Reports of Cases

JUDGMENT OF THE GENERAL COURT (Second Chamber)

26 July 2023 *

(Environment – Directive 2003/87/EC – Scheme for greenhouse gas emission allowance trading – National implementing measures – Transitional free allocation of greenhouse gas emission allowances – Decision to exclude an installation exclusively using biomass – Duty of diligence – Right to be heard – Obligation to state reasons – Manifest error of assessment – Equal treatment – Legitimate expectations – Plea of illegality – Paragraph 1 of Annex I to Directive 2003/87)

In Case T-269/21,

Arctic Paper Grycksbo AB, established in Grycksbo (Sweden), represented by A. Bryngelsson, A. Johansson and F. Sjövall, lawyers,

applicant,

v

European Commission, represented by G. Wils, B. De Meester and P. Carlin, acting as Agents,

defendant,

supported by

European Parliament, represented by C. Ionescu Dima, W. Kuzmienko and P. Biström, acting as Agents,

and by

Council of the European Union, represented by A. Norberg and J. Himmanen, acting as Agents,

interveners,

THE GENERAL COURT (Second Chamber),

composed of A. Marcoulli, President, S. Frimodt Nielsen (Rapporteur) and R. Norkus, Judges,

Registrar: H. Eriksson, Administrator,

having regard to the written part of the procedure,

* Language of the case: Swedish.

further to the hearing on 2 February 2023,

gives the following

Judgment

1 By its action based on Article 263 TFEU, the applicant, Arctic Paper Grycksbo AB, seeks annulment, in so far as it is concerned, of Article 1(1) of, and Annex I to, Commission Decision (EU) 2021/355 of 25 February 2021 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 of the European Parliament and of the Council (OJ 2021 L 68, p. 221; 'the contested decision').

Background to the dispute

2 The present action concerns an installation for the production of coated fine paper operated by the applicant in Grycksbo (Sweden). The applicant has held a greenhouse gas emissions permit since 2005.

3 The effect of the contested decision is to exclude the installation in question from the scheme for greenhouse gas emission allowance trading ('the ETS') established by Directive 2003/87/EC of the European Parliament and of the Council of 13 October 2003 establishing an ETS within the Community and amending Council Directive 96/61/EC (OJ 2003 L 275, p. 32), as amended by Directive (EU) 2018/410 of the European Parliament and of the Council of 14 March 2018 amending Directive 2003/87 to enhance cost-effective emission reductions and low-carbon investments, and Decision (EU) 2015/1814 (OJ 2018 L 76, p. 3). That exclusion has, inter alia, the effect of depriving the applicant of the free allocation of emission allowances for the fourth trading period (2021-2025).

4 In order to claim that allowance, on 7 May 2019 the applicant submitted an application to that effect to the Naturvårdsverket (Environmental Protection Agency, Sweden). In that application, it rounded to zero the number of tonnes of fossil carbon dioxide emitted during the baseline period (from 2014 to 2018). According to the applicant, its actual emissions were greater than 0 tonnes and less than 0.5 tonnes for the years 2018 to 2020.

5 On 27 September 2019, the Kingdom of Sweden submitted to the European Commission the national implementation measure ('NIM') provided for in Article 11 of Directive 2003/87, that is to say, the list of installations to be covered by the ETS for the fourth trading period. The installation in question appeared on that list, under reference SE468. The quantities of fossil carbon dioxide reported for that installation were 0 tonnes, for each year of the baseline period (2014-2018).

6 By letter containing comments of 19 May 2020, the Commission challenged the inclusion of 49 installations on the NIM, including the installation in question, in the following terms:

'In at least one year of the baseline period, [the installation in question] had close to 100% of emissions from biomass. Such installations are not expected to be included in the … ETS. Please explain.'

7 On 16 June 2020, the Environmental Protection Agency replied to the Commission's comments, stating that the installation in question was covered by a national option measure, approved by the Commission, providing for the inclusion of installations connected to a district heating network.

8 By email sent to the Environmental Protection Agency on 30 September 2020, the Commission reiterated its position that installations that had exclusively used biomass during the abovementioned reporting period (2014-2018) had to be excluded from the ETS.

9 By email of 1 October 2020, the Environmental Protection Agency sent the Commission an email in which it acknowledged that the installation in question was not connected to a district heating network and that its inclusion in the ETS was questionable. Nevertheless, it did not consider that it could withdraw that installation from the NIM at that stage of the procedure, on the ground that national administrative law did not provide for the possibility of unilateral withdrawal without a legal basis for the authorisation available to the applicant. It also stated that it could not be ruled out that the installation in question might use fossil fuel in the future.

10 By email of 17 December 2020, the Environmental Protection Agency informed the Commission that the identification of the installations the exclusion of which was envisaged by the Commission was an arduous task, due to the criterion of exclusive use of biomass and the baseline period used (2014-2018).

11 On 14 January 2021, the Commission communicated to the representatives of the Member States sitting on the Climate Change Committee a draft regulation on the revision of the product benchmark values for the trading period 2021 to 2025. That draft was amended on 26 January 2021, with a view to its approval on the following day by that committee.

12 By email of 26 January 2021, the Environmental Protection Agency informed the Commission that it had found differences in the declarations of undertakings which had emitted less than 0.5 tonnes of fossil carbon dioxide during the baseline period. It stated that some undertakings, which it did not identify, had rounded those emissions to 0 tonnes, while others had indicated their actual emissions without rounding such emissions. It observed that the Commission disputed the inclusion only of installations which reported fossil carbon dioxide emissions equal to 0 tonnes, whereas the inclusion of installations which had reported their emissions without rounding them had not been challenged. It asked the Commission to specify the methods which it intended to apply to all installations using biomass.

13 On 28 January 2021, the Commission informed the Environmental Protection Agency that the phase for review of the NIMs had been completed and that it could no longer thereafter take account of amendments affecting the list of installations and the calculation of the product benchmarks.

14 On the same day, the final text of the draft regulation referred to in paragraph 11 above was sent to the Member States for adoption by written procedure. The deadline for making representations was fixed at 11 February 2021.

15 On 1 February 2021, the Environmental Protection Agency stated that the list of installations included in the NIM could not be regarded as definitive until the Commission had taken a position on the issues mentioned in the email of 26 January 2021 (see paragraph 12 above).

16 By email of the same date, the Commission replied as follows:

'We had finalised all the stages of the NIMs' assessments before we submitted the [benchmark] regulation to the Climate Change Committee for positive opinion and the NIMs Commission Decision for adoption.

As mentioned in a previous email, in case that a [Member State] finds an error in the NIMs list that has an impact to neither [benchmark] values, nor NIMs [decision], but only to free allocations (or just updates the data so in the future there is the correct reference and in order to avoid a NIMs correction in the future) we can accept [an] updated NIMs list at this stage, before the submission of the preliminary annual amount of free allowances.

As regards the method we followed concerning the installations with exclusive use of biomass, that was based on the emissions and no rounding was applied, either to direct emissions or to emissions from biomass.'

17 By email of 4 February 2021, the Environmental Protection Agency drew the Commission's attention to apparent inconsistencies in how it intended to treat, in the light of the exclusion of installations exclusively using biomass, installations whose fossil carbon dioxide emissions appeared to it to be similar. In the same email, it also pointed out to the Commission that the applicant had reported 0.3727 tonnes of fossil carbon dioxide emissions in 2018. Lastly, it asked whether it was possible for it to update the NIM by mentioning, without rounding them, the quantities of fossil carbon dioxide actually released during the baseline period for each installation regarded by the Commission as exclusively using biomass.

18 By email of 16 February 2021, the Commission replied to the Environmental Protection Agency, stating that it was no longer possible to make amendments affecting the identity of the installations in the NIM or the calculation of the product benchmarks, since the acts relating to them were in the process of being adopted.

19 On 25 February 2021, the Commission adopted the contested decision.

20 In the contested decision, the Commission indicated the cases in which it intended to raise objections to the NIMs which had been proposed to it. As regards the applicant, the Commission stated the following in recital 11 of that decision:

'[The Republic of] Finland and [the Kingdom of] Sweden proposed the inclusion of 51 installations using biomass exclusively. Some of those installations were subject to unilateral opt-in in 2004-2007, approved by the Commission pursuant to Article 24 of Directive [2003/87]. Nevertheless, installations exclusively using biomass were subsequently excluded from the EU ETS, in line with a new provision in paragraph 1 of Annex I to Directive [2003/87]. That provision was introduced … by Directive 2009/29 … and since its application on 1 January 2013, it determined a new scope for the ETS, including regarding prior opt-ins. Therefore, the inclusion of the installations that used biomass exclusively is to be rejected for all the years of the baseline period including when they were listed in Article 11(1) of Directive [2003/87].'

21 On 12 March 2021, the Commission adopted Implementing Regulation (EU) 2021/447 determining revised benchmark values for the free allocation of emission allowances for the period from 2021 to 2025 pursuant to Article 10a(2) of Directive 2003/87 (OJ 2021 L 87, p. 29).

22 On 2 June 2021, the Kingdom of Sweden sent the Commission a new NIM, on which the applicant no longer appeared.

Forms of order sought

23 The applicant claims that the Court should:

– annul the contested decision in so far as it concerns the applicant;

– order the Commission to pay the costs.

24 The Commission contends that the Court should:

– dismiss the action;

– order the applicant to pay the costs.

25 The European Parliament contends, in essence, that the Court should dismiss the action.

26 The Council of the European Union contends that the Court should:

– dismiss the action;

– order the applicant to pay the costs.

Law

27 In support of the action, the applicant relies on six pleas in law. The first alleges a manifest error of assessment. The second alleges infringement of the principle of equal treatment. The third relates to infringement of essential procedural requirements. The fourth plea in law alleges an infringement of the principle of the protection of legitimate expectations. The fifth plea in law alleges infringement of Directive 2003/87, in particular Article 10a thereof and paragraph 1 of Annex I thereto. Finally, the sixth plea in law alleges that that latter paragraph is unlawful.

28 In addition, without formally linking them to the six pleas in law in the action, the main parties exchanged arguments relating to the legal framework applicable to the procedure for the adoption of the contested decision and to the obligations incumbent on the Commission. Those arguments have a bearing on the assessment of the second and third pleas in law, in particular.

29 It is therefore necessary, first of all, to recall the legal framework of which the ETS forms part and the objectives of Directive 2003/87, then to examine the parties' arguments relating to the regularity of the procedure for adoption of the contested decision and, finally, those calling into question the merits of that decision.

Preliminary observations on the ETS and the objectives pursued by Directive 2003/87

30 The ETS, governed by Directive 2003/87, concerns installations meeting the criteria set out in Annex I thereto and emitting one or more of the greenhouse gases mentioned in Annex II thereto (Article 2 of that directive). In accordance with Article 1 of that directive, the purpose of the ETS is to encourage undertakings to reduce their greenhouse gas emissions in a cost-effective and economically efficient manner. As is apparent from recital 8 of that directive, the ETS therefore involves the inclusion of activities which have some potential to reduce greenhouse gas emissions (see judgment of 20 June 2019, *ExxonMobil Production Deutschland*, C-682/17, EU:C:2019:518, paragraphs 55 and 56 and the case-law cited).

31 In that regard, it should be recalled that Directive 2003/87 has the purpose of establishing an ETS scheme which seeks to reduce greenhouse gas emissions in the atmosphere to a level that prevents dangerous anthropogenic interference with the climate system, with the ultimate objective of protecting the environment (see, to that effect, judgments of 8 March 2017, *ArcelorMittal Rodange et Schifflange*, C-321/15, EU:C:2017:179, paragraph 24 and the case-law cited, and of 20 June 2019, *ExxonMobil Production Deutschland*, C-682/17, EU:C:2019:518, paragraph 62 and the case-law cited). That directive thus aims to reduce the overall greenhouse gas emissions of the European Union in comparison with 1990 levels, in an economically efficient manner (see, to that effect, judgment of 20 June 2019, *ExxonMobil Production Deutschland*, C-682/17, EU:C:2019:518, paragraph 64 and the case-law cited).

32 The ETS thus aims to fulfil the International commitments of the European Union and the Member States as regards the environment, in following multiple objectives, such as 'the least possible diminution of economic development and employment' (recital 5 of Directive 2003/87), 'preserving the integrity of the internal market' (recital 7 of that directive), 'to avoid distortions of competition' (recital 7 of that directive) (see judgment of 20 June 2019, *ExxonMobil Production Deutschland*, C-682/17, EU:C:2019:518, paragraph 101 and the case-law cited) and to prevent 'carbon leakage', that is to say, the relocation, outside the internal market, of producers that emit greenhouse gases, under the conditions laid down in Article 10b of that directive, in particular.

33 To that end, the undertakings included in the ETS are required, first, to obtain a greenhouse gas emissions permit issued to them by the Member States subject to the demonstration of their capacity to monitor and report their emissions and, second, to surrender each year allowances that are transferable within and outside the European Union. The equivalence between the allowances surrendered by each installation and its actual greenhouse gas emissions assessed in tonnes of carbon dioxide equivalent is verified and accounted for by the Member States (Article 3(a) and Articles 4 to 6, 12, 15, 19 and 25 of Directive 2003/87).

34 The ETS thus establishes a set of economic incentives for the reduction of greenhouse gases by the installations themselves. While the ultimate objective of the ETS is the protection of the environment, that scheme does not of itself reduce greenhouse gas emissions. On the other hand, it encourages and promotes the pursuit of the lowest cost of achieving a reduction of those emissions to a level compatible with the international commitments of the European Union and its Member States, which depends on the stringency of the total quantity of allowances allocated (judgments of 16 December 2008, *Arcelor Atlantique et Lorraine and Others*, C-127/07, EU:C:2008:728, paragraph 31, and of 17 October 2013, *Billerud Karlsborg and Billerud Skärblacka*, C-203/12, EU:C:2013:664, paragraph 26).

35 The ETS thus relies on an economic logic that encourages a participant 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. Emission allowances therefore have commercial value (see judgment of 8 March 2017, *ArcelorMittal Rodange et Schifflange*, C-321/15, EU:C:2017:179, paragraph 22 and the case-law cited; judgment of 20 June 2019, *ExxonMobil Production Deutschland*, C-682/17, EU:C:2019:518, paragraph 63; see also Opinion of Advocate General Campos Sánchez-Bordona in *ArcelorMittal Rodange et Schifflange*, C-321/15, EU:C:2016:516, points 48 to 55).

36 The ETS also provides, by a transitional exception to the rule that emission allowances are to be auctioned, for the distribution of certain free allowances (Articles 9, 9a, 10, 10a and 10c of Directive 2003/87), the number of which has declined in a linear manner since 2013. The number of free allowances allocated is now determined on the basis of a benchmark calculated for each product, in principle and as far as possible, which corresponds to the average performance of the 10% most environmentally efficient producers under the conditions laid down in Article 10a of that directive. Under Article 10a(2)(a) and (b) of that directive, for the period 2021 to 2025, the benchmark values are to be subject to a maximum annual reduction rate of 1.6%.

37 In order to be eligible for the free allocation of allowances, an installation must be included in the implementing measure, the adoption of which by the Member State in the territory of which it is situated is provided for in Article 11(1) of Directive 2003/87. In accordance with paragraph 3 of Article 11, Member States may not issue allowances free of charge to installations whose inscription has been refused by the Commission. It is, moreover, by taking account of the emissions of the installations included that the average performance for each product benchmark, on which the free allocation of allowances depends, is calculated.

38 Allowances which are not distributed free of charge are auctioned under the conditions laid down in Article 10 of Directive 2003/87. The allocation of emission allowances is therefore gradually required to be based exclusively on the principle of auctioning, which, according to the EU legislature, is generally considered to be the most efficient system from an economic point of view (see, to that effect, judgment of 20 June 2019, *ExxonMobil Production Deutschland*, C-682/17, EU:C:2019:518, paragraph 66).

39 The categories of activities listed in Annex I to Directive 2003/87 include the production of paper or cardboard with a production capacity exceeding 20 tonnes per day. According to that annex, the installations concerned are subject to the ETS with regard to their carbon dioxide emissions.

40 However, paragraphs 1 and 3 of Annex I to Directive 2003/87 provide:

‘1. … installations exclusively using biomass are not covered by this Directive …

…

3. … units which use exclusively biomass shall not be taken into account for the purposes of this calculation [of the total rated thermal input of an installation]. “Units using exclusively biomass” include units which use fossil fuels only during start-up or shut-down of the unit.’

41 Part A of Annex IV to Directive 2003/87 contains a section entitled 'Calculation of emissions', the last sentence of the fourth paragraph of which provides that 'the emission factor for biomass … shall be zero'.

42 Directive (EU) 2018/2001 of the European Parliament and of the Council of 11 December 2018 on the promotion of the use of energy from renewable sources (OJ 2018 L 328, p. 82) includes biomass among renewable energy sources. Point 24 of Article 2 of that directive defines biomass as 'the biodegradable fraction of products, waste and residues from biological origin from agriculture, including vegetal and animal substances, from forestry and related industries, including fisheries and aquaculture, as well as the biodegradable fraction of waste, including industrial and municipal waste of biological origin'.

43 The parties disagree as to the scope and lawfulness of the exception relating to greenhouse gas emissions from biomass, which, as noted in paragraphs 2 to 22 above, led the Commission, in the contested decision, to refuse to include the installation in question in the ETS, which has the effect, inter alia, of depriving it of any free allocation of greenhouse gas allowances for the fourth trading period (2021-2025).

The regularity of the procedure leading to the adoption of the contested decision

44 In addition to the arguments specifically relating to the regularity of the procedure leading to the adoption of the contested decision, the parties disagree on two issues, which must be examined as a preliminary point.

45 First, the applicant criticises the Commission for refusing to take account of the arguments submitted to it on 26 January and 4 February 2021 (see paragraphs 12 and 17 above), on the ground that, at that stage of the adoption of the NIMs provided for in Article 11 of Directive 2003/87 and of the delegated regulation on the value of the benchmarks provided for in Article 10a of that directive, it was no longer possible for that institution to take into account amendments affecting the identification of the installations included in the ETS and eligible for a free allocation of allowances. Those arguments, presented independently, overlap in large measure with those put forward by the applicant in support of the first part of the third plea and will be examined in that context.

46 Second, the parties disagree on the scope of the rounding rules resulting from the first subparagraph of Article 72(1) of Commission Implementing Regulation (EU) 2018/2066 of 19 December 2018 on the monitoring and reporting of greenhouse gas emissions pursuant to Directive 2003/87 and amending Commission Regulation (EU) No 601/2012 (OJ 2018 L 334, p. 1). It is necessary to examine, first of all, whether the applicant, as it claims, was entitled to base an argument on the fact that the rounded data which it submitted to the Environmental Protection Agency and which were transmitted by the latter to the Commission corresponded, however, to actual emissions of fossil carbon dioxide that were not zero, but between 0 and 0.5 tonnes.

The taking into account of the rounded data reported during the procedure leading to the adoption of the contested decision

47 In 2018, as the email that the Environmental Protection Agency sent to the Commission on 4 February 2021 (see paragraph 17 above) mentions, the applicant submits that it emitted 0.37 tonnes of fossil carbon dioxide. The applicant also produces certified statements for 2019 and 2020, according to which it issued, in respect of those two years, 0.29 tonnes and 0.46 tonnes of fossil carbon dioxide respectively.

48 The applicant submits that, because it complied with the rounding rules laid down by the Commission by reporting zero emissions for 2018, it finds itself, by virtue of that fact alone, in a less favourable situation than the undertakings which, in breach of those rules, had reported their actual emissions below 0.5 tonnes. Those installations were not excluded from the ETS.

49 Lastly, the applicant maintains that the Commission's position that all installations which emitted less than 0.5 tonnes of fossil carbon dioxide, whether rounded in their declarations or not, had to be excluded from the ETS constitutes an *a posteriori* rationalisation of which the Environmental Protection Agency was clearly not informed before the contested decision was adopted.

50 The Commission disputes the applicant's line of reasoning.

51 According to the wording of the first subparagraph of Article 72(1) of Implementing Regulation 2018/2066, 'total annual emissions of each of the greenhouse gases [carbon dioxide, nitrous oxide and perfluorocarbons] shall be reported as rounded tonnes of [carbon dioxide or carbon dioxide equivalent]'.

52 It is common ground and it is apparent, in particular, from the documents produced by the Commission in response to the measure of organisation of procedure sent to it by the Court and from the documents spontaneously lodged by the applicant that, throughout the procedure leading to the adoption of the contested decision, the emissions data concerning the applicant in respect of the 2014 to 2018 baseline period which had been communicated by the Environmental Protection Agency to the Commission were zero.

53 The applicant does not dispute that it did not emit fossil carbon dioxide from 2014 to 2017. By contrast, the applicant argues that the figure of zero tonnes relating to 2018 was a result of rounding down its actual emissions, which amounted to 0.37 tonnes. It maintains that its compliance with the rounding rules caused it relative harm, compared with installations which did not report zero data even though their actual emissions were below 0.5 tonnes and were not excluded from the ETS, which allowed them to continue to receive a free allocation of allowances.

54 Without disputing the truth of the applicant's claims, the Commission submits that the rounding rules are mandatory in nature and that the applicant is not justified in complaining about the consequences of their application.

55 There can, however, be little doubt that, although the applicant complied with the rounding rules laid down by the abovementioned provision, that is not the case for all the installations in the NIM. The Commission acknowledges, moreover, that it erroneously failed to exclude two installations whose reported emissions were less than 0.5 tonnes, but had not been rounded.

56 It is, admittedly, regrettable that the Commission did not take a consistent position on that issue during the procedure for the adoption of the contested decision, as illustrated, inter alia, by the questions which it put to the Environmental Protection Agency and the identification of installations which it intended to exclude from the ETS. However, the application of the rounding rule is required by the first subparagraph of Article 72(1) of Implementing Regulation 2018/2066. That obligation reproduces the obligation previously laid down in the first subparagraph of Article 72(1) of Commission Regulation (EU) No 601/2012 of 21 June 2012 on the monitoring and reporting of greenhouse gas emissions pursuant to Directive 2003/87 (OJ 2012 L 181, p. 30), which it replaces. Therefore, it was applicable both to the annual emissions reports drawn up by installations covered by the ETS for each of the years in the period 2014 to 2018 and to the emissions report relating to the baseline period which the Member States were required to submit in support of their NIM initiatives.

57 The applicant's argument that that rule cannot be applied in order to determine whether, within the meaning of paragraph 1 of Annex I to Directive 2003/87, an installation must be regarded as exclusively using biomass cannot be upheld.

58 As is apparent from Articles 1 and 2 of Implementing Regulation 2018/2066, that mandatory rule applies to all emission reports linked to the activities referred to in Annex I to Directive 2003/87. It is therefore an objective method, applicable to all installations coming within the scope of application of the directive for each year of the baseline period, as was pointed out in paragraph 56 above, for determining whether or not an installation using biomass comes within the exclusion relating to the exclusive use of that biomass within the meaning of paragraph 1 of that annex.

59 By contrast, the interpretation proposed by the applicant, according to which an installation using biomass and declaring 0 tonnes of fossil carbon dioxide emissions should be regarded as not exclusively using biomass, since its actual emissions are not zero, would run counter to the requirement of consistency of the ETS, which depends, in particular, on the harmonisation of the reporting and monitoring rules which Implementing Regulation 2018/2066 is intended to ensure. In addition, it should be noted that, by treating as installations exclusively using biomass those which emit fossil carbon dioxide solely for the purpose of starting and stopping the production process, paragraph 3 of Annex I to Directive 2003/87 expressly provides for the non-inclusion in the ETS of installations whose fossil carbon dioxide emissions are marginal, but not necessarily zero.

60 Consequently, the applicant was required, as it did, to report zero fossil carbon dioxide emissions in respect of each of the years of the baseline period and, in particular, to round its 2018 emissions report to zero. It is therefore not justified in complaining, without prejudice to the consequences of a possible infringement of the principle of equal treatment, that the Commission took into account the reports relating to the installation in question sent to it by the Environmental Protection Agency, which showed the absence of fossil carbon dioxide emissions and, consequently, the exclusive use of biomass.

The third plea in law, alleging infringement of essential procedural requirements

61 The third plea, alleging infringement of essential procedural requirements, is divided into three parts: by the first, the applicant alleges infringement of the duty of diligence, by the second, that of the right to be heard and, by the third, infringement of the obligation to state reasons.

– *The first part of the third plea in law, alleging infringement of the duty of diligence*

62 The applicant submits that, if the Commission had correctly assessed the information submitted by the Environmental Protection Agency, it would have reached a different conclusion as regards the inclusion of the installation in question in the ETS. The Commission, it submits, therefore failed in its duty of diligence.

63 According to the applicant, for the application of the exclusion of installations exclusively using biomass laid down in paragraph 1 of Annex I to Directive 2003/87, the question whether or not the installation in question generates fossil carbon dioxide emissions is a relevant factor. However, the Commission failed in its duty to verify properly whether that installation exclusively used biomass. What is more, the Commission sent a question to the Environmental Protection Agency, according to which it seemed to it that that installation was using biomass 'almost exclusively', which means that it was aware of the use of fossil fuels by such an installation. It thus deliberately chose to disregard without good reason the certified data provided by the Environmental Protection Agency, whose impartiality could not be called into question.

64 Furthermore, the applicant submits, the Commission was late in informing the Environmental Protection Agency that it was of the opinion that installations, such as the installation in question, which had reported quantities of fossil carbon dioxide emissions equal to zero had to be excluded from the ETS. The imposition on the Environmental Protection Agency of an alleged period beyond which new data, even if relevant, could no longer be taken into account was, it is argued, misleading.

65 In the reply, the applicant also criticises the Commission on the ground that it did not clearly impose a time limit on the Environmental Protection Agency. Accordingly, the Commission is not justified in basing its argument on the lateness of some of the information submitted to it. According to the applicant, the Commission could not have excluded the installation in question from the ETS if that institution had taken account of the fact that it had rounded its emissions in accordance with the rules in force, when, in fact, those emissions were not zero.

66 According to the applicant, the Commission cannot rely on a failure to comply with a time limit which it had not set. Contrary to the Commission's claims, the data provided by the Environmental Protection Agency in the email of 26 January 2021 were not submitted too late for that institution to take them into account. The Commission itself made amendments to the measures which were in the process of being adopted, relating, inter alia, to the emission value of 10% of the most efficient installations covered by other product benchmarks. Furthermore, it would appear from Annex A 10 to the application that two installations were authorised to provide updated data after the adoption of the contested decision, and therefore, a fortiori, after 26 January 2021.

67 In addition, the contested decision was adopted more than one month after the Environmental Protection Agency had communicated the existence of a disparity in treatment between installations which did or did not round their reports and the regulation on product benchmarks had been adopted almost one and a half months later. However, the fact that the installation in question was taken into account in calculating the product benchmark was only a minor adjustment. Although the Commission claims that the process of adopting the contested decision lasted 15 months, it should nevertheless be observed that the problem relating to the

taking into account of installations that rounded their reports to zero could be raised by the Environmental Protection Agency only after 12 months and that the lateness of that information, alleged by the Commission, is in fact largely attributable to the latter.

68 The Commission disputes the applicant's line of reasoning.

69 According to the case-law, in the case of an administrative procedure involving complex technical assessments, the institutions and bodies of the European Union must have a power of appraisal in order to be able to perform their functions. However, where they have such a power of appraisal, the respect for the guarantees conferred by the EU legal order in administrative procedures is of even more fundamental importance. Those guarantees include, in particular, the duty to examine carefully and impartially all the relevant aspects of the individual case (see, to that effect, judgment of 21 November 1991, *Technische Universität München*, C-269/90, EU:C:1991:438, paragraphs 13 and 14).

70 As is apparent from recitals 2 to 8 of the contested decision, the Commission carried out checks relating to the completeness and consistency of the information communicated to it by the competent services of the Member States.

71 Contrary to the Commission's contention, the applicant does not in any way criticise it for failing to carry out on-the-spot checks or for not having verified the accuracy of the reports submitted by the installations to the authorities of the competent Member States. By contrast, the applicant submits that the Commission could not dismiss, as being out of time, the information sent to it by the Environmental Protection Agency, according to which, first, it had rounded its emission reports and, second, its true emissions of fossil carbon dioxide were not zero in 2018.

72 Under the second subparagraph of Article 11(1) of Directive 2003/87, the NIMs relating to the fourth trading period (2021-2025) were to be communicated to the Commission by 30 September 2019. It is common ground that that time limit was respected in the present case by the Environmental Protection Agency.

73 On the other hand, it is clear from the documents before the Court that no time limit other than that referred to in paragraph 72 above was imposed on the Environmental Protection Agency. In that regard, the Commission's assertion that a deadline of 7 December 2021 was set is unconvincing. That time limit, referred to in an email, was the subject of an immediate challenge by the Environmental Protection Agency, to which the Commission's services did not object.

74 Furthermore, it is common ground that the amendments to the NIMs relating to the values reported by the installations are, prima facie, likely to have an impact on the definition of the product benchmark, in so far as they come within the scope of the ETS. That is all the more so in the case of installations using biomass, since such emissions are not counted for the purpose of calculating the number of allowances to be surrendered. The parties disagree, however, as to the conclusions which the Commission should have drawn in the present case from the information sent to it by the Environmental Protection Agency between 26 January and 4 February 2021. The applicant submits that the Commission was required to assess all the relevant data, irrespective of the date on which they were submitted, whereas the Commission is of the opinion that, once the procedure for the adoption of the regulation establishing the product benchmarks was under way, it was too late to submit to it amendments that could call into question the draft benchmarks. The

Commission maintains that, if such amendments would then have had to be taken into account, there would have been a considerable delay in adopting the measures necessary for the free allocation of allowances.

75 It is not disputed that, on the date on which the Environmental Protection Agency warned the Commission of problems connected with differences in the rounding of reported values and, a fortiori, when the Environmental Protection Agency informed the Commission that the value of emissions from the installation in question was not zero in 2018, but that it was 0.3727 tonnes of fossil carbon dioxide (see paragraph 17 above), that is to say, on 4 February 2021, the draft regulation establishing the product benchmarks had already been submitted to the Climate Change Committee. By email of 1 February 2021 (see paragraph 16 above), the Commission had informed the Environmental Protection Agency that only amendments that did not affect the product benchmarks could still be taken into account.

76 It is true that the Commission is justified in maintaining that Article 10a of Directive 2003/87 provides that free allocation of allowances presupposes the prior definition of benchmarks per activity sector and that, under Article 11(2) of that directive, free allocation must take place before 28 February of the current year. Article 10a(2) of that directive, in providing that the starting point for *ex ante* benchmarks is the average performance of the 10% most efficient installations in the sector, presupposes the establishment of the list of installations included in the ETS. Therefore, it is, in principle, open to the Commission to adopt the measures of organisation of administrative procedure necessary to ensure compliance with the deadlines laid down in Article 11(2) of that directive, in particular by setting deadlines for the national authorities to submit all the data necessary to draw up the list of installations included and their energy performance. However, as stated in paragraph 73 above, it is not apparent from the documents before the Court that, in the present case, the Commission clearly set a mandatory time limit for the Environmental Protection Agency.

77 In those circumstances, the Commission had an obligation to take into consideration the information which had been sent to it.

78 As is apparent from the Commission's email of 1 February 2021, addressed to the Environmental Protection Agency (see paragraph 16 above), the Commission, in the present case, refused in principle to take into account any new information likely to have an impact on the list of installations included and on the calculation of the benchmark values. That refusal was confirmed by the Commission's email of 16 February 2021 (see paragraph 18 above), in which the Commission informed the Environmental Protection Agency that it could not take account of the information which the latter had submitted to it on 4 February 2021 concerning (i) the inclusion of two installations which had reported values that were non-zero but lower than 0.5 tonnes of fossil carbon dioxide emissions and (ii) the exclusion of the applicant's installation, even though the applicant had rounded its 2018 emissions reports to zero tonnes, whereas its true unrounded emissions were greater than 0 tonnes and less than 0.5 tonnes. In so doing, the Commission failed to fulfil its obligation, under the case-law cited in paragraph 77 above, to examine carefully and impartially all the relevant aspects of the individual case.

79 In addition, as the applicant submits, it is worth noting the exclusion criterion mentioned in the Commission's letter of comments of 19 May 2020 to the Environmental Protection Agency (see paragraph 7 above), related to the use, even in one year of the baseline period, of almost 100% biomass. Since that criterion is stricter than that ultimately adopted by the Commission, that

incorrect information had the effect of depriving the Environmental Protection Agency of the possibility of knowing precisely, during the procedure for the adoption of the contested decision, the Commission's interpretation of paragraph 1 of Annex I to Directive 2003/87.

80 Nevertheless, it follows from paragraphs 51 to 60 above that taking into consideration the data put forward on 4 February 2021 by the Environmental Protection Agency would not have had the slightest effect on the exclusion of the applicant's installation, since, as is apparent from paragraphs 51 to 60 above, installations which emitted less than 0.5 tonnes of fossil carbon dioxide had to be regarded as exclusively using biomass within the meaning of paragraph 1 of Annex I to Directive 2003/87. Moreover, it is apparent from the statements made by the parties at the hearing that the maximum reduction in the benchmark value provided for in Article 10a(2)(b) of that directive (see paragraph 36 above) had been achieved, with the result that it is likely that the inclusion of a more efficient installation than the average, or the exclusion of two wrongly included installations, would in the present case, given the large number of installations covered by that benchmark, be zero or, at the very least, very marginal.

81 In those circumstances, it must be held that the Commission's infringement of its obligation to examine carefully and impartially all the relevant aspects of the individual case, as noted in paragraph 78 above, has no effect on the lawfulness of the exclusion of the installation in question from the ETS. It should also be noted that, in the context of the present dispute, the question of the inclusion in the NIM notified by the Kingdom of Sweden of the two other installations mentioned in the email of 4 February 2021, which reported, without rounding, fossil carbon dioxide emissions below 0.5 tonnes, is not brought before the Court.

82 Accordingly, despite the error made by the Commission in refusing in principle to take account of the information sent to it by the Environmental Protection Agency on 4 February 2021, the first part of the third plea in law must be rejected.

– *The second part of the third plea in law, alleging infringement of the right to be heard*

83 The applicant claims that, because the Commission did not give it the opportunity to make representations before adopting the contested decision, the Commission infringed its right to be heard. It considers that that infringement is contrary to Article 41 of the Charter of Fundamental Rights of the European Union and that, had it not been for that infringement, it would have been able to establish that the installation in question did not exclusively use biomass, but that its carbon dioxide emissions were partly fossil in origin. It maintains that it would thus have been better able to defend itself if its right to be heard had been respected. It submits that it could have informed the Commission that it had rounded its fossil carbon dioxide emissions to zero even though those emissions were not zero, and that it intended to continue to emit fossil carbon dioxide during the period 2021 to 2025.

84 The applicant also submits that the contested decision adversely affects it to a very great extent. According to the applicant, first, it is deprived of an annual profit of more than EUR 3 million estimated on the basis of the free allocation of emission allowances, which it received for 2020. Second, it submits that the exclusion of the installation in question from the ETS deprives it of the permit to emit fossil carbon dioxide and exposes it to criminal sanctions.

85 Lastly, the applicant states that, as long as paragraph 1 of Annex I to Directive 2003/87 is drafted as at present, the fact that it may have used only biomass during the baseline period (2014-2018) should not be decisive as regards the question whether it intended to emit fossil carbon dioxide in subsequent years. It considers that, if it had been able to put forward that argument, it would have been able to demonstrate the right of the installation in question to remain in the ETS.

86 The Commission disputes the applicant's line of reasoning.

87 Article 41(2)(a) of the Charter of Fundamental Rights provides that every person has the right to be heard before any individual measure which would affect him or her adversely is taken.

88 It is apparent from the case-law that respect for the rights of the defence is, in all proceedings initiated against a person which are liable to culminate in a measure adversely affecting that person, a fundamental principle of EU law which must be guaranteed even in the absence of any rules governing the proceedings in question. The right to be heard guarantees every person the opportunity to make known his or her views effectively during the administrative procedure and before the adoption of any decision liable to affect his or her interests adversely (see judgments of 9 June 2005, *Spain* v *Commission*, C-287/02, EU:C:2005:368, paragraph 37 and the case-law cited, and of 22 November 2012, *M.*, C-277/11, EU:C:2012:744, paragraph 87 and the case-law cited).

89 In the present case, the right to be heard has not been infringed. As the Commission states, the procedure provided for in Article 11(3) of Directive 2003/87 is initiated only against the Member State concerned. The purpose of that procedure is to ensure that NIMs for the free allocation of emission allowances, submitted by the Member State concerned, comply with the rules referred to in Article 10a(1) of that directive.

90 As regards that procedure, according to Article 14 of 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 (OJ 2019 L 59, p. 8), the operators of installations concerned have no specific procedural rights. According to the rules laid down by that delegated regulation, it is in the context of the national procedure relating to the submission to the Commission of the list of installations covered by Directive 2003/87 and of the free allocations to each installation that the operators of installations concerned must be heard. In that regard, Article 3 of that delegated regulation provides that Member States must take the appropriate administrative measures to ensure the implementation of the rules provided for in that regulation. Moreover, the applicant has not claimed that, before the Environmental Protection Agency, it was not in a position to make known its views effectively (see, to that effect, judgment of 26 September 2014, *Arctic Paper Mochenwangen* v *Commission*, T-634/13, not published, EU:T:2014:828, paragraph 105 and the case-law cited).

91 It follows that the second part of the third plea must be rejected.

– *The third part of the third plea in law, alleging infringement of the obligation to state reasons*

92 The applicant submits that, in order to satisfy the obligation to state reasons laid down in Article 296 TFEU, the contested decision should have, on the one hand, set out the reasons justifying the Commission's interpretation of the criteria for the application of the biomass exemption and, on the other hand, made clear the reasons why: (i) the fact that it emitted fossil carbon dioxide was irrelevant; (ii) installations whose emission levels were similar were treated differently; (iii) the Commission failed to take into account information on the existence of its

fossil carbon dioxide emissions submitted to it by the Environmental Protection Agency; (iv) it was not heard despite the information available to the Commission; and (v) in order to determine whether the biomass exception was applicable to it, the Commission took into account only past fossil carbon dioxide emissions from the installation concerned and not its current or future emissions.

93 The Commission disputes the applicant's line of reasoning.

94 The statement of reasons required by Article 296 TFEU must show clearly and unequivocally the reasoning of the institution which adopted the contested measure, so as to enable the persons concerned to ascertain the reasons for it in order to defend their rights and to enable the competent court to exercise its power of review (see judgment of 23 September 2009, *Poland* v *Commission*, T-183/07, EU:T:2009:350, paragraph 136 and the case-law cited).

95 The requirements to be satisfied by the statement of reasons depend on the circumstances of each case, in particular the content of the measure in question, the nature of the reasons given and the interest that the addressees of the measure, or other parties to whom it is of direct and individual concern, may have in obtaining explanations. It is not necessary for the reasoning to go into all the relevant facts and points of law, since the question whether the statement of reasons meets the requirements of Article 296 TFEU must be assessed with regard not only to its wording but also to its context and to all the legal rules governing the matter in question (see judgment of 23 September 2009, *Poland* v *Commission*, T-183/07, EU:T:2009:350, paragraph 137 and the case-law cited).

96 It must also be held that compliance with the obligation to state reasons under Article 296 TFEU, as regards a decision concerning the NIMs for the transitional free allocation of greenhouse gas emission allowances, in accordance with Article 11(3) of Directive 2003/87, is of particularly fundamental importance because, in this case, exercise of the Commission's power of review under that latter provision entails complex economic and ecological assessments and review by the EU Courts of the legality and merits of those assessments is restricted (see, by analogy, judgment of 23 September 2009, *Poland* v *Commission*, T-183/07, EU:T:2009:350, paragraph 138 and the case-law cited).

97 In the present case, the reasoning set out in recital 11 of the contested decision (see paragraph 20 above) indicates unequivocally the reasoning followed in the contested decision. It follows from that recital that the Commission took the view that the installation in question, because it had exclusively used biomass, had to be excluded from the ETS pursuant to paragraph 1 of Annex I to Directive 2003/87.

98 Since that information was sufficient to enable the applicant effectively to bring its action and to enable the Court to assess the legality of the contested decision, the Commission was not, therefore, and contrary to what the applicant claims, required to provide specific reasons on the questions referred to in paragraph 92 above.

99 The third part of the third plea must therefore be rejected and, accordingly, that plea must be rejected in its entirety.

The merits of the contested decision

100 It is appropriate to begin by examining the fifth plea in law relied on by the applicant, relating to the legality of the interpretation of the exclusion criteria adopted by the Commission in the contested decision. In support of that plea, the applicant submits that the Commission, in taking the view that all installations that reported zero fossil carbon dioxide emissions, including those that rounded their actual emissions to zero, should be excluded from the ETS, fails to comply with the essential provisions of Directive 2003/87.

The fifth plea in law, alleging infringement of Directive 2003/87

101 This plea is divided into two parts. In support of the first, the applicant maintains that the Commission was wrong to take into account the baseline period defined in Article 2(14) of Delegated Regulation 2019/331 in order to determine whether the installation in question could come within the scope of the ETS. In support of the second, it submits that the Commission's interpretation of Directive 2003/87, in particular of paragraph 1 of Annex I thereto, is vitiated by several errors of law.

– *The first part of the fifth plea in law, alleging that old values were wrongly taken into account*

102 The applicant submits that it follows from Article 11 of Directive 2003/87 that the baseline period defined in Article 2(14) of Delegated Regulation 2019/331, namely the period from 2014 to 2018, is relevant only for the purpose of determining the number of free allowances that may be allocated. By contrast, no link is established between that baseline period and the exception relating to the exclusion of installations exclusively using biomass, provided for in paragraph 1 of Annex I to that directive. The applicant therefore considers that the Commission erred in law in inferring the exclusion of the installation in question from the ETS from the fact that it had not reported any fossil carbon dioxide emissions during the baseline period.

103 According to the applicant, the question whether an installation comes within the scope of the ETS should, on the contrary, depend not on its historical emissions, which are more than two years old, but on those actually generated at the time of the adoption of the NIMs and on the undertaking's intention to release them in the future. Otherwise, an undertaking intending to emit fossil carbon dioxide would be deprived of the possibility of obtaining the necessary permit.

104 The Commission disputes the applicant's line of reasoning.

105 Under the second subparagraph of Article 11(1) of Directive 2003/87, the list of installations covered by that directive for the five-year period beginning 1 January 2021 had to be submitted by 30 September 2019 at the latest, and the lists for each subsequent five-year period are to be submitted every five years thereafter. Each list must include information on production activity, transfers of heat and gas, electricity production and emissions at sub-installation level over the five calendar years preceding its submission. Free allocations are to be given only to installations in respect of which such information is provided.

106 Article 2(14) of Delegated Regulation 2019/331 defines the 'baseline period' as 'the five calendar years preceding the time limit for submission of data to the Commission pursuant to Article 11(1) of Directive [2003/87]'.

107 The first subparagraph of Article 11(1) of Directive 2003/87 states:

'Each Member State shall publish and submit to the Commission … the list of installations covered by … Directive [2003/87] in its territory and any free allocation to each installation …'

108 First of all, it should be noted that Article 11(1) of Directive 2003/87 refers to the 'list of installations covered by [that] Directive'. By contrast, the applicant's interpretation that a distinction must be drawn between the baseline period, in respect of which the historical data of each installation must be taken into account in calculating the number of free allowances that may be allocated to it, and the period which must be taken into account for the application of the exclusion of installations exclusively using biomass has no basis in the provisions of that directive.

109 The concept of 'installations covered' by Directive 2003/87 cannot be interpreted independently of Article 2(1) of that directive, which refers to the activities listed in Annex I to that directive, paragraph 1 of which provides for the exclusion of installations exclusively using biomass. It thus follows from the scheme of those provisions, taken together, that, in order to be eligible for the free distribution of allowances, installations must be included on the list of NIMs, which presupposes that they satisfy one of the criteria for inclusion in the ETS provided for in that annex.

110 The distinction put forward by the applicant, according to which it is necessary to take account of the future intentions of the operator in order to be included on the list of NIMs and thus to benefit from the free allocation of allowances is, therefore, contrary to the clear provisions of Directive 2003/87.

111 The first part of the fifth plea in law must therefore be rejected.

– *The second part of the fifth plea in law, alleging errors of law*

112 In the first place, the applicant submits that the amendment of paragraph 1 of Annex I to Directive 2003/87 by Directive 2009/29/EC of the European Parliament and of the Council of 23 April 2009 amending Directive 2003/87 so as to improve and extend the ETS (OJ 2009 L 140, p. 63), is intended to alleviate the constraints on operators of installations using biomass by exempting them from the reports necessary to obtain the allowances required to cover emissions from their production process. In its view, that exemption is minor in relation to the other amendments introduced by that directive.

113 In the second place, the applicant maintains that, by contrast, the core element of the amendments made to the ETS by Directive 2009/29 consisted of the definition of product benchmarks for the calculation of free allocations of emission allowances. It observes that Article 10a of Directive 2003/87, which was introduced by Directive 2009/29, defines the allowances to be allocated on the basis of the emissions from the 10% of the most environmentally efficient installations and the quantities produced by each installation, irrespective of its actual emissions. That new provision is thus intended to encourage each operator to reduce the ratio between its emissions and its production, and one of the methods expressly mentioned for that purpose is to promote the use of renewable biomass, rather than fossil fuels. In any event, according to the applicant, the amendments introduced were expressly intended not to encourage operators to increase their emissions (Article 10a of Directive 2003/87 and recital 23 of Directive 2009/29).

114 The applicant maintains that taking into account the environmental efficiency of biomass results from the attribution of a factor equal to zero to emissions from biomass and that the calculation of the emissions emitted by the 10% of the most efficient installations takes into account only fossil fuel emissions. However, it would be absurd, following that logic, not to be able to take into account the zeroing of emissions that would occur if operators were to succeed in completely substituting biomass for fossil fuels. In such a situation, operators would be encouraged not to use exclusively biomass in order to continue to receive free allocations. According to the applicant, the Commission's interpretation of the biomass exception in the contested decision, because it leads to the paradoxical result of excluding the installation in question, which is one of the most environmentally efficient, from the product benchmark, is directly contrary to the wording and scheme of Article 10a of Directive 2003/87.

115 In the third place, as a result of the foregoing, the applicant is of the opinion that the interpretation given in the contested decision to paragraph 1 of Annex I to Directive 2003/87 is in conflict with Article 10a of that directive, which should, however, prevail over that paragraph.

116 The Commission disputes the applicant's line of reasoning.

117 In the first place, as the Commission rightly submits, the amendment to paragraph 1 of Annex I to Directive 2003/87 aimed at excluding installations exclusively using biomass is not ancillary, since it defines the scope of the ETS. Article 2 of that directive defines the installations covered by the ETS by referring to that annex, therefore, inter alia, to the provision concerned. Moreover, the applicant does not adduce any evidence capable of supporting its argument that that provision is intended solely to alleviate the administrative constraints which the ETS imposes on installations covered by it. The definition of the scope of that directive excluding installations which exclusively use biomass is not, therefore, secondary in relation to Article 10a of that directive. The *ex ante* benchmarks defined therein are intended to apply only to installations covered by the ETS.

118 In the second place, as the applicant submits, the exclusion of installations exclusively using biomass precludes account from being taken of the environmental performance of those installations for the calculation of the benchmarks. Nevertheless, the counterpart for the installations concerned is the absence of an obligation to surrender allowances equal in number to the carbon dioxide emissions produced by those installations, which was already provided for in Annex IV to Directive 2003/87 in its initial version. That fact, although it does not allow account to be taken of the environmental performance of installations exclusively using biomass, makes it possible to avoid the windfall effects which would be created by the possibility for an installation deemed not to emit carbon dioxide to obtain a free allocation of emission allowances. The fact that the values of installations exclusively using biomass are not affected cannot, however, have the consequence that paragraph 1 of Annex I to that directive can be interpreted independently of Article 11 of the same directive. As is apparent from the examination of the first part of the present plea, the fact that an installation using biomass belongs to the ETS is linked to the fact that it emitted fossil carbon dioxide during the baseline period.

119 In the third place, the interpretation of paragraph 1 of Annex I to Directive 2003/87, according to which installations whose emissions amounted to zero during the baseline period must be excluded, is also not contrary to Article 10a of that directive. That provision does not require the environmental performance achieved by installations not covered by the ETS to be taken into account, but provides, on the contrary, that the emissions of installations covered by an *ex ante* benchmark must be taken into account. Because of the exclusion of those installations when they exclusively use biomass, they cannot be regarded as coming within the scope of such a benchmark.

120 In the fourth place, it is common ground that installations not covered by the ETS are not eligible for free allocations. It follows that, since the installation in question was excluded from the ETS, the applicant is not in a similar situation to those of other undertakings holding installations thereunder for the purposes of such allowances and which are obliged to surrender a number of allowances equal to their emissions. As a result, the applicant also avoids the risk of being subject to the penalties provided for in Article 16 of Directive 2003/87 in the event of an infringement of their obligations by the installations included in the ETS. Therefore, the fact that the interpretation of paragraph 1 of Annex I to that directive adopted in the contested decision results in the applicant no longer being able to benefit from allocations of free allowances cannot infringe the principle of equal treatment.

121 In the fifth place, no provision of Directive 2003/87 implies that the inclusion of an installation in the ETS is strictly neutral as regards the competitive situation of those installations in comparison with those which are not included or are excluded from it. It follows that the distortions of competition alleged by the applicant are not such as to establish the unlawfulness of the Commission's interpretation in the contested decision of paragraph 1 of Annex I to that directive.

122 In the sixth place, contrary to what the applicant claims, the fact that the interpretation given to paragraph 1 of Annex I to Directive 2003/87 in the contested decision is likely to result in installations thus excluded ceasing to use exclusively biomass, cannot establish that that interpretation is unlawful. The overall objective of reducing emissions pursued by the ETS cannot have the effect of invalidating the exclusion of installations exclusively using biomass on the ground that certain operators might be led freely to make choices that are environmentally less efficient. Such contingencies are inherent in any threshold effect, which cannot be avoided in cases where the scope of a measure such as the ETS is defined. Consequently, the applicant is not justified in claiming that the exclusion of installations exclusively using biomass from the mechanisms for the allocation of free allowances is contrary to the objectives of that directive and infringes the principle of proportionality.

123 The applicant has thus failed to establish the unlawfulness of the Commission's interpretation of paragraph 1 of Annex I to Directive 2003/87 in the contested decision. Accordingly, the second part of the fifth plea and, therefore, that plea in its entirety, must be rejected.

The first plea in law, alleging a manifest error of assessment

124 The applicant submits that, by taking the view that the installation concerned exclusively used biomass, the Commission committed a manifest error of assessment. In that regard, it maintains that the installation in question emitted fossil carbon dioxide during the baseline period, in 2018, in 2019 and in 2020, and that the reported values of 0 tonnes were the result of rounding. By refusing to take account of that information, which had been communicated to it by the Environmental Protection Agency prior to the adoption of the contested decision, the Commission not only treated comparable installations differently, since it did not object to the inclusion in the Swedish NIM of installations which had emitted equivalent quantities of fossil carbon dioxide, but also wrongly refused to take account of relevant information. It therefore committed a manifest error of assessment in taking the view that the installation in question exclusively used biomass within the meaning of paragraph 1 of Annex I to Directive 2003/87.

125 Moreover, the applicant contends, the Commission did not follow a consistent practice. The Commission now appears to base its interpretation of the exception for exclusive use of biomass on the fact that an installation has not reported any fossil carbon dioxide emissions throughout

the five-year baseline period, since a positive report in respect of a single year of that period is sufficient to exempt it from exclusion from the ETS. In its letter of comments of 19 May 2020, the Commission maintained a different position, according to which the mere fact that an installation has reported almost zero emissions during a single year of the baseline period is sufficient to justify its exclusion. By virtue of those criteria, which it disputes, the applicant considers that it should also have been excluded in respect of the third trading period, from 2013 to 2020.

126 Thus, the applicant asserts that, as a result of the contested decision, it is in a paradoxical situation, since, in order to be able to receive free allocations of allowances in the future, it would already have had to increase its fossil carbon dioxide emissions by more than one tonne per year. It would, moreover, be prepared to increase them above five tonnes per year if a legislative amendment extending the exclusion for exclusive use of biomass to installations emitting less than five tonnes of fossil carbon dioxide per year were to be adopted.

127 Moreover, since they are not drafted in exactly identical terms, paragraphs 1 and 3 of Annex I to Directive 2003/87 (see paragraph 40 above) cannot concern the same installations. It would therefore be illogical to treat in all cases installations with low fossil carbon dioxide emissions in the same way as installations that use fossil fuels only for starting and shutting down the unit. Consequently, contrary to what the Commission claims, low fossil carbon dioxide emissions do not mean that they may be regarded as having no effect for the application of the exclusion laid down in paragraph 1 of that annex.

128 Lastly, the appellant refers to its arguments seeking to establish that the information which was capable of justifying the maintenance of the installation in question in the ETS had been sent to the Commission by the Environmental Protection Agency on a date which did not preclude it from being taken into account (see paragraphs 66 and 67 above).

129 The Commission disputes the applicant's line of reasoning.

130 According to the case-law, in a complex and evolving area of technology such as that in the present case, the competent EU authorities have a broad discretion, in particular as to the assessment of highly complex scientific and technical facts, in order to determine the nature and scope of the measures which they adopt, whereas review by the EU Courts has to be limited to verifying whether there has been a manifest error of assessment or a misuse of powers, or whether those authorities have manifestly exceeded the limits of their discretion. In such a context, the EU Courts cannot substitute their own assessment of scientific and technical facts for that of the EU authorities, on which alone the FEU Treaty has conferred that task (see, to that effect, judgments of 21 July 2011, *Etimine*, C-15/10, EU:C:2011:504, paragraph 60, and of 21 June 2018, *Poland* v *Parliament and Council*, C-5/16, EU:C:2018:483, paragraph 150 and the case-law cited).

131 Moreover, it must be stated that the EU authorities' broad discretion, which implies limited judicial review of its exercise, applies not only to the nature and scope of the measures to be taken but also, to some extent, to the finding of the basic facts. However, even though such judicial review is of limited scope, it requires that the EU authorities which have adopted the act in question must be able to show before the EU Courts that in adopting the act they actually exercised their discretion, which presupposes the taking into consideration of all the relevant factors and circumstances of the situation that the act was intended to regulate (judgment of

8 July 2010, *Afton Chemical*, C-343/09, EU:C:2010:419, paragraphs 33 and 34; see also judgment of 30 April 2015, *Polynt and Sitre* v *ECHA*, T-134/13, not published, EU:T:2015:254, paragraph 53 and the case-law cited).

132 It is therefore for the EU Courts, in the light of the evidence relied on by the applicant, to establish whether that evidence relied on is factually accurate, reliable and consistent, and to determine whether that evidence contains all the information which must be taken into account in order to assess a complex situation, and also whether it is capable of substantiating the conclusions drawn from it (judgment of 6 November 2008, *Netherlands* v *Commission*, C-405/07 P, EU:C:2008:613, paragraph 55; see also judgment of 9 September 2011, *France* v *Commission*, T-257/07, EU:T:2011:444, paragraph 87 and the case-law cited).

133 According to the Commission, in the list of installations covered by the NIM, the Environmental Protection Agency reported zero fossil carbon dioxide emissions, as regards the applicant, for all years of the baseline period. The applicant itself maintains that it rounded its emissions reports during each of the years of the baseline period to zero in order to comply with the rounding rules. The documents in the file submitted to the Court do not make it possible to establish with certainty whether the data in the email sent by the Environmental Protection Agency to the Commission on 4 February 2021 (see paragraph 17 above), according to which the applicant had reported 0.3727 tonnes of fossil carbon dioxide emissions for 2018, had been communicated to the Commission prior to that email. In that regard, it is not apparent from the documents relating to the applicant which were lodged by the parties following the measure of organisation of procedure adopted by the Court that the Commission possessed that information before that date.

134 However, even if that had been the case, the taking into account of emissions of less than 0.5 tonnes of fossil carbon dioxide would, in any event, have infringed the rounding rules, which, as noted in paragraphs 60 and 61 above, were general and mandatory in nature. The uniform application of the rules on the functioning of the ETS is intended to prevent distortion of the market in emissions allowances, which is essential in order to achieve, indirectly, the objective of environmental protection which that market serves (Opinion of Advocate General Campos Sánchez-Bordona in *ArcelorMittal Rodange et Schifflange*, C-321/15, EU:C:2016:516, point 78).

135 It follows that, in taking the view that the installation in question exclusively used biomass and that, therefore, the exclusion provided for in paragraph 1 of Annex I to Directive 2003/87 had to be applied to that installation, the Commission did not commit any manifest error of assessment.

136 Furthermore, it should be noted that, first, the alleged infringement of the principle of equal treatment, resulting, according to the applicant, from the different treatment of installations in comparable situations, is irrelevant as regards the application of the rules on the functioning of the ETS to the installation in question. That question, moreover, will be assessed below, in the context of the examination of the second plea in law.

137 Second, the fact, even if it were established, that, according to the application of the exclusion criterion adopted by the Commission in the contested decision, the installation in question should already have been excluded in respect of the preceding period, has no bearing whatsoever on the legality of the contested decision, which relates only to the allocation period of allowances from 2021 to 2025.

138 Third, it follows both from the second subparagraph of Article 11(1) of Directive 2003/87, in the version resulting from Directive 2018/410, and from Article 2(14) of Delegated Regulation 2019/331 that the five-year baseline period which had to be taken into account in the contested decision for the assessment of emissions ran from 2014 to 2018. The applicant's intention to carry out fossil carbon dioxide emissions during the period 2021 to 2025 therefore has no effect on the legality of the contested decision.

139 Fourth, it should be noted that, as the parties also agreed at the hearing in response to a question put by the Court, the purpose of the ETS is not to allocate free allowances but to encourage installations to reduce their greenhouse gas emissions and, in particular, to promote the use of biomass rather than fossil fuels. Therefore, where an installation has been excluded from the ETS because of its exclusive use of biomass, it cannot validly be argued that that exclusion is vitiated by a manifest error of assessment.

140 Fifth and lastly, in so far as the applicant reproduces, in support of the first plea in law on which it relies, the claims relating to the rounding of its 2018 report of its fossil carbon dioxide emissions and the Commission's failure to take into account the data sent to it by the Environmental Protection Agency on 26 January and 4 February 2021, which have already been assessed in the present judgment, it is sufficient to refer to paragraphs 51 to 60 and 69 to 82 above.

141 It follows from the foregoing that the first plea in law must be rejected.

The second plea in law, alleging infringement of the principle of equal treatment

142 According to the applicant, in the contested decision the Commission infringed the principle of equal treatment in two respects.

143 First, as the Environmental Protection Agency pointed out to the Commission in its email of 4 February 2021, installations with comparable levels of fossil carbon dioxide emissions are treated differently with regard to their inclusion in the ETS, for the sole reason that some of them rounded their reports, while others did not. The applicant also notes that at least one of the installations whose inclusion in the ETS has not been challenged by the Commission emitted less fossil carbon dioxide than the installation in question. Compliance with the principle of equal treatment meant that the Commission, which had been informed of the situation before the adoption of the contested decision, avoided treating similar situations differently. Contrary to what the Commission claims, a mere difference in the statements resulting from the fact that, for some installations, rounding was carried out, whereas for others it was not, is not relevant and does not justify different treatment of those two categories of operations.

144 Second, the Commission's infringement of the principle of equal treatment in the present case gave rise to distortions of competition and unduly rewarded producers using fossil fuels, which, unlike the applicant, had access to the ETS and could thus make profits by reselling their unused free allowances. The applicant submits that its exclusion therefore entails, as between producers belonging to the same product benchmark, a difference in treatment that is unjustified in the light of the environmental objectives pursued by the ETS.

145 The Commission disputes the applicant's line of reasoning.

146 The general principle of equality, which is one of the fundamental principles of EU law, requires that similar situations must not be treated differently and that different situations must not be treated in the same way unless such treatment is objectively justified (see, to that effect, judgments of 19 October 1977, *Ruckdeschel and Others*, 117/76 and 16/77, EU:C:1977:160, paragraph 7, and of 17 December 2020, *Centraal Israëlitisch Consistorie van België and Others*, C-336/19, EU:C:2020:1031, paragraph 85 and the case-law cited).

147 It is apparent from the documents before the Court, in particular from the rejoinder and the responses of the Commission and the applicant following the measure of organisation of procedure adopted by the Court, that, except in two cases in which it acknowledged that it had erred in not excluding the installations in question, the Commission excluded from the ETS installations which had reported zero fossil carbon dioxide emissions or less than 0.5 tonnes during the baseline period. Since the applicant is in that situation, it is not justified in maintaining, on the basis of the principle of equal treatment, that it should have been treated differently.

148 It is true that the Commission states that it should have excluded two installations with fossil carbon dioxide emissions of less than 0.5 tonnes. However, it follows from settled case-law that the principle of equal treatment must be reconciled with the principle of legality, according to which a person may not rely, in support of his or her claim, on an unlawful act committed in favour of a third party. Such an approach would be tantamount to laying down a principle of 'equal treatment in illegality' (see judgment of 16 November 2006, *Peróxidos Orgánicos* v *Commission*, T-120/04, EU:T:2006:350, paragraph 77 and the case-law cited). It should be observed in this regard that, at the hearing, the Commission did not rule out the possibility of remedying the illegality of the inclusion of those two installations following the intervention of the present judgment.

149 The applicant's claims that it is in a less favourable situation than undertakings covered by the same product benchmark must also be rejected as unfounded. The exclusion of installations exclusively using biomass precludes them from being regarded as being covered by a product benchmark. The applicant is therefore not in the same situation as undertakings which have an *ex ante* benchmark and are included in the ETS. In that regard, moreover, it should also be borne in mind that, as is apparent from the assessment of the fifth plea in law (see paragraph 120 above), the interpretation of the exclusion criterion laid down in paragraph 1 of Annex I to Directive 2003/87, according to which installations which have not emitted fossil carbon dioxide or which have issued amounts to be rounded to zero cannot benefit from a free allocation of greenhouse gas emission allowances, does not infringe the principle of equal treatment.

150 The applicant is therefore not justified in claiming that the contested decision directly disregards the principle of equal treatment, without prejudice to the question, which is the subject of the sixth plea in law, of whether the exclusion of installations exclusively using biomass constitutes, in itself, an infringement of that principle.

151 It follows that the second plea must be rejected.

The fourth plea in law, alleging infringement of the principle of the protection of legitimate expectations

152 The applicant submits that it voluntarily carried out a transition aimed at operating its installation essentially from biomass and that it therefore spontaneously complied with the objectives pursued by Directive 2003/87. Further, it maintains that it could not foresee that that conduct would lead to its exclusion from the ETS, with the result that it is deprived of the authorisation to use fossil fuel and of the financial proceeds from the resale of the free emission allowances allocated to it. On the contrary, it considers that it was entitled to infer from the position taken by the Commission at the time of the allocations of quotas for the third trading period (2013-2020), even though its conversion to biomass had already taken place, that it could count on a positive decision in its regard for the period from 2021 to 2025. In respect of the earlier period, it had already reported zero emissions, which had not led to its exclusion from the ETS. It thus enjoys a precise assurance from the Commission and is in a situation comparable to that of the applicant in the case which gave rise to the judgment of 28 April 1988, *Mulder* (120/86, EU:C:1988:213). In the present case, it argues, there is no overriding public interest capable of justifying the setting-aside of the principle of the protection of legitimate expectations.

153 Without expressly linking that argument to the fourth plea, the applicant also claims that it had confidential information according to which the Environmental Protection Agency, on the one hand, and the Commission staff specialised in the application of the ETS, on the other, shared the view that the installation in question should not be excluded from the ETS.

154 The Commission disputes the applicant's line of reasoning.

155 The right to rely on the principle of the protection of legitimate expectations, which is the corollary of the principle of legal certainty, extends to any individual in a situation in which the EU authorities have caused him or her to entertain justified hopes. In whatever form it is given, information which is precise, unconditional and consistent and comes from authorised and reliable sources constitutes assurances capable of giving rise to such hopes. By contrast, a person may not plead infringement of the principle unless he or she has been given precise assurances by the authorities. Similarly, if a prudent and alert economic operator can foresee that the adoption of an EU measure is likely to affect his or her interests, he or she cannot plead that principle if that measure is adopted (see, to that effect, judgment of 21 June 2018, *Poland* v *Parliament and Council*, C-5/16, EU:C:2018:483, paragraphs 110, 111, 113 and the case-law cited).

156 In that regard, first, it must be stated that the applicant has not established that the Commission gave it assurances within the meaning of the case-law cited in paragraph 155 above that it would receive free allocations of greenhouse gas emission allowances for the period 2021 to 2025.

157 It should be pointed out that the fact that the Commission did not decide to exclude the installation in question from the NIM notified by the Kingdom of Sweden in respect of the third trading period (2013-2020) cannot be regarded as an unconditional position statement by the Commission with regard to the applicant's right to continue to be covered by the ETS and, consequently, to benefit from free allocations of allowances in respect of the following period.

158 In addition, it is common ground that the applicant 'completed its transition to biomass in 2010'. It is apparent from Article 10a(5) of Directive 2003/87, in the version then in force, that the baseline period which had to be taken into account in calculating the number of allowances to be

allocated free of charge to installations such as that of the applicant included the years 2005 to 2007. The applicant has not established, and indeed does not maintain, that its fossil carbon dioxide emissions were zero or had to be rounded to zero for those three years.

159 Second, the application of the exclusion provided for in paragraph 1 of Annex I to Directive 2003/87 was largely foreseeable on the date of adoption of the contested decision, since it follows from Directive 2009/29, the period for transposition of which expired on 31 December 2012. Since that provision was not subsequently amended, an informed economic operator within the meaning of the case-law cited in paragraph 155 above could not, therefore, have been unaware that the exclusion of installations exclusively using biomass, applicable since 1 January 2013, was still in force for the fourth trading period (2021-2025) covered by the contested decision.

160 It follows that the fourth plea in law must be rejected.

The sixth plea in law, alleging illegality of paragraph 1 of Annex I to Directive 2003/87

161 Pursuant to Article 277 TFEU, in the event that the Court does not uphold one of the first five pleas in law, the applicant submits that paragraph 1 of Annex I to Directive 2003/87 is unlawful. According to the applicant, if that provision cannot be interpreted in accordance with Article 10a of that directive and the fundamental principles of primary EU law, it must then be declared unlawful. In that regard, it refers to the arguments put forward in support of the fifth plea.

162 According to the applicant, the exclusion relating to the exclusive use of biomass makes it impossible to take into account, for the calculation of the product benchmarks, the most environmentally efficient installations. Such an exclusion is therefore, it argues, incompatible with the objectives pursued by Directive 2003/87 and with the principle of proportionality.

163 That is also, it submits, contrary to the principle of equal treatment. First, installations which rounded their reports are treated less favourably than those which did not. Second, installations which emitted fossil carbon dioxide during the period 2014 to 2018 are treated less favourably than those which emitted fossil carbon dioxide in 2019 and 2020. Third, installations with fossil carbon dioxide emissions of less than 0.5 tonnes are treated less favourably than those whose emissions exceed that threshold. Fourth, from the point of view of competition, the situation of installations with 100% emissions originating from biomass is no different from those in respect of which some or all of the emissions are fossil-based.

164 The Commission, supported by the Parliament and the Council, disputes the line of reasoning put forward by the applicant.

165 It follows from the examination of the fifth plea that the interpretation of paragraph 1 of Annex I to Directive 2003/87 adopted by the Commission in the contested decision does not infringe either the provisions and objectives of that directive or the principles of equal treatment and proportionality. The applicant maintains, however, in the context of the sixth plea, that, if that is the case, the exclusion from the ETS of installations exclusively using biomass is then in itself contrary to those principles and those provisions.

166 In this regard, it should be noted at the outset that the admissibility of the plea of illegality raised by the applicant is not disputed and that it is hardly in doubt. It is not certain that the applicant would have been entitled to seek the annulment of the amendment at issue introduced by

Directive 2009/29, and it is common ground that it was by applying paragraph 1 of Annex I to Directive 2003/87 in the contested decision that the Commission took the view that the applicant had to be withdrawn from the NIM.

167 However, in so far as the applicant puts forward the same arguments as those relied on in support of the second part of the fifth plea, it is sufficient to note that those arguments have been rejected in paragraphs 120 to 122 above.

168 For the rest, in an area in which the EU legislature has a broad discretion, only a manifest infringement of those principles could establish the illegality of the exclusion laid down by the contested provision.

169 It cannot, however, be disputed that the current system, as defined, leads to the applicant being penalised for having reduced its fossil carbon dioxide emissions almost to zero. First, the applicant states, without being seriously contradicted, that its transition to biomass required extremely expensive investments for which it no longer enjoys any benefit in return. Second, it is apparent from the statements made by the parties at the hearing that the position adopted by the Commission, according to which the applicant cannot, even if it decides to use fossil fuels again, be regarded as a 'new entrant' deprives it of any possibility of receiving a free allocation of allowances again.

170 However, as has been pointed out in paragraph 122 above, such effects are inherent in any system providing for inclusion and exclusion thresholds. The exclusion provided for in paragraph 1 of Annex I to Directive 2003/87 at issue in the present case has the effect of exempting from the obligations inherent in the ETS installations which have opted in full for a production process using renewable energy and of encouraging installations which have not fully exercised that option to substitute biomass for fossil fuels. In that regard, it should also be observed that the applicant's position that it should again receive a free allocation of allowances if it were to revert to the use of fossil fuels would run directly counter to that objective.

171 Therefore, despite its negative effects on the applicant, the exclusion of installations exclusively using biomass and the treatment of those installations in the same way as those which emitted less than 0.5 tonnes of fossil carbon dioxide during the baseline period are not such as to establish a manifest infringement of the principles of proportionality and equal treatment by the EU legislature.

172 Lastly, the applicant seeks to rely on a legislative proposal, submitted by the Commission to the Parliament and the Council, endeavouring to set at 5% the fossil carbon dioxide emissions threshold below which installations are deemed to be exclusively using biomass. According to the applicant, that intention on the part of the legislature to alter the system demonstrates its imperfections. However, such observations *de lege ferenda* cannot lead to the rules in force being regarded as unlawful and, consequently, inapplicable.

173 It follows that the plea of illegality raised by the applicant must be rejected and it follows from all of the foregoing that the action must be dismissed.

Costs

174 Under Article 134(1) of the Rules of Procedure of the General Court, the unsuccessful party is to be ordered to pay the costs if they have been applied for in the successful party's pleadings. Under Article 135(1) of those rules, however, if equity so requires, the General Court may decide that an unsuccessful party is to pay only a proportion of the costs of the other party in addition to bearing his or her own costs, or even that he or she is not to be ordered to pay any costs.

175 Article 138(1) of the Rules of Procedure, under which the institutions which have intervened in the proceedings are to bear their own costs, precludes granting the form of order sought by the Council that the applicant should be ordered to pay the costs.

176 Furthermore, in the circumstances of the present case, particularly in view of the errors identified in paragraphs 78 and 79 above, it must be decided that each party is to bear its own costs.

On those grounds,

THE GENERAL COURT (Second Chamber)

hereby:

1. Dismisses the action;

2. Orders each party to bear its own costs.

Marcoulli Frimodt Nielsen Norkus

Delivered in open court in Luxembourg on 26 July 2023.

[Signatures]

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