Reports of Cases

OPINION OF ADVOCATE GENERAL
HOGAN
delivered on 24 June 2021 [1]

Case C-271/20

Aurubis AG
v
Bundesrepublik Deutschland

(Request for a preliminary ruling from the Verwaltungsgericht Berlin (Administrative Court, Berlin, Germany))

(Reference for a preliminary ruling – Environment – Scheme for greenhouse gas emission allowance trading – Transitional arrangement for the harmonised free allocation of emission allowances – Decision 2011/278/EU – Article 3(d) – Concept of 'fuel benchmark sub-installation' – Flash smelting – Autothermal reaction – Allocation request not awarded at the end of a trading period)

I. Introduction

1. This request for a preliminary ruling from the Verwaltungsgericht Berlin (Administrative Court, Berlin, Germany) concerns principally the interpretation of the concept of 'fuel benchmark sub-installation' within the meaning of Article 3(d) of Commission Decision 2011/278/EU of 27 April 2011 determining transitional Union-wide rules for harmonised free allocation of emission allowances pursuant to Article 10a of Directive 2003/87/EC of the European Parliament and of the Council [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)]. [2]

2. The 'fuel benchmark sub-installation' is one of the categories of industrial installation which may be allocated emission allowances free of charge for the purposes of Directive 2003/87. It is this directive which establishes a scheme for greenhouse gas emission allowances for firms trading within the European Union.

3. The request has been made in the course of proceedings between Aurubis AG ('Aurubis') and the Bundesrepublik Deutschland (Federal Republic of Germany), represented by the Umweltbundesamt, Deutsche Emissionshandelsstelle (Federal Environment Agency, German Emissions Trading Authority, 'the DEHSt'), concerning the amount of emission allowances allocated to Aurubis for free for its primary copper production activity.

[1] Original language: English.

[2] OJ 2011 L 130, p. 1.

II. Legal context

A. EU Law

1. Directive 2003/87

4. Directive 2003/87 has been amended several times, including by Directive 2009/29/EC of the European Parliament and of the Council of 23 April 2009 amending Directive 2003/87/EC so as to improve and extend the greenhouse gas emission allowance trading scheme of the Community [3] and by Directive (EU) 2018/410 of the European Parliament and of the Council of 14 March 2018 amending Directive 2003/87/EC to enhance cost-effective emission reductions and low-carbon investments, and Decision (EU) 2015/1814. [4] In view of the facts of the main proceedings, it is the version applicable in 2012 which seems to me to be relevant to the answer to the first question and will therefore be used, unless otherwise specified.

5. Article 1 of Directive 2003/87, headed 'Subject matter', states:

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

…'

6. Article 2 of Directive 2003/87, entitled 'Scope', provides in paragraph 1:

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

7. Article 3 of Directive 2003/87, headed 'Definitions', states:

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

…

(b) "emissions" means the release of greenhouse gases into the atmosphere from sources in an installation …

…

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

…

[3] OJ 2009 L 140, p. 63.

[4] OJ 2018 L 76, p. 3.

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

…'

8. Article 10a(1) of Directive 2003/87, entitled 'Transitional [Union]-wide rules for harmonised free allocation', states:

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

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

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

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

…'

2. Decision 2011/278

9. Recitals 1, 5, 12 and 18 of Decision 2011/278 provided as follows:

'(1) Article 10a of the Directive requires that the Community-wide and fully harmonised implementing measures for the allocation of free emission allowances should, to the extent feasible, determine *ex ante* benchmarks so as to ensure that the free allocation of emission allowances 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 carbon dioxide, where such facilities are available, and should not provide incentives to increase emissions. Allocations must be fixed prior to the trading period so as to enable the market to function properly.

…

(5) The Commission considered that setting a benchmark for a product was feasible where, taking into account the complexity of the production processes, product definitions and classifications were available that allow for verification of production data and a uniform application of the product benchmark across the Union for the purposes of allocating emission allowances. No differentiation was made on the basis of geography or on the basis of technologies, raw materials or fuels used, so as not to distort comparative advantages in carbon efficiency across the Union economy, and to enhance harmonisation of the transitional free allocation of emission allowances.

…

(12) Where deriving a product benchmark was not feasible, but greenhouse gases eligible for the free allocation of emission allowances occur, those allowances should be allocated on the basis of generic fallback approaches. A hierarchy of three fallback approaches has been developed in order to maximise greenhouse gas emission reductions and energy savings for at least parts of the production processes concerned. The heat benchmark is applicable for heat consumption processes where a measurable heat carrier is used. The fuel benchmark is applicable where non-measurable heat is consumed. The heat and fuel benchmark values have been derived based upon the principles of transparency and simplicity, using the reference efficiency of a widely available fuel that can be regarded as second-best in terms of greenhouse gas efficiency, considering energy efficient techniques. For process emissions, emission allowances should be allocated on the basis of historical emissions …

(18) In order to avoid any distortion of competition and to ensure an orderly functioning of the carbon market, Member States should ensure that when determining the allocation of individual installations no double counting and no double allocation takes place. In this context, Member States should pay particular attention to cases where a benchmarked product is produced in more than one installation, where more than one benchmarked product is produced in the same installation or where intermediate products are exchanged across installation boundaries.'

10. Article 2 of that decision, entitled 'Scope', provided:

'This Decision shall apply to the free allocation of emission allowances under Chapter III (stationary installations) of Directive [2003/87] in trading periods from 2013 …'

11. Article 3 of Decision 2011/278 provided:

'For the purposes of this Decision, the following definitions shall apply:

(b) "product benchmark sub-installation" means inputs, outputs and corresponding emissions relating to the production of a product for which a benchmark has been set in Annex I;

(c) "heat benchmark sub-installation" means inputs, outputs and corresponding emissions not covered by a product benchmark sub-installation relating to the production, the import from an installation or other entity covered by the Union scheme, or both, of measurable heat which is:

– consumed within the installation's boundaries for the production of products, for the production of mechanical energy other than used for the production of electricity, for

heating or cooling with the exception of the consumption for the production of electricity, or

– exported to an installation or other entity not covered by the Union scheme with the exception of the export for the production of electricity;

(d) "fuel benchmark sub-installation" means inputs, outputs and corresponding emissions not covered by a product benchmark sub-installation relating to the production of non-measurable heat by fuel combustion consumed for the production of products, for the production of mechanical energy other than used for the production of electricity, for heating or cooling with the exception of the consumption for the production of electricity, including safety flaring;

(e) "measurable heat" means a net heat flow transported through identifiable pipelines or ducts using a heat transfer medium, such as, in particular, steam, hot air, water, oil, liquid metals and salts, for which a heat meter is or could be installed;

…

(g) "non-measurable heat" means all heat other than measurable heat;

(h) "process emissions sub-installation" means greenhouse gas emissions listed in Annex I to Directive [2003/87] other than carbon dioxide, which occur outside the system boundaries of a product benchmark listed in Annex I, or carbon dioxide emissions, which occur outside the system boundaries of a product benchmark listed in Annex I, as a result of any of the following activities and emissions stemming from the combustion of incompletely oxidised carbon produced as a result of the following activities for the purpose of the production of measurable heat, non-measurable heat or electricity provided that emissions that would have occurred from the combustion of an amount of natural gas, equivalent to the technically usable energy content of the combusted incompletely oxidised carbon, are subtracted:

(i) the chemical or electrolytic reduction of metal compounds in ores, concentrates and secondary materials;

(ii) the removal of impurities from metals and metal compounds;

(iii) the decomposition of carbonates, excluding those for flue gas scrubbing;

(iv) chemical syntheses where the carbon bearing material participates in the reaction, for a primary purpose other than the generation of heat;

(v) the use of carbon containing additives or raw materials for a primary purpose other than the generation of heat;

(vi) the chemical or electrolytic reduction of metalloid oxides or non-metal oxides such as silicon oxides and phosphates;

…'

12. Article 10(8) of Decision 2011/278, headed 'Allocation at installation level', stated:

'When determining the preliminary total annual amount of emission allowances allocated free of charge for each installation, Member States shall ensure that emissions are not double counted and that the allocation is not negative …'

13. Decision 2011/278 was repealed with effect from 1 January 2021 by Commission Delegated Regulation (EU) 2019/331 of 19 December 2018 determining transitional Union-wide rules for harmonised free allocation of emission allowances pursuant to Article 10a of Directive 2003/87/EC of the European Parliament and of the Council.[5] However, according to Article 27 of that Delegated Regulation, that decision shall continue to apply to allocations in relating to the period prior to 1 January 2021.

B. German law

1. Treibhausgas-Emissionshandelsgesetz

14. Paragraph 9 of the Treibhausgas-Emissionshandelsgesetz (Law on greenhouse gas emissions trading) of 21 July 2011[6] ('the TEHG') is worded as follows:

'(1) Installation operators shall receive an allocation of free allowances in accordance with the principles laid down in Article 10a … of Directive [2003/87] … in the version in force at the relevant time and in … Decision [2011/278]

…'

15. Part 2 of Annex 1 to the TEHG, headed 'Activities', lists, in point 1, among the installations whose emissions fall within the scope of that law, 'combustion units intended to burn fuel with a total rated thermal input equal to or exceeding 20 MW in an installation, unless covered by one of the following points'.

2. Zuteilungsverordnung 2020

16. Paragraph 2(27) and (29) of the Verordnung über die Zuteilung von Treibhausgas-Emissionsberechtigungen in der Handelsperiode 2013 bis 2020 (Zuteilungsverordnung 2020) (Regulation on the allocation of greenhouse gas emission allowances in the 2013 to 2020 trading period) of 26 September 2011[7] ('the ZuV 2020') defines the terms 'fuel benchmark sub-installation' and 'process emissions sub-installation' in terms similar to those of Article 3(d) and (h) of Decision 2011/278.

5 OJ 2019 L 59, p. 8.

6 BGBl. 2011 I, p. 1475.

7 BGBl. 2011 I, p. 1921.

III. The facts of the main proceedings

17. Aurubis operates an installation in Hamburg (Germany) which produces primary copper. Since this activity falls under the category of activities in point 6 of Annex I to Directive 2003/87 of 'production or processing of non-ferrous metals … where combustion units with a total rated thermal input … exceeding 20 MW are operated', Aurubis is subject to the emission trading obligation.

18. The installation comprises two sub-installations, the Rohhüttenwerk Nord and the Rohhüttenwerk Ost (RWO). The dispute in the main proceedings concerns only the latter. The RWO sub-installation is a foundry in which primary copper is obtained by flash smelting the copper concentrate, using what is known as the 'Outokumpu' process.[8] However, according to Aurubis, this process was improved through its own research and development work so that the flash smelting furnace could be operated without the use of carbon fuels.[9]

19. By decision of 17 February 2014, the DEHSt allocated the applicant a total of 2 596 999 free emission allowances for the years 2013 to 2020 further to the applicant's request of 20 January 2012.

20. On 14 March 2014, the applicant lodged an objection. By decision on the objection of 3 April 2018, the DEHSt revoked the allocation decision in part, in so far as the allocation exceeds 1 784 398 emission allowances. It gave as its reason the fact that the copper concentrate could not be taken into account in the context of a 'fuel benchmark sub-installation' but rather had to be attached to a 'process emissions sub-installation'. Following recalculation of the allowance entitlement, the DEHSt revoked 523 027 allowances.

21. The applicant contested the decision on the objection by an action lodged on 30 April 2018 before the referring court.

22. According to the request for a preliminary ruling, Aurubis has maintained before the referring court that the copper concentrate which it uses for the flash smelting process comprises copper and iron sulphide (30% each copper, iron and sulphur). The concentrate also contains traces of carbon and other metals. In order to obtain primary copper, that concentrate is first mixed with sand and other substances for use which also sometimes contain very small quantities of carbon. The preparation thus obtained is placed in the flash smelting furnace with a mixture of air and oxygen. Because of the chemical reaction between oxygen and sulphur contained in the copper concentrate, the temperature in the furnace exceeds 1 200 °C, which in turn leads to the liquidation of the copper concentrate. The sand is also heated and the raw iron masses also liquefy. No fossil fuels are used in the process.

23. According to the request for a preliminary ruling, the substances thus obtained are matte (which is a copper and iron sulphide mixture), iron silicate (as slag) and sulphur dioxide (SO_2). Subsequently, this matte is inserted into a converter, into which the remaining fractions of sulphur and iron are also oxidised by the insufflation of a mixture of air and oxygen. Heat would also be generated on that occasion. The product of that stage, known as 'blister copper', is placed in an anode furnace, in which the remaining fractions of sulphur are transformed into SO_2 by combustion. The final product, primary copper, is thus obtained.

[8] This process is named after a (now disused) copper mine in eastern Finland which first developed this smelting process for sulphur-containing ores in the late 1940s.

[9] See paragraph 8 of Aurubis' written observations.

24. It appears therefore that the process does not use fossil fuels. Unlike other copper producers which use carbon containing fuels such as heavy fuel oil or natural gas, the process developed and used by Aurubis would therefore be an improvement in terms of climate protection. However, although that process typically generates SO_2 – rather than carbon dioxide (CO_2) – the foundry in question nevertheless emits small quantities of CO_2 into the atmosphere because of the presence of very small quantities of carbon in the copper concentrate. The copper concentrate used contained carbon in a proportion of approximately 0.7% by mass. The RWO would therefore emit 0.026 tonnes of CO_2 per tonne of copper concentrate, or on average 29 024 tonnes of CO_2 per year.

25. Aurubis submits that the free allocation of emission allowances should have been based on Article 2(27) of the ZuV 2020 and Article 3(d) of Decision 2011/278 because the sulphur combusted in the flash smelting furnace constitutes a 'fuel' for this purpose. The classification of an input as a fuel does not presuppose that the main purpose of the use of that input is the production of heat or that it is a standard fuel such as coal, oil or natural gas. In the copper concentrate, the copper component is the raw material and the sulphur component is the fuel.

26. Aurubis further argues that the defendant has always relied on a hierarchical relationship between the three fallback methods. According to Aurubis, since the criteria for a 'fuel benchmark sub-installation' are fulfilled, the allocation on the basis of the process emissions benchmark should be disregarded. In addition, for the 'process emissions sub-installation' criterion to be met, there would have to be a direct and immediate causal relationship between the CO_2 emission and the process used. This would not be the case with the 'Outokumpu' process.

27. For those reasons, Aurubis seeks the annulment of the decision of 3 April 2018 and the allocation of additional emission allowances for the years 2013 to 2020.

28. According to the Federal Republic of Germany, for there to be a 'fuel benchmark sub-installation' within the meaning of Article 2(27) of the ZuV 2020 and Article 3(d) of Decision 2011/278, it is necessary that the main purpose of the use of the relevant material is heat generation. It contends that this is not the case so far as the RWO plant is concerned, as the copper concentrate is a raw material and the main purpose of its use is primary copper production. Furthermore, that concentrate is not completely burned in the process involved, contrary to what is assumed when the fuel benchmark is calculated. Moreover, fuels, within the meaning of the fuel benchmark, are fuels which can be replaced by other fuels, in particular by natural gas.

29. The referring court notes at the outset that, if it were to be considered that the RWO is a 'fuel benchmark sub-installation', that would amount to classifying the copper concentrate – or the fraction of sulphur contained therein – as a 'fuel'.

30. That court notes that the Court held, in paragraph 53 of the judgment of 20 June 2019, *ExxonMobil Production Deutschland* (C-682/17, EU:C:2019:518), that Article 3(t) of Directive 2003/87 does not reduce the concept of 'combustion' solely to oxidation reactions which generate a greenhouse gas themselves. That interpretation by the Court is not, however, necessarily decisive for the purpose of interpreting the scope of the term 'fuel' in Article 3(d) of Decision 2011/278.

31. It is necessary, in particular, to determine whether an allocation on the basis of the fuel benchmark presupposes that the primary objective of combustion is the generation of heat. Critically, however, in the present case, the copper concentrate used serves both as a raw material and as fuel. Nor is the question of whether the existence of a fuel, within the meaning of the fuel benchmark referred to in Decision 2011/278 requires the fuel used to be interchangeable, governed by the case-law of the Court.

32. The referring court notes, finally, that the third exchange period ends on 31 December 2020. It states that, according to German case-law, the end of the first and second trading period meant that claims for an allowance which had not yet been paid on 30 April following the end of the trading period had lapsed, in the absence of any express transitional provision in national law. Nor does national law contain any transitional provision in respect of the third trading period. The German authorities refused to adopt such a provision on the ground that the rules relating to the fourth trading period (2021-2030) were laid down exhaustively by EU legislation and that compensation for rights which encroached on several periods would be lawful only if provided for by that legislation.

33. According to the referring court, none of the relevant EU acts contain a provision relating to compensation for rights overlapping several periods. Moreover, no provision was made for any specific quota reserves in anticipation of court decisions. That said, an indication in favour of the argument that the transition from the third to the fourth period does not extinguish the allocation entitlements not awarded on 31 December 2020 could be found in Decision 2015/1814,[10] which provides that certain allowances not allocated until 31 December 2020 must be placed in the 'market stability reserve'.

IV. The questions referred for a preliminary ruling and the procedure before the Court

34. It is in those circumstances that, by decision of 11 June 2020, received at the Court on 19 June 2020, 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) Are the requirements of Article 3(d) of [Decision 2011/278] for a free allocation of emission allowances on the basis of a fuel benchmark sub-installation fulfilled where, in an installation for the production of non-ferrous metals in accordance with Annex I to Directive 2003/87, a sulphur-containing copper concentrate is used in a flash smelting furnace to produce primary copper and the non-measurable heat required to melt the copper ore contained in the concentrate is produced essentially through oxidation of the sulphur contained in the concentrate, meaning that the copper concentrate is used both as a source of raw material and as a combustible material to generate heat?

(2) If the answer to Question 1 is in the affirmative:

[10] Decision (EU) 2015/1814 of the European Parliament and of the Council of 6 October 2015 concerning the establishment and operation of a market stability reserve for the Union greenhouse gas emission trading scheme and amending Directive 2003/87/EC (OJ 2015 L 264, p. 1).

Can entitlements to a further free allocation of emission allowances for the third trading period be met after the end of the third trading period with entitlements for 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?'

35. Written observations were submitted by Aurubis, the Federal Republic of Germany, and the Commission. In addition, they presented oral arguments at the hearing on 19 May 2021.

V. Analysis

A. The first question

36. In the context of the dispute before it, the referring court must determine whether the activity consisting of the production of primary copper in a flash smelting furnace using the 'Outokumpu' process meets the criteria of a 'fuel benchmark sub-installation'. The first question asked by the referring court concerns, consequently, the interpretation of Article 3(d) of Decision 2011/278, which defines this concept for the trading period running from 2013 to 2020.

37. The specific features of the process at issue in the main proceedings give rise to three particular difficulties in the interpretation of the definition of 'fuel benchmark sub-installation' contained in Article 3(d) of Decision 2011/278. First, the substance involved is both a raw material and a fuel. Furthermore, it is a low-carbon raw material and it is subject to autothermal reaction. There is therefore no *external* heat source and no input of high carbon fuels. Second, the combustion of the fuel used is only partial. Third, the heat production is not necessarily the main purpose of the use of the material in question.

38. However, for the reasons I will explain, I do not consider that these particularities prevent the requirements of Article 3(d) of Decision 2011/278 from being satisfied where an installation for the production of non-ferrous metals uses a copper concentrate containing sulphur in a flash smelting furnace to produce primary copper and that the non-measurable heat required to smelt the copper ore contained in that concentrate is produced essentially through oxidation of the sulphur contained in the same concentrate.

39. This interpretation is founded on the traditional methods of interpretation used by the Court in the context of the greenhouse gas emission allowance trading scheme, that is to say, by having regard not only to the wording of Article 3(d) of Decision 2011/278, but also by taking into account the general scheme of Directive 2003/87 and of Decision 2011/278 and the objectives which they pursue.[11] I propose now to consider each of these in turn.

1. Literal and contextual interpretations

40. First, it may be observed that while the term 'fuel' is not defined by Decision 2011/278, the notion of 'fuel benchmark sub-installation' is, however, defined by Article 3(d) of Decision 2011/278.

[11] See, to that effect, judgments of 18 January 2018, *INEOS* (C-58/17, EU:C:2018:19, paragraphs 34 and 35), and of 3 December 2020, *Ingredion Germany* (C-320/19, EU:C:2020:983, paragraphs 49 and 50).

41. According to this provision, a 'fuel benchmark sub-installation' exists where 'inputs, outputs and corresponding emissions [are] not covered by a product benchmark sub-installation [and are related] to the production of non-measurable heat by fuel combustion consumed for the production of products …'.

42. It follows from that definition that the term 'combustion' can be relevant in order to specify the meaning of the notion of 'fuel' used by Article 3(d) of Decision 2011/278. However, 'combustion' is defined in Article 3(t) of Directive 2003/87 as 'any oxidation of fuels, regardless of the way in which the heat … produced by this process is used, and any other directly associated activities …'. Furthermore, in the case which gave rise to the judgment of 20 June 2019, *ExxonMobil Production Deutschland* (C-682/17, EU:C:2019:518), the Court clarified that Article 3(t) of Directive 2003/87 does not reduce the concept of 'combustion' solely to oxidation reactions which generate a greenhouse gas themselves'. [12]

43. As explained by Advocate General Saugmandsgaard Øe in his Opinion in that case, the relevant preparatory documents confirm that Article 3(t) of Directive 2003/87 was inserted with the intention to give a broad definition of 'combustion' that could cover any oxidation of fuels, regardless of the objective. [13]

44. In that context, it must be noted that the two provisions of the relevant legal framework which refer to the concept of 'fuel' do not limit the scope of this term in any way, whether as regards its composition or nature, the amount of carbon it should contain, the way in which the ignition should take place, the percentage of fuel to be used in the process or the purpose of the use of the material which contains the fuel in question. By way of contrast with the provisions of Article 3(h)(v) of Decision 2011/278 – which expressly refers to the use of carbon containing additives or raw materials for a *primary purpose* other than the generation of heat – Article 3(d) of Decision 2011/278 seems to require only that the inputs, outputs and corresponding emissions are *related* to the production of non-measurable heat by fuel combustion consumed for the production of products.

45. The objectives pursued by Directive 2003/87 and Decision 2011/278 serve to confirm that particular interpretation.

2. Teleological interpretation

46. As is apparent from the Court's settled case-law, Directive 2003/87 has the purpose of establishing an emission allowance trading scheme which seeks to reduce greenhouse gas emissions into the atmosphere to a level that prevents dangerous anthropogenic interference with the climate system and the ultimate objective of which is protection of the environment. [14] Nevertheless, it is clear that there is an economic logic underlying the scheme that encourages a participant in the scheme to emit quantities of greenhouse gases that are less than the allowances originally allocated to it, in order to sell the surplus to another participant which has emitted more than its allowance. [15]

[12] Paragraph 53.

[13] Opinion of Advocate General Saugmandsgaard Øe in *ExxonMobil Production Deutschland* (C-682/17, EU:C:2019:167, point 44).

[14] See, to that effect, judgments of 20 June 2019, *ExxonMobil Production Deutschland* (C-682/17, EU:C:2019:518, paragraph 62), and of 3 December 2020, *Ingredion Germany* (C-320/19, EU:C:2020:983, paragraph 38).

[15] See, to that effect, judgments of 8 March 2017, *ArcelorMittal Rodange et Schifflange* (C-321/15, EU:C:2017:179, paragraph 22); of 20 June 2019, *ExxonMobil Production Deutschland* (C-682/17, EU:C:2019:518, paragraph 63); and of 3 December 2020, *Ingredion Germany* (C-320/19, EU:C:2020:983, paragraph 39).

47. In other words, the scheme for greenhouse gas emission allowance trading at EU level is an economic tool for environmental protection based on the polluter-pays principle. The objective of this instrument is that the *global level* of pollution should decrease. It follows, therefore, that Decision 2011/278 should, where possible, be interpreted in a fashion which rewards – rather than penalises – the undertaking which has mitigated and reduced greenhouse gas emissions.

48. In that context, the incentive mechanism underlying the emission allowance trading system cannot be underestimated. Indeed, one of the functions of the scheme is to encourage investments with a view to reducing carbon dioxide emissions in an economically efficient way and thus to be a driver of low-carbon innovation that contributes to the fight against climate change. [16] This incentive mechanism is clearly intended by the EU legislature, with Article 10a(1) of Directive 2003/87 specifying that allocation should take 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 [and] alternative production processes'. The first recital of Decision 2011/278 specifically draws attention to this aspect of the scheme.

49. As, however, I have already pointed out, that is the economic logic underlying the scheme that encourages a participant to emit less quantities of greenhouse gases than the allowances originally allocated to it, in order to sell the surplus to another participant who has emitted more than its allowance. In this way, the second participant will not reduce its emissions, but it will have to pay for its emissions and, above all, the overall target will be met – since the first participant will have reduced its emissions – thanks to an investment whose positive effects on the environment will continue after the complete abolition of the free allowances. [17] Until then, the retention of emission allowances does not constitute a form of permit to pollute, [18] but obtaining a profit from the sale of its unused allowances is in fact part of the system of incentives created by the emissions trading scheme. [19]

50. In those circumstances, it seems to me that the objectives pursued by Directive 2003/87 and Decision 2011/278 lead to the rejection of an interpretation which would exclude from the concept of 'fuel' used in Article 3(d) of Decision 2011/278 a concentrate such as that at issue in the main proceedings *simply* because its combustion is only partial or because the purpose of its use would not be primarily to produce heat, whereas, first, it is not disputed that the process in question leads to the production of non-measurable heat by a combustion phenomenon and, secondly and most importantly, that process is an innovation which guarantees a reduction in greenhouse gases emissions or, at least, seems to have some potential to reduce CO_2 emissions. [20]

51. Against this interpretation, the Commission and the Federal Republic of Germany argue that there is a risk of overlap and double counting of emissions, although such an overlap is prohibited by several provisions of Decision 2011/278. [21] At the hearing on 19 May 2021, the representative of

[16] See, to that effect, judgments of 12 April 2018, *PPC Power* (C-302/17, EU:C:2018:245 paragraph 27), and of 21 June 2018, *Poland* v *Parliament and Council* (C-5/16, EU:C:2018:483, paragraph 61).

[17] The principle that free emission allowances should be abolished entirely by 2027 was enshrined in Article 10a(11) of Directive 2003/87, in the version which was applicable in the present case. However, this principle has been called into question by the amendments made to Articles 10a and 10b of Directive 2003/87 by Article 1(14)(k) and (15) of Directive 2018/410.

[18] See, to that effect (implicitly), judgment of 17 October 2013, *Billerud Karlsborg and Billerud Skärblacka* (C-203/12, EU:C:2013:664, paragraph 32).

[19] See, to that effect, judgment of 12 April 2018, *PPC Power* (C-302/17, EU:C:2018:245, paragraph 27).

[20] According to my understanding of the process at issue as explained by Aurubis and the referring court in its request for a preliminary ruling, and therefore subject to verification by the latter.

[21] See, in this regard, Articles 6(2), 7(7) and 8(5) of Decision 2011/278 and judgment of 8 September 2016, *Borealis and Others* (C-180/15, EU:C:2016:647, paragraphs 69 and 70).

the Federal Republic of Germany emphasised the absence of any criteria in Decision 2011/278 which would enable any distinction to be made in 'dual' cases between what is fuel on the one hand and what constitutes raw materials on the other.

52. For my part, however, I do not share this fear. Indeed, I recently explained in my Opinion of 3 June 2021 in *ExxonMobil* (C-126/20, EU:C:2021:457) why I consider that it would be contrary to the scheme of Article 10a of Directive 2003/87 and of Decision 2011/278 not to apply a hierarchy between the different benchmarks, as expressly described in recital 12 of Decision 2011/278. [22]

53. In this regard, therefore, I would simply recall that, while the Court has already held on multiple occasions that the definitions of the different benchmark sub-installations are mutually exclusive, [23] it has also ruled that Decision 2011/278 has developed '*a hierarchy of three fallback approaches* … in order to maximise greenhouse gas emission reductions and energy savings for at least parts of the production processes concerned'. [24] It is therefore established that 'it is only in the case where deriving a product benchmark has not been feasible, but greenhouse gases eligible for the free allocation of emission allowances occur, that those allowances should be allocated on the basis of the three other so-called "fallback" approaches, *in accordance with the hierarchy thus determined*'. [25] The very existence of this hierarchy militates against the risk of double counting.

3. Conclusion on the first question

54. Consequently, on the basis of a literal, contextual and teleological interpretation of Article 3(d) of Decision 2011/278, I find myself arriving at the conclusion that this provision should be interpreted as meaning that the requirements for a free allocation of emission allowances on the basis of a 'fuel benchmark sub-installation' are fulfilled where, in an installation for the production of non-ferrous metals in accordance with Annex I to Directive 2003/87, a sulphur-containing copper concentrate is used in a flash smelting furnace to produce primary copper and the non-measurable heat required to melt the copper ore contained in the concentrate is produced essentially through oxidation of the sulphur contained in the concentrate, meaning that the copper concentrate is used both as a source of raw material and as a combustible material to generate heat.

B. The second question

55. By its second question, the referring court wants to know whether entitlements to free allowances for the third trading period which are only established by a court after the end of that trading period can be met by free allowances for the fourth trading period.

56. This question is exactly the same as the fifth question in *ExxonMobil* case (C-126/20).

[22] See my Opinion of 3 June 2021, *ExxonMobil* (C-126/20, EU:C:2021:457, points 79 to 87).

[23] See, to that effect, judgments of 8 September 2016, *Borealis and Others* (C-180/15, EU:C:2016:647, paragraph 62); of 18 January 2018, *INEOS* (C-58/17, EU:C:2018:19, paragraph 29); of 20 June 2019, *ExxonMobil Production Deutschland* (C-682/17, EU:C:2019:518, paragraph 104); and of 3 December 2020, *Ingredion Germany* (C-320/19, EU:C:2020:983, paragraph 68).

[24] Judgment of 8 September 2016, *Borealis and Others* (C-180/15, EU:C:2016:647, paragraph 67). Emphasis added.

[25] Judgment of 18 January 2018, *INEOS* (C-58/17, EU:C:2018:19, paragraph 30). Emphasis added.

57. Following my analysis in the Opinion delivered in that case, I had come to the conclusion that this question should be answered in the affirmative. As the Court has not yet delivered its judgment, I respectfully maintain this interpretation and take the liberty to refer to my earlier Opinion for further explanation. [26]

VI. Conclusion

58. Accordingly, in the light of the foregoing considerations, I propose that the Court should answer the questions referred by the Verwaltungsgericht Berlin (Administrative Court, Berlin, Germany) as follows:

(1) Article 3(d) of Commission Decision 2011/278/EU of 27 April 2011 determining transitional Union-wide rules for harmonised free allocation of emission allowances pursuant to Article 10a of Directive 2003/87/EC must be interpreted as meaning that the requirements for a free allocation of emission allowances on the basis of a 'fuel benchmark sub-installation' are fulfilled where, in an installation for the production of non-ferrous metals in accordance with Annex I to Directive 2003/87/EC of the European Parliament and of the Council of 13 October 2003 establishing a scheme for greenhouse gas emission allowance trading within the Community and amending Council Directive 96/61/EC, as amended by Directive 2009/29/EC of the European Parliament and of the Council of 23 April 2009, a sulphur-containing copper concentrate is used in a flash smelting furnace to produce primary copper and the non-measurable heat required to melt the copper ore contained in the concentrate is produced essentially through oxidation of the sulphur contained in the concentrate, meaning that the copper concentrate is used both as a source of raw material and as a combustible material to generate heat.

(2) Entitlements to a further free allocation of emission allowances for the third trading can be met after the end of the third trading period with 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. Allowances for the third trading period do not lapse on expiry of the third trading period.

[26] See my Opinion of 3 June 2021, *ExxonMobil* (C-126/20, EU:2021:C:2021:457, points 89 to 98).