Reports of Cases

JUDGMENT OF THE GENERAL COURT (Fifth Chamber)

26 September 2014*

(Environment — Directive 2003/87/EC — Scheme for greenhouse gas emission allowance trading — Transitional rules for harmonised free allocation of emission allowances from 2013 — Decision 2011/278/EU — National implementing measures submitted by Germany — Hardship clause — Freedom to choose an occupation and to conduct a business — Right to property — Proportionality)

In Case T-614/13,

Romonta GmbH, established in Seegebiet Mansfelder Land (Germany), represented by I. Zenke, M.-Y. Vollmer, C. Telschow and A. Schulze, lawyers,

applicant,

v

European Commission, represented by E. White, C. Hermes and K. Herrmann, acting as Agents,

defendant,

APPLICATION for annulment of Commission Decision 2013/448/EU of 5 September 2013 concerning national implementation measures for the transitional free allocation of greenhouse gas emission allowances in accordance with Article 11(3) of Directive 2003/87/EC of the European Parliament and of the Council (OJ 2013 L 240, p. 27), in so far as Article 1(1) thereof refuses, in respect of the third emissions trading period from 2013 to 2020, to grant the applicant the supplementary allowances requested on the basis of the hardship clause under Paragraph 9(5) of the Treibhausgas-Emissionshandelsgesetz (German Law on greenhouse gas emissions trading) of 21 July 2011,

THE GENERAL COURT (Fifth Chamber),

composed of A. Dittrich (Rapporteur), President, J. Schwarcz and V. Tomljenović, Judges,

Registrar: J. Plingers, Administrator,

having regard to the written procedure and further to the hearing on 14 May 2014,

gives the following

* Language of the case: German.

Judgment

Background to the dispute

1 The applicant, Romonta GmbH, is an undertaking based in Germany which is the only producer of montan wax in Europe. It extracts bitumen from particularly bitumen-rich lignite in order to process it and market it in the form of montan wax. The applicant uses the lignite residues in a high-efficiency cogeneration plant whose heat is used for its industrial process. It sells the electricity generated as a by-product in its cogeneration plant. Since 1 January 2005 the applicant has been subject to the scheme for greenhouse gas emission allowance trading in the European Union under Directive 2003/87/EC of the European Parliament and of the Council of 13 October 2003 establishing a scheme for greenhouse gas emission allowance trading within the Community and amending Council Directive 96/61/EC (OJ 2003 L 275, p. 32), as last amended by Directive 2009/29/EC of the European Parliament and of the Council of 23 April 2009 amending Directive 2003/87/EC so as to improve and extend the greenhouse gas emission allowance trading scheme of the Community (OJ 2009 L 140, p. 63) ('Directive 2003/87'). According to Article 1 of Directive 2003/87, that scheme for greenhouse gas emission allowance trading was established in order to reduce such emissions in the Union.

2 To that end, the first paragraph of Article 9 of Directive 2003/87 provides that the Union-wide quantity of allowances issued each year starting in 2013 will decrease in a linear manner beginning from the mid-point of the period from 2008 to 2012. Under the second paragraph of Article 9, the European Commission had to publish the absolute Union-wide quantity of allowances for 2013. In this connection, it adopted Decision 2010/384/EU of 9 July 2010 on the Community-wide quantity of allowances to be issued under the EU Emission Trading Scheme for 2013 (OJ 2010 L 175, p. 36), repealed by Commission Decision 2010/634/EU of 22 October 2010 adjusting that quantity (OJ 2010 L 279, p. 34). That total quantity is distributed according to the rules set out in Articles 10, 10a and 10c of Directive 2003/87. Thus, a proportion of the allowances are allocated free of charge on the basis of Articles 10a and 10c of that directive. All allowances which are not allocated free of charge in accordance with Articles 10a and 10c of Directive 2003/87 are to be auctioned by the Member States from 2013 onwards under Article 10 of that directive.

3 As regards free allocation of allowances on the basis of Article 10a of Directive 2003/87, the Commission had to adopt Union-wide and fully-harmonised implementing measures for the free allocation of emission allowances. In this regard, it was required, in particular, to set ex ante benchmarks in individual sectors or sub-sectors and to take as the starting point in this regard the average performance of the 10% most efficient installations in a sector or sub-sector in the Union in the years 2007-2008. On the basis of those benchmarks, the free allocation of emission allowances to each installation concerned was calculated from 2013.

4 On 27 April 2011, the Commission adopted Decision 2011/278/EU determining transitional Union-wide rules for harmonised free allocation of emission allowances pursuant to Article 10a of Directive 2003/87 (OJ 2011 L 130, p. 1). In that decision, the Commission defined, to the extent feasible, a benchmark for each product, as is stated in recital 4 in the preamble and Annex I to that decision. Where deriving a product benchmark was not feasible, but greenhouse gases eligible for the free allocation of emission allowances occur, a hierarchy of three fallback approaches was developed, according to recital 12 in the preamble to that decision. Thus, the heat benchmark was applicable for heat consumption processes where a measurable heat carrier was used. The fuel benchmark was applicable where non-measurable heat was consumed. For process emissions, emission allowances were allocated on the basis of historical emissions.

5 Article 10 of Decision 2011/278 contains the rules on the basis of which Member States are to calculate for each year the number of emission allowances allocated free of charge from 2013 onwards to each incumbent installation on their territory. Under Article 10(2), the Member States are required

first to determine the preliminary annual number of emission allowances allocated free of charge for each sub-installation separately for each product benchmark sub-installation and for heat benchmark, fuel benchmark and process emissions sub-installations.

6 Under Article 11(1) of Directive 2003/87 and Article 15(1) and (2) of Decision 2011/278, Member States had to submit to the Commission, by 30 September 2011, the list of installations covered by that directive in their territory and any free allocation to each installation in their territory calculated in accordance with the rules referred to in Article 10a(1) and Article 10c of that directive. Under Article 15(3) of Decision 2011/278, the Commission had to assess the inclusion of each installation in the list and the related preliminary total annual amounts of emission allowances allocated free of charge. That determination was necessary because the maximum annual amount of allowances to be allocated free of charge was limited under Article 10a(5) of Directive 2003/87. Article 15(4) of Decision 2011/278 provides that if the Commission does not reject an installation's inscription on this list, including the corresponding preliminary total annual amounts of emission allowances allocated free of charge for this installation, the Member State concerned must proceed to the determination of the final annual amount of emission allowances allocated free of charge for each year over the period from 2013 to 2020. Under Article 11(3) of Directive 2003/87, Member States may not issue allowances free of charge to installations whose inscription in the list referred to in paragraph 1 of that article has been rejected by the Commission.

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

'If the allocation of allowances made on the basis of Article 10 entails undue hardship for the operator of the installation and for a connected undertaking which, for reasons relating to commercial law and company law, is liable for the economic risks of that operator, the competent authority shall allocate, at the request of the operator, supplementary allowances in the amount required for fair compensation, provided the European Commission does not reject that allocation on the basis of Article 11(3) of Directive 2003/87/EC.'

8 On 21 December 2011, the applicant applied to the German authority responsible for implementing emission allowance trading for free allocation of allowances for its installation, whose identification code is DE000000000000978, on the basis of the process emissions criterion, the heat benchmark and the hardship clause in Article 9(5) of the TEHG. It explained in this regard that its survival depended on the allocation of supplementary allowances under that clause, failing which it would enter court-ordered liquidation.

9 On 7 May 2012, the Federal Republic of Germany sent the Commission the list of installations covered by Directive 2003/87 in its territory and any free allocation to each installation in its territory in accordance with Article 15(1) of Decision 2011/278. For the applicant's installation, the Federal Republic of Germany calculated the preliminary number of emission allowances to be allocated free of charge, applying the hardship clause under Article 9(5) of the TEHG.

10 On 5 September 2013, the Commission adopted Decision 2013/448/EU concerning national implementation measures for the transitional free allocation of greenhouse gas emission allowances in accordance with Article 11(3) of Directive 2003/87 (OJ 2013 L 240, p. 27, 'the contested decision').

11 By Article 1(1) of the contested decision in conjunction with point A of Annex I to that decision, the Commission rejected the inscription of the applicant's installation on the lists of installations covered by Directive 2003/87 submitted by the Member States pursuant to Article 11(1) of that directive and the preliminary total annual amounts of emission allowances allocated free of charge to that installation.

12 The Commission stated, in recital 11 in the preamble to the contested decision, that free allocation of allowances to the applicant on the basis of Article 9(5) of the TEHG had to be refused on the ground that Decision 2011/278 did not provide for the adjustment which the Federal Republic of Germany wished to make on the basis of that provision. The Federal Republic of Germany had not substantiated that the allocation for the installation in question calculated on the basis of Decision 2011/278 was manifestly inappropriate having regard to the objective of full harmonisation of allocations to be achieved. Assigning more free allowances to some installations distorted or threatened to distort competition and had cross-border effects given Union-wide trade in all sectors covered by Directive 2003/87. In the light of the principle of equal treatment of installations under the scheme for greenhouse gas emission allowance trading, the Commission found that it was therefore appropriate to object to the preliminary amounts of free allocation to certain installations contained in the German national implementing measures and listed in point A of Annex I of the contested decision.

13 Under Article 2 of the contested decision, without prejudice to Article 1 of that decision, the Commission raised no objections with regard to the lists of installations covered by Directive 2003/87 submitted by Member States pursuant to Article 11(1) of that directive or with regard to the corresponding preliminary total annual amounts of emission allowances allocated for free to those installations.

14 In Article 3 of the contested decision the Commission adjusted the total quantity of allowances to be issued from 2013 onwards, determined on the basis of Articles 9 and 9a of Directive 2003/87, as fixed in Decision 2010/634.

15 Lastly, in Article 4 of the contested decision in conjunction with Annex II to that decision, the Commission determined, in accordance with Article 15(3) of Decision 2011/278, the uniform cross-sectoral correction factor referred to in Article 10a(5) of Directive 2003/87.

Procedure and forms of order sought

16 By application lodged at the Registry of the Court on 26 November 2013, the applicant brought the present action.

17 By separate document lodged at the Registry of the Court on the same date, the applicant applied for the present action to be decided under an expedited procedure in accordance with Article 76a of the Rules of Procedure of the Court. On 10 December 2013, the Commission submitted its observations on that application.

18 By separate document lodged at the Registry of the Court on 27 November 2013, the applicant made an application for interim measures in which it essentially requested the President of the Court to suspend operation of the contested decision in so far as, by that decision, the allocation of allowances on the basis of Article 9(5) of the TEHG had been refused.

19 By decision of 17 December 2013, the General Court (Fifth Chamber) granted the application for an expedited procedure.

20 By order of 20 January 2014 in *Romonta* v *Commission* (T-614/13 R, EU:T:2014:16), the application for interim measures was rejected and the costs were reserved.

21 On 21 January 2014 the written procedure was closed.

22 Acting on a report from the Judge-Rapporteur, the General Court (Fifth Chamber) decided to open the oral procedure.

23 In the context of a measure of organisation of procedure laid down in Article 64 of its Rules of Procedure, the Court requested the Commission to answer one question at the hearing.

24 The parties submitted oral argument and replied to the questions put by the Court at the hearing on 14 May 2014.

25 The applicant claims that the Court should:

— annul the contested decision in so far as Article 1(1) thereof refuses to grant it the supplementary allowances requested for the third trading period of the 2013 to 2020 emissions trading on the basis of the hardship clause under Paragraph 9(5) of the TEHG;

— order the Commission to pay the costs.

26 The Commission contends that the Court should:

— dismiss the action;

— order the applicant to pay the costs.

Law

27 Without formally raising a plea of inadmissibility, the Commission challenges the admissibility of the action. Before considering the pleas in law raised by the applicant, it is therefore necessary to examine the admissibility of the action.

Admissibility

28 The Commission disputes the applicant's standing to bring proceedings, and more precisely its direct concern. In the view of the Commission, Article 15(4) and (5) of Decision 2011/278 provides for national implementing measures prior to the allocation of emission allowances.

29 Under the fourth paragraph of Article 263 TFEU, any natural or legal person may, under the conditions laid down in the first and second paragraphs of that article, institute proceedings against an act addressed to that person or which is of direct and individual concern to them, and against a regulatory act which is of direct concern to them and does not entail implementing measures.

30 It is common ground in the present case that the contested decision was not addressed to the applicant, who is not therefore the person to whom that act is addressed. Accordingly, under the fourth paragraph of Article 263 TFEU, the applicant may bring an action for annulment against that act only if, among other things, it is of direct concern to it.

31 With regard to direct concern, it is settled case-law that that condition requires that, firstly, the contested Union measure must directly affect the legal situation of the individual and, secondly, it must leave no discretion to its addressees, who are entrusted with the task of implementing it, such implementation being purely automatic and resulting from Union rules without the application of other intermediate rules (*Dreyfus* v *Commission*, C-386/96 P, ECR, EU:C:1998:193, paragraph 43; *Front national* v *Parliament*, C-486/01 P, ECR, EU:C:2004:394, paragraph 34; and *Commission* v *Ente per the Ville vesuviane* and *Ente per the Ville vesuviane* v *Commission*, C-445/07 P and C-455/07 P, ECR, EU:C:2009:529, paragraph 45).

32 It should be noted that under Article 11(3) of Directive 2003/87, Member States may not issue allowances free of charge to installations whose inscription in the list of installations referred to in paragraph 1 of that article has been rejected by the Commission. The rejection of the inscription of the applicant's installation in that list and the corresponding preliminary total annual amounts of emission allowances allocated free of charge for that installation therefore directly affects the legal situation of the applicant and leaves no discretion to the Federal Republic of Germany, which is entrusted with the task of implementing the contested decision. Furthermore, the effects of the contested decision are also reflected in Article 9(5) of the TEHG, under which the national authority may allocate emission allowances free of charge on the basis of the hardship clause only if the Commission does not reject that under Article 11(3) of Directive 2003/87 (see paragraph 7 above).

33 This conclusion is not called into question by the Commission's arguments. Although it is true, as the Commission claims, that Article 15(4) and (5) of Decision 2011/278 provides for national implementing measures, that provision is still not an obstacle to the contested decision being of direct concern to the applicant.

34 First, Article 15(4) of Decision 2011/278 provides that if the Commission does not reject an installation's inscription on the list of installations referred to in Article 11(1) of Directive 2003/87, including the corresponding preliminary total annual amounts of emission allowances allocated free of charge for this installation, the Member State concerned must proceed to the determination of the final annual amount of emission allowances allocated free of charge for each year over the period from 2013 to 2020 in accordance with Article 10(9) of Decision 2011/278. The latter provision states how the final total annual amount of emission allowances allocated free of charge for each incumbent installation is established. That amount corresponds to the preliminary total annual amount of emission allowances allocated free of charge for each installation multiplied by the cross-sectoral correction factor as determined by the Commission.

35 In this case, in the contested decision the Commission definitively determined all the factors to be taken into account for the Federal Republic of Germany's calculation of the final annual amounts of emission allowances allocated free of charge for each year over the period from 2013 to 2020 to the applicant's installation. In that decision, it determined the preliminary total annual amounts of emission allowances allocated free of charge to each installation and the cross-sectoral correction factor. In calculating the final total annual amount of emission allowances allocated free of charge for the installation concerned in accordance with Article 10(9) of Decision 2011/278, the Federal Republic of Germany did not therefore have any discretion. The calculation of that amount resulted from the contested decision alone, in which all the relevant factors had been definitively determined. The implementation of the contested decision by the calculation of the final total annual amount of emission allowances allocated free of charge for the installation concerned was therefore purely automatic.

36 Second, Article 15(5) of Decision 2011/278 obliges the Member States to submit to the Commission a list of the final annual amounts of emission allowances allocated free of charge over the period from 2013 to 2020 as determined in accordance with Article 10(9) of that decision, after determination of the final annual amount for all incumbent installations in their territory. It need only be noted in this regard that such an obligation to provide information does not effectively confer discretion upon the Member States and merely requires the Member States to communicate to the Commission the result of their calculation of the final total annual amount of emission allowances allocated free of charge for each installation concerned.

37 Consequently, the contested decision must be considered to be of direct concern to the applicant. Because it is also individually affected by that decision by reason of the fact that, by that decision, the Commission individually rejected the preliminary total annual amounts of emission allowances allocated free of charge to its installation, which is not disputed by the Commission, moreover, it does have standing to bring proceedings.

38 The action is therefore admissible.

Substance

39 In support of its action, the applicant raises three pleas in law, alleging, first, infringement of the principle of proportionality, second, infringement of the powers of the Member States and of the principle of subsidiarity and, third, infringement of fundamental rights. The Court considers it appropriate to examine the first and third pleas in law together first and then the second plea in law.

The first and third pleas in law, alleging infringement of the principle of proportionality and of fundamental rights

40 The applicant claims that, by rejecting free allocation of emission allowances in case of undue hardship, the Commission infringed the principle of proportionality and its fundamental rights. It asserts as its principal claim that by taking the view that Decision 2011/278 precludes the allocation of allowances on the basis of a hardship clause, the Commission failed to have regard to that decision and infringed the principle of proportionality and its fundamental rights. In the alternative, the applicant claims that if its main argument were to be rejected on the ground that Decision 2011/278 does not expressly mention the possibility of allocating supplementary allowances in cases of undue hardship, the view would have to be taken that that decision is disproportionate and infringes its fundamental rights.

– The argument, made as a principal claim, concerning infringement of the principle of proportionality and of fundamental rights by reason of an infringement of Decision 2011/278

41 The applicant claims that the Commission infringed Decision 2011/278 by taking the view that that decision precluded the allocation of allowances on the basis of a hardship clause. By refusing to authorise the allocation of allowances on the basis of Article 9(5) of the TEHG, the Commission infringed the principle of proportionality and its fundamental rights, namely its freedom to choose an occupation, its freedom to conduct a business and its right to property, as provided for in Articles 15 to 17 of the Charter of Fundamental Rights of the European Union.

42 In order to be able to conclude that the Commission infringed Decision 2011/278, and thus the principle of proportionality and the applicant's fundamental rights, by refusing to authorise free allocation of emission allowances on the basis of a hardship clause, such an allocation would have to be possible under that decision, which is based on Directive 2003/87, a point disputed by the Commission.

43 In the present case, free allocation of emission allowances on the basis of a hardship clause was not possible under Decision 2011/278, which is based on Directive 2003/87, since under the applicable rules of law Decision 2011/278 did not permit the Commission to authorise the allocation of allowances on the basis of such a clause and the Commission had no discretion, as it argues.

44 First, Decision 2011/278 does not permit the Commission to authorise free allocation of emission allowances on the basis of a hardship clause like that in Article 9(5) of the TEHG. Article 10 of Decision 2011/278 contains the rules on the basis of which Member States are to calculate for each year the number of emission allowances allocated free of charge from 2013 onwards to each incumbent installation on their territory. Under that provision, the Member States are required to calculate the amount of allowances to be allocated free of charge to installations on their territory on the basis of the benchmark values determined in Decision 2011/278 or process emissions, certain multiplier coefficients and the cross-sectoral correction factor determined in accordance with Article 15(3) of that decision.

45 These allocation rules are explained in the recitals in the preamble to Decision 2011/278. According to recital 4 in the preamble to Decision 2011/278, the Commission developed, to the extent feasible, benchmarks for products. Recital 12 in the preamble to that decision states that where deriving a product benchmark was not feasible, but greenhouse gases eligible for the free allocation of emission allowances occur, a hierarchy of three fallback approaches was developed. Thus according to recital 12, the heat benchmark was applicable for heat consumption processes where a measurable heat carrier was used. The fuel benchmark was applicable where non-measurable heat was consumed. For process emissions, emission allowances were allocated on the basis of historical emissions.

46 The scheme established by Decision 2011/278 therefore lays down exhaustive rules governing free allocation of emission allowances with the result that any free allocation of allowances outside the scope of those rules is precluded. This conclusion is confirmed by the fact that, although the inclusion of a hardship clause was discussed on the initiative of a Member State during the procedure leading to the adoption of Decision 2011/278, such a clause was ultimately not included, as was pointed out by the Commission at the hearing in response to a question asked by the Court.

47 Second, the Commission had no discretion to reject the inscription of the applicant's installation on the lists of installations covered by Directive 2003/87 submitted to the Commission pursuant to Article 11(1) of that directive and the corresponding preliminary total annual amounts of emission allowances allocated free of charge for that installation. The legal bases of the contested decision are Articles 10a and 11 of Directive 2003/87. Under Article 11(1) of that directive, each Member State must submit to the Commission the list of installations covered by that directive in their territory and any free allocation to each installation in their territory calculated in accordance with the rules referred to in Article 10a(1) and Article 10c of that directive. Under Article 11(3) of that directive, Member States may not issue allowances free of charge to installations whose inscription in the list referred to in paragraph 1 of that article has been rejected by the Commission. As the Commission states, it follows from Article 11(1) and (3) of Directive 2003/87 that its decision whether or not to reject the inscription of an installation on that list depends solely on whether the allowances allocated to the installation by the Member State in question were calculated in accordance with the rules referred to in Article 10a(1) and Article 10c of that directive. If that is not the case, the Commission must reject that inscription, having no discretion in that regard.

48 Third, in so far as the applicant claims that recognition of circumstances constituting *force majeure* is possible and thus permits free allocation of emission allowances where an undertaking is likely to become insolvent and unable to meet its repayment obligations in the absence of sufficient funds, its argument must also be rejected. According to case-law, even in the absence of specific provisions, recognition of circumstances constituting *force majeure* presupposes that the external cause relied on by individuals has consequences which are inexorable and inevitable to the point of making it objectively impossible for the persons concerned to comply with their obligations (*Billerud Karlsborg and Billerud Skärblacka*, C-203/12, ECR, EU:C:2013:664, paragraph 31; see also, to this effect, *Ferriera Valsabbia and Others* v *Commission*, 154/78, 205/78, 206/78, 226/78 to 228/78, 263/78, 264/78, 31/79, 39/79, 83/79 and 85/79, ECR, EU:C:1980:81, paragraph 140). However, as the applicant has been subject to the scheme for greenhouse gas emission allowance trading under Directive 2003/87/EC since 1 January 2005, the mere risk of becoming insolvent and being unable to meet repayment obligations in the absence of sufficient funds is not enough to establish a case of *force majeure*, which requires unusual and unforeseeable circumstances which were beyond the control of the party by whom it is pleaded and the consequences of which could not have been avoided even if all due care had been exercised (see *Eurofit*, C-99/12, ECR, EU:C:2013:487, paragraph 31 and cited case-law).

49 Consequently, the Commission did not infringe Decision 2011/278 by rejecting the free allocation of emission allowances on the basis of a hardship clause.

50 The applicant's argument, made as a principal claim, must therefore be rejected.

– The argument, made in the alternative, relating to infringement of the principle of proportionality and of fundamental rights by Decision 2011/278

51 The applicant claims that in so far as Decision 2011/278 does not permit free allocation of allowances on the basis of a hardship clause, that decision infringes its fundamental rights and the principle of proportionality.

52 It must therefore be examined whether the Commission infringed the applicant's fundamental rights and the principle of proportionality by failing to provide, in the rules on free allocation of emission allowances laid down in Decision 2011/278, that those free allowances could be allocated on the basis of a hardship clause.

53 An infringement of fundamental rights and of the principle of proportionality by reason of the absence of a hardship clause in the rules on free allocation of emission allowances laid down in Decision 2011/278 cannot be ruled out a priori, since Article 10a of Directive 2003/87, which constitutes the legal basis of that decision, does not exclude free allocation of allowances on the basis of such a clause by the Commission. First, under the first and second paragraphs of Article 10a(1) of Directive 2003/87, the Commission had to adopt Union-wide and fully-harmonised implementing measures for the free allocation of emission allowances which were designed to amend non-essential elements of Directive 2003/87 by supplementing it. The introduction by the Commission of a hardship clause applicable to all Member States would have respected the requirement of Union-wide and fully-harmonised implementing measures. In addition, in so far as such a clause would have applied only in exceptional cases and, consequently, would not have undermined the scheme established by Directive 2003/87, it would not have been designed to amend essential elements of that directive. Second, under the third subparagraph of Article 10a(1) of Directive 2003/87, the Commission was required, to the extent feasible, to determine ex ante benchmarks. Where deriving a product benchmark was not feasible, but greenhouse gases eligible for the free allocation of emission allowances occur, the Commission had discretion to lay down rules, which it did by developing a hierarchy of three fallback approaches. Within the scope of that discretion, therefore, the Commission could also, in principle, have provided for free allocation of allowances on the basis of a hardship clause.

54 In support of its argument, the applicant claims that, by failing to provide for a hardship clause, Decision 2011/278 does not respect its freedom to choose an occupation, its freedom to conduct a business and its right to property as provided for by Articles 15 to 17 of the Charter of Fundamental Rights, and the principle of proportionality.

55 Under the first subparagraph of Article 6(1) TEU, the Union recognises the rights, freedoms and principles set out in the Charter of Fundamental Rights, which have the same legal value as the Treaties.

56 Article 15(1) of the Charter of Fundamental Rights provides that everyone has the right to pursue a freely chosen or accepted occupation. Under Article 16 of the Charter of Fundamental Rights, the freedom to conduct a business in accordance with Union law and national laws and practices is recognised. The protection afforded by Article 16 of the Charter covers the freedom to exercise an economic or commercial activity, the freedom of contract and free competition, as is apparent from the explanations relating to that article, which, in accordance with the third subparagraph of Article 6(1) TEU and Article 52(7) of the Charter of Fundamental Rights, have to be taken into consideration for the interpretation of the Charter (*Sky Österreich*, C-283/11, ECR, EU:C:2013:28, paragraph 42).

57 Under Article 17(1) of the Charter of Fundamental Rights, everyone has the right to own, use, dispose of and bequeath his or her lawfully acquired possessions. No one may be deprived of his or her possessions, except in the public interest and in the cases and under the conditions provided for by

law, subject to fair compensation being paid in good time for their loss. The use of property may be regulated by law in so far as is necessary for the general interest. The protection granted by that article applies to rights with an asset value creating an established legal position under the legal system, enabling the holder to exercise those rights autonomously and for his benefit (*Sky Österreich*, paragraph 56 above, EU:C:2013:28, paragraph 34).

58 In the absence of a hardship clause in Decision 2011/278, the Commission was required to reject the free allocation of emission allowances for the applicant, which went beyond the allocation rules laid down in that decision. As such a clause was intended to deal with the undue hardship experienced by the installation in question, which threatened its existence, its absence constitutes interference in the applicant's freedom to choose an occupation and to conduct a business and its right to property.

59 However, according to settled case-law, the freedom to pursue a trade or profession, like the right to property, is not an absolute right but must be considered in relation to its social function. Consequently, restrictions may be imposed on the exercise of those freedoms and on the right to property, provided that those restrictions in fact correspond to objectives of general interest pursued by the European Union and do not constitute, with regard to the aim pursued, a disproportionate and intolerable interference, impairing the very substance of those rights (*Nold* v *Commission*, 4/73, ECR, EU:C:1974:51, paragraph 14; see also *Zuckerfabrik Süderdithmarschen and Zuckerfabrik Soest*, C-143/88 and C-92/89, ECR, EU:C:1991:65, paragraph 73 and cited case-law; *Deutsches Weintor*, C-544/10, ECR, EU:C:2012:526, paragraph 54 and cited case-law; and *Sky Österreich*, paragraph 56 above, EU:C:2013:28, paragraph 45 and cited case-law). Under Article 52(1) of the Charter of Fundamental Rights, any limitation on the exercise of the rights and freedoms recognised by the Charter must be provided for by law and respect the essence of those rights and freedoms. Subject to the principle of proportionality, limitations may be made only if they are necessary and genuinely meet objectives of general interest recognised by the Union or the need to protect the rights and freedoms of others.

60 As regards the objectives of general interest referred to above, established case-law also shows that protection of the environment is one of those objectives (see *ERG and Others*, C-379/08 and C-380/08, ECR, EU:C:2010:127, paragraph 81 and cited case-law).

61 The absence of a hardship clause in Decision 2011/278 does not affect the essence of either the freedom to choose an occupation and to conduct a business or the right to property. The absence of such a clause does not prevent operators of installations subject to the emission allowance trading scheme from pursuing an occupation or conducting a business as such and does not deprive them of their property. The expenditure resulting from the absence of such a clause for the installations concerned is connected with the obligation to purchase the missing allowances by auction, which is the rule established by Directive 2009/29.

62 As regards the proportionality of the interference established, it must be recalled that, according to settled case-law, the principle of proportionality, which is one of the general principles of Union law, requires that measures adopted by institutions do not exceed the limits of what is appropriate and necessary in order to attain the objectives legitimately pursued by the legislation in question; when there is a choice between several appropriate measures recourse must be had to the least onerous, and the disadvantages caused must not be disproportionate to the aims pursued (see *Afton Chemical*, C-343/09, ECR, EU:C:2010:419, paragraph 45 and cited case-law).

63 With regard to judicial review of the conditions referred to in paragraph 62 above, the Commission must be allowed a wide discretion in an area such as that involved in the present case, which entails political, economic and social choices on its part, and in which it is called upon to undertake complex assessments and evaluations with the general objective of reducing greenhouse gas emissions by means of a cost-effective and economically efficient emission trading scheme (first paragraph of Article 1 and recital 5 in the preamble to Directive 2003/87). The lawfulness of a measure adopted in that sphere can

be affected only if the measure is manifestly inappropriate in relation to the objective which the competent institutions are seeking to pursue (see, to this effect, *Germany* v *Parliament and Council*, C-380/03, ECR, EU:C:2006:772, paragraph 145 and cited case-law, and *Poland* v *Commission*, T-370/11, ECR, EU:T:2013:113, paragraph 65 and cited case-law).

64 The applicant contests the appropriateness of Decision 2011/278 and claims that that decision is not manifestly proportionate in the strict sense.

65 In the first place, with regard to the appropriateness of Decision 2011/278, the applicant claims that the absence of a hardship clause does not benefit climate protection. In its view, on the one hand, any increase in the number of allowances in a particular case entails an increase in the cross-sectoral correction factor whose purpose is to ensure observance of the fixed amount of free allowances to be issued throughout the Union. On the other hand, the disappearance of its installation would not give rise to an absolute reduction of emissions, since demand for products would continue and would be covered by competitors outside the Union, which would not generate any fewer emissions.

66 In that regard it should be noted that the principal declared objective of Directive 2003/87, prior to its amendment by Directive 2009/29, was to reduce greenhouse gas emissions substantially in order to be able to fulfill the commitments of the European Union and its Member States under the Kyoto Protocol, approved by Council Decision 2002/358/EC of 25 April 2002 concerning the approval, on behalf of the European Community, of the Kyoto Protocol to the United Nations Framework Convention on Climate Change and the joint fulfilment of commitments thereunder (OJ 2002 L 130, p. 1) (*Commission* v *Poland*, C-504/09 P, ECR, EU:C:2012:178, paragraph 77, and *Commission* v *Estonia*, C-505/09 P, ECR, EU:C:2012:179, paragraph 79). Under recital 4 in the preamble to Directive 2003/87, the Kyoto Protocol committed the European Union and its Member States to reducing their aggregate anthropogenic emissions of greenhouse gases by 8% compared to 1990 levels in the period 2008 to 2012 (*Poland* v *Commission*, paragraph 63 above, EU:T:2013:113, paragraph 67).

67 It is clear from the second paragraph of Article 1 and recital 3 in the preamble to Directive 2003/87 that, after its amendment by Directive 2009/29, Directive 2003/87 provides for the reductions of greenhouse gas emissions to be increased so as to contribute to the levels of reductions that are considered scientifically necessary to avoid dangerous climate change. As is apparent from those provisions and recitals 3, 5, 6 and 13 in the preamble to Directive 2009/29, the principal objective of Directive 2003/87, after its amendment by Directive 2009/29, is to reduce by 2020 global greenhouse gas emissions in the European Union by at least 20% compared to 1990 levels (*Poland* v *Commission*, paragraph 63 above, EU:T:2013:113, paragraph 68).

68 That objective must be achieved in compliance with a series of 'sub-objectives' and through recourse to certain instruments. The principal instrument for that purpose is constituted by the scheme for greenhouse gas emission trading, as is apparent from the first paragraph of Article 1 of Directive 2003/87 and recital 2 in its preamble. The first paragraph of Article 1 of that directive states that that scheme promotes emission reductions in a cost-effective and economically efficient manner. The other sub-objectives to be fulfilled by that scheme are, inter alia, as set out in recitals 5 and 7 in the preamble to the directive, the safeguarding of economic development and employment and the preservation of the integrity of the internal market and of conditions of competition (*Commission* v *Poland*, paragraph 66 above, EU:C:2012:178, paragraph 77; *Commission* v *Estonia*, paragraph 66 above, EU:C:2012:179, paragraph 79; and *Poland* v *Commission*, paragraph 63 above, EU:T:2013:113, paragraph 69).

69 First, as regards the principal objective of Directive 2003/87, namely reducing greenhouse gas emissions within the Union, it cannot be argued that, in the absence of a hardship clause, the allocation rules contained in Decision 2011/278 are manifestly inappropriate for achieving that objective. The rules laid down in Decision 2011/278 for calculating allocations of emission allowances on the basis of product, heat and fuel benchmarks and process emissions seek to ensure that the

amount of allowances to be allocated free of charge for the third trading period, namely from 2013, is reduced compared with amount to be allocated for the second trading period, namely the period from 2008 to 2012. Those measures form part of the transitional rules for harmonised free allocation under Article 10a of Directive 2003/87 and, as is clear from the third subparagraph of paragraph 1 of that provision, seek to ensure that allocation takes place in a manner that provides incentives for reductions in greenhouse gas emissions and energy efficient techniques and does not provide incentives to increase emissions.

70 This conclusion is not affected by the fact that if free allocation of supplementary allowances on the basis of a hardship clause were permitted, the maximum annual amount of free allowances referred to in Article 10a(5) of Directive 2003/87 would not be increased on account of the need to apply the uniform cross-sectoral correction factor, which would lead to a uniform reduction of the initial amounts of free allowances in all sectors and sub-sectors concerned. As the Commission claims, if there were a hardship clause, operators of installations might have less of an incentive to reduce their emissions through economic or technical adjustment measures as they could apply for supplementary free allowances for their installations in the case of undue hardship.

71 With regard to the applicant's argument that the disappearance of its installation would not give rise to an absolute reduction of emissions, since demand for products would continue and would be covered by competitors outside the Union, which would not generate any fewer emissions, it should be stated, first, that the principal objective of Directive 2003/87 consists in reducing greenhouse gas emissions within the Union. Second, it is inherent to such general allocation rules that they have a greater impact on some installations than others (*Poland* v *Commission*, paragraph 63 above, EU:T:2013:113, paragraph 85). In addition, Article 10a(12) of Directive 2003/87 contains a special rule for the free allocation of allowances to installations in sectors or sub-sectors which are exposed to a significant risk of 'carbon leakage', namely a risk of the activities of Union-based undertakings in sectors subject to a strong international competition being relocated to third countries in which greenhouse gas emission requirements are less strict. That special rule reduces the risk of emissions simply being displaced.

72 Second, as regards the sub-objectives of Directive 2003/87, namely safeguarding economic development and employment, it is true that the Court has ruled that the aim of reducing greenhouse gas emissions in accordance with the commitments of the Union and its Member States under the Kyoto Protocol must be achieved, in so far as possible, while respecting the needs of the European economy (*United Kingdom* v *Commission*, T-178/05, ECR, EU:T:2005:412, paragraph 60). However, account must be taken of the fact that auctioning, as provided for in Article 10 of Directive 2003/87, should be the basic principle for the allocation of allowances since the third trading period, as recital 15 in the preamble to Directive 2009/29 states (*Poland* v *Commission*, paragraph 63 above, EU:T:2013:113, paragraph 72). Since that principle is subject to exceptions in order to mitigate any detrimental effects of the allowance trading scheme on those sub-objectives, namely the transitional rules laid down in Article 10a of Directive 2003/87 on free allocation of allowances during a transitional period, the possibility of financial measures under paragraph 6 of that article and the special rules applicable to sectors exposed to a significant risk of carbon leakage in paragraph 12 of that article, it cannot be argued that the allocation rules laid down in Decision 2011/278 are manifestly inappropriate having regard to those sub-objectives.

73 Consequently, the applicant has not put forward any arguments to show that Decision 2011/278 was, by reason of the absence of a hardship clause, manifestly inappropriate having regard to the objectives to be achieved.

74 In the second place, with regard to proportionality in the strict sense of Decision 2011/278 in respect of the absence of a hardship clause, it should be noted that, under that principle, even if it is appropriate and necessary for achieving legitimately pursued goals, Decision 2011/278 must not cause disadvantages that are disproportionate to the aims pursued (see, to this effect, *Poland* v *Commission*, paragraph 63 above, EU:T:2013:113, paragraph 89).

75 It must therefore examined whether the absence of a hardship clause in Decision 2011/278 is likely to cause, for operators of installations that are subject to the emission allowance trading scheme, disadvantages that are disproportionate to the aims pursued by the establishment of that scheme such that that decision would manifestly disproportionate in the strict sense.

76 It should be stated in this regard that in adopting Union-wide and fully-harmonised implementing measures for the free allocation of emission allowances under the first subparagraph of Article 10a(1) of Directive 2003/87, the Commission had to balance the fundamental rights of operators of installations that are subject to the emission allowance trading scheme and environmental protection as provided for in Article 37 of the Charter of Fundamental Rights, the first subparagraph of Article 3(3) TEU and Articles 11 and 191 TFEU.

77 Where several rights and fundamental freedoms protected by the European Union legal order are at issue, the assessment of the possible disproportionate nature of a provision of EU law must be carried out with a view to reconciling the requirements of the protection of those different rights and freedoms and a fair balance between them (see *Sky Österreich*, paragraph 56 above, EU:C:2013:28, paragraph 60 and cited case-law; see also, to this effect, *Schmidberger*, C-112/00, ECR, EU:C:2003:333, paragraphs 77 and 81).

78 The applicant claims that the Commission did not correctly assess or balance climate protection and its economic ruin. The Commission took the view that its court-ordered liquidation is a positive measure with a view to better climate protection. According to the applicant, the Commission ignored the fact that improved climate protection was not ensured in this case because of the risk of emissions being displaced outside the Union. In addition, the Commission failed to have regard to the serious consequences for it, its employees and its customers if it ceased operating. According to the applicant, the Commission wrongly held that climate protection took precedence over safeguarding a large number of jobs.

79 The applicant has not put forward any arguments to show that, in the absence of a hardship clause, Decision 2011/278 was manifestly disproportionate in the strict sense.

80 First, contrary to the claim made by the Commission, the introduction of a hardship clause is not incompatible with the objectives of Directive 2003/87 because the principal objective of reducing greenhouse gas emissions in the Union must be achieved in compliance with a series of sub-objectives and through recourse to certain instruments (see paragraph 68 above). The first paragraph of Article 1 of that directive states that the scheme for greenhouse gas emission allowance trading promotes reductions of such emissions in a cost-effective and economically efficient manner. One of the other sub-objectives that must be met by that scheme, as is explained in recital 5 in the preamble to that directive, is safeguarding economic development and employment. The free allocation of allowances on the basis of a hardship clause would be intended precisely to prevent such difficulties for the installations in question and would thus promote the safeguarding of economic development and employment.

81 However, the introduction of such a clause is difficult to reconcile with the principle that the polluter should pay, which is established in the field of the environment in Article 191(2) TFEU. In accordance with that principle, the purpose of the trading scheme was to fix a price for greenhouse gas emissions and leave the operators to choose between paying the price or reducing their emissions (*Poland* v *Commission*, paragraph 63 above, EU:T:2013:113, paragraph 90). The principle that the polluter

should pay is therefore essentially designed to make each installation concerned individually accountable. The introduction of a hardship clause would result in free allocation of supplementary allowances to some installations and the uniform reduction by the same amount of this type of allowances for installations in all sectors and sub-sectors concerned, on account of the need to apply the uniform cross-sectoral correction factor, since the maximum annual amount of allowances referred in Article 10a(5) of Directive 2003/87 cannot be increased. Increasing the quantities of allowances to be allocated free of charge for the installations concerned pursuant to a hardship clause could therefore result in a reduction of such quotas for other installations (see, to this effect, *Poland* v *Commission*, paragraph 63 above, EU:T:2013:113, paragraph 83). This could be envisaged if free allocation of emission allowances under the allowances trading scheme was governed by the principle of solidarity, as was the case with the quota system established on the basis of Article 58 of the ECSC Treaty, when faced with a manifest crisis in the iron and steel industry, to spread equitably throughout the iron and steel industry the unavoidable consequences of the adjustment of production to the reduced number of possibilities of disposal (*Fabrique de fer de Charleroi and Dillinger Hüttenwerke* v *Commission*, 351/85 and 360/85, ECR, EU:C:1987:392, paragraphs 13 to 16). However, the establishment of an emission allowance trading scheme falls within the scope of the environment, which is governed by the principle that the polluter should pay.

82 Second, the rules introduced by Directive 2009/29 for the trading periods starting in 2013 profoundly changed the methods of allocating allowances to implement, in the light of the experience gathered during the first and second trading periods, namely during the periods from 2005 to 2007 and from 2008 to 2012, a more harmonised emission trading system in order to better exploit the benefits of emission trading, to avoid distortions in the internal market and to facilitate the linking of emission trading systems, as set out in recital 8 in the preamble to Directive 2009/29 (*Poland* v *Commission*, paragraph 63 above, EU:T:2013:113, paragraph 53). In addition, it is clear from the second paragraph of Article 1 and recital 3 in the preamble to Directive 2003/87 that, after its amendment by Directive 2009/29, Directive 2003/87 provides for the reductions of greenhouse gas emissions to be increased so as to contribute to the levels of reductions that are considered scientifically necessary to avoid dangerous climate change (*Poland* v *Commission*, paragraph 63 above, EU:T:2013:113, paragraph 68). For the third trading period, Article 9 of Directive 2003/87 provides that the Union-wide quantity of allowances issued each year starting in 2013 will decrease in a linear manner beginning from the mid-point of the period from 2008 to 2012. Under Article 10(1) of Directive 2003/87 and recital 15 in the preamble to Directive 2009/29, auctioning should be the basic principle for the allocation of allowances from 2013 onwards. Article 10a(3) of Directive 2003/87 provides that, in principle, no free allocation is to be given any longer to electricity generators. According to the second sentence of Article 10a(11) of Directive 2003/87, after 2013 the free allocation is to decrease each year by equal amounts resulting in 30% free allocation in 2020, with a view to reaching no free allocation in 2027.

83 In order to mitigate the consequences of this allowance trading scheme for the sectors and sub-sectors concerned, the Union legislature laid down transitional rules in Article 10a of Directive 2003/87 relating to respect for the fundamental rights and the principles recognised in particular by the Charter of Fundamental Rights, as is stated in recital 50 in the preamble to Directive 2009/29. It thus established a transitional scheme for harmonised free allocation for sectors other than the power sector, for which, under Article 10a(3) of Directive 2003/87, no free allocation is to be given. Recital 19 in the preamble to Directive 2009/29 states that, according to the legislature, that sector has the ability to pass on the increased cost of CO2.

84 In addition, the legislature created special rules for some sectors aiming at the least possible diminution of economic development and employment, as is stated in recital 5 in the preamble to Directive 2003/87.

85 On the one hand, under Article 10a(6) of Directive 2003/87, Member States may adopt financial measures in favour of sectors or sub-sectors determined to be exposed to a significant risk of carbon leakage due to costs relating to greenhouse gas emissions passed on in electricity prices, in order to

compensate for those costs and where such financial measures are in accordance with State aid rules applicable and to be adopted in this area. In this regard, the Commission adopted Guidelines on certain State aid measures in the context of the greenhouse gas emission allowance trading scheme post-2012 (OJ 2012 C 158, p. 4). It has also already authorised State aid intended for German undertakings exposed to a significant risk of carbon leakage due to costs relating to greenhouse gas emissions passed on in electricity prices (OJ 2013 C 353, p. 2).

86 On the other hand, in Article 10a(12) of Directive 2003/87, the legislature laid down a special rule governing the free allocation of allowances to installations in sectors or sub-sectors which are exposed to a significant risk of carbon leakage. Under that rule, in 2013 and in each subsequent year up to 2020, the installations concerned are to be allocated allowances free of charge at 100% of the quantity determined in accordance with the measures referred to in Article 10a(1) of Directive 2003/87. That rule was introduced, according to recital 24 in the preamble to Directive 2009/29, in order to avoid putting at an economic disadvantage energy-intensive sectors and sub-sectors in the Union which are subject to international competition, which is not subject to comparable restrictions on carbon emissions.

87 Furthermore, under Article 10(3) of Directive 2003/87, Member States are to determine the use of revenues generated from the auctioning of allowances. In this regard, they are required to use at least 50% of the revenues generated from the auctioning of allowances for the purposes mentioned in that provision, including, under paragraph 3(a) and (g), reducing greenhouse gas emissions and financing research and development in energy efficiency and clean technologies in the sectors covered by Directive 2003/87.

88 Consequently, as the basic principle of auctioning of emission allowances under Directive 2003/87 is not challenged by the applicant, the disadvantage that may be suffered by operators of installations subject to the scheme for greenhouse gas emission allowance trading by reason of the absence of a hardship clause is that, during the transitional period, they are able to obtain free allowances only pursuant to the rules of Decision 2011/278 and not also by virtue of a hardship clause.

89 That being said, it does not seem that Decision 2011/278 is manifestly disproportionate in the strict sense by reason of the fact that it does not additionally provide for a hardship clause for specific cases. The applicant has not put forward any arguments to show that, aside from the risk in a market economy, the existence of operators of installations subject to the scheme for greenhouse gas emission allowance trading is typically threatened by the application of the allocation rules laid down in Decision 2011/278. The fact that that decision does not include a clause to avoid situations where an undertaking's existence is threatened by economic and financial difficulties resulting from its individual management does not allow the conclusion that it is manifestly disproportionate in the strict sense. It should be noted in this regard that Member States may take State aid measures into consideration having due regard to Articles 107 TFEU and 108 TFEU.

90 In the present case, the applicant claims that its economic and financial difficulties essentially stem from the fact that, in Decision 2011/278, the Commission wrongly refused to determine a specific product benchmark for montan wax, of which it is the only producer in Europe. According to the applicant, if such a product benchmark had been determined, the allocation rules laid down in Decision 2011/278 would have allowed it to obtain a sufficient number of free allowances. However, the circumstances behind those difficulties, which relate to the determination by the Commission of a benchmark for a specific product, do not allow the conclusion that the existence of the installations is typically threatened by the application of the allocation rules laid down in Decision 2011/278, especially since in the present action the applicant has not raised any pleas in law alleging a failure in that decision to determine a product benchmark for montan wax, as is also evident from the hearing.

91 In particular, the factual and legal arguments put forward by the applicant do not indicate that the rules laid down in Article 10a(12) of Directive 2003/87 are not likely, in certain situations, to prevent economic difficulties for installations in a sector exposed to a significant risk of carbon leakage pursuant to Commission Decision 2010/2/EU of 24 December 2009 determining, pursuant to Directive 2003/87, a list of sectors and sub-sectors which are deemed to be exposed to a significant risk of carbon leakage (OJ 2010 L 1, p. 10), as last amended by Commission Decision 2014/9/EU of 18 December 2013 (OJ 2014 L 9, p. 9). It should be stated in this regard that the applicant belongs to such a sector under point 1.2 of the Annex to Decision 2010/2. The applicant comes under the sector 'Manufacture of refined petroleum products', which corresponds to code 2320 of the Statistical Classification of Economic Activities in the European Community (NACE). The applicant therefore already enjoys special treatment in that it was allocated in 2013, and it will be allocated each subsequent year up to 2020, allowances free of charge at 100% of the quantity determined in accordance with Decision 2011/278 and not just 80% with a decrease each year by equal amounts resulting in 30% free allocation in 2020, as provided for by the general scheme under Article 10a(11) of Directive 2003/87.

92 According to case-law, the benefit for the environment depends on the stringency of the total quantity of allowances allocated, which represents the overall limit on emissions allowed by the allowance trading scheme (*Billerud Karlsborg and Billerud Skärblacka*, paragraph 48 above, EU:C:2013:664, paragraph 26). As the Commission claims, if there were a hardship clause, operators would have less of an incentive to reduce their emissions through economic or technical adjustment measures, as they could still apply for supplementary free allowances in the case of undue hardship.

93 In addition, it has previously been ruled that although in exercising their powers the institutions must ensure that the burdens which commercial operators are required to bear are no greater than is required to achieve the aim which the authorities are to accomplish, it does not necessarily follow that that obligation must be measured in relation to the individual situation of any one particular group of operators. Given the multiplicity and complexity of economic circumstances, such an evaluation would not only be impossible to achieve, but would also create perpetual uncertainty in the law (*Balkan-Import-Export*, 5/73, ECR, EU:C:1973:109, paragraph 22, and *Unifruit Hellas* v *Commission*, T-489/93, ECR, EU:T:1994:297, paragraph 74). Furthermore, it has been ruled that the goal of European Union restrictive measures of improving market conditions does not require the Commission to guarantee each individual undertaking a minimum level of production determined in accordance with the undertaking's own criteria of profitability and development (see, to this effect, *Klöckner-Werke* v *Commission*, 119/81, ECR, EU:C:1982:259, paragraph 13, and *Ferriere San Carlo* v *Commission*, 235/82, ECR, EU:C:1983:356, paragraph 18).

94 It follows that the argument made by the applicant in the alternative and therefore the first and third pleas in law must be rejected.

The second plea in law, alleging infringement of the powers of the Member States and of the principle of subsidiarity

95 The applicant claims that by rejecting free allocation of allowances on the basis of the hardship clause laid down in Article 9(5) of the TEHG, the Commission infringed the powers of the Member States. In its view, the Member States have the power to determine all the allocation rules applicable alongside the methods of allocating allowances defined by the Commission in Decision 2011/278. Directive 2003/87 does not provide that the Union has exclusive competence to lay down the allocation rules. The applicant also claims that the Commission thus infringed the principle of subsidiarity.

96 In the first place, with regard to the argument that the Member States have the power to determine all the allocation rules applicable alongside the methods of allocating allowances defined by the Commission in Decision 2011/278, the applicant argues that it follows from Article 11(3) of Directive

2003/87 that other allocation rules can exist alongside the methods of allocating allowances defined by the Commission, otherwise the rejection mentioned in that provision would be meaningless. In its view, the scope of Article 11(3) of Directive 2003/87 can encompass only cases which do not concern individual allocations and their calculation, but general allocation rules, because the Commission's right to monitor individual allocations by the Member States is already laid down in Article 51 of Commission Regulation (EU) No 389/2013 of 2 May 2013 establishing a Union Registry pursuant to Directive 2003/87, Decisions No 280/2004/EC and No 406/2009/EC of the European Parliament and of the Council and repealing Commission Regulations (EU) No 920/2010 and No 1193/2011 (OJ 2013 L 122, p. 1).

97 That argument must be rejected. Article 11(3) of Directive 2003/87 concerns individual allocations as that provision, read in conjunction with the paragraph 1 of the same article, provides inter alia that the Commission must review whether the lists of installations and any free allocation to each installation are in accordance with the rules referred to in Article 10a of Directive 2003/87.

98 As regards the argument relating to Regulation No 389/2013, it must be stated that that regulation is an implementing regulation based on Article 19 of Directive 2003/87, which may not therefore depart from the provisions of Article 11(3) of that directive. Furthermore, under Article 1 of Regulation No 389/2013, that regulation covers only, on the one hand, operational and maintenance requirements concerning the independent transaction log provided for in Article 20(1) of Directive 2003/87/EC and concerning registries provided for in Article 6 of Decision No 280/2004/EC of the European Parliament and of the Council of 11 February 2004 concerning a mechanism for monitoring Community greenhouse gas emissions and for implementing the Kyoto Protocol (OJ 2004 L 49, p. 1) and, on the other, communication with the Registry.

99 The applicant also claims that an overall analysis of the broad logic of the scheme for the allocation of allowances under Decision 2011/278 shows that because the methods of allocating allowances apply only to general cases and do not provide for exceptions for atypical situations, the Federal Republic of Germany was entitled to fill that gap by means of Article 9(5) of the TEHG. In its view, whilst it is true that the Member States do not have the power to regulate cases governed by Decision 2011/278, they do have the power to determine all other allocation rules applicable alongside the methods of allocating allowances defined by the Commission.

100 That argument must also be rejected.

101 First, Article 10a of Directive 2003/87 lays down transitional rules for harmonised free allocation. Under the first subparagraph of paragraph 1 of that provision, the Commission must adopt Union-wide and fully-harmonised implementing measures for the allocation of greenhouse gas emission allowances, as it did by adopting Decision 2011/278, which, under Article 1 thereof, lays down transitional Union-wide rules for the harmonised free allocation of emission allowances under Directive 2003/87 from 2013 onwards. Article 10 of Decision 2011/278 contains calculation methods for the allocation of those allowances to installations (see paragraph 44 above). As the Commission argues, such Union-wide full harmonisation presupposes that the allocation rules adopted in Decision 2011/278 are exhaustive and necessarily preclude any free allocation of allowances under national rules.

102 Second, free allocation of emission allowances on the basis of a national rule which goes beyond the rules adopted in Decision 2011/278 is contrary to the objective of the Union legislature, which, as has already been stated (see paragraph 82 above), envisaged establishing a more harmonised emission trading system in order to better exploit the benefits of emission trading, to avoid distortions in the internal market and to facilitate the linking of emissions trading systems (*Poland* v *Commission*, paragraph 63 above, EU:T:2013:113, paragraph 41).

103 Third, it cannot be argued that the allocation rules laid down in Decision 2011/278 apply only to general cases and that, accordingly, atypical situations may be regulated by national law. The Commission was required, under the first subparagraph of Article 10a(1) of Directive 2003/87, to adopt Union-wide and fully-harmonised measures for the free allocation of allowances. Because it is inherent to such general rules that they have a greater impact on some installations than others (see paragraph 71 above), those rules apply to all situations, including atypical situations. A derogation from the harmonised Union rules cannot be granted unilaterally by a Member State (see, by analogy, *Faroe Seafood and Others*, C-153/94 and C-204/94, ECR, EU:C:1996:198, paragraph 56).

104 Furthermore, it should be noted that Article 9(5) of the TEHG does not provide that the Federal Republic of Germany has the power to allocate free allowances to operators of installations facing undue hardship. Such allocation is possible, under that provision, only if it is not refused by the Commission.

105 In the second place, with regard to the applicant's argument that the Commission infringed the principle of subsidiarity by rejecting free allocation of allowances on the basis of the hardship clause laid down in Article 9(5) of the TEHG, Article 5(3) TEU provides that under that principle, in areas which do not fall within its exclusive competence, the Union may act only if and in so far as the objectives of the proposed action cannot be sufficiently achieved by the Member States, either at central level or at regional and local level, but can rather, by reason of the scale or effects of the proposed action, be better achieved at Union level.

106 In this case, that argument must be rejected. The transitional rules on free allocation of allowances adopted in Decision 2011/278 on the basis of the first subparagraph of Article 10a(1) of Directive 2003/87 are exhaustive and necessarily preclude any free allocation of allowances under national rules (see paragraph 101 above). In addition, the applicant has not contested the fact that the establishment of the emission allowance trading scheme in the Union by Directive 2003/87 could not be sufficiently achieved by the Member States acting individually and that the establishment of that scheme could therefore, by reason of its scale or effects, be better achieved at Union level. It is also apparent from recital 8 in the preamble to Directive 2009/29 that a review undertaken in 2007 in the light of the experience gathered during the first two trading periods confirmed that a more harmonised emission trading system was imperative in order to better exploit the benefits of emission trading, to avoid distortions in the internal market and to facilitate the linking of the various emissions trading systems.

107 Consequently, the second plea in law must be rejected.

108 In the light of all the foregoing, the action must be dismissed.

Costs

109 Under Article 87(2) of the Rules of Procedure, the unsuccessful party is to be ordered to pay the costs if they were applied for in the successful party's pleadings. Since the applicant has been unsuccessful, it must be ordered to pay the costs relating to the main proceedings and to the proceedings for interim measures, in accordance with the form of order sought by the Commission.

On those grounds,

THE GENERAL COURT (Fifth Chamber)

hereby:

1. **Dismisses the action;**

2. **Orders Romonta GmbH to pay the costs relating to the main proceedings and to the proceedings for interim measures.**

Dittrich Schwarcz Tomljenović

Delivered in open court in Luxembourg on 26 September 2014.

[Signatures]