Reports of Cases

JUDGMENT OF THE COURT (Tenth Chamber)

21 December 2021 *

(Reference for a preliminary ruling – Scheme for greenhouse gas emission allowance trading – Directive 2003/87/EC – Article 11(3) – Decision 2011/278/EU – Article 3(b) and Article 10(2)(a) – Product benchmark sub-installation – Decision 2013/448/EU – Validity – Installation using a basic oxygen furnace – Hot metal – Input from a third-party installation – Refusal to allocate emission allowances – Admissibility – Failure by the applicant in the main proceedings to bring an action for annulment)

In Case C-524/20,

REQUEST for a preliminary ruling under Article 267 TFEU from the Městský soud v Praze (Prague City Court, Czech Republic), made by decision of 29 September 2020, received at the Court on 20 October 2020, in the proceedings

Vítkovice Steel a.s.

v

Ministerstvo životního prostředí,

THE COURT (Tenth Chamber),

composed of C. Lycourgos (Rapporteur), President of the Fourth Chamber, acting as President of the Tenth Chamber, I. Jarukaitis and M. Ilešič, Judges,

Advocate General: H. Saugmandsgaard Øe,

Registrar: A. Calot Escobar,

having regard to the written procedure,

after considering the observations submitted on behalf of:

– Vítkovice Steel a.s., by O. Hájek, advokát,

– the Czech Government, by M. Smolek, J. Vláčil and O. Serdula, acting as Agents,

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

* Language of the case: Czech.

having decided, after hearing the Advocate General, to proceed to judgment without an Opinion,

gives the following

Judgment

1 This request for a preliminary ruling concerns the interpretation of Article 2(1) of, and Annex I to, Directive 2003/87/EC of the European Parliament and of the Council of 13 October 2003 establishing a scheme for greenhouse gas emission allowance trading within the Community and amending Council Directive 96/61/EC (OJ 2003 L 275, p. 32), as amended by Directive 2009/29/EC of the European Parliament and of the Council of 23 April 2009 (OJ 2009 L 140, p. 63) ('Directive 2003/87'), and the interpretation and validity, first, of Article 10(8) of Commission Decision 2011/278/EU of 27 April 2011 determining transitional Union-wide rules for harmonised free allocation of emission allowances pursuant to Article 10a of Directive 2003/87/EC of the European Parliament and of the Council (OJ 2011 L 130, p. 1), read together with Annex I to that decision, and, second, of Article 1(1) and the third subparagraph of Article 1(2) 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).

2 The request has been made in proceedings between Vítkovice Steel a.s. and the Ministerstvo životního prostředí (Ministry of the Environment, Czech Republic) ('the Ministry') regarding the refusal to allocate emission allowances free of charge to that company for the period from 2013 to 2020 for the operation in the Czech Republic of a steel-making installation named Ocelárna I and bearing the identifier CZ-existing-CZ-52-CZ-0102-05 ('the installation at issue in the main proceedings').

Legal context

European Union law

Directive 2003/87

3 Under the heading 'Scope', Article 2(1) of Directive 2003/87 provides:

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

4 Annex I to that directive contains, in the 'Activities' column, the production of pig iron or steel (primary or secondary fusion), including continuous casting, with a capacity exceeding 2.5 tonnes per hour. The 'Greenhouse gases' column of that annex mentions carbon dioxide (CO_2) as corresponding to that activity.

5 Article 10a of that directive provides:

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

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

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

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

…’

6 Article 11 of that directive states:

‘1. Each Member State shall publish and submit to the Commission, by 30 September 2011, the list of installations covered by this Directive in its territory and any free allocation to each installation in its territory[,] calculated in accordance with the rules referred to in Article 10a(1) and Article 10c.

2. By 28 February of each year, the competent authorities shall issue the quantity of allowances that are to be allocated for that year, calculated in accordance with Articles 10, 10a and 10c.

3. Member States may not issue allowances free of charge under paragraph 2 to installations whose inscription in the list referred to in paragraph 1 has been rejected by the Commission.’

Decision 2011/278

7 According to Article 3(b) of Decision 2011/278, ‘product benchmark sub-installation’ means ‘inputs, outputs and corresponding emissions relating to the production of a product for which a benchmark has been set in Annex I’.

8 Article 10(1), (2) and (8) of that decision, headed ‘Allocation at installation level’, provides:

‘1. Based on the data collected in accordance with Article 7, Member States shall, for each year, calculate the number of emission allowances allocated free of charge from 2013 onwards to each incumbent installation on their territory in accordance with paragraphs 2 to 8.

2. For the purpose of this calculation, Member States shall first determine the preliminary annual number of emission allowances allocated free of charge for each sub-installation separately as follows:

(a) for each product benchmark sub-installation, the preliminary annual number of emission allowances allocated free of charge for a given year shall correspond to the value of this product benchmark as referred to in Annex I multiplied by the relevant product-related historical activity level;

…

8. When determining the preliminary total annual amount of emission allowances allocated free of charge for each installation, Member States shall ensure that emissions are not double counted and that the allocation is not negative. In particular, where an intermediate product that is covered by a product benchmark according to the definition of the respective system boundaries set out in Annex I is imported by an installation, emissions shall not be double counted when determining the preliminary total annual amount of emission allowances allocated free of charge for both installations concerned.'

9 Annex I to that decision, headed 'Product benchmarks', sets the benchmark value for certain products listed on an exhaustive basis, including the product 'hot metal', which is defined as 'liquid iron saturated with carbon for further processing'. That annex specifies, in addition, the processes and emissions covered by the product benchmark, which, as far as the benchmark for the product 'hot metal' is concerned, are 'all processes directly or indirectly linked to the process units' which include, inter alia, 'basic oxygen furnace'.

Decision 2013/448

10 Recital 14 of Decision 2013/448 states:

'With regard to the application of the benchmark for hot metal in the [national implementation measures (NIMs)] as proposed by the Czech Republic, … the Commission notes that the allocation to the installation listed under point C with the identifier CZ-existing-CZ-52-CZ-0102-05 takes account of processes that are covered by the system boundaries of the hot metal benchmark. The installation, however, does not produce, but imports[,] hot metal. Due to the lack of production of hot metal in the installation with the identifier CZ-existing-CZ-52-CZ-0102-05, and thus a lack of a corresponding product benchmark sub-installation that would allow for the determination of the allocation in accordance with Article 10 of Decision 2011/278/EU, the proposed allocation is not consistent with the allocation rules and may give rise to double counting. The Commission therefore objects to the allocation to the installations listed in point C of Annex I to this Decision.'

11 Article 1(1) and the third subparagraph of Article 1(2) of that decision provide:

'1. The inscription of the installations listed in Annex I to this Decision on the lists of installations covered by Directive 2003/87/EC submitted to the Commission pursuant to Article 11(1) of Directive 2003/87/EC and the corresponding preliminary total annual amounts of emission allowances allocated free of charge to these installations is rejected.

2. …

No objections are raised should a Member State amend the preliminary total annual amounts of emission allowances allocated free of charge to installations in its territory included in the lists referred to in paragraph 1 and listed in point C of Annex I to this Decision before determining the final total annual amount for each year from 2013 to 2020 in accordance with Article 10(9) of Decision 2011/278/EU to the extent that the amendment consists of bringing the allocation in line with Article 10(2)(a) of Decision 2011/278/EU and excluding any allocation for processes that are covered by the system boundaries of the product benchmark for hot metal as defined in Annex I to Decision 2011/278/EU to an installation not producing, but importing[,] hot metal that would otherwise lead to double counting.'

Czech law

12 Paragraph 2(a) of Zákon č. 383/2012 Sb., o podmínkách obchodování s povolenkami na emise skleníkových plynů (Law No 383/2012 on the conditions of greenhouse gas emission allowance trading) of 24 October 2012 provides:

'For the purposes of this Law, "installation" means a stationary technical unit where one or more of the activities listed in Annex No 1 to this Law, or other directly associated activities which have a technical connection with the activities carried out on the site concerned and which could have an effect on emissions, are carried out; stationary technical units used for research, development and testing of new products and processes shall not be regarded as installations.'

13 Under the first sentence of Paragraph 10(1) of that law, the Ministry is to decide on the free allocation of allowances to installation or aircraft operators for each year in the trading period from 1 January 2013 to 31 December 2020, by a procedure and in an amount calculated on the basis of the reference values established by EU law.

14 Annex No 1 to that law contains, in the 'Activities' column, the production of pig iron or steel (primary or secondary fusion), including by continuous casting, with a capacity exceeding 2.5 tonnes per hour. In the same line as such production, the 'Greenhouse gases' column shows carbon dioxide (CO_2).

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

15 Until 30 November 2015, Vítkovice Steel operated the installation at issue in the main proceedings, in which a basic oxygen furnace was used. The hot metal (liquid iron saturated with carbon) used as an input in that intermediate process for the production of steel came from a neighbouring installation operated at the time by ArcelorMittal Ostrava a.s.

16 In 2013, Vítkovice Steel applied to the Czech authorities for a free allocation of allowances for the period from 2013 to 2020 for the installation at issue in the main proceedings, relying on the use of a basic oxygen furnace as that process was referred to in Annex I to Decision 2011/278.

17 The Ministry included that installation in the draft list of installations eligible for free allowances submitted to the Commission in accordance with Article 11(1) of Directive 2003/87.

18 It interpreted Decision 2011/278 as meaning that free emission allowances could be allocated to the installation at issue in the main proceedings, provided that any risk of double counting with the emissions from ArcelorMittal Ostrava's installation was eliminated.

19 The Ministry therefore sought a formula allowing for the allocation of free allowances to Vítkovice Steel and ArcelorMittal Ostrava reflecting the emissions of their respective installations whilst avoiding the double counting of those emissions or the double allocation of allowances related to the product 'hot metal'. After agreement by those companies on such a formula for apportionment, the Ministry informed the Commission to that effect.

20 In a letter of 16 July 2013, the Commission reiterated that it was not possible to apportion the allowances between Vítkovice Steel and ArcelorMittal Ostrava. It explained that, whilst Article 10(8) of Decision 2011/278 requires a Member State to prevent the double allocation of allowances, that provision nevertheless does not allow for the apportionment of allowances between two operators of different installations.

21 On 5 September 2013, the Commission adopted Decision 2013/448. By Article 1(1) of that decision, read together with point C of Annex I thereto, the Commission refused the inclusion of the installation at issue in the main proceedings on the list of installations receiving free allowances. In recital 14 to that decision, the Commission indicated that that installation 'does not produce, but imports[,] hot metal' and, 'due to the lack of production of hot metal …, and thus a lack of a corresponding product benchmark sub-installation that would allow for the determination of the allocation in accordance with Article 10 of Decision [2011/278], the proposed allocation is not consistent with the allocation rules and may give rise to double counting'.

22 Although it did not share the Commission's interpretation, the Ministry made it known, in a letter of 16 October 2013, that it was making a notification in respect of the preliminary allocation of all the allowances solely for ArcelorMittal Ostrava's installation.

23 By decision of 23 July 2014, the Ministry did not allocate any allowances free of charge for the installation at issue in the main proceedings in respect of the period from 2013 to 2020. Vítkovice Steel made a complaint against that decision, which the ministr životního prostředí (Minister for the Environment, Czech Republic) ('the Minister') rejected on 12 November 2014.

24 The action brought by Vítkovice Steel against that refusal was dismissed at first instance by judgment of the Městský soud v Praze (Prague City Court, Czech Republic) of 9 February 2017. By judgment of 23 February 2018, the Nejvyšší správní soud (Supreme Administrative Court, Czech Republic) set aside that judgment for failure to state reasons and referred the case back to the court of first instance after having found that it could not be unequivocally concluded that Decision 2013/448 indisputably indicated that no allowances were due to the installation at issue in the main proceedings on the ground that that installation does not produce hot metal. By judgment of 4 April 2018, the Městský soud v Praze (Prague City Court) annulled the Minister's contested decision and referred the case back to him.

25 On 28 June 2018, the Minister therefore annulled the Ministry's decision of 23 July 2014. The Ministry subsequently, by decision of 13 August 2018, allocated to Vítkovice Steel for the years 2013 to 2020 precisely the same number of allowances free of charge as it had allocated to it in the original decision of 23 July 2014. A complaint lodged by Vítkovice Steel against that decision was rejected by decision of the Minister of 31 December 2018. By the latter decision, the Minister took the view that he could not decide on the free allocation of allowances for the installation at issue in the main proceedings, since, by Decision 2013/448, the Commission objected to that

allocation pursuant to Article 11(3) of Directive 2003/87. The Minister also highlighted that, since 2015, Vítkovice Steel had no longer been operating that installation and that, since then, it had no longer been entitled to receive allowances for that installation.

26 Vítkovice Steel brought an action before the referring court against the Minister's decision of 31 December 2018. It argues, in essence, that the Ministry disregarded the earlier decisions of the administrative courts from which it is apparent that the Ministry incorrectly interpreted Decision 2013/448, and that it is possible to retroactively allocate allowances to the installation at issue in the main proceedings even though it is no longer operated.

27 By its first question, the referring court asks whether Article 10(8) of Decision 2011/278, read together with Annex I thereto, requires emission allowances to be allocated free of charge for the period 2013 to 2020 to the installation at issue in the main proceedings, provided that it is ensured that there will be no double counting of emissions or double allocation of allowances in respect of the product 'hot metal'.

28 In that regard, that court is of the opinion that the relevant provisions of Decision 2011/278 must be interpreted as meaning that free allowances were required to be allocated to Vítkovice Steel's installation pursuant to Article 10a(1) and (5) of Directive 2003/87.

29 That court points out, first, that the installation at issue in the main proceedings fulfilled the conditions of Article 2(1) of Directive 2003/87 and thus fell within the scheme for allowance trading. It is not disputed, first, that that installation, in which a 'basic oxygen furnace' process was used, fell, in general terms, within an activity to which that directive applies and, second, that such a process generates CO_2 emissions. Furthermore, it is apparent from Decision 2013/448 that, even though the Commission confirmed that the 'basic oxygen furnace' process produces fewer emissions than the process for the production of hot metal, it did not deny that some emissions are nevertheless generated by the first of those processes. Thus, if, in breach of Directive 2003/87, no free allowances were allocated to an installation which is supposed to fall within the scheme for allowance trading, that would be a denial of the economic logic on which that scheme is based.

30 The referring court recalls, second, that it is clear from the terms of recital 14 of Decision 2013/448 that the Commission objected to the receipt by the installation at issue in the main proceedings of free allowances on the ground that it 'does not produce, but imports[,] hot metal'.

31 However, such a finding renders meaningless the part of Annex I to Decision 2011/278 in which, for the purposes of the free allocation of emission allowances, the Commission included, under the product 'hot metal', the 'basic oxygen furnace' process too, in which hot metal is an input. The wording of Decision 2011/278 thereby created a legitimate expectation on the part of the operators concerned, who were entitled to expect that free allowances would be allocated to installations using a basic oxygen furnace. Moreover, the referring court considers that the solution adopted by the Commission in that decision is consistent with the objective of Directive 2003/87.

32 Third, having regard to the wording of Article 10(8) of Decision 2011/278, the referring court indicates that it does not understand why the Commission refused to apportion the emission allowances related to hot metal between the installation in which it is produced and that in which it is used, proportionately to the CO_2 emissions generated by the activities of each of those installations.

33 In that regard, the solution envisaged by the Commission, consisting of allocating all the free emission allowances to ArcelorMittal Ostrava, on the understanding that it would then be able to transfer them free of charge to Vítkovice Steel under a private-law agreement, is not satisfactory. Such an approach fails to take account of the fact that Vítkovice Steel has a subjective right to the free allocation of allowances.

34 Thus, in the opinion of the referring court, the Commission's position is contrary to the economic logic of the scheme for allowance trading because it deprives, in an unwarranted manner, the operator of an installation in which a process falling within the allowance scheme takes place, of the possibility of obtaining the allowances to which it is entitled free of charge and, where applicable, of trading them.

35 In addition, the solution advocated by the Commission, inasmuch as it is based on a private-law agreement between the two companies concerned, is liable to create a serious distortion of competition, thus failing to respect the objective of Decision 2011/278.

36 Should the first question be answered in the negative, the referring court asks, by its second question, if Article 10(8) of Decision 2011/278, read together with Annex I thereto, is invalid with respect to the product 'hot metal'. It takes the view that that decision should be declared invalid by reason of its incompatibility with Directive 2003/87 and its internal inconsistency.

37 If the second question is answered in the affirmative, the referring court takes the view that it should be found, in response to the third question, that Decision 2013/448 is also invalid in so far as the Commission rejected the Czech Republic's proposal to allocate allowances free of charge to Vítkovice Steel for the installation at issue in the main proceedings.

38 If the answer to the first question is in the affirmative, it will be necessary to examine the fourth question posed, in order to determine whether Decision 2013/448 may be interpreted as permitting the Czech Republic to seek, on a further occasion, authorisation for the free allocation of allowances to Vítkovice Steel for the installation at issue in the main proceedings, provided that it can be guaranteed that that will not lead to double counting of emissions or double allocation of allowances.

39 If that fourth question is answered in the negative, the court takes the view that it will be necessary to consider, in the fifth question, the validity of Decision 2013/448 inasmuch as it concerns the installation at issue in the main proceedings.

40 Finally, if the third, fourth or fifth question is answered in the affirmative, which implies that EU law requires allowances to be allocated to the installation at issue in the main proceedings, it will be necessary to answer the sixth question in order to determine how a national authority should proceed, in accordance with EU law, where the installation concerned is no longer operated and, in addition, the period for which the allowances were required to be allocated has come to an end.

41 In those circumstances, the Městský soud v Praze (Prague City Court) decided to stay the proceedings and to refer the following questions to the Court of Justice for a preliminary ruling:

‘(1) Does Article 10(8) of [Decision 2011/278], read in conjunction with Annex I thereto, require emission allowances to be allocated free of charge for the period 2013 to 2020 to an installation operating a basic oxygen furnace process, where the input to that process is carbon-saturated liquid iron imported from another installation belonging to another operator, if at the same time it is ensured that there will be no double counting or double allocation of allowances in respect of the ‘hot metal’ product?

(2) If the first question is answered in the negative, is Article 10(8) of [Decision 2011/278], read in conjunction with Annex I thereto, invalid with respect to the ‘hot metal’ product on the grounds that it is incompatible with Article 2(1) of Directive [2003/87], read in conjunction with Annex I thereto, or alternatively on the grounds that it is incomprehensible?

(3) If the second question is answered in the affirmative, is Article 1(1) of [Decision 2013/448] also invalid in respect of [the installation at issue in the main proceedings] given that it no longer has a legal basis?

(4) If the first question is answered in the affirmative, must Article 1(1) and the third subparagraph of Article 1(2) of [Decision 2013/448] be interpreted in respect of [the installation at issue in the main proceedings] as permitting the allocation of allowances for the ‘hot metal’ product to that installation on the basis of a new application from the Czech Republic if double counting and double allocation of allowances are excluded?

(5) If the fourth question is answered in the negative, is Article 1(1) of [Decision 2013/448] invalid in respect of [the installation at issue in the main proceedings] on the grounds that it is incompatible with Article 10(8) of [Decision 2011/278], read in conjunction with Annex I thereto?

(6) If the third, fourth or fifth question is answered in the affirmative, how should an authority of a Member State proceed under EU law where that authority has failed, contrary to EU law, to allocate free emission allowances to the operator of an installation which operates a basic oxygen furnace process if the installation concerned is no longer in operation and the period for which the allowances were allocated has already ended?’

Consideration of the questions referred

The fourth question

42 By its fourth question, which it is appropriate to examine first, the referring court asks, in essence, whether Article 1(1) and the third subparagraph of Article 1(2) of Decision 2013/448 must be interpreted as permitting the free allocation to the installation at issue in the main proceedings of emission allowances based on the ‘hot metal’ product benchmark, on the basis of a new application from the Czech Republic, if double counting of emissions and double allocation of allowances are excluded.

43 In that regard, it must be recalled, first of all, that, under Article 11(1) of Directive 2003/87, each Member State was to publish and submit to the Commission, by 30 September 2011 at the latest, the list of installations covered by that directive in its territory and any free allocation to each installation in its territory, calculated in accordance with the rules referred to in Article 10a(1) and Article 10c of that directive. Then, in accordance with Article 11(2) thereof, by 28 February of each year at the latest, the competent authorities are to issue the quantity of allowances that are to be allocated for that year, calculated in accordance with Articles 10, 10a and 10c of that directive.

44 Finally, according to Article 11(3) of Directive 2003/87, Member States may not issue emission allowances free of charge under Article 11(2) thereof to installations whose inclusion on the list referred to in Article 11(1) of that directive has been rejected by the Commission.

45 On 5 September 2013, the Commission adopted Decision 2013/448, in accordance with Article 11(3) of Directive 2003/87. As is apparent from Article 1(1) of, and point C of Annex I to, that decision, the Commission rejected the inclusion of the installation at issue in the main proceedings on the list of installations covered by Directive 2003/87, and the corresponding preliminary total annual amounts of emission allowances allocated free of charge to that installation.

46 According to recital 14 of that decision, the Commission noted that the installation at issue in the main proceedings does not produce hot metal, but imports it. The Commission adds, in the same recital, that, due to the lack of production of hot metal in that installation, and thus a lack of a corresponding product benchmark sub-installation that would allow for the determination of the allocation in accordance with Article 10 of Decision 2011/278, the proposed allocation for that installation is not consistent with the allocation rules and may give rise to double counting.

47 It thus follows from Article 1(1) of, and point C of Annex I to, Decision 2013/448, read in the light of Article 11(3) of Directive 2003/87, that the Czech Republic is prohibited from allocating emission allowances free of charge to the installation at issue in the main proceedings on the basis of the product benchmark for hot metal.

48 The Commission did, admittedly, specify in the third subparagraph of Article 1(2) of Decision 2013/448 that it would not raise objections 'should a Member State amend the preliminary total annual amounts of emission allowances allocated free of charge to installations in its territory included in the lists referred to in paragraph 1 [of Article 1] and listed in point C of Annex I to [that] decision before determining the final total annual amount for each year from 2013 to 2020 … to the extent that the amendment consists of bringing the allocation in[to] line with Article 10(2)(a) of Decision [2011/278] and excluding any allocation for processes that are covered by the system boundaries of the product benchmark for hot metal as defined in Annex I to Decision [2011/278] to an installation not producing, but importing[,] hot metal that would otherwise lead to double counting'.

49 Vítkovice Steel takes the view, in essence, that it follows from the third subparagraph of Article 1(2) of Decision 2013/448, and in particular from the phrase 'that would otherwise lead to double counting', that it is entitled to be allocated emission allowances free of charge on account of the use of hot metal in the installation at issue in the main proceedings, provided that any double counting of emissions is avoided. The CO_2 emissions in respect of that product and its

use in the basic oxygen furnace process should, to that end, be apportioned between its installation and that of ArcelorMittal Ostrava, which, in order also to make steel, itself produces, first, hot metal using blast furnaces and, second, uses that hot metal in a basic oxygen furnace.

50 However, that interpretation of Decision 2013/448 cannot be accepted.

51 Article 10(2)(a) of Decision 2011/278 lays down the rules for calculation of the preliminary annual number of emission allowances allocated free of charge for each 'product benchmark sub-installation', which concept is defined in Article 3(b) of that decision as 'inputs, outputs and corresponding emissions relating to the production of a product for which a benchmark has been set in Annex I [to that decision]'. Thus, in accordance with Article 10(2)(a) of Decision 2011/278, read in the light of Article 3(b) of that decision, there can be no free allocation of emission allowances to a sub-installation on the basis of a product benchmark where that sub-installation does not produce the product in question.

52 In this case, as the installation at issue in the main proceedings does not produce hot metal, it cannot receive free emission allowances on the basis of the product benchmark for hot metal.

53 That is how it is necessary to understand the statement, appearing in the third subparagraph of Article 1(2) of Decision 2013/448, according to which the Commission would accept the amendment, by the Member State concerned, of the preliminary total annual amounts of emission allowances allocated free of charge to installations, such as that at issue in the main proceedings, listed in point C of Annex I to that decision, to the extent that that amendment brings the proposed allocation into line with Article 10(2)(a) of that decision.

54 That interpretation is, moreover, confirmed by the express statement, appearing in the third subparagraph of Article 1(2) of Decision 2013/448, according to which the amendment to be made by the Member State concerned to the amount of emission allowances allocated free of charge should consist '[of] excluding any allocation for processes that are covered by the system boundaries of the product benchmark for hot metal as defined in Annex I to Decision [2011/278] to an installation not producing, but importing[,] hot metal that would otherwise lead to double counting'.

55 As regards the last phrase, relating to double counting, it is sufficient to point out that it constitutes an additional element of reasoning to justify the exclusion of the free allocation of allowances laid down in the sentence of which it forms part. In any event, that phrase cannot be read as allowing such an allocation simply on the condition that it is guaranteed that it will not lead to double counting of emissions or double allocation of allowances. Such a reading of the third subparagraph of Article 1(2) of Decision 2013/448 would be manifestly contrary to the unequivocal wording of that provision and, as is apparent from paragraph 51 of the present judgment, would infringe Article 10(2)(a) of Decision 2011/278.

56 It follows from all the foregoing considerations that the answer to the fourth question is that Article 1(1) and the third subparagraph of Article 1(2) of Decision 2013/448 must be interpreted as not permitting the free allocation to the installation at issue in the main proceedings of allowances based on the 'hot metal' product benchmark, on the basis of a new application from the Czech Republic, even if double counting of emissions and double allocation of allowances are excluded.

The third and fifth questions

57 By its third and fifth questions, the referring court queries, in essence, the validity of Decision 2013/448.

58 Relying on the case-law arising from the judgments of 9 March 1994, *TWD Textilwerke Deggendorf* (C-188/92, EU:C:1994:90), and of 25 July 2018, *Georgsmarienhütte and Others* (C-135/16, EU:C:2018:582), the Czech Government argues that those questions are inadmissible since Vítkovice Steel had the option to bring an action for annulment against Decision 2013/448, on the basis of the fourth paragraph of Article 263 TFEU. As that company failed to exercise that option, the definitive nature of Decision 2013/448 cannot be called into question in the context of the dispute in the main proceedings.

59 In that regard, it must be recalled that, according to settled case-law, the possibility for a person to rely, in an action brought before a national court, on the invalidity of provisions contained in a measure of the European Union, which constitutes the basis of a national decision taken concerning him or her, presupposes either that he or she has also brought, pursuant to the fourth paragraph of Article 263 TFEU, an action for annulment of that EU measure within the prescribed time limits, or that he or she has not done so, as a result of not having an undoubted right to bring such an action (judgment of 25 July 2018, *Georgsmarienhütte and Others*, C-135/16, EU:C:2018:582, paragraph 17 and the case-law cited).

60 In the present case, although the referring court indicates, in its request for a preliminary ruling, that the third and fifth questions are posed on the basis of its own reasoning and do not simply reuse Vítkovice Steel's arguments, that court specifies that the dispute in the main proceedings relates, inter alia, to the validity of Decision 2013/448. It is apparent, moreover, from the case file before the Court that Vítkovice Steel, in the context of that dispute, asked the referring court to refer to the Court for a preliminary ruling questions relating to the validity of Decision 2013/448. It is necessary, therefore, to examine whether that company undoubtedly had standing to bring an action for annulment of that decision before the General Court, on the basis of the fourth paragraph of Article 263 TFEU.

61 In that regard, it follows from that provision that a natural or legal person may institute proceedings against an EU legal act only if that act is addressed to that person or if it is of direct and individual concern to that person.

62 In the present case, it is apparent from Article 5 of Decision 2013/448 that that decision is addressed to the Member States. Consequently, it is necessary to examine whether Vítkovice Steel is directly and individually concerned by that decision.

63 First, as regards Vítkovice Steel's being directly concerned, it should be pointed out that, in view of the prohibition appearing in Article 11(3) of Directive 2003/87 and as is apparent from the analysis of the fourth question, the Czech authorities were required, without having any margin of discretion, to refuse the free allocation to Vítkovice Steel, for the installation at issue in the main proceedings, of emission allowances on the basis of the 'hot metal' product benchmark, following the Commission's rejection, by Decision 2013/448, of such an allocation of allowances. Consequently, Vítkovice Steel must be regarded as directly concerned by that decision (see, by analogy, judgment of 25 July 2018, *Georgsmarienhütte and Others*, C-135/16, EU:C:2018:582, paragraphs 29 and 30 and the case-law cited).

64 Second, as regards that company's being individually concerned, it is apparent from Article 1(1) of Decision 2013/448 that the Commission refused the inclusion of the installation at issue in the main proceedings on the list of installations covered by Directive 2003/87, and the preliminary total annual amounts of emission allowances allocated free of charge to that installation, which was specifically designated by means of an individual identifier ('CZ-existing-CZ-52-CZ-0102-05'), in point C of Annex I to that decision.

65 That decision thus affected Vítkovice Steel by reason of certain attributes which are particular to it or by reason of circumstances in which it is differentiated from all other persons and, by virtue of these factors, distinguishes it individually just as in the case of the person addressed (see, by analogy, judgment of 25 July 2018, *Georgsmarienhütte and Others*, C-135/16, EU:C:2018:582, paragraph 31 and the case-law cited).

66 In those circumstances, it must be concluded that Vítkovice Steel undoubtedly had standing to bring an action for annulment against Decision 2013/448, on the basis of the fourth paragraph of Article 263 TFEU. As Vítkovice Steel failed to bring an action of that nature, that decision became definitive in respect of it. Consequently, the requirements of legal certainty lead to the conclusion that the definitive nature of that decision can no longer be called into question in the context of the proceedings before the referring court (see, to that effect, judgments of 9 March 1994, *TWD Textilwerke Deggendorf*, C-188/92, EU:C:1994:90, paragraphs 17 and 18, and of 25 July 2018, *Georgsmarienhütte and Others*, C-135/16, EU:C:2018:582, paragraph 15).

67 As a result, the third and fifth questions are inadmissible.

The first, second and sixth questions

68 It follows from all of the foregoing that it is not necessary to answer the first, second and sixth questions, since, whatever the answers given to those questions are, they will not be able to affect the outcome of the dispute in the main proceedings, as Decision 2013/448, the validity of which can no longer be challenged by Vítkovice Steel, is opposed to the free allocation of emission allowances to the installation at issue in the main proceedings.

Costs

69 Since these proceedings are, for the parties to the main proceedings, a step in the action pending before the national court, the decision on costs is a matter for that court. Costs incurred in submitting observations to the Court, other than the costs of those parties, are not recoverable.

On those grounds, the Court (Tenth Chamber) hereby rules:

Article 1(1) and the third subparagraph of Article 1(2) 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 must be interpreted as not permitting the free allocation to the installation at issue in the main proceedings of allowances based on the 'hot metal' product benchmark, on the basis of a new application from the Czech Republic, even if double counting of emissions and double allocation of allowances are excluded.

[Signatures]