Reports of Cases

JUDGMENT OF THE COURT (Fifth Chamber)

20 January 2022 *

[Text rectified by order of 22 March 2022]

(Reference for a preliminary ruling – Scheme for greenhouse gas emission allowance trading – Directive 2003/87/EC – Article 3e – Inclusion of aviation activities – Directive 2008/101/EC – Allocation and issue of allowances free of charge to aircraft operators – Cessation, by such an operator, of its activities due to insolvency – Decision of the competent national authority refusing to issue allowances to the insolvency administrator of the company in liquidation)

In Case C-165/20,

REQUEST for a preliminary ruling under Article 267 TFEU from the Verwaltungsgericht Berlin (Administrative Court, Berlin, Germany), made by decision of 30 March 2020, received at the Court on 16 April 2020, in the proceedings

ET, acting as insolvency administrator of Air Berlin PLC & Co. Luftverkehrs KG,

v

Bundesrepublik Deutschland,

THE COURT (Fifth Chamber),

composed of E. Regan, President of the Chamber, K. Lenaerts, President of the Court, acting as Judge of the Fifth Chamber, C. Lycourgos (Rapporteur), President of the Fourth Chamber, I. Jarukaitis and M. Ilešič, Judges,

Advocate General: G. Hogan,

Registrar: M. Krausenböck, Administrator,

having regard to the written procedure and further to the hearing on 10 June 2021,

after considering the observations submitted on behalf of:

– ET, acting as insolvency administrator of Air Berlin PLC & Co. Luftverkehrs KG, by B. Schröder and H. Krüger, Rechtsanwälte,

* Language of the case: German.

– [as rectified by order of 2 March 2022] the Bundesrepublik Deutschland, by A. Wendl-Damerius, acting as Agent, and by G. Buchholz, Rechtsanwalt,

– the German Government, initially by J. Möller, P.-L. Krüger and S. Heimerl, and subsequently by J. Möller and P.-L. Krüger, acting as Agents,

– the European Commission, by B. De Meester, C. Hermes and G. Wils, acting as Agents,

after hearing the Opinion of the Advocate General at the sitting on 23 September 2021,

gives the following

Judgment

1 This request for a preliminary ruling concerns the interpretation 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 (EU) 2017/2392 of the European Parliament and of the Council of 13 December 2017 (OJ 2017 L 350, p. 7) ('Directive 2003/87'), and the validity of Article 10(5), Article 29, Article 55(1)(a) and (3) and Article 56 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).

2 The request has been made in proceedings between ET, acting as insolvency administrator of Air Berlin plc & Co. Luftverkehrs KG ('Air Berlin'), and the Bundesrepublik Deutschland (Federal Republic of Germany) represented by the Umweltbundesamt (Federal Environment Agency), concerning a decision to cease the free allocation of greenhouse gas emission allowances which had previously been granted.

Legal context

European Union law

Directive 2003/87

3 Article 1 of Directive 2003/87, entitled 'Subject matter', provides, in the first paragraph thereof:

'This Directive establishes a scheme for greenhouse gas emission allowance trading … in order to promote reductions of greenhouse gas emissions in a cost-effective and economically efficient manner.'

4 Article 2 of that directive, entitled 'Scope', provides, in paragraph 1 thereof:

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

5 Article 3 of that directive, entitled ‘Definitions’, states:

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

…

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

…’

6 Article 3c of the same directive, entitled ‘Total quantity of allowances for aviation’, provides:

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

2. For the period … beginning on 1 January 2013 … the total quantity of allowances to be allocated to aircraft operators shall be equivalent to 95% of the historical aviation emissions multiplied by the number of years in the period.

…

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

…’

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

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

2. From 1 January 2013, 15% of allowances shall be auctioned. …

…’

8 Under Article 3e of that directive, headed ‘Allocation and issue of allowances to aircraft operators’:

‘1. For each period referred to in Article 3c, each aircraft operator may apply for an allocation of allowances that are to be allocated free of charge. An application may be made by submitting to the competent authority in the administering Member State verified tonne-kilometre data for the aviation activities listed in Annex I performed by that aircraft operator for the monitoring year. … Any application shall be made at least 21 months before the start of the period to which it relates …

2. At least 18 months before the start of the period to which the application relates …, Member States shall submit applications received under paragraph 1 to the Commission.

3. At least 15 months before the start of each period referred to in Article 3c(2) …, the Commission shall calculate and adopt a decision setting out:

(a) the total quantity of allowances to be allocated for that period in accordance with Article 3c;

(b) the number of allowances to be auctioned in that period in accordance with Article 3d;

(c) the number of allowances in the special reserve for aircraft operators in that period in accordance with Article 3f(1);

(d) the number of allowances to be allocated free of charge in that period by subtracting the number of allowances referred to in points (b) and (c) from the total quantity of allowances decided upon under point (a); and

(e) the benchmark to be used to allocate allowances free of charge to aircraft operators whose applications were submitted to the Commission in accordance with paragraph 2.

…

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

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

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

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

9 Article 3f of the directive, entitled 'Special reserve for certain aircraft operators', provides:

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

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

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

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

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

…'

10 Article 12 of the same directive, headed 'Transfer, surrender and cancellation of allowances', provides, in paragraph 2a thereof:

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

11 Article 28a of Directive 2003/87, entitled 'Derogations applicable in advance of the implementation of the [International Civil Aviation Organization (ICAO)]'s global market-based measure', provides:

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

(a) all emissions from flights to and from aerodromes located in countries outside the EEA in each calendar year from 1 January 2013 to 31 December 2023, subject to the review referred to in Article 28b;

(b) all emissions from flights between an aerodrome located in an outermost region within the meaning of Article 349 [TFEU] and an aerodrome located in another region of the EEA in each calendar year from 1 January 2013 to 31 December 2023, subject to the review referred to in Article 28b.

…

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

…

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

…'

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

'1. Before 1 January 2019 and regularly thereafter, the Commission shall report to the European Parliament and to the Council on progress in the ICAO negotiations to implement the global market-based measure to be applied to emissions from 2021 …

…

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

…'

13 Annex I to that directive, headed 'Categories of activities to which this directive applies', contains an 'Aviation' section, which covers, subject to certain exceptions, 'flights which depart from or arrive in an aerodrome situated in the territory of a Member State to which the Treaty applies'.

Directive 2008/101/EC

14 Recital 20 of Directive 2008/101/EC of the European Parliament and of the Council of 19 November 2008 amending Directive 2003/87/EC so as to include aviation activities in the scheme for greenhouse gas emission allowance trading within the Community (OJ 2009 L 8, p. 3) states:

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

Regulation No 389/2013

15 Article 10 of Regulation No 389/2013, titled 'Account status', provides:

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

…

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

from the competent authority that an aircraft operator's flights are again included in the Union scheme.

…'

16 Article 29 of that regulation, entitled 'Closure of aircraft operator holding accounts', provides:

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

17 Article 55 of that regulation, entitled 'Changes to the national aviation allocation tables', provides:

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

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

…

3. The Commission shall instruct the central administrator to make the corresponding changes to the national aviation allocation table … if it considers that the change to the national aviation allocation table is in accordance with Directive [2003/87] …

…'

18 Article 56 of the same regulation, entitled 'Free allocation of aviation allowances', provides:

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

2. From 1 February 2013 the central administrator shall ensure that the Union Registry transfers aviation allowances automatically from the EU Aviation Allocation Account to the relevant open or blocked aircraft operator holding account in accordance with the relevant allocation table …

…'

German law

19 Paragraph 2, entitled 'Scope', of the Treibhausgas-Emissionshandelsgesetz (Law on greenhouse gas emissions trading) of 21 July 2011 (BGBl. 2011 I, p. 1475), in the version applicable to the main proceedings ('the TEHG'), provides, in subparagraph 6 thereof:

'With respect to aviation activities, the scope of this Law extends to all emissions from an aircraft that result from fuel consumption. … This Law applies only to aviation activities conducted:

1. by aircraft operators which hold a German operating licence … or

2. by aircraft operators which have been allocated Germany as the administering Member State … and which do not hold a valid operating licence issued by another [EEA State].

…'

20 Paragraph 9 of the TEHG, entitled 'Allocation of emission allowances free of charge to operators of installations', provides, in subparagraph 6 thereof:

'The allocation decision shall be withdrawn if, as a result of a legal act of the European Union, it has to be amended retrospectively. …'

21 Paragraph 11 of the TEHG, entitled 'General allocation of allowances to aircraft operators free of charge', provides:

'(1) The aircraft operator shall be allocated a number of aviation allowances free of charge for a trading period which corresponds to the product of the transport performance in the base year … and the benchmark which is calculated in accordance with … Directive 2003/87.

…

(6) The competent authority shall allocate allowances free of charge within three months of the date of publication by the [Commission] of the benchmark pursuant to Article 3e(3) of Directive 2003/87. …'

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

22 By decision of 12 December 2011, the Deutsche Emissionshandelsstelle (German Emissions Trading Authority; 'the DEHSt') allocated, under Article 11 of the TEHG, a total of 28 759 739 free greenhouse gas emission allowances ('aviation allowances') to Air Berlin. 3 360 363 aviation allowances were allocated for 2012 and 3 174 922 aviation allowances were allocated per year for the period from 1 January 2013 to 31 December 2020.

23 By decision of 15 January 2015, the DEHSt withdrew 9 980 071 aviation allowances, due to the introduction, by an EU act of a temporary suspension, for the years 2013 to 2016, of the emissions trading obligation for certain international flights. That withdrawal became final and the number of aviation allowances allocated to Air Berlin for the years 2012 to 2020 was thus reduced to 18 779 668 units.

24 On 15 August 2017, Air Berlin filed a request for insolvency proceedings to be opened against it. On the same day, the Amtsgericht Charlottenburg (Local Court, Charlottenburg, Germany) opened preliminary insolvency proceedings with no declining of jurisdiction and appointed the applicant in the main proceedings as temporary administrator of the assets.

25 On 28 October 2017, Air Berlin officially ceased its aviation activities.

26 By order of 1 November 2017, the Amtsgericht Charlottenburg (Local Court, Charlottenburg) opened the main insolvency proceedings and appointed the applicant in the main proceedings as administrator of the assets. Next, by decision of 16 January 2018, that court terminated the insolvency proceedings with no declining of jurisdiction at Air Berlin's request and appointed the applicant in the main proceedings as insolvency administrator.

27 By decision of 28 February 2018 addressed to the applicant in the main proceedings, the DEHSt carried out another partial withdrawal of aviation allowances, adjusting the number of those allowances allocated to Air Berlin for all the years from 2013 to 2020 to 12 159 960 units.

28 The DEHSt based that decision on the extension to the years 2017 to 2020 of the suspension of the emissions trading obligation for certain international flights and on the fact that, before the end of 2017, Air Berlin had ceased its aviation activities. In the light of the latter factor, the DEHSt stated that there was no need to issue aviation allowances for the years 2018 to 2020. For that same reason, it decided to set Air Berlin's aircraft operator holding account to 'excluded' status within the meaning of Article 10(5) of Regulation No 389/2013.

29 The applicant in the main proceedings filed an opposition against that decision in so far as it was based on the cessation of Air Berlin's activities. He relied, in particular, on the principle of protection of legitimate expectations and on the fourth sentence of recital 20 of Directive 2008/101.

30 By decision of 19 June 2018, the DEHSt rejected that opposition. According to the DEHSt, the applicant could not usefully rely on the principle of protection of legitimate expectations since it is apparent from Article 10(5) of Regulation No 389/2013 that aviation allowances may no longer be issued where the aircraft operator in question no longer carries out flights subject to greenhouse gas emissions trading schemes. The fourth sentence of recital 20 of Directive 2008/101 did not have to be taken into consideration, the content of that sentence not being reflected in substantive provisions of EU legislation.

31 On 23 July 2018, the applicant in the main proceedings applied for legal aid in order to bring an action. By order of 16 December 2019, the Oberverwaltungsgericht Berlin-Brandenburg (Higher Administrative Court, Berlin-Brandenburg, Germany) granted that aid, taking the view that it could be inferred from Directive 2008/101 that the cessation of aviation activities does not justify the withdrawal of aviation allowances.

32 On 2 January 2020, the applicant in the main proceedings brought an action against the decision of 28 February 2018 before the Verwaltungsgericht Berlin (Administrative Court, Berlin, Germany). He observes that the TEHG did not provide for the possibility of withdrawing aviation allowances in the event of cessation of aviation activities. It is starkly apparent from the fourth sentence of recital 20 of Directive 2008/101 that the EU legislature intended that allocated aviation allowances would still be issued in such a case.

33 The applicant in the main proceedings states that, a few months before ceasing its aviation activities, Air Berlin sold the majority of the aviation allowances that had been allocated to it for 2017. It did so with the legitimate expectation that the aviation allowances allocated for the years 2018 to 2020 would continue to be issued to it and that it would therefore be in a position to fulfil, as regards 2018, its obligations relating to the surrender of allowances for emissions resulting from the flights it performed in 2017.

34 According to the applicant in the main proceedings, the right of an aircraft operator to maintain the aviation allowances that have been allocated to it is not subject to any specific condition nor does it depend on whether, after the cessation of that operator's activities, they are performed, within the meaning of Article 3f(1), by other operators. The applicant in the main proceedings nevertheless observes that, following the cessation of Air Berlin's activities, its slots were sold to other airlines.

35 According to the defendant in the main proceedings, the initial allocation decision was based on the assumption that Air Berlin would carry out, throughout the greenhouse gas emission allowance trading period ('the trading period') in question, aviation activities subject to the greenhouse gas emissions trading system obligation. Since the cessation of its activities, however, Air Berlin is no longer subject to the greenhouse gas emission allowance trading scheme ('ETS') provided for by Directive 2003/87, with the result that, in accordance with Article 10(5) of Regulation No 389/2013, its aircraft operator holding account was excluded from that system. Furthermore, with the expiry of its operating licence on 1 February 2018, Air Berlin no longer even had the status of aircraft operator within the meaning of Article 2(6) TEHG.

36 Regarding the fourth sentence of recital 20 of Directive 2008/101, the defendant in the main proceedings maintains that that sentence is inconsistent with the ETS and, consequently, cannot be taken into account. Moreover, it considers that the applicant in the main proceedings cannot rely on any legitimate expectation of Air Berlin, as that company could not reasonably assume that it would continue to receive aviation allowances after it ceased its activities.

37 The referring court states that the lawfulness of the withdrawal of the aviation allowances for the years 2018 to 2020 depends largely on the legal effects of Air Berlin's cessation of its aviation activities. In that regard, it is uncertain, inter alia, as to the scope of the fourth sentence of recital 20 of Directive 2008/101. Failing a substantive provision supporting that sentence, the issue of whether aviation allowances must be maintained or withdrawn in the event of cessation of activities should be clarified by the Court.

38 It is also appropriate to interpret the concept of 'performance', by other operators, of aviation activities, within the meaning of Article 3f(1) of Directive 2003/87, and specify whether the maintenance of aviation allowances is contingent on such performance.

39 Should the Court rule that EU law precludes the withdrawal of aviation allowances in the event of cessation of aviation activities, it would still be necessary, first, to examine the validity of Articles 10, 29, 55 and 56 of Regulation No 389/2013, in so far as those articles provide, in the event of cessation of those activities, for the exclusion or closure of the aircraft operator holding account and, second, to determine whether the trading period in question ended, for aircraft operators, on 31 December 2020 or will end, having regard to Articles 28a and 28b of Directive 2003/87, only on 31 December 2023. In that latter regard, should the Court find that that period ended on 31 December 2020, it must still be specified whether aviation allowances relating to that period may still be issued after 31 December 2020, pursuant to a judicial decision delivered after that date.

40 In those circumstances, the Verwaltungsgericht Berlin (Administrative Court, Berlin) decided to stay the proceedings and to refer the following questions to the Court of Justice for a preliminary ruling:

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

Is Article 3f(1) of Directive [2003/87] to be interpreted as meaning that the withdrawal of the allocation decision after aviation activities have been ceased due to insolvency is dependent on whether there has been a continuation of the aviation activities by other air transport operators? Is Article 3f(1) of Directive [2003/87] to be interpreted as meaning that there has

been a continuation of aviation activities if landing rights at so-called coordinated airports (slots) have been sold in part (for the insolvent air carrier's short- and medium-haul operations) to three other air transport operators?

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

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

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

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

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

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

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

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

Consideration of the questions referred

The first and third questions

41 The first and third questions, which should be examined together, relate to how the scheme for allocating aviation allowances must be applied in the event of cessation, by the aircraft operator concerned, of its aviation activities.

42 That scheme is contained in Articles 3e and 3f of Directive 2003/87, which is part of Chapter II thereof, headed 'Aviation' and inserted into that directive by Directive 2008/101.

43 Therefore, it must be considered that, by its first and third questions, the referring court is asking, in essence, whether Articles 3e and 3f of Directive 2003/87 must be interpreted as meaning that the number of aviation allowances allocated to an aircraft operator must, in the event of cessation of that operator's aviation activities during the trading period in question, be reduced in proportion to the part of that period during which those activities are no longer carried out.

44 In that regard, it should be noted, first of all, that Article 3e(1) to (3) of Directive 2003/87 allows every aircraft operator to request the allocation of aviation allowances; such a request must be made at least 21 months before the start of a new trading period. It is for the Member States to submit, at least 18 months before the start of that period, the requests received to the Commission, which is to adopt, at least 15 months before the start of that period, a decision stating, inter alia, the number of aviation allowances available and the benchmark to be used for their allocation.

45 Article 3e(4) of that directive provides that, in the three months following the adoption of that decision, each Member State is to calculate and publish, first, the total of the aviation allowances allocated for the period in question to each aircraft operator concerned and, second, 'the allocation of allowances to each aircraft operator for each year, which shall be determined by dividing its total allocation of allowances for the period [in question] by the number of years in the period for which that aircraft operator is performing an aviation activity listed in Annex I'.

46 It is thus apparent from Article 3e(4) of Directive 2003/87 that the total quantity of aviation allowances allocated to an aircraft operator for a given trading period is calculated *ex ante* and that, on that occasion, the number of aviation allowances allocated per year is also set, by dividing that total quantity by the number of years in that period in respect of which that operator carries out the aviation activities listed in Annex I to that directive, those activities alone being subject to the ETS.

47 Next, Article 3e(5) of that directive specifies that that number of aviation allowances per year is issued to the 'aircraft operator' concerned on 28 February at the latest of each year of that period.

48 It follows from those factors that the scheme for allocating aviation allowances presupposes that the recipient of that allocation carries out the aviation activities listed in Annex I to Directive 2003/87 and that those quotas are issued in yearly instalments provided that the recipient, also at the moment that those allowances are actually issued, is an 'aircraft operator', that concept being defined in Article 3(o) of that directive as referring to 'the person who operates an aircraft at the time it performs an aviation activity listed in Annex I'.

49 Having regard to those detailed rules of the scheme for allocation of aviation allowances and, more specifically, to the link expressly made by the EU legislature between the allocation and issue of those allowances and the performance of aviation activities subject to the ETS, the performance of such activities throughout the trading period in question must be considered to constitute not a mere presumption on the basis of which the *ex ante* calculation of aviation allowances is made, but a substantive condition for the actual issue of the yearly instalments of those allowances until the end of that period.

50 Therefore, where an aircraft operator ceases its activities during a trading period and thereby loses its aircraft operator status for the purposes of Directive 2003/87, consequently being deprived of the aviation allowances allocated for the years during which now turn out to be devoid of aviation activity, the insolvency administrator of that former aircraft operator cannot usefully rely on a breach of the principle of protection of legitimate expectations.

51 In that connection, it should be borne in mind that that principle extends to any person in a situation in which an administrative authority has caused that person to entertain expectations which are justified by precise assurances provided to him or her (judgment of 15 April 2021, *Administration de l'Enregistrement, des Domaines et de la TVA*, C-846/19, EU:C:2021:277,

paragraph 90 and the case-law cited). As the Advocate General observed in point 81 of his Opinion, there is no indication in the file before the Court that precise assurances relating to an issue of aviation allowances until the end of the trading period were given to Air Berlin at any point during that period or, once it became insolvent, to the applicant in the main proceedings. In particular, as has been set out in paragraphs 48 and 49 of the present judgment, the allocation of aviation allowances for a trading period cannot be understood as guaranteeing, in all circumstances, the issue of those allowances until the end of that period.

52 That finding is not invalidated by the fourth sentence of recital 20 of Directive 2008/101.

53 Admittedly, if read in isolation, that sentence, contained in the preamble to the act by which the EU legislature introduced aviation activities into the ETS and according to which 'aircraft operators that cease operations should continue to be issued with allowances until the end of the period for which free allowances have already been allocated', suggests that the EU legislature intended that the yearly instalments of the aviation allowances allocated for a trading period be issued until the end of that period, even where aviation activities have ceased.

54 However, without there being any need for the Court to examine the circumstances that led to the inclusion of that sentence in the preamble to Directive 2008/101, it is clear that that preamble is contradicted by Article 3e(4) and (5) of Directive 2003/87, the very wording of which highlights the indispensable link between the allocation and issue of the aviation allowances and the actual performance of the aviation activities listed in Annex I to that directive.

55 Consequently, in accordance with the case-law of the Court according to which the preamble to an EU act has no binding legal force and cannot be relied on either as a ground for derogating from the actual provisions of the act in question or for interpreting those provisions in a manner clearly contrary to their wording (see, inter alia, judgments of 19 June 2014, *Karen Millen Fashions*, C-345/13, EU:C:2014:2013, paragraph 31, and of 25 November 2020, *Istituto nazionale della previdenza sociale (Family benefits for long-term residents)*, C-303/19, EU:C:2020:958, paragraph 26), it is appropriate to rule out the possibility, for an insolvency administrator of a former aircraft operator, of relying on the fourth sentence of recital 20 of Directive 2008/101 in order to claim, for the benefit of the assets of the company in liquidation, the issue of aviation allowances for the years without aviation activity.

56 It must be added that the issue, to the insolvency administrator of a former aircraft operator, of aviation allowances for the years during which no aviation activity listed in Annex I to Directive 2003/87 is performed would be incompatible not only with the wording of Article 3e of that directive, but also with the purpose and general scheme of the ETS.

57 In that regard, it must be borne in mind that the ultimate objective of the ETS, as established by Directive 2003/87, is the protection of the environment and the economic logic underlying that scheme is that it encourages participants to emit quantities of greenhouse gases that are less than the greenhouse gas emission allowances originally allocated to it, in order to sell the surplus to another participant which has emitted more than its allowance (judgment of 3 December 2020, *Ingredion Germany*, C-320/19, EU:C:2020:983, paragraphs 38 and 39 and the case-law cited). As a result of the amendments introduced by Directive 2008/101, the purpose and logic of the ETS were extended to the aviation sector (see, to that effect, judgment of 21 December 2011, *Air Transport Association of America and Others*, C-366/10, EU:C:2011:864, paragraphs 138 to 140).

58 The overall scheme of Directive 2003/87 is thus based on the strict accounting of the issue, holding, transfer and cancellation of greenhouse gas emission allowances (judgment of 8 March 2017, *ArcelorMittal Rodange et Schifflange*, C-321/15, EU:C:2017:179, paragraph 24 and the case-law cited). In that connection, that directive requires, in Article 12(2a) thereof in particular, that each aircraft operator, each year, '[surrender] 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 …'.

59 As was observed by the Advocate General in point 95 of his Opinion, the issue of aviation allowances to the insolvency administrator of a former aircraft operator for the years during which the latter no longer carried out aviation activities is irrelevant both to that purpose and to the general scheme of the ETS and would merely create an unforeseen advantage for the creditors of that former aircraft operator.

60 Last, in so far as the referring court's uncertainty pertains also to Article 3f of Directive 2003/87, it must be noted that that article provides, in paragraph 1 thereof, for the setting up of a special reserve for the allocation of aviation allowances in respect of new or additional aviation activities, provided that those activities are not the continuation of an aviation activity performed previously by another aircraft operator.

61 It is thus apparent that that provision covers not the situation in which an aircraft operator ceases its activities, but that in which such an operator carries out new or additional aviation activities. The special reserve provided for by that provision therefore cannot concern either Air Berlin or the applicant in the main proceedings.

62 In addition, assuming that Air Berlin's aviation activities have been continued by other operators, it follows from the very wording of that Article 3f(1) that such new or additional activities carried out by those operators in continuation of aviation activities previously carried out by Air Berlin would fall outside the scope of that provision.

63 It follows that Article 3f of Directive 2003/87 is irrelevant to the answer to the first and third questions.

64 Regarding whether the operators that have, where applicable, continued Air Berlin's aviation activities could, irrespective of Article 3f of that directive, assert a right to the transfer, to their aircraft operator holding accounts, of the allowances originally allocated to Air Berlin before being withdrawn on account of the cessation of its aviation activities, it must be noted that there is nothing in the order for reference or in the observations lodged before the Court to indicate that such a right is being asserted in the main proceedings. The question of such a transfer cannot, as a result, be examined in the present reference for a preliminary ruling.

65 Having regard to all the foregoing considerations, the answer to the first and third questions is that Article 3e of Directive 2003/87 must be interpreted as meaning that the number of aviation allowances allocated to an aircraft operator must, in the event of cessation of that operator's aviation activities during the trading period in question, be reduced in proportion to the part of that period during which those activities are no longer carried out.

The second, fourth and fifth questions

66 In the light of the answer given to the first and third questions, there is no need to examine the second, fourth and fifth questions.

Costs

67 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 (Fifth Chamber) hereby rules:

Article 3e 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 Regulation (EU) 2017/2392 of the European Parliament and of the Council of 13 December 2017, must be interpreted as meaning that the number of greenhouse gas emission allowances allocated free of charge to an aircraft operator must, in the event of cessation of that operator's aviation activities during the period of greenhouse gas emission allowance trading in question, be reduced in proportion to the part of that period during which those activities are no longer carried out.

[Signatures]