardship cases' submitted by the German authorities, which had included its own.

90. In the judgment under appeal the General Court found that Decision 2011/278 did not permit the Commission to authorise the free allocation of emission allowances on the basis of a hardship clause. It also found that if a Member State allocated allowances free of charge to an installation which were not calculated in accordance with the rules referred to in Article 10a(1) of Directive 2003/87, and thus Decision 2011/278, the Commission had to reject the inscription of that installation under Article 11(3) of Directive 2003/87, having no discretion in that regard.[66]

91. It follows from those findings that the Commission, having no discretion, had to refuse the inscription of the installations in question and was not able to examine individually the cases which had been submitted to it by the German authorities outside the scope of the rules contained in Decision 2011/278. In the absence of the plea of illegality of the abovementioned provisions of Directive 2003/87, those findings of the General Court are, in my view, a sufficient response to the argument relied on by Raffinerie Heide before it. In those circumstances, Raffinerie Heide cannot claim any infringement of its right to be heard or of the duty to state reasons. This ground of appeal must therefore be rejected.

2. The second ground of appeal alleging infringement of Articles 10a and 11(3) of Directive 2003/87 and of Decision 2011/278

92. In a first limb, Raffinerie Heide claims that the General Court made an error in law in ruling that Decision 2011/278 precluded any free allocation of supplementary allowances in individual cases of undue hardship and did not confer on the Commission any discretion in that regard. In a second limb, Raffinerie Heide claims that in adopting the contested decision the Commission could have allocated supplementary allowances to installations suffering undue hardship pursuant to Article 11(3) of Directive 2003/87.

93. It is clear from the considerations set out in points 43 to 71 of this Opinion that the Commission was not authorised to provide, in Decision 2011/278, for free allocation of allowances on the basis of a hardship clause. Accordingly, the first limb must be rejected. It also follows from those considerations that free allocation of allowances on the basis of such a clause would be incompatible with a sub-objective which constitutes an essential element of Directive 2003/87. Consequently, no other provision of that directive could justify such allocation. Therefore, the second limb must also be rejected.

66 — See judgment in *Raffinerie Heide* v *Commission* (T-631/13, EU:T:2014:830, paragraphs 41 to 44).

3. The third ground of appeal alleging a failure to have regard to the duty on the EU institutions to interpret in a manner consistent with fundamental rights

94. In its third ground of appeal, Raffinerie Heide claims that the General Court failed to have regard to the Commission's duty to interpret in a manner consistent with fundamental rights and that it therefore infringed Article 51(1) of the Charter. Even if Decision 2011/278 were regarded as leaving the Commission no discretion to take account of cases of undue hardship, the Commission was in any event required to interpret Directive 2003/87 in the light of fundamental rights and thus to take into consideration cases of undue hardship, including that of Raffinerie Heide, which were submitted to it. A derogation from the institutions' duty to give an interpretation in a manner consistent with fundamental rights cannot be disregarded on the ground that the Commission was not authorised to that effect.

95. It should be noted that this ground of appeal was not raised before the General Court and also does not arise from the judgment under appeal itself.[67] In those circumstances, in so far as it changes the subject-matter of the proceedings, it must be regarded as inadmissible.[68]

4. The fourth ground of appeal alleging a distortion of evidence

96. Raffinerie Heide considers that the General Court distorted the evidence which it provided to show that its situation constituted force majeure. Of that evidence it cites investments made in 2011 on the basis of an administrative obligation, the use of the investments for environmental protection measures, the need to take out a loan to provide the financing for those investments, and the request made to the German authorities for recognition of a case of undue hardship and the positive response by the authorities.

97. This ground of appeal is, in my view, manifestly unfounded. There is distortion of the clear sense of the evidence where, without recourse to new evidence, the assessment of the existing evidence appears to be clearly incorrect.[69] In paragraph 45 of the judgment under appeal concerning Raffinerie Heide (T-631/13, EU:T:2014:830), the General Court correctly explained why it considered that Raffinerie Heide was not in a case of force majeure.

5. The fifth ground of appeal alleging infringement of fundamental rights and of the proportionality test by reason of the absence of a hardship clause in Decision 2011/278

98. In a first limb, Raffinerie Heide challenges the General Court's analysis of the appropriateness of Decision 2011/278. In the absence of a hardship clause, that decision: (i) does not contain any provision responding to the sub-objective of safeguarding economic development and employment and even undermines that sub-objective, (ii) runs counter to the objective of gradual adaptation, as installations which do not have financial resources to improve their efficiency have to shut down, (iii) thus encourages the relocation of production to third countries outside the allowance trading scheme, and (iv) forces installations which are in a precarious financial situation, but are still economically efficient, to leave the market.

67 — Judgments in *Commission and Others* v *Siemens Österreich and Others* (C-231/11 P to C-233/11 P, EU:C:2014:256, paragraph 102) and *Areva and Others* v *Commission* (C-247/11 P and C-253/11 P, EU:C:2014:257, paragraphs 118 and 170).

68 — See point 72 and footnote 49 of this Opinion.

69 — See, inter alia, order in *The Sunrider Corporation* v *OHIM* (C-142/14 P, EU:C:2015:371, paragraph 49 and the case-law cited).

99. In a second limb, Raffinerie Heide challenges the General Court's analysis in relation to the necessity of Decision 2011/278. The General Court reversed the burden of proof by requiring the holder of fundamental rights to prove the necessity of the established infringement of its rights, when it is for the EU institution to prove that its measure is compatible with the principle of proportionality. In addition, consideration by the Commission of specific, limited cases of undue hardship constitutes a less severe measure than a general refusal to examine them.

100. In a third limb, Raffinerie Heide challenges the General Court's analysis concerning the proportionality in the strict sense of Decision 2011/278. First, it was not apparent from Decision 2011/278 that the necessary weighing of interests by the General Court had taken place. Second, the General Court applied an incorrect test to assess proportionality. The measures mentioned by the General Court in paragraphs 82 to 86 of the judgment under appeal (T-631/13, EU:T:2014:830) are general rules in relation to infringements of the fundamental rights by Directive 2003/87, but they cannot justify the restriction of fundamental rights at issue in this case. Third, in holding in paragraph 88 of the judgment under appeal that Decision 2011/278 would be disproportionate only if it 'typically' threatened the existence of operators of installations, the General Court applied an incorrect criterion and disregarded the fact that the hardship clause is intended to take account of atypical consequences occurring in particular cases which are liable to be caused by measures of a public authority. In addition, according to Raffinerie Heide, the rudimentary analysis of its individual case in paragraph 89 of the judgment under appeal did not show that the application of Decision 2011/278 in its case was proportionate. The General Court did not answer the question whether the rules contained in Decision 2011/278 are appropriate in all situations. The judgment in *T. Port* (C-68/95, EU:C:1996:452) confirmed that examination of individual cases of undue hardship may be absolutely necessary in order to guarantee the proportionality of a common organisation of the markets.

101. This ground of appeal seeks, in essence, to challenge the General Court's conclusion that the interference with fundamental rights as a result of the absence of a hardship clause in Decision 2011/278 is not disproportionate in the light of the aims pursued by the allowance trading scheme. As this ground of appeal concerns the absence of such a clause in Decision 2011/278, it is clear from the considerations set out in paragraphs 35, 72 and 74 of this Opinion that it must be rejected as ineffective. In the alternative, I consider this ground of appeal to be unfounded.

102. As regards the first limb, it should be pointed out, as the Commission states, that Directive 2003/87 itself contains provisions responding to the sub-objective of safeguarding economic development and employment and seeking to avoid relocation.[70] The introduction of free allocation of allowances is intended in itself to pursue the objective of the gradual adaptation of installations to the trading scheme, although the achievement of such an objective must be in keeping with the specific objectives and sub-objectives of Directive 2003/87. As I have observed several times, a clause like that advocated by Raffinerie Heide would be incompatible with the sub-objective of the preservation of competition. Lastly, as the starting point in defining the principles for setting *ex ante* benchmarks, under Article 10a(2) of Directive 2003/87, is the average performance of the 10% most efficient installations in a sector or subsector, it must be stated that, contrary to the claim made by Raffinerie Heide, the free allowance allocation scheme is intended to promote the most economically efficient installations.

70 — See paragraph 82 et seq. of the judgment in *Raffinerie Heide* v *Commission* (T-631/13, EU:T:2014:830).

103. As regards the first part of the second limb, it must be stated that in paragraphs 72 and 73 of the judgment under appeal (T-631/13, EU:T:2014:830), cited by Raffinerie Heide, the General Court did not reverse the burden of proof, but simply responded to an argument concerning the necessity of Decision 2011/278, in which connection it was for Raffinerie Heide, which had raised it, to demonstrate that it was well founded. The second part merely addresses the argument already put forward before the General Court, which did not err in rejecting it. [71]

104. As regards the third limb, it should be noted, first, that the fact that the recitals of Decision 2011/278 do not explicitly mention the balancing of the interests involved does not mean that the Commission did not weigh those interests in that decision. Second, Raffinerie Heide does not challenge the General Court's finding in paragraph 89 of the judgment under appeal that its difficulties stemmed from its own economic and financial behaviour. With regard to the third part, I refer to the statements made in paragraphs 81 and 87 of this Opinion.

105. In conclusion, in the light of all the above considerations, I propose that the appeal brought by Raffinerie Heide be dismissed.

E – *The appeal brought by Romonta (Case C-565/14 P)*

1. The first ground of appeal alleging an error in law in the interpretation of Decision 2011/278 and a misapplication of the principle of proportionality

106. In a first limb, Romonta claims that the General Court made an error in law in interpreting Decision 2011/278 as exhaustive and thus in concluding that an allocation of supplementary allowances requested on the basis of the hardship clause was ruled out in absence of an express reference in that decision. According to Romonta, even in the absence of such a clause, the allocation of supplementary allowances should have taken place as this was a case of undue hardship by reason of force majeure. The risk of insolvency was not foreseeable as it did not become plausible until 2011, when the Commission decided not to define a product benchmark for lignite wax. That risk was also inevitable, since Romonta could not move to other fuels for its production for technical reasons.

107. In this regard, as far as the exhaustive character of Decision 2011/278 is concerned, it is clear from the wording of Article 10a(1) of Directive 2003/87, which refers to 'Community-wide and fully-harmonised implementing measures', that the transitional rules on free allocation of allowances adopted in Decision 2011/278 give rise to full harmonisation which does not leave any scope for national rules. They are therefore exhaustive.

108. In addition, as is pointed out by the General Court, according to case-law, circumstances constituting force majeure presuppose an external cause which is unforeseeable and inevitable to the point of making it objectively impossible for the persons concerned to comply with their obligations. [72]

71 — See paragraphs 72 and 73 of the judgment in *Raffinerie Heide* v *Commission* (T-631/13, EU:T:2014:830).

72 — See, respectively, judgment in *Billerud Karlsborg and Billerud Skärblacka* (C-203/12, EU:C:2013:664, paragraph 31) and judgment in *Romonta* v *Commission* (T-614/13, EU:T:2014:835, paragraph 48).

109. However, it is the Court's settled case-law that the notion of force majeure must be understood as referring to unusual and unforeseeable circumstances which were beyond the control of the party by whom it is pleaded and the consequences of which could not have been avoided even if all due care had been exercised.[73] I concur with the General Court's finding, which is not even contested by Romonta, that the mere risk of becoming insolvent and being unable to meet repayment obligations in the absence of sufficient funds is not enough to establish a case of force majeure. This is sufficient to reject the first limb.

110. In a second limb, Romonta considers, in the alternative, that the General Court incorrectly applied the principle of proportionality in examining the appropriateness of Decision 2011/278. That limb has three parts. First, Romonta takes the view, unlike the General Court, that a hardship clause is not contrary to the principle that the polluter should pay for two reasons: that principle does not have primacy over the principle of proportionality and the scheme for free allocation of allowances does not operate according to the causal link characteristic of the principle that the polluter should pay but depending on the product and industrial policy choices. Second, Romonta considers that specific measures to support industry are not adequate compensation for the costs and do not justify the appropriateness of Decision 2011/278. Third, it asserts that the General Court failed to have regard to the 'individual scope' of the principle of proportionality laid down in Article 52(1) of the Charter by disregarding the specific cases of undertakings suffering undue hardship in the analysis of the appropriateness of the decision.

111. That second limb seeks, in essence, to challenge the General Court's conclusion that the interference with fundamental rights as a result of the absence of a hardship clause in Decision 2011/278 is not disproportionate. In the light of the considerations set out in points 35, 72 and 74 of this Opinion, it must be rejected as ineffective. In the alternative, I consider this ground of appeal in any event to be unfounded.

112. With regard to the first part, I have already stated that I consider the General Court's analysis in relation to the principle that the polluter should pay to be correct. That analysis cannot be called into question by the reference to the judgment in *Standley and Others*,[74] on which Romonta's first argument is based. In addition, as regards the second argument, since the principle that the polluter should pay is mentioned in Article 191(2) TFEU as one of the guiding principles of Union policy on the environment, it is clear that any secondary legislation must comply with it. As regards the second and third parts I refer to point 87 of this Opinion.

113. In the light of all these considerations, the first ground of appeal must be rejected.

2. The second ground of appeal alleging infringement of fundamental rights

114. Romonta claims that the General Court infringed its freedom to choose an occupation and its right to property laid down in Articles 15 and 16 of the Charter. It claims that the General Court wrongly held that the absence of a hardship clause in Decision 2011/278 did not affect the essence of Romonta's fundamental rights, since the absence of such a clause constitutes an impairment the intensity of which is equivalent to a direct prohibition on pursuing an occupation or a deprivation of property, because Romonta could not continue its activities.

73 — Judgment in *Eurofit* (C-99/12, EU:C:2013:487, paragraph 31). The Court has thus recognised that a mere internal breakdown cannot constitute such a circumstance. See judgment in *Billerud Karlsborg and Billerud Skärblacka* (C-203/12, EU:C:2013:664, paragraph 31).

74 — C-293/97, EU:C:1999:215, paragraph 52.

115. By this ground of appeal, Romonta claims that the General Court infringed its fundamental rights by failing to criticise the absence of a hardship clause in Decision 2011/278. In the light of the considerations set out in points 35, 72 and 74 of this Opinion, I consider this ground of appeal to be ineffective. In the alternative, I consider this ground of appeal to be unfounded. In paragraph 61 of the relevant judgment under appeal, the General Court rightly found that the absence of hardship clause in Decision 2011/278 does not affect the essence of either the freedom to choose an occupation and to conduct a business or the right to property in so far as it does not prevent operators of installations subject to the emission allowance trading scheme from pursuing an occupation or conducting a business as such and does not deprive them of their property. This ground of appeal must therefore be rejected.

3. The third ground of appeal alleging an infringement of the principle of subsidiarity

116. Romonta claims that the General Court made an error in law by failing to find an infringement of the principle of subsidiarity. In its view, Decision 2011/278 relates to the field of the environment, which is a matter for shared competences. Shared competences which are not exercised by the Union fall to the Member States. Contrary to the ruling made by the General Court, Decision 2011/278 did not lay down exhaustive allocation rules. The absence of a hardship clause created a regulatory gap which permitted the Federal Republic of Germany to adopt legislation in this regard in order to attain the regulatory objectives in respect of Romonta.

117. Under the principle of subsidiarity, as enshrined in the second sentence of Article 5(1) TEU in conjunction with Article 5(3) TEU, the Union may act in areas which do not fall within its exclusive competence only if and in so far as the objectives of the proposed action cannot be sufficiently achieved by the Member States, either at central level or at regional and local level, but can rather, by reason of the scale or effects of the proposed action, be better achieved at Union level (Article 5(3) TEU).

118. It should be observed in this regard, first, that Romonta's argument is based on a false premise. As was stated in point 107 of this Opinion, the General Court did not err in finding that Decision 2011/278 is exhaustive. Second, in its appeal Romonta does not even attempt to refute the finding made by the General Court in paragraph 106 of the relevant judgment under appeal that Romonta did not contest the fact that the establishment of the emission allowance trading scheme in the Union by Directive 2003/87 could not be sufficiently achieved by the Member States acting individually and that the establishment of that scheme could therefore, by reason of its scale or effects, be better achieved at Union level. In those circumstances, this ground of appeal must be rejected.

4. The fourth ground of appeal concerning an insufficient and contradictory statement of reasons

119. First, Romonta claims that the finding made by the General Court in paragraph 70 of the judgment under appeal that operators of installations would have less of an incentive to reduce their greenhouse gas emissions if there were a hardship clause is contradictory to another of its findings, in paragraph 81 of the judgment under appeal, that allocation of supplementary allowances under that clause would result, in all the sectors and subsectors concerned, in a reduction in the number of allowances allocated free of charge for other operators on account of the application of the uniform cross-sectoral correction factor. Romonta claims that such a clause would not provide the slightest incentive to reduce emissions, but that the incentive would be shifted to more economically efficient operators. Second, Romonta considers that the General Court did not adequately examine the question of the displacement of emissions to third countries. It thus did not take sufficient account of the objective of global protection against climate change. Third, Romonta considers that the General Court also contradicted itself in paragraph 89 of the judgment under appeal by stating, on the one

hand, that the hardship clause is intended to overcome economic and financial difficulties resulting from the individual management of an undertaking, then, in paragraph 90, that Romonta's economic difficulties stemmed solely from the application of a heat benchmark related to gas and not to montan wax, and thus from action by the Commission.

120. First, there is no contradiction between the considerations set out in paragraphs 70 and 81 of the relevant judgment under appeal. As is clear from the General Court's reasoning in the latter paragraph, the introduction of a hardship clause would increase the costs stemming from the consequences of the necessary adjustment to reduce emissions for the most economically efficient undertakings, which is contrary to the principle that the polluter should pay, a fundamental principle in the field of the environment. That statement is entirely consistent with the statement made in paragraph 70. Second, I cannot identify any inadequate statement of reasons in the General Court's reasoning in paragraph 71 of the relevant judgment under appeal. Third, in the first sentence of paragraph 90 of the relevant judgment under appeal, to which Romonta's argument relates, the General Court simply reproduced its argument and did not make a factual finding as to the reasons for its economic difficulties.

121. In the light of the foregoing, this ground of appeal must also be rejected. Consequently, the appeal brought by Romonta must be dismissed in its entirety.

VI – **Cost**

122. Under Article 184(2) of the Rules of Procedure of the Court of Justice, where the appeal is unfounded, the Court is to make a decision as to costs. Under Article 138(1) of those Rules, which are applicable to the procedure on appeal by virtue of Article 184(1) thereof, the unsuccessful party is to be ordered to pay the costs if they have been applied for in the successful party's pleadings. As the Commission has applied for costs against the appellants and the appellants have been unsuccessful, they must be ordered to bear their own costs and to pay those incurred by the Commission.

VII – **Conclusion**

123. Having regard to all the foregoing considerations, I propose that the Court:

— dismiss the appeal brought by DK Recycling und Roheisen GmbH in Case C-540/14 P and order it to pay the costs;

— dismiss the appeal brought by Arctic Paper Mochenwangen GmbH in Case C-551/14 P and order it to pay the costs;

— dismiss the appeal brought by Raffinerie Heide GmbH in Case C-564/14 P and order it to pay the costs;

— dismiss the appeal brought by Romonta GmbH in Case C-565/14 P and order it to pay the costs.