Reports of Cases

OPINION OF ADVOCATE GENERAL
KOKOTT
delivered on 12 November 2015 [1]

Joined Cases C-191/14 and C-192/14

Borealis Polyolefine GmbH and OMV Refining & Marketing GmbH
v
Bundesminister für Land- und Forstwirtschaft, Umwelt und Wasserwirtschaft
(Request for a preliminary ruling from the Landesverwaltungsgericht Niederösterreich (Austria))
Case C-295/14
DOW Benelux BV and Others
v
Staatssecretaris van Infrastructuur en Milieu
(Request for a preliminary ruling from the Raad van State (Netherlands))
and
Joined Cases C-389/14, C-391/14 to C-393/14
Esso Italiana Srl and Others
v
Comitato nazionale per la gestione della direttiva 2003/87/CE e per il supporto nella gestione delle attività di progetto del protocollo di Kyoto,
Ministero dell'Ambiente e della Tutela del Territorio e del Mare,
Ministero dell'Economia e delle Finanze,
Presidenza del Consiglio dei Ministri

(Request for a preliminary ruling from the Tribunale Amministrativo Regionale per il Lazio (Italy))

(Environmental law — Scheme for greenhouse gas emission allowance trading — Method for allocating allowances — Free allocation of allowances — Uniform cross-sectoral correction factor — Calculation — Waste gases — Cogeneration — Activities newly added from 2008 and 2013 onwards — Statement of reasons — Comitology — Property — Individual concern — Limitation of the effects of annulment)

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I – **Introduction**

1. The emission allowance trading scheme laid down in Directive 2003/87 [2] continues to make transitional provision for allocating greenhouse gas emission rights, or 'allowances', free of charge to many industrial installations. However, the directive contains a complicated regime that limits the quantity of allowances to be allocated free of charge by means of a correction factor based on a comprehensive examination of the historical emissions and recognised need of the installations in question.

2. In this Opinion, I shall be analysing requests for a preliminary ruling from Austria, the Netherlands and Italy concerning the determination of that correction factor. Those requests are based on actions brought by undertakings which have objected to certain aspects of the way in which that correction factor is calculated with a view, ultimately, to obtaining a greater quantity of emission rights free of charge. In addition to those cases, the Court has pending before it a number of other requests for a preliminary ruling from Italy, Finland, Sweden, Spain and Germany, made in pursuit of the same aim, which raise largely similar questions. [3]

2 — 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), in the version of the Treaty on the Accession of Croatia (OJ 2012 L 112, p. 21).

3 — Cases C-502/14 (*Buzzi Unicem SpA and Others*, OJ 2015 C 26, p. 13); C-506/14 (*Yara Suomi Oy and Others*, OJ 2015 C 34, p. 9); C-180/15 (*Borealis AB and Others* v *Naturvårdsverket*, OJ 2015 C 205, p. 21); C-369/15 to C-373/15 (*Siderúrgica Sevillana and Others*, OJ 2015, C 311, p. 35); and C-456/15 (*BASF*), C-457/15 (*Vattenfall Europe*), C-460/15 (*Schaefer Kalk*) and C-461/15 (*EON Kraftwerke*).

3. The question central to these cases is whether the Commission correctly took account of certain activities when calculating the correction factor. Those activities are the use of 'waste gases' as fuel, the use of heating from cogeneration, and industrial activities that were subject to the scheme under Directive 2003/87 only from 2008 or 2013 onwards. In addition, those undertakings seek full access to all the data which the Commission used to make the calculation in order to be able to review whether there are further grounds for objection to it.

4. It also falls to be clarified whether the Commission was right to refrain from applying a particular 'comitology' procedure, whether the undertakings' fundamental right to property has been infringed, whether the undertakings should have brought actions directly before the EU judicature rather than before the national courts, and what the legal consequences would be if their objections were upheld in whole or in part.

II – **Legal context**

A – *Directive 2003/87*

5. The proceedings concern decisions adopted by the Commission on the basis of Directive 2003/87 establishing a scheme for greenhouse gas emission allowance trading within the Community. Most of the provisions relevant to the present cases were inserted into the aforementioned directive by Amending Directive 2009/29. [4]

6. Among the definitions given in Article 3 of Directive 2003/87, attention should be drawn to the following two:

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

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

…

(u) "electricity generator" means an installation that, on or after 1 January 2005, has produced electricity for sale to third parties, and in which no activity listed in Annex I is carried out other than the "combustion of fuels".'

7. Article 9 of Directive 2003/87 governs the quantity of available emission rights and their annual reduction:

'The Community-wide quantity of allowances issued each year starting in 2013 shall decrease in a linear manner beginning from the mid-point of the period from 2008 to 2012. The quantity shall decrease by a linear factor of 1.74% compared to the average annual total quantity of allowances issued by Member States in accordance with the Commission Decisions on their national allocation plans for the period from 2008 to 2012. The Community-wide quantity of allowances will be increased as a result of Croatia's accession only by the quantity of allowances that Croatia shall auction pursuant to Article 10(1).

4 — Directive 2009/29/EC of the European Parliament and of the Council of 23 April 2009 (OJ 2009 L 140, p. 63).

The Commission shall, by 30 June 2010, publish the absolute Community-wide quantity of allowances for 2013, based on the total quantities of allowances issued or to be issued by the Member States in accordance with the Commission Decisions on their national allocation plans for the period from 2008 to 2012.

…'

8. Article 9a(2) of the directive governs how emissions from installations included in the scheme for the first time in 2013 are to be determined for the purposes of the allocation of emission rights:

'In respect of installations carrying out activities listed in Annex I, which are only included in the Community scheme from 2013 onwards, Member States shall ensure that the operators of such installations submit to the relevant competent authority duly substantiated and independently verified emissions data in order for them to be taken into account for the adjustment of the Community-wide quantity of allowances to be issued.

Any such data shall be submitted, by 30 April 2010, to the relevant competent authority in accordance with the provisions adopted pursuant to Article 14(1).

If the data submitted are duly substantiated, the competent authority shall notify the Commission thereof by 30 June 2010 and the quantity of allowances to be issued, adjusted by the linear factor referred to in Article 9, shall be adjusted accordingly. In the case of installations emitting greenhouse gases other than CO_2, the competent authority may notify a lower amount of emissions according to the emission reduction potential of those installations.'

9. Article 10a(1) and (2) of Directive 2003/87 governs the determination of the 'benchmarks' for the various activities:

'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. No free allocation shall be made in respect of any electricity production, except for cases falling within Article 10c and electricity produced from waste gases.

…

2. In defining the principles for setting *ex-ante* benchmarks in individual sectors or subsectors, the starting point shall be the average performance of the 10% most efficient installations in a sector or subsector in the Community in the years 2007-2008 …'

10. Article 10a(3) of Directive 2003/87 excludes, inter alia, the free allocation of allowances for electricity generation:

'Subject to paragraphs 4 and 8, and notwithstanding Article 10c, no free allocation shall be given to electricity generators, to installations for the capture of CO_2, to pipelines for transport of CO_2 or to CO_2 storage sites.'

11. Article 10a(4) of Directive 2003/87, however, contains special provisions applicable to cogeneration:

'Free allocation shall be given to district heating as well as to high efficiency cogeneration, … for economically justifiable demand, in respect of the production of heating or cooling. In each year subsequent to 2013, the total allocation to such installations in respect of the production of that heat shall be adjusted by the linear factor referred to in Article 9.'

12. Article 10a(5) of Directive 2003/87 concerns the determination of a correction factor for the allocation of allowances:

'The maximum annual amount of allowances that is the basis for calculating allocations to installations which are not covered by paragraph 3 and are not new entrants shall not exceed the sum of:

(a) the annual Community-wide total quantity, as determined pursuant to Article 9, multiplied by the share of emissions from installations not covered by paragraph 3 in the total average verified emissions, in the period from 2005 to 2007, from installations covered by the Community scheme in the period from 2008 to 2012; and

(b) the total average annual verified emissions from installations in the period from 2005 to 2007 which are only included in the Community scheme from 2013 onwards and are not covered by paragraph 3, adjusted by the linear factor, as referred to in Article 9.

A uniform cross-sectoral correction factor shall be applied if necessary.'

B – *Decision 2011/278*

13. Article 10 of Decision 2011/278[5] governs the free allocation of allowances. In accordance with paragraph 2, Member States must first calculate the preliminary quantity of allowances to be allocated to the individual industrial installations on the basis of historical emissions and the product benchmarks previously identified by the Commission. The results are to be notified to the Commission pursuant to Article 15(2)(e).

14. In accordance with Article 15(3) of Decision 2011/278, the Commission is to calculate the correction factor provided for in Article 10a(5) of Directive 2003/87 on the basis of the information thus communicated by the Member States:

'Upon receipt of the list referred to in paragraph 1 of this Article, the Commission shall assess the inclusion of each installation in the list and the related preliminary total annual amounts of emission allowances allocated free of charge.

5 — 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).

After notification by all Member States of the preliminary total annual amounts of emission allowances allocated free of charge over the period from 2013 to 2020, the Commission shall determine the uniform cross-sectoral correction factor as referred to in Article 10a(5) of Directive 2003/87/EC. It shall be determined by comparing the sum of the preliminary total annual amounts of emission allowances allocated free of charge to installations that are not electricity generators in each year over the period from 2013 to 2020 without application of the factors referred to in Annex VI with the annual amount of allowances that is calculated in accordance with Article 10a(5) of Directive 2003/87/EC for installations that are not electricity generator or new entrants, taking into account the relevant share of the annual Union-wide total quantity, as determined pursuant to Article 9 of that Directive, and the relevant amount of emissions which are only included in the Union scheme from 2013 onwards.'

15. In accordance with Article 10(9) of Decision 2011/278, the final total annual amount of emission allowances to be allocated free of charge to each individual industrial installation is arrived at by multiplying the preliminary final total annual amount by the correction factor.

16. So far as concerns the taking into account of cogeneration in the determination of benchmarks, recital 21 of Decision 2011/278 is of particular interest:

'Where measurable heat is exchanged between two or more installations, the free allocation of emission allowances should be based on the heat consumption of an installation and take account of the risk of carbon leakage. Thus, to ensure that the number of free emission allowances to be allocated is independent from the heat supply structure, emission allowances should be allocated to the heat consumer.'

17. Recital 32 of Decision 2011/278 explains how account is taken of waste gases in the setting of product benchmarks:

'It is also appropriate that the product benchmarks take account of the efficient energy recovery of waste gases and emissions related to their use. To this end, for the determination of the benchmark values for products of which the production generates waste gases, the carbon content of these waste gases has been taken into account to a large extent. Where waste gases are exported from the production process outside the system boundaries of the relevant product benchmark and combusted for the production of heat outside the system boundaries of a benchmarked process as defined in Annex I, related emissions should be taken into account by means of allocating additional emission allowances on the basis of the heat or fuel benchmark. In the light of the general principle that no emission allowances should be allocated for free in respect of any electricity production, to avoid undue distortions of competition on the markets for electricity supplied to industrial installations and taking into account the inherent carbon price in electricity, it is appropriate that, where waste gases are exported from the production process outside the system boundaries of the relevant product benchmark and combusted for the production of electricity, no additional allowances are allocated beyond the share of the carbon content of the waste gas accounted for in the relevant product benchmark.'

C – Decision 2013/448

18. Article 4 of Decision 2013/448[6] concerns the correction factor for the years 2013 to 2020:

'The uniform cross-sectoral correction factor referred to in Article 10a(5) of Directive 2003/87/EC and determined in accordance with Article 15(3) of Decision 2011/278/EU is set out in Annex II to this Decision.'

19. Under Annex II to Decision 2013/448, the correction factor for 2013 was 94.272151%. Over the subsequent years, that level was reduced to 82.438204% for the year 2020.

20. In recital 25, the Commission explains how it arrived at those figures:

'The limit set by Article 10a(5) of Directive 2003/87/EC is 809 315 756 allowances in 2013. In order to derive this limit, the Commission first collected from Member States and the EEA-EFTA countries information on whether installations qualify as an electricity generator or other installation covered by Article 10a(3) of Directive 2003/87/EC. The Commission then determined the share of emissions in the period from 2005 to 2007 from the installations not covered by that provision, but included in the EU ETS [European Union Emissions Trading Scheme] in the period from 2008 to 2012. The Commission then applied this share of 34.78289436% to the quantity determined on the basis of Article 9 of Directive 2003/87/EC (1 976 784 044 allowances). To the result of this calculation, the Commission then added 121 733 050 allowances, based on the average annual verified emissions in the period from 2005 to 2007 of relevant installations taking into account the revised scope of the EU ETS as of 2013. In this respect, the Commission used information provided by Member States and the EEA-EFTA countries for the adjustment of the cap. Where annual verified emissions for the period 2005-2007 were not available, the Commission extrapolated, to the extent possible, the relevant emission figures from verified emissions in later years by applying the factor of 1.74% in reverse direction. The Commission consulted and obtained confirmation from Member States' authorities on information and data used in this respect. The limit set by Article 10a(5) of Directive 2003/87/EC compared to the sum of the preliminary annual amounts of free allocation without application of the factors referred to in Annex VI to Decision 2011/278/EU gives the annual cross-sectoral correction factor as set out in Annex II to this Decision.'

III – **National proceedings and the requests for a preliminary ruling**

21. In 2012, Austria, the Netherlands and Italy (provisionally) calculated the greenhouse gas emission allowances to be allocated free of charge to the applicants in the main proceedings and notified these to the Commission.

22. On 5 September 2013, the Commission adopted Decision 2013/448, in which it determined the uniform cross-sectoral correction factor.

23. On the basis of that correction factor, the aforementioned three Member States allocated to the applicants an amount of emission allowances that was reduced by comparison with the preliminary calculation.

24. Against that reduced allocation the parties to the main proceedings brought the actions which have led to the present requests for a preliminary ruling.

6 — 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 (OJ 2013 L 240, p. 27).

A – *The questions in Cases C-191/14* (Borealis Polyolefine) *and C-192/14* (OMV Refining & Marketing)

25. The Landesverwaltungsgericht Niederösterreich (Regional Administrative Court, Lower Austria) submits the following questions to the Court of Justice:

'(1) Is Decision 2013/448 invalid and does it infringe Article 10a(5) of Directive 2003/87 in so far as it excludes from the basis of calculation pursuant to subparagraphs (a) and (b) of Article 10a(5) of that directive emissions associated with waste gases produced by installations falling within Annex I to Directive 2003/87 and heat used by installations falling within Annex I to Directive 2003/87 and which comes from combined heat and power installations, for which a free allocation is granted pursuant to Article 10a(1) and (4) of Directive 2003/87 and Decision 2011/278?

(2) Is Decision 2013/448 invalid and does it infringe Article 3e and 3u of Directive 2003/87, alone and/or in conjunction with Article 10a(5) of Directive 2003/87, in so far as it provides that CO_2 emissions associated with waste gases — which are produced by installations falling within Annex I to Directive 2003/87 — and heat used in installations falling within Annex I to Directive 2003/87 and which was acquired by combined heat and power installations are emissions from 'electricity generators'?

(3) Is Decision 2013/448 invalid and does it infringe the objectives of Directive 2003/87 in so far as it creates an asymmetry by excluding emissions associated with the combustion of waste gases and with heat produced in cogeneration from the basis of calculation in subparagraphs (a) and (b) of Article 10a(5), whereas free allocation with regard to them is due in accordance with Article 10a(1) and (4) of Directive 2003/87 and Decision 2011/278?

(4) Is Decision 2011/278 invalid and does it infringe Article 290 TFEU and Article 10a(5) of Directive 2003/87 in so far as Article 15(3) of that decision amends subparagraphs (a) and (b) of Article 10a(5) of Directive 2003/87 to the effect that it replaces the reference to 'installations which are not covered by paragraph 3' by the reference to 'installations that are not electricity generators'?

(5) Is Decision 2013/448 invalid and does it infringe Article 23(3) of Directive 2003/87 in so far as that decision was not adopted on the basis of the regulatory procedure with scrutiny which is laid down in Article 5a of Council Decision 1999/468 and Article 12 of Regulation No 182/2011?

(6) Is Article 17 of the European Charter of Fundamental Rights to be understood as precluding the retention of free allocations on the basis of the wrongful calculation of a cross-sectoral correction factor?

(7) Is Article 10a(5) of Directive 2003/87, on its own and/or in conjunction with Article 15(3) of Decision 2011/278, to be understood as precluding the application of a provision of national law which provides for the application of the wrongfully calculated uniform cross-sectoral correction factor, as determined in Article 4 of Decision 2013/448 and in Annex II thereto, to the free allocations in a Member State?

(8) Is Decision 2013/448 invalid and does it infringe Article 10a(5) of Directive 2003/87 in so far as it includes only emissions from installations which were contained in the Community scheme from 2008, with the result that it excludes those emissions which are associated with activities which were contained in the Community scheme from 2008 (in the amended Annex I to Directive 2003/87) if those activities took place in installations which were already contained in the Community scheme prior to 2008?

(9) Is Decision 2013/448 invalid and does it infringe Article 10a(5) of Directive 2003/87 in so far as it includes only emissions from installations which were contained in the Community scheme from 2013, with the result that it excludes those emissions which are associated with activities which were contained in the Community scheme from 2013 (in the amended Annex I to Directive 2003/87) if those activities took place in installations which were already contained in the Community scheme prior to 2013?'

B – *The questions in Case C-295/14* (DOW Benelux)

26. The questions referred by the Netherlands Raad van State (Council of State) read as follows:

'(1) Must the fourth paragraph of Article 263 TFEU be interpreted as meaning that operators of installations to which, as from the beginning of 2013, the emissions-trading rules laid down in Directive 2003/87 have been applicable, with the exception of operators of the installations referred to in Article 10a(3) of that directive and of newcomers, could undoubtedly have brought an action before the General Court seeking the annulment of Decision 2013/448, in so far as the uniform cross-sectoral correction factor is determined by that decision?

(2) Is Decision 2013/448, in so far as the uniform cross-sectoral correction factor is determined thereby, invalid because that decision was not adopted in accordance with the regulatory procedure with scrutiny referred to in Article 10a(1) of Directive 2003/87?

(3) Is Article 15 of Commission Decision 2011/278 contrary to Article 10a(5) of Directive 2003/87 because the former article precludes emissions from electricity generators from being taken into account in the determination of the uniform cross-sectoral correction factor? If so, what are the consequences of that conflict for Decision 2013/448?

(4) Is Decision 2013/448, in so far as the uniform cross-sectoral correction factor is determined thereby, invalid because that decision is based on, inter alia, data submitted pursuant to Article 9a(2) of Directive 2003/87 without the provisions to be adopted pursuant to Article 14(1), referred to in Article 9a(2), having been established?

(5) Is Decision 2013/448, in so far as the uniform cross-sectoral correction factor is determined thereby, contrary to, in particular, Article 296 TFEU or Article 41 of the Charter of Fundamental Rights of the European Union on the ground that the quantities of emissions and emission allowances which determined the calculation of the correction factor are set out only partially in that decision?

(6) Is Decision 2013/448, in so far as the uniform cross-sectoral correction factor is determined thereby, contrary to, in particular, Article 296 TFEU or Article 41 of the Charter of Fundamental Rights of the European Union on the ground that that correction factor was determined on the basis of data of which the operators of the installations involved in emissions trading could not have become aware?'

C – *The questions in Cases C-389/14 and C-391/14 to C-393/14 (*Esso Italiana)

27. Finally, the Italian Tribunale Amministrativo Regionale per il Lazio (Regional Administrative Court, Lazio) submits the following questions to the Court of Justice:

'(1) Is Decision 2013/448 invalid for not having taken into account, in the calculation of the allowances to be allocated free of charge, the percentage of emissions associated with waste gas combustion — or steel processing gas — or of emissions associated with the heat produced by

cogeneration, thereby infringing Article 290 TFEU and Article 10a(1),(4) and (5) of Directive 2003/87, going beyond the limits of the powers conferred by that directive and at variance with its objectives (to encourage more energy-efficient techniques and to protect the needs of economic development and employment)?

(2) Is Decision 2013/448 invalid, in the light of Article 6 TEU, on grounds of its inconsistency with Article 1 of the Additional Protocol to the European Convention for the Protection of Human Rights and Fundamental Freedoms ('the ECHR') and Article 17 of the ECHR, owing to undue failure to respect the applicant companies' legitimate expectation of remaining in possession of a good consisting of the number of the allowances allocated to them on a preliminary basis and to which they are entitled on the basis of Directive 2003/87, thereby depriving those companies of the economic benefit associated with that good?

(3) Furthermore, is Decision 2013/448 invalid as regards its definition of the cross-sectoral correction factor, given that the decision infringes the second paragraph of Article 296 TFEU and Article 41 of the Charter of Fundamental Rights of the European Union owing to its failure to provide an adequate statement of reasons?

(4) Is Decision 2013/448 invalid as regards its definition of the cross-sectoral correction factor, given that the decision infringes Article 10a(5) of Directive 2003/87, fails to respect the principle of proportionality enshrined in Article 5(4) TEU and is also vitiated by failure to carry out a proper inquiry and error of assessment, in the light of the fact that the calculation of the maximum number of allowances to be allocated free of charge (relevant for the purposes of defining a uniform cross-sectoral correction factor) did not take into account the effects of the changes in the interpretation of the term 'combustion plant' between the first phase (2005 to 2007) and the second phase (2008 to 2012) of the implementation of Directive 2003/87?

(5) Is Decision 2013/448 invalid as regards its definition of the cross-sectoral correction factor, on grounds of infringement of Articles 10a(5) and 9a(2) of Directive 2003/87, and also on account of the failure to carry out a proper inquiry and error of assessment, in view of the fact that the calculation of the maximum number of allowances to be allocated free of charge (relevant for the purposes of defining a uniform cross-sectoral correction factor) was made on the basis of data, provided by the Member States, which are mutually inconsistent because they are based on different interpretations of Article 9a(2) of Directive 2003/87?

(6) Is Decision 2013/448 invalid as regards its definition of the cross-sectoral correction factor, on grounds of infringement of the procedural rules under Articles 10a(1) and 23(3) of Directive 2003/87?'

D – *Procedure before the Court of Justice*

28. Written observations have been submitted by Borealis Polyolefine and Others in the Austrian proceedings, by Dow Benelux, Esso Nederland and Others, Akzo Nobel Chemicals and Others and Yara Sluiskil and Others in the Netherlands proceedings, and by Esso Italiana, Eni and Linde Gas Italia in the Italian proceedings, as parties to those respective sets of proceedings. Written observations have also been submitted by Germany, the Netherlands, Spain (in the Italian proceedings only) and the Commission.

29. While the Court has joined the two Austrian and the four Italian requests for a preliminary ruling respectively, it has thus far not otherwise formally joined the cases at issue here. It none the less organised a joint hearing on 3 September 2015. With the exception of Linde, all the aforementioned parties to the proceedings as well as Luchini and Others and Buzzi Unicem, as parties to the Italian proceedings, took part in that hearing.

30. I shall deal with all of the aforementioned cases in a single Opinion and would suggest that the Court adopt the same approach by joining the cases for the purposes of the judgment.

IV – **Legal assessment**

31. The purpose of the questions raised by the requests for a preliminary ruling is to call into question the uniform cross-sectoral correction factor ('the correction factor') provided for in Article 10a(5) of Directive 2003/87, which the Commission determined in Article 4 of, and Annex II to, Decision 2013/448.

32. In order to understand those questions, it first needs to be explained how that correction factor is calculated and how significant it is within the scheme of Directive 2003/87 (see Section A). Then, I shall consider the questions concerned with the failure to take adequate account of particular sources of emissions (see Sections B and C), thereafter the statement of reasons for the determination of the correction factor (see Section D), followed by the fundamental right to property (see Section E) and the procedure applied in the decision (see Section F). So as not to interrupt the presentation of an area in which the law is highly complex, it is only subsequently that I shall submit that the applicants in the main proceedings were under no obligation to raise their objections directly before the EU judicature (see Section G) and set out the consequences that should follow from the examination of the decision (see Section H).

A – *The legal classification of the correction factor*

33. Article 1 of Directive 2003/87 states that that directive establishes a scheme for greenhouse gas emission allowance trading in order to promote reductions of greenhouse gas emissions in a cost-effective and economically efficient manner.

34. Installations subject to the scheme must acquire emission rights, or 'allowances', in order to emit greenhouse gases. In practice, these rights are almost exclusively concerned with the emission of CO_2. Articles 9 and 9a of Directive 2003/87 limit the total quantity of available allowances and provide for that quantity to be decreased by 1.74% each year from 2010 onwards. According to recital 13 of Directive 2009/29, the decrease should help reduce climate-damaging emissions by 20% below 1990 levels by 2020.

35. Since 2013, only a portion of those allowances have been allocated free of charge, the remainder having been auctioned. A distinction is drawn between electricity generators, who, with few exceptions, do *not* receive free allowances,[7] and industrial installations, which receive either all[8] or at least a portion[9] of the allowances they require free of charge.

36. The questions raised in the present cases are directly concerned only with the situation of industrial installations eligible for a free allocation of allowances, but not with that of electricity generators. This is because the correction factor at issue has the effect of reducing the emission allowances allocated free of charge to industrial installations.

7 — Second sentence of the third subparagraph of Article 10a(1), Article 10a(3) and the third subparagraph of Article 10a(7) of Directive 2003/87.

8 — In accordance with Article 10a(12) of Directive 2003/87, these are installations in sectors or subsectors which are exposed to a significant risk of 'carbon leakage'.

9 — In accordance with Article 10a(11) of Directive 2003/87, they are initially to receive 80% of the allowances they require free of charge. That percentage is to be decreased on a linear basis to 30% by 2020 and to 0% by 2027.

37. The correction factor is determined using a mechanism whereby the Member States, on the one hand, and the Commission, on the other, calculate how many allowances are to be allocated in total to all existing industrial installations. In so doing, the two sides apply different methods of calculation. The lower of the two values determines how many allowances are ultimately allocated free of charge.

38. If the Member States' figure had been lower, no correction would have been required. The Member States would have been able to allocate allowances free of charge on the basis of their initial figure.

39. As it turned out, however, the Commission's figure was lower. This gave rise to the situation provided for in the second subparagraph of Article 10a(5) of Directive 2003/87, inasmuch as a uniform cross-sectoral correction factor had to be applied. This amounted to approximately 94.3% in the first year, dropping to around 80.4% by 2020. This means that only the percentage of the preliminary quantity of allowances to be allocated free of charge can ultimately be allocated.

1. The recognised need of industrial installations as calculated by the Member States

40. The figure mentioned at the beginning of Article 10a(5) of Directive 2003/87, that is to say the quantity of allowances that serves as the basis for calculating (future) free annual allocations to industrial installations, is determined by the Member States. That quantity is to some extent calculated roots upwards, that is to say on the basis of the historical activity of each individual installation and benchmarks which the Commission laid down for the activity in question in Decision 2011/278. The benchmarks equate to a specific quantity of CO_2 emissions which the Commission recognises as being necessary for the production of a particular amount of the relevant product. I shall henceforth refer to that value as the *recognised need*.

41. In accordance with the first subparagraph of Article 10a(2) of Directive 2003/87, the starting point for the benchmarks is the average performance of the 10% most efficient installations in the sector or subsector in question in the European Union. Furthermore, in accordance with the third subparagraph of Article 10a(1), those benchmarks are 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, inter alia, high-efficiency cogeneration and the efficient energy recovery of waste gases, and are not to provide incentives to increase emissions. The Commission is tasked with achieving that objective when setting benchmarks for the various activities.

42. The benchmarks set by the Commission for industrial installations include in particular emissions from the use as fuel of waste gases occurring as a result of certain production processes (see Section B, point 1), and take into account the industrial use of heat produced by cogeneration installations (see Section B, point 2). Moreover, they are applied to all industrial installations currently subject to the scheme laid down in Directive 2003/87, including, therefore, installations covered by that scheme only from 2008 (see Section C, point 2, part (b)) or 2013 (see Section C, point 2, part (a)) onwards.

43. The Member States determine the recognised need of all industrial installations within their territory, as established on the basis of those benchmarks, by multiplying the benchmarks for the activity in question by the historical activity level of the sub-installations concerned, in accordance with Article 10 of Decision 2011/278. Article 11(1) of Directive 2003/87 provides that they are to notify those data to the Commission by 30 September 2011. The Commission adds together the figures notified to it, so as to determine the total recognised need of all industrial installations within the European Union.

2. The industry ceiling calculated by the Commission

44. The Commission calculates the second figure, the 'industry ceiling', to some extent from a bird's eye perspective by determining, on the basis of historical emissions data, what share of the total quantity of emission allowances available is to be allocated to industrial installations as a whole. That industry ceiling consists of two partial amounts which are governed by Article 10a(5)(a) and (b) of Directive 2003/87.

a) Article 10a(5)(a) of Directive 2003/87

45. In accordance with Article 10a(5)(a) of Directive 2003/87, the starting point for the first partial amount is the average annual total quantity of allowances, as provided for in the first paragraph of Article 9, that were allocated in the second allocation period from 2008 to 2012, that is to say the historical need of all installations subject to the scheme laid down in the directive during that period. That total quantity includes both groups, namely electricity generators and industrial installations.

46. The quantity of those allowances was determined by the individual Member States. However, the version of Directive 2003/87 applicable at that time did not prescribe a specific method to be used in making that determination. [10]

47. The average quantity for the European Union as a whole for the years 2008 to 2012, as determined on the basis of those national allocations, is decreased each year [11] by a linear factor of 1.74% from the mid-point of that period, that is to say from 2010, in order to calculate the relevant annual total quantity applicable in future.

48. In accordance with Article 10a(5)(a) of Directive 2003/87, however, only those installations not covered by Article 10a(3) can be taken into account in the calculation of the industry ceiling. In practice, therefore, allowances allocated to electricity generators up until 2012 are disregarded. The Commission calculates that number of allowances by reference to the average quantity of allowances allocated to industrial installations in the years 2005 to 2007.

49. Allowances allocated to electricity generators in the past for emissions from the use of waste gases as fuel (see Section B, point 1) or the generation of industrially-produced heating in cogeneration installations (see Section B, point 2) do not therefore form part of the industry ceiling. Moreover, the reference to the number of allowances allocated to industrial installations in the period 2005 to 2007 also makes it impossible to take account of industrial installations which were subject to Directive 2003/87 only from 2008 onwards (see Section C, point 2, part (b)). These include certain combustion installations and installations within the territory of the EEA States. None the less, all such emissions are taken into account in the industrial benchmarks.

b) Article 10a(5)(b) of Directive 2003/87

50. The second partial amount referred to in Article 10a(5)(b) of Directive 2003/87 covers installations which have been subject to the scheme laid down in the Directive only since 2013. Since then, for example, the scheme has also applied to emissions from the production of aluminium and from certain sectors of the chemicals industry.

10 — Judgment in *Commission* v *Estonia* (C-505/09 P, EU:C:2012:179, paragraph 52).

11 — For further clarification, see recital 13 of Commission 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).

51. These installations are included on the basis of the total annual verified emissions which they generated on average in the years 2005 to 2007. That figure, too, is decreased each year by the aforementioned linear factor of 1.74% and no account is taken of electricity generators.

52. This raises an issue inasmuch as the same emissions data were not used for all Member States. In the case of some Member States, the data used were confined to emissions from installations which had been included in the scheme only since 2013. In the case of other Member States, however, the data used also covered emissions from activities new to the scheme which are carried out at installations that were previously included in the scheme on account of other activities (see Section C, point 2, part (a)).

3. The correction factor determined

53. At first sight, one would expect recognised need based on the most efficient installations, as calculated by the Member States, to be necessarily lower than the historical allocations to all installations, including the less efficient ones, that form the basis of the figure calculated by the Commission. [12] Thus, the only striking feature likely to emerge from a comparison of the two figures would be the annual linear reduction of the industry ceiling by 1.74%. There should be no need for a correction factor until the 'advantage' achieved by taking the most efficient installations as basis of measurement has been offset by the reductions applied.

54. In fact, however, the result of the comparison between the figure arrived at by the Member States and that calculated by the Commission gives the impression that the recognised need that formed the basis of Decision 2013/448 was of a *greater* magnitude than the historical allocations. After all, from the very start, the correction factor has a more pronounced impact than the linear reductions. In the first year, 2013, the correction factor of 94.272151% reduces the free allocation by 5.727849%. The linear reduction applied up to that point for the years 2011 to 2013 amounts to only 5.2%. That effect none the less dissipates to some extent over time. In the final year, 2020, a correction factor of 82.438204% is applied, thus giving rise to a reduction of 17.561796%. This is only slightly higher than the accumulated linear reduction of 17.4% over those ten years.

55. For that reason, the applicants in the main proceedings consider the correction to be too high. They put this down in particular to the fact that certain activities were wrongly taken into account in the determination of recognised need [13] but not taken into account in the determination of the industry ceiling. [14] They also seek access to the data necessary to be able to carry out a comprehensive review of the calculation of the correction factor (see Section D).

4. The objectives of Directive 2003/87 in relation to the correction factor

56. In response to that argument, it must be conceded that an 'asymmetrical' [15] taking into account of certain activities is at odds with one of the objectives of the correction factor. It is true that those objectives were not expressly stated. In the light of the context within which it sits in the directive, the correction factor none the less serves a dual purpose.

12 — According to Esso Nederland and Others and contrary to the Commission's submissions in the present cases, this assumption was also made by the Commission in 2010.

13 — See point 42 above.

14 — See points 49 and 52 above.

15 — European Commission's Directorate-General for Climate Action, 'Calculations for the determination of the cross-sectoral correction factor in the EU ETS in 2013 to 2020' of 22 October 2013, at p. 4 of Annex I to Borealis Polyolefine's pleadings, also available, as at 12 August 2015, on the Commission's website at http://ec.europa.eu/clima/policies/ets/cap/allocation/docs/cross_sectoral_correction_factor_en.pdf.

57. First, it gives effect to the linear reduction factor of 1.74%. Its purpose in this regard is unaffected by the asymmetry complained of. The reduction factor could, however, have been achieved without the complicated comparison between the recognised need and the industry ceiling.

58. More important, therefore, is the correction factor's second function: to ensure that the free allocations based on the product benchmarks do not tip the balance between industrial activities and electricity generation that existed under the former allocation scheme in favour of industry.

59. That balance is important. For, if industrial activities as a share of the total quantity of available allowances were to increase, the quantity of allowances available for auction would dwindle accordingly. If the quantity of those allowances were not sufficient to satisfy the overall need that must be met through auctioning, there would be a risk of disproportionate price rises. This would place a burden primarily on the electricity industry and on electricity consumers. However, it would also affect certain industrial sectors that have to buy some of the allowances they require.

60. Shifts in that historical balance do occur, however, where, as a result of a new method of calculation, activities that used to be classified as electricity generation or were not taken into account at all are now attributed to industry.

61. As Linde, for example, explains, such an asymmetrical need for correction is also at odds with the objective laid down in Directive 2003/87 of avoiding 'carbon leakage'. That term describes the process whereby activities that cause greenhouse gas emissions are relocated to third countries. An exodus of this kind would not only be economically disadvantageous; it would also undermine the overarching goal of reducing greenhouse gas emissions globally.

62. For that reason, in order to avoid carbon leakage, Article 10a(12) of Directive 2003/87 provides that installations in sectors or subsectors which are exposed to a significant risk of carbon leakage are to be allocated allowances free of charge at 100% of their need as recognised by reference to the corresponding benchmarks. However, an unduly high correction factor may ultimately mean that they receive less than 100% of the allowances they require, and, therefore, that the scheme laid down in Directive 2003/87 creates an incentive for the relocation of such activities.

63. On the other hand, the asymmetrical taking into account of the use of waste gases is consistent with the overarching objective of Directive 2003/87 to reduce climate-damaging emissions. Because it reduces the quantity of allowances allocated free of charge, it provides a greater incentive to reduce CO_2 emissions. It therefore contributes to preserving and protecting the environment, to combating climate change and to ensuring a high level of protection, as required by Article 191 TFEU.

64. In the light of the foregoing, it is necessary to examine more closely the four areas in which the applicant undertakings complain of such shifts in the balance between industry and electricity generation, that is to say the taking into account of waste gases and cogeneration installations (see Section B) and the taking into account of activities and installations which have been subject to the scheme laid down in Directive 2003/87 only since 2013 or 2008 (see Section C).

B – *The taking into account of electricity generation from waste gases and of the industrial use of heating from high-efficiency cogeneration installations*

65. The first to fourth questions in *Borealis Polyolefine*, the third question in *Dow Benelux* and the first question in *Esso Italiana* concern the taking into account of electricity generation from waste gases (see point 1) and of the industrial use of heating from high-efficiency cogeneration installations (see point 2) in the calculation of the correction factor. Both activities are today classified as industrial activities, even though they were previously taken into account under the heading of electricity generation.

1. Electricity generation from waste gases

66. Waste gases are produced as part of certain industrial production processes, such as in the manufacture of coke and steel, and can be used as fuel, in particular for electricity generation. From the point of view of the sustainable management of resources, this makes much more sense than discharging those gases or flaring them off to no useful purpose.

67. Their use as such presumably explains why the first sentence of the third subparagraph of Article 10a(1) of Directive 2003/87 includes promoting the use of waste gases among the incentives to reduce greenhouse gas emissions and employ energy efficient techniques. It is probably also the reason why the second sentence of that provision creates an exception to the exclusion of electricity generation from the free allocation of allowances for electricity produced from waste gases.

68. As the Commission explains, when it set the product benchmarks, it therefore took into account the fact that, in some sectors, waste gases are combusted to generate electricity. It states that this led in particular to an increase in the product benchmark for coke, hot metal and sintered ore, and therefore to an increase in the recognised need in those sectors.

69. The Commission acknowledges that only some of the associated emissions were included in the industry ceiling, that is to say, only to the extent that the waste gases were combusted in industrial installations. To the extent that the waste gases were combusted by an electricity generator within the meaning of Article 10[a](3) of Directive 2003/87, however, they were left out of account in the calculation of the industry ceiling. Since the ceiling is lower by that amount, the fact that the waste gases are taken into account in the determination of the benchmarks increases the correction factor accordingly.

70. It must therefore be examined whether the asymmetrical taking into account of the use of waste gases is compatible with Directive 2003/87.

71. It must be pointed out, in this regard, that the asymmetry has its basis in the wording of Article 10a(1), (3) and (5) of Directive 2003/87. In accordance with paragraphs (3) and (5), electricity generators, and therefore the generation of electricity from waste gases too, are not to be taken into account in the calculation of the industry ceiling. The third subparagraph of paragraph (1), on the other hand, supports the inference that the Commission was to take into account electricity generation from waste gases in the determination of the product benchmarks forming the basis for determining the recognised need of industrial installations.

72. Moreover, the applicants in the main proceedings cannot successfully counter the foregoing submission with the argument that the reference in Article 10a(5) of Directive 2003/87 to ‘installations which are not covered by paragraph 3’ must not be understood as meaning that emissions from electricity generators are not to be taken into account. They take the view that that reference is to installations which are eligible for the free allocation of allowances. There is, however, no basis for that view in the legislation.

73. In particular, contrary to the argument put forward by Buzzi Unicem, it is not a precondition for the application of Article 10a(3) of Directive 2003/87 that no free allocation be given for electricity generation. Rather, the exclusion of free allocation is the legal consequence of that provision, to which other provisions permit exceptions.

74. As I have indicated above,[16] it is true that that asymmetry is not really in line with the objective pursued by the correction factor of maintaining the historical balance between industrial installations and electricity generation. It also increases the incentive to relocate emission-heavy activities. At the same time, however, it serves the environmental objectives of Directive 2003/87.

75. In such a situation of conflicting objectives and structured considerations, one would have hoped that the legislature would expressly indicate its intentions. It did so, for example, in another provision of Directive 2003/87, namely the third sentence of the first paragraph of Article 9, which was inserted into the directive on the occasion of Croatia's accession. In accordance with that provision, the quantity of allowances in the European Union is to be increased as a result of Croatia's accession only by the quantity of allowances that Croatia must auction pursuant to Article 10(1). Since the allowances allocated free of charge by Croatia are not therefore taken into account, this inevitably leads to a reduction in the allowances available throughout the European Union and to a need for correction as provided for in Article 10a(5).

76. So far as waste gases are concerned, however, there is no evidence of a similarly clear provision in this regard in the directive or of a corresponding reference in its preamble or drafting history. The indications are, in fact, that the legislature simply overlooked the issue when drafting Amending Directive 2009/29. After all, the reference to waste gases was included in that legislation only at a relatively late stage, in the course of the tripartite dialogue on the adoption of Directive 2009/29 at first reading. Waste gases were mentioned for the first time in an amendment proposed by the Parliament[17] which, within the space of a few weeks, appeared in the interinstitutional compromise on the adoption of Directive 2009/29.[18] In this regard, a number of MEPs bemoaned the great haste with which the directive had been adopted.[19]

77. Nor, on the other hand, did the legislature expressly indicate that preference should in any event be given to the undistorted guarantee of the balance between industrial installations and electricity generators and to easing the burden on industrial installations.

78. Consequently, the conflict of objectives connected with the asymmetrical taking into account of electricity generation from waste gases is no justification for interpreting Directive 2003/87 in a manner not supported by its wording so as to avoid that asymmetry.

79. Moreover, there is no need to address the question of whether the Commission could none the less have removed the asymmetry associated with the taking into account of waste gases by means of implementing legislation. It is true that Article 10a(1) of Directive 2003/87 empowers it to adopt, in relation to Article 10a(5), implementing measures to amend non-essential elements of the directive by supplementing it. However, in the light of the conflicting objectives, it was in any event under no obligation to exercise that power in order to remove the asymmetry.

80. It must therefore be concluded that the examination of the questions concerning electricity generation from waste gases has not revealed anything that would call into question the legality of the way in which the correction factor was determined in Decision 2013/448.

16 — See point 56 et seq. above.

17 — 48th proposal for an amendment (Council Document 14764/08 of 24 October 2008, p. 80).

18 — Adopted by the Parliament on 17 December 2008 (see Council Document 17146/08 of 14 January 2010), confirmed by the Council on 4 April 2009.

19 — Council Document 17146/08 of 14 January 2010, p. 5.

2. Cogeneration installations

81. Cogeneration promises a more comprehensive use of the energy derived from fuels. If use is made only of the power generated, for example, to generate electricity, the heat produced is pointlessly lost. So, in cogeneration installations, the heat emitted is harnessed and made available for other activities. Some of that heat is also used to generate cooling.

82. The questions concerning the taking into account of cogeneration installations are concerned only with those installations that satisfy the definition of an electricity generator in Article 3(u) of Directive 2003/87. Electricity generators are installations that produce electricity for sale to third parties, and in which no activity listed in Annex I is carried out other than the 'combustion of fuels'.

83. Although, during the written procedure, the parties to the proceedings were still in disagreement as to how such electricity cogeneration installations were to be taken into account in the calculation of the correction factor, they reached agreement on the matter following a question put to them at the hearing.

84. Of interest in this regard is the situation where an electricity cogeneration installation supplies heating or cooling to industrial customers. As is clear in particular from recital 21 of Decision 2011/278, that situation is taken into account in the industrial consumer benchmark. The recognised need of that installation is therefore increased, but the associated emissions are not included in the industry ceiling because they derive from cogeneration installations, and therefore from electricity generators. The industrially-deployed heat from cogeneration installations therefore increases the correction factor and leads to further asymmetry.

85. The factors to be taken into consideration here are essentially the same as those looked at in the context of electricity generation from waste gases.

86. That asymmetry has its basis in Article 10a(1), (3) and (5) of Directive 2003/87. On the one hand, in accordance with paragraphs 3 and 5, electricity generators, and electricity cogeneration installations too, therefore, are left out of account in the determination of the industry ceiling. On the other hand, the first sentence of the third subparagraph of paragraph 1 provides that the product benchmarks are to provide incentives for reductions in greenhouse gas emissions and energy efficient techniques, by taking account, inter alia, of high efficiency cogeneration.

87. The integration of heating consumption into the industrial product benchmarks provided for by the Commission in Decision 2011/278 is consistent with that objective and makes it easier in practice to deal with heating usage by industry when it comes to the free allocation of allowances. Such usage is made easier to handle because installations which generate heat themselves and installations which obtain heating from cogeneration installations are treated in the same way. This makes it unnecessary to verify how much heating individual installations obtain and from which sources for the purposes of allocating allowances to those installations. It also has the effect of promoting the reduction of greenhouse gas emissions to the extent that, when procuring heating from cogeneration installations, industrial installations save allowances which they can sell.

88. At first sight, the first sentence of Article 10a(4) of Directive 2003/87 appears to say something different, to the effect that allowances are to be allocated to high efficiency cogeneration, for economically justifiable demand, in respect of the *production* of heating or cooling. However, the possibility of such direct allocation does not preclude account being taken of consumption in the product benchmarks, but above all permits cogeneration installations to be allocated allowances for the production of heating or cooling which they do not supply to customers forming part of the scheme laid down in the directive. Such customers include, for example, private households.

89. It is for this reason that the benchmarks for the industrial use of heating from cogeneration installations fall within the framework of the implementing powers exercised by the Commission in accordance with Article 10a(1) of Directive 2003/87.

90. Furthermore, the same applies here as in the context of the taking into account of waste gases. It is true that there are conflicting objectives and no clear guidance from the legislature. However, this does not compel an interpretation of Directive 2003/87 which precludes such asymmetry. Moreover, the Commission was under no obligation to remove that asymmetry when exercising its implementing powers.

91. Consequently, the examination of the questions concerning the taking into account of cogeneration has also revealed nothing that would call into question the legality of the way in which the correction factor was determined in Decision 2013/448.

C – *The data used for the industry ceiling so far as concerns the sectors to be included for the first time as from 2008 or 2013*

92. All three national courts raise doubts about the data used for the industry ceiling so far as concerns the sectors to be included for the first time as from 2013 onwards. While the Raad van State, by its fourth question, asks whether the implementing provisions necessary for the provision of the data already existed (see Section 1), the questions put by the other two courts concern the quality and scope of the data communicated and used (see Section 2(a)). Those two courts also raise doubts as to whether due account was taken of installations and activities that were included for the first time in 2008 (see Section 2(b)).

1. The implementing provisions

93. By its fourth question, the Raad van State wishes to ascertain whether the determination of the correction factor is unlawful because, among other things, it is based on data submitted for the purposes of implementing Article 9a(2) of Directive 2003/87, even though the provisions referred to there, to be adopted pursuant to Article 14(1), were not in place.

94. Only on second glance does it become clear what bearing Article 9a(2) of Directive 2003/87 has on the correction factor at issue. That provision specifies how the average total annual verified emissions in the years 2005 to 2007, which are to be added to the industry ceiling in accordance with Article 10(5)(b), are to be determined in the case of installations which are included in the scheme only from 2013 and are not electricity generators.

95. In the case of those installations, the first subparagraph of Article 9a(2) of Directive 2003/87 requires operators to submit to the relevant competent authority duly substantiated and independently verified emissions data in order for them to be taken into account for the adjustment of the industry ceiling.

96. In this regard, the second subparagraph of Article 9a(2) of Directive 2003/87 provides that those data are to be submitted in accordance with the provisions adopted pursuant to Article 14(1).

97. The Raad van State assumes that the provisions in question are those contained in Regulation (EU) No 601/2012,[20] although they had not yet been adopted at the time when the aforementioned data were submitted to the Commission. After all, in accordance with the second subparagraph of Article 9a(2) of Directive 2003/87, the data had to be submitted by 30 April 2010.

98. As Germany rightly contends, the submission of the data in 2010 could none the less be based on uniform provisions which had been laid down in Decision 2007/589.[21] Those provisions were required by the version of Article 14(1) of Directive 2003/87 in force prior to Amending Directive 2009/29.

99. It must also be assumed that the second subparagraph of Article 9a(2) of Directive 2003/87 refers to the provisions of Decision 2007/589. After all, that subparagraph required the data to be submitted at a point in time prior to the deadline for the adoption of the new implementing provisions contained in Regulation No 601/2012. In its new version, Article 14(1) of Directive 2003/87 laid down a deadline for the adoption of the new implementing provisions of no later than 31 December 2011.

100. Furthermore, there is nothing in the relevant provisions to indicate that, so far as concerns the determination of the correction factor, the necessary data must be established and submitted again on the basis of Regulation No 601/2012.

101. The question thus raised by the Raad van State has therefore revealed nothing that would call into question the legality of the way in which the correction factor was determined in Article 4 of, and Annex II to, Decision 2013/448.

2. The quality of the data

102. In this context, the requests for a preliminary ruling from Italy and Austria also cast doubt on the quality and scope of the data submitted by the Member States. These questions are based on the fact that the scheme laid down in Directive 2003/87 was further extended both between the first phase (2005 to 2007) and the second phase (2008 to 2012) (see Section b) and by the third phase (2013 to 2020) (see Section a).

a) The expansion from 2013 onwards

i) The failure to take account of new activities in the data submitted by some Member States

103. In its ninth question, the Landesverwaltungsgericht Niederösterreich assumes that the data on emissions from installations which, prior to 2013, were subject only *in part* to the scheme laid down in Directive 2003/87 were not fully taken into account in the determination of the industry ceiling, that is to say that they were taken into account only to the extent that those installations had been subject to the scheme previously.

20 — Commission Regulation (EU) No 601/2012 of 21 June 2012 on the monitoring and reporting of greenhouse gas emissions pursuant to Directive 2003/87 (OJ 2012 L 181, p. 30).

21 — Commission Decision of 18 July 2007 establishing guidelines for the monitoring and reporting of greenhouse gas emissions pursuant to Directive 2003/87 (Monitoring Guidelines) (OJ 2007 L 229, p. 1).

104. That, in essence, is also the assumption which underpins the fifth question referred by the Tribunale Amministrativo Regionale per il Lazio, which, ostensibly, is concerned with the Member States' different interpretations of Article 9a(2) of Directive 2003/87. After all, those differences relate specifically to whether the data to be submitted by the Member States must relate only to installations subject to the scheme for the first time from 2013 onwards, or must also cover activities newly subject to the scheme which are carried on in installations that were already included in the scheme on account of other activities.

105. Article 10a(5)(b) and the first sentence of the third subparagraph of Article 9a(2) of Directive 2003/87 do not provide a clear answer to those questions as they do not deal with emissions from newly included *activities* carried on at installations already covered by the scheme. Both provisions refer only to the verified emissions from *installations* included in the scheme for the first time from 2013 onwards.

106. If, however, emissions subject to the scheme only from 2013 onwards which are the result of activities carried on at installations already covered by that scheme are not taken into account in the determination of the industry ceiling, this will inevitably increase the need to apply a correction, since those activities *are* taken into account in the calculation of recognised need.

107. Much as with the taking into account of electricity generation from waste gases [22] and heating from cogeneration installations, [23] therefore, the wording of the relevant provision causes emissions to be taken into account in an asymmetrical manner. This situation too is characterised by the familiar conflicting objectives and a lack of clear guidance from the legislature.

108. In this instance too, therefore, a different interpretation of Article 10a(5)(b) of Directive 2003/87 is not required and the Commission was under no obligation to redress the asymmetry in the implementing rules.

109. It must therefore be concluded that the examination of the questions concerning installations and activities subject to the scheme laid down in Directive 2003/87 only since 2013 has not shown that the fact that account was not taken of new activities carried on in installations already covered by the scheme in the data submitted by certain Member States for the purposes of establishing the industry ceiling calls into question the legality of the way in which the correction factor was determined in Article 4 of, and Annex II to, Decision 2013/448.

ii) The taking into account of new activities in the data submitted by other Member States

110. The foregoing examination has shown, however, that the fact that account was taken of new activities carried on in installations already covered by the scheme in the data submitted by *other* Member States for the purposes of establishing the industry ceiling does call into question the legality of the way in which the correction factor was determined in Article 4 of, and Annex II to, Decision 2013/448, since Article 10a(5)(b) of Directive 2003/87 provides that account is to be taken only of new installations.

22 — See point 71 et seq. above.

23 — See point 86 et seq. above.

111. Contrary to the argument advanced by Germany, there is also no discretion in the interpretation of Article 10a(5)(b) of Directive 2003/87 that would allow some Member States to take into account only installations newly subject to the scheme, while other Member States also include new activities carried on in installations already covered by that scheme. Member States' authorities may well enjoy a measure of discretion in the assessment of the data communicated by operators, but there is simply no legal basis for taking account of new activities carried on in installations already covered by the scheme.

112. The point is rightly made by the Commission — and Germany — that Directive 2003/87 does not allow it to alter the information supplied by the Member States. It does not follow from this, however, that the correction factor may be determined on the basis of data which the applicable provisions preclude from being taken into account. Rather, the Commission must at least investigate any doubts as to the quality of the data and, if necessary, ensure that the Member States make the necessary corrections as soon as possible. This is part and parcel of the task assigned to it under Article 17(1) TEU of overseeing the application of EU law.

113. Moreover, no other inference can be drawn from the judgment in *Commission* v *Estonia*. That judgment concerned the previously applicable version of Directive 2003/87, which afforded the Member States considerably greater discretion than the law in force now. What is more, even in that case, the Court did not rule out a review of legality. [24]

114. Nor does the need to determine the correction factor at a particular time do anything to alter the position. If the data to be used cannot be ascertained in good time, the Commission must, if necessary, determine a preliminary correction factor which it may adjust at a later date.

115. It must thus be concluded that Article 10(a)(5)(b) of Directive 2003/87 permits account to be taken only of emissions from installations newly subject to the scheme from 2013 onwards, but not of activities newly included in the scheme that are carried on in installations already covered by it.

116. It has none the less been argued in the course of the present proceedings that France, Belgium, Germany, Italy and Spain at least have also submitted data on emissions from activities newly subject to the scheme that are carried on in installations already covered by the scheme on account of other activities. What is more, the Commission used that data in its calculation of the industry ceiling.

117. The Commission thus established an unduly *high* industry ceiling in so far as, in its calculation, it took account of emissions from activities newly subject to the scheme since 2013 that were carried on in installations already covered by that scheme. To that extent, the correction factor was determined in an unlawful manner and Article 4 of, and Annex II to, Decision 2013/448 are invalid.

118. It is important to make the further point that that principle should apply not only in the context of establishing the correction factor but also when it comes to determining the total quantity of allowances available under Article 9a(2). In that event, the asymmetry would give rise not to fewer free allocations but to a reduced quantity of available allowances and, therefore, to a reduction in climate-damaging emissions. This would be even *more clearly* consistent with the overarching environmental objectives pursued by Directive 2003/87 and Article 191 TFEU than the restriction of free allocations. However, since none of the questions in the present proceedings concerns the total quantity available, the Court is under no obligation to give a ruling in this regard.

24 — Judgment in *Commission* v *Estonia* (C-505/09 P, EU:C:2012:179, paragraph 54).

b) The expansion from 2008 onwards

119. By its fourth question, the Tribunale Amministrativo Regionale per il Lazio also wishes to ascertain whether the calculation of the industry ceiling is erroneous because the expansion of the scheme that took place between the first phase (2005 to 2007) and the second phase (2008 to 2012) of implementation of Directive 2003/87 was not taken into account in the determination of the industry ceiling. This includes the alleged error which the Landesverwaltungsgericht Niederösterreich raises for examination in its eighth question. It assumes that the data on emissions from installations which, prior to 2008, were subject to the scheme laid down in Directive 2003/87 only *in part* were not fully taken into account, that is to say only to the extent that they had been subject to the scheme beforehand.

120. The amendments made during the second allocation period were the result of clarifications by the Commission, with regard to the meaning of 'combustion installation', on the basis of which some Member States were compelled to include a number of other installations.[25] In addition, Norway, Iceland and Liechtenstein joined the scheme.

121. When calculating historical emissions for the purposes of determining the industry ceiling, the Commission relied on the European Union Emissions Register.[26] However, that register did not contain data on emissions from installations that were included in the scheme for the first time in the second allocation period.

122. As the Commission correctly submits, this is consistent with Article 10a(5)(a) of Directive 2003/87, which provides that only the average verified emissions for the years 2005 to 2007 may be used for the calculation of the industry ceiling. Moreover, so far as concerns the activities included from 2008 onwards, there is no provision comparable to Article 9a(2) that would require the Member States to submit verified data on emissions from those activities too. Consequently, emissions that were included only from 2008 onwards were not verified and for that reason could not be taken into account.

123. To this extent too, therefore, the wording of the relevant provisions leads to emissions being taken into account in an asymmetrical manner. Consequently, the same considerations apply here as in the context of the asymmetries examined previously.

124. Examination of these questions has therefore revealed nothing that would call into question the validity of the way in which the correction factor was determined in Decision 2013/448.

D – *The statement of reasons for the determination of the correction factor*

125. The Raad van State (fifth and sixth questions) and the Tribunale Amministrativo Regionale per il Lazio (third question) also present the Court with doubts as to the statement of reasons for the determination of the correction factor.

126. Those questions have to do with the proposition that the statement of reasons for Decision 2013/448, that is to say, in essence, recital 25 of that decision, does not contain all the data necessary to convey an understanding of how the correction factor is calculated. They are concerned in particular with the contentions that certain figures can be inferred only indirectly from the information provided in the statement of reasons (see Section 4), and that an explanatory document published subsequently

25 — Communication from the Commission of 22 December 2005 entitled 'Further guidance on allocation plans for the 2008 to 2012 trading period of the EU Emission Trading Scheme', COM(2005) 703 final, paragraph 36 and Annex 8.

26 — Paper produced by DG Climate Action (cited in footnote 15, p. 2).

by the Directorate-General for Climate Action, although containing important additional information, first of all, does not form part of the statement of reasons (see Section 3) and, secondly, still lacks a considerable amount of important information (see Section 2). In order to answer those questions, it is necessary, first of all, to clarify the requirements applicable to a statement of reasons (see Section 1).

1. The need to give reasons for the determination of the correction factor in Decision 2013/448

127. It is common knowledge that the statement of reasons required by the second paragraph of Article 296 TFEU must be appropriate to the measure at issue and must disclose in a clear and unequivocal fashion the reasoning followed by the institution which adopted the measure in such a way as to enable the persons concerned to ascertain the reasons for it and to enable the competent Court of the European Union to exercise its power of review. [27]

128. The Court has expanded on the foregoing inasmuch as it has held that, in addition to permitting review by the Courts, the purpose of the reasons given for *individual decisions* is to provide the person concerned with sufficient information to know whether the decision may be vitiated by an error enabling its validity to be challenged. [28]

129. In the case of *measures of general application*, however, the statement of reasons may be confined to indicating the general situation which led to its adoption and the general objectives which it is intended to achieve; it must clearly disclose only the essential objective pursued by the measure in question. [29] In those circumstances, it would be excessive to require a specific statement of reasons for each of the technical choices made by the institution. [30]

130. The determination of the correction factor at issue is without any doubt not an individual decision but a measure of general application and, at the same time, a technical choice made by the Commission. It might therefore be assumed that the requirements applicable to the statement of reasons are limited.

131. That assumption would, however, be incorrect.

132. The limited requirements applicable to the statement of reasons for measures of general application are explained by the discretion which the legislature regularly enjoys in the formulation of such measures. Since that discretion is open to judicial review only within narrow limits, the statement of reasons need only contain the elements necessary to support such limited review.

133. When it determined the correction factor in Decision 2013/448, however, the Commission was not exercising powers conferring such discretion. The method of calculation and the data to be used are set out in Directive 2003/87 and Decision 2011/278. Any judicial review therefore extends in essence to whether that method was correctly applied and whether the correct data were used. The statement of reasons must therefore contain the data necessary to make such a review possible.

27 — See, for example, the judgments in *Régie Networks* (C-333/07, EU:C:2008:764, paragraph 63); *AJD Tuna* (C-221/09, EU:C:2011:153, paragraph 58); and *Banco Privado Português and Massa Insolvente do Banco Privado Português* (C-667/13, EU:C:2015:151, paragraph 44).

28 — Judgments in *SISMA* v *Commission* (32/86, EU:C:1987:187, paragraph 8); *Corus UK* v *Commission* (C-199/99 P, EU:C:2003:531, paragraph 145); *Ziegler* v *Commission* (C-439/11 P, EU:C:2013:513, paragraph 115); and *Dole Food and Dole Fresh Fruit Europe* v *Commission* (C-286/13 P, EU:C:2015:184, paragraph 93).

29 — Judgments in *AJD Tuna* (C-221/09, EU:C:2011:153, paragraph 59) and *Inuit Tapiriit Kanatami and Others* v *Commission* (C-398/13 P, EU:C:2015:535, paragraph 29).

30 — Judgments in *Eridania zuccherifici nazionali and Others* (250/84, EU:C:1986:22, paragraph 38); *Italy* v *Council and Commission* (C-100/99, EU:C:2001:383, paragraph 64); *British American Tobacco (Investments) and Imperial Tobacco* (C-491/01, EU:C:2002:741, paragraph 166); *Arnold André* (C-434/02, EU:C:2004:800, paragraph 62); *Alliance for Natural Health and Others* (C-154/04 and C-155/04, EU:C:2005:449, paragraph 134); *AJD Tuna* (C-221/09, EU:C:2011:153, paragraph 59); and *Estonia* v *Parliament and Council* (C-508/13, EU:C:2015:403, paragraph 60).

2. The data used by the Commission

134. The foregoing itself provides a key component of the answer to the sixth question referred by the Raad van State, that is to say whether the statement of reasons must include *all* the data necessary to make it possible to conduct a detailed review of the calculation of the correction factor.

135. The statement of reasons for Decision 2013/448 must indeed refer specifically to those data, since the Court would otherwise be unable to review whether the Commission used the correct data when calculating the correction factor and properly applied the method of calculation. By the same token, the persons concerned also need those data in order to be able to pursue the corresponding legal remedies — before the Courts of the European Union or the national courts.

136. The statement of reasons for the determination of the correction factor that is set out in recital 25 of Decision 2013/448 clearly does not satisfy those requirements, since it does not contain all the data which the Commission used to calculate the correction factor. In this regard, the Raad van State draws particular attention to three factors.

137. First, in order to be able to review the determination of the proportion of emissions in the period 2005 to 2007 that were attributable to installations which are not electricity generators, it would be necessary to know which installations the Commission regards as electricity generators.

138. Secondly, the calculation of the total amount of emissions from installations which have been subject to the rules on emission trading only since 2013 is understandable only on sight of the related data submitted by the Member States to the Commission on the basis of Article 9a(2) of Directive 2003/87.

139. Thirdly, the non-adjusted allocation is verifiable only via access to the lists, communicated by the Member States, containing the preliminary total annual amounts of emission allowances allocated free of charge.

140. To my mind, however, it is not essential for those data to be incorporated in full into the statement of reasons for the measure, since the statement would then become very extensive. The Court has thus recognised that the degree of precision of the statement of reasons for a decision must be weighed against practical realities and the time and technical facilities available for making it.[31] It would therefore have been enough to make available the possibility of viewing the raw data and to include a reference to that effect in the statement of reasons.

141. This did not happen, however. Not only that, the Commission even refused to grant access to the data after having been asked for sight of it. In so doing, it undermined the comprehensive legal protection attendant upon the calculation of the correction factor.

142. However, the Commission and Germany rely on the fact that those data contained business secrets.

143. It must be conceded, in that regard, that the protection of confidential information and business secrets must be adjusted so as to reconcile it with the requirements of effective legal protection and the rights of defence of the parties to the dispute.[32]

31 — Judgment in *Delacre and Others* v *Commission* (C-350/88, EU:C:1990:71, paragraph 16).

32 — Judgments in *Mobistar* (C-438/04, EU:C:2006:463, paragraph 40) and *Varec* (C-450/06, EU:C:2008:91, paragraph 52).

144. As a rule, this means that the body responsible for the review, usually a court, must have at its disposal all the information required in order to decide in full knowledge of the facts. This includes confidential information and business secrets. On the other hand, it must be possible to withhold that information from one party if the opposing party convinces the review body that there is an overriding interest in ensuring that that information is treated confidentially. [33]

145. In the present case, however, it is doubtful whether there is an overriding interest in ensuring that the necessary data is treated confidentially. After all, Article 17 of Directive 2003/87 provides that decisions relating to the allocation of allowances and the reports of emissions required under the greenhouse gas emissions permits and held by the competent authority are to be made available to the public in accordance with the Environmental Information Directive. [34] Article 15a of Directive 2003/87 says much the same.

146. As the second paragraph of Article 15a of Directive 2003/87 provides, the foregoing does not preclude the protection of business secrets which none the less exist, but the reasons given for protecting such a secret must be subject to stringent requirements, since the obligation to preserve that secret cannot be given so wide an interpretation that the obligation to provide a statement of reasons is deprived of its essential content, thus making it difficult for a party to prepare its defence. [35]

147. It should be borne in mind in particular that, in accordance with the fourth sentence of Article 4(2) of the Environmental Information Directive and the first sentence of Article 6(1) of the Åarhus Regulation, [36] access to information relating to emissions into the environment cannot be refused on the basis of business or trade secrets.

148. Contrary to the view expressed by the Commission, not even the judgment in *Ville de Lyon* operates to alter that position. It is true that that judgment too concerned access to specific information on the application of Directive 2003/87. However, that information was subject to a specific scheme which, in derogation from the Environmental Information Directive, precluded such access. [37] On the other hand, there is nothing to indicate that the information of interest in the present case is subject to a specific scheme making it impossible for the principle laid down in the Environmental Information Directive and the Aarhus Regulation to be transposed to the obligation to state reasons.

149. It seems at least reasonable to assume that much, if not perhaps all, of the relevant information in the present case concerns emissions into the environment. This would point to the need for a careful examination to determine which of the data used do not concern emissions into the environment and must at the same time be treated confidentially as business secrets. In addition to the aforementioned factors, the Commission would also have to look, in that examination, at whether the interest in the protection of information originally to be recognised as business secrets has since ceased to exist on account of the passage of time. [38] All the other data necessary to review the way in which the correction factor was determined should be available to the general public, and also, therefore, to the undertakings concerned.

33 — Judgments in *Varec* (C-450/06, EU:C:2008:91, paragraphs 53 and 54) and, in relation to security-related information, *Commission and Others* v *Kadi* (C-584/10 P, C-593/10 P and C-595/10 P, EU:C:2013:518, paragraphs 117 to 129).

34 — Directive 2003/4/EC of the European Parliament and of the Council of 28 January 2003 on public access to environmental information and repealing Council Directive 90/313/EEC (OJ 2003 L 41, p. 26).

35 — Judgment in *Netherlands and Leeuwarder Papierwarenfabriek* v *Commission* (296/82 and 318/82, EU:C:1985:113, paragraph 27).

36 — Regulation (EC) No 1367/2006 of the European Parliament and of the Council of 6 September 2006 on the application of the provisions of the Aarhus Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters to Community institutions and bodies (OJ 2006 L 264, p. 13).

37 — Judgment in *Ville de Lyon* (C-524/09, EU:C:2010:822, paragraph 40).

38 — See Article 4(7) of Regulation (EC) No 1049/2001 of the European Parliament and of the Council of 30 May 2001 regarding public access to European Parliament, Council and Commission documents (OJ 2001 L 145, p. 43) and the judgment in *Internationaler Hilfsfonds* v *Commission* (C-362/08 P, EU:C:2010:40, paragraphs 56 and 57).

150. In the present proceedings, it is impossible to come to a definitive decision on which data used to calculate the correction factor must be treated confidentially for overriding reasons. Thus, at the hearing, Germany explained that the data relating to the total annual emissions from installations are public, whereas data relating to particular parts of installations are regarded as business secrets because they permit the inference of conclusions with respect to production. The extent to which the latter data are necessary in order to make it possible to review the calculation of the correction factor and the question whether they should in fact be treated confidentially in this instance are not matters that form part of the subject matter of the present proceedings.

151. The fact none the less remains that the determination of the correction factor in Article 4 of, and Annex II to, Decision 2013/448 is insufficiently reasoned and therefore invalid. It falls to the Commission to adopt a new decision containing a sufficient statement of reasons and, in so doing, to examine to what extent the confidential treatment of the raw data is justified. Any difference of opinion in this regard must, if necessary, form the subject of new proceedings.

3. The explanatory paper prepared by the Directorate-General for Climate Action

152. It is also important to make clear that, irrespective of its content, the explanatory paper produced by the Directorate-General for Climate Action on 22 October 2013,[39] to which reference is made in the third question referred by the Tribunale Amministrativo Regionale per il Lazio, was not capable of remedying the aforementioned inadequacy of the statement of reasons.

153. The question raised by the Tribunale Amministrativo is based on the correct view that the statement of reasons for an EU measure must appear in the measure itself and be adopted by the author of the measure.[40]

154. It is true that the scope of the obligation to state reasons may be restricted where the relevant information is known to the persons concerned.[41] However, such knowledge may limit the obligation to state reasons at most where the persons concerned were able to gain access to that information at the same time as the decision. The document in question, however, is dated 22 October 2013, whereas Decision 2013/448 was adopted on 5 September 2013 and was published two days later.

155. However, information supplied later is capable only of supplementing a statement of reasons which is in and of itself sufficient, but cannot remedy any inadequacy in the statement of reasons. It must also be borne in mind, in the present case, that that information was not published by the Commission as the author of Decision 2013/448, but merely by one of its departments. The fact that the Commission has not made a single direct reference to that document in the present proceedings, and, since its publication, has even contradicted it so far as concerns the taking into account of cogeneration installations, shows that that document does not have the same status as the statement of reasons for a measure.

4. The need for a back-calculation

156. Lastly, the Raad van State asks whether the fact that only some of the quantities of emissions and emission allowances that are crucial to the calculation of the correction factor were indicated in the decision is compatible with the obligation to state reasons. That question is based on the fact that certain initial values can be determined only by back-calculating from the figures given, in accordance with the calculation rules.

39 — Cited in footnote 15.

40 — Judgments in *Commission* v *Parliament and Council* (C-378/00, EU:C:2003:42, paragraph 66) and *Etimine* (C-15/10, EU:C:2011:504, paragraph 113).

41 — See, by way of illustration, the judgment in *Krupp Stahl* v *Commission* (275/80 and 24/81, EU:C:1981:247, paragraph 13).

157. This does not constitute an inadequacy in the statement of reasons, however, since the scope of the obligation to state reasons is to be determined with reference to the context of the measure and the whole body of legal rules governing the matter in question. [42] Provided that that context makes it possible, with reasonable effort, to ascertain further reliable information on the basis of the details given in a statement of reasons, the obligation to state reasons is discharged. As I have already explained, however, this is not a means of determining all the necessary data.

5. Conclusion with respect to the statement of reasons for the determination of the correction factor

158. The determination of the correction factor in Article 4 of, and Annex II to, Decision 2013/448 does not adequately state the reasons on which it is based and is therefore invalid.

E – *The fundamental right to property (sixth question in* Borealis Polyolefine *and second question in* Esso Italiana)

159. The requests for a preliminary ruling from Austria and the requests from Italy all raise the question of whether the fact that the preliminary quantity of emission allowances to be allocated free of charge was reduced by virtue of the correction factor is compatible with the fundamental right to property.

160. The Tribunale Amministrativo Regionale per il Lazio refers in this regard to Article 1(1) of the First Additional Protocol to the ECHR and to Article 17 of the ECHR, which prohibits the abuse of rights and freedoms. However, since the ECHR is not directly binding on the European Union, [43] regard must be had to the corresponding provisions of the Charter of Fundamental Rights, that is to say Articles 17 and 54, and to the associated general principles of EU law.

161. However, it is unclear to what extent an abuse of fundamental rights within the meaning of Article 54 of the Charter might exist.

162. My examination must therefore be confined to the right to property protected under Article 17 of the Charter and the associated general legal principle. The protection granted by Article 17 does not apply to mere commercial interests or opportunities, the uncertainties of which are part of the very essence of economic activity, but 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. [44]

163. However, the foregoing does not apply in the case of the preliminary calculation of the number of free emission allowances provided for in Article 10 of Decision 2011/278. That calculation was not capable of creating an established legal position because Article 10a(5) of Directive 2003/87 provides for the possibility of its being reduced.

42 — See, for example, the judgments in *Arnold André* (C-434/02, EU:C:2004:800, paragraph 62) and *Gauweiler and Others* (C-62/14, EU:C:2015:400, paragraph 70).

43 — Judgments in *Kamberaj* (C-571/10, EU:C:2012:233, paragraph 60) and *Åkerberg Fransson* (C-617/10, EU:C:2013:105, paragraph 44) and Opinion 2/13 (EU:C:2014:2454, paragraph 179).

44 — Judgment in *Sky Österreich* (C-283/11, EU:C:2013:28, paragraph 34).

164. What is more, the foregoing is not altered by the references made by the Tribunale Amministrativo Regionale per il Lazio to the case-law of the ECtHR to the effect that the protection of property under Article 1(1) of the First Additional Protocol to the ECHR can also include the legitimate expectation of acquiring an asset.[45] It is true that, in accordance with Article 52(3) of the Charter, the meaning and scope of Article 17 of the Charter is the same as that of the right to property under the ECHR as interpreted by the ECtHR.[46] However, the fact that provision is made for a correction factor to reduce the preliminary calculation precludes any legitimate expectation.[47]

165. The correction factor does not therefore infringe the fundamental right to property.

F – *Procedure for the adoption of Decision 2013/448*

166. By the fifth question referred in *Borealis Polyolefine*, the second question referred in *Dow Benelux* and the sixth question referred in *Esso Italiana*, the national courts each wish to ascertain, in essence, whether the determination of the correction factor is invalid because the Commission did not adopt Decision 2013/448 on the basis of the regulatory procedure with scrutiny provided for in Article 5a of Decision 1999/468.

167. The background to those questions is the fact that, although Article 10a(1) of Directive 2003/87 empowers the Commission to adopt implementing measures, it must, when doing so, apply the regulatory procedure with scrutiny. The purpose of that procedure is to provide a means of monitoring the Commission in its exercise of quasi-legislative powers. The monitoring process consists, on the one hand, of submission of the measures to a regulatory committee composed of representatives of the Member States and, on the other hand, of the possibility of subsequent intervention by the Parliament and the Council.

168. The Commission adopted Decision 2011/278 under that procedure and, in Article 15(3) of that decision, laid down the detailed rules for the calculation of the correction factor provided for in Article 10a(5) of Directive 2003/87. The quantitative determination of the correction factor, on the other hand, manifested itself in the adoption, *without* the application of a separate procedure, of Article 4 of, and Annex II to, Decision 2013/448.

169. The direct legal basis for the adoption of Article 4 of, and Annex II to, Decision 2013/448 is Article 15(3) of Decision 2011/278, in accordance with which the Commission is to determine the correction factor. Although Article 15(3) of Decision 2011/278 is not explicitly referred to as the legal basis in the preamble to Decision 2013/448, it is none the less expressly mentioned as the legal basis for Decision 2013/448 in Article 4 of that decision.[48]

170. Article 15(3) of Decision 2011/278 did not, however, lay down any specific rules relating to the procedure for determining the correction factor. In principle, therefore, the Commission was empowered simply to adopt Article 4 of Decision 2013/448.

171. A number of parties to the proceedings contend, however, that, in Article 15(3) of Decision 2011/278, the Commission unlawfully conferred on itself the power to determine the correction factor or at least circumvented the regulatory procedure with scrutiny.

45 — See, for example, the judgments of the ECtHR in *Kopecký v. Slovakia* [GC], no. 44912/98, § 35, ECHR 2004-IX and *Gáll v. Hungary*, no. 49570/11, §§ 33 and 34, 25 June 2013.

46 — See to that effect the judgments in *Centre public d'action sociale d'Ottignies-Louvain-La-Neuve* v *Moussa Abdida* (C-562/13, EU:C:2014:2453, paragraph 47) and *Minister for Justice and Equality* v *Francis Lanigan* (C-237/15 PPU, EU:C:2015:474, paragraphs 56 and 57).

47 — See the judgment of the ECtHR in *Maurice v. France* [GC], no. 11810/03, §§ 65 and 66, ECHR 2005-IX.

48 — The requirements governing the identification of the legal basis in the statement of reasons are therefore also met; see the judgments in *Commission* v *Council* (45/86, EU:C:1987:163, paragraph 9, and *Commission* v *Council* (C-370/07, EU:C:2009:590, paragraph 56).

172. It must be considered, first of all, whether, in Article 15(3) of Decision 2011/278, the Commission was entitled to provide itself with a legal basis for the adoption of Article 4 of Decision 2013/448.

173. In accordance with the first subparagraph of Article 10a(1) of Directive 2003/87, the Commission is to adopt implementing measures for the free allocation of allowances. Decision 2011/278 is one such implementing measure. Since the power to determine the correction factor provided for in Article 15(3) also has the object of implementation, the creation of such a legal basis for that power is, in principle, an appropriate subject for the provisions contained in implementing measures of that kind.

174. Articles 290 TFEU and 291 TFEU may, however, impose limits on the content of such implementing measures.

175. In accordance with Article 290(1) TFEU, a legislative act may delegate to the Commission the power to adopt non-legislative acts of general application to supplement or amend certain non-essential elements of the legislative act. This is known as 'delegated legislation'.

176. Article 291(2) TFEU, on the other hand, provides that, where uniform conditions for implementing legally binding Union acts are needed, those acts confer implementing powers on the Commission (or, in specific cases, on the Council).

177. The classification of Decision 2013/448 under one of those two categories is made more difficult by the fact that the Commission refers to it neither as a delegated act nor as an implementing measure, even though Article 290(3) TFEU and Article 291(4) TFEU require it to be so designated. None the less, I do not consider that procedural error to be serious enough in the present case to justify the repeal of that decision, since it is sufficiently clear from the context in which it was adopted and its content that it is an implementing measure. [49]

178. The proposition that it was the Commission's intention to adopt an implementing measure is supported not least by the fact that Decision 2013/448 is based on Decision 2011/278. After all, in accordance with Article 290(1) TFEU, a delegated act may be based only on a legislative act. In accordance with Article 289 TFEU, the delegated acts referred to are legal acts adopted on the basis of the Treaties by the Parliament and the Council, but not legal acts adopted by the Commission. Article 291(2) TFEU, on the other hand, provides that implementing powers may be conferred simply by 'legally binding acts', and therefore also by legal acts adopted by the Commission such as Decision 2011/278.

179. The content of Article 4 of, and Annex II to, Decision 2013/448 confirms its classification as an implementing measure.

180. When exercising implementing powers within the meaning of Article 291 TFEU, the institution concerned must provide further detail in relation to the content of the basic act, in order to ensure that it is implemented under uniform conditions in all the Member States. [50] The *further detail* remains within the bounds of what is permissible, provided that the provisions of the implementing

49 — See, by analogy, the Court's case-law concerning reference to the legal basis as part of the obligation to state reasons in the judgments in *Commission* v *Council* (45/86, EU:C:1987:163, paragraph 9) and *Commission* v *Council* (C-370/07, EU:C:2009:590, paragraph 56).

50 — See the judgments in *Commission* v *Parliament and Council* (C-427/12, EU:C:2014:170, paragraph 39); *Parliament* v *Commission* (C-65/13, EU:C:2014:2289, paragraph 43); and *Commission* v *Parliament and Council* (C-88/14, EU:C:2015:499, paragraph 30).

measure (i) comply with the essential general aims pursued by the basic act and (ii) are necessary or appropriate for the implementation of that act.[51] However, the implementing measure may neither amend nor supplement the basic act, even in relation to its non-essential elements.[52] The Commission may be so empowered only under Article 290 TFEU.

181. The determination of the correction factor via the adoption of Article 4 of, and Annex II to, Decision 2013/448 did not have the effect of amending either Decision 2011/78 or Directive 2003/87. There was no interference with the text of those acts. Indeed, their prescriptive content remained unchanged.[53] Nor have those acts been supplemented. After all, the Commission did not establish the correction factor in Decision 2013/448. It had already been laid down in Directive 2003/87 and was elaborated upon in Decision 2011/278.

182. The quantitative determination of the correction factor is the result rather of the application of the calculation mechanism already laid down for that purpose and thus implements Article 10a(5) of Directive 2003/87 and Article 15(3) of Decision 2011/278. Since the need for an EU-wide uniform determination in this context must also be recognised as a point of common ground, the adoption of Article 4 of, and Annex II to, Decision 2013/448 constitutes an implementing measure falling within the scope of Article 291(2) TFEU.

183. Article 291(3) TFEU provides that, so far as concerns implementing measures adopted by the Commission, the Parliament and the Council are to lay down in advance the rules and general principles concerning mechanisms for control by Member States of the Commission's exercise of implementing powers.

184. Those rules and general principles are laid down in Regulation (EU) No 182/2011.[54] That regulation does not, however, lay down any mandatory procedural requirements, since, in accordance with Article 1, such rules and principles are to apply (only) where a legally binding Union act requires that the adoption of implementing acts by the Commission be subject to the control of Member States.

185. The Commission was therefore entitled, in Article 15(3) of Decision 2011/278, to grant itself the power to determine the correction factor without providing for a further control procedure.

186. Since the determination of the correction factor in Article 4 of, and Annex II to, Decision 2013/448 is an implementing measure within the meaning of Article 291 TFEU, the objection that the regulatory procedure with scrutiny was circumvented can also be easily dealt with.

187. After all, the second subparagraph of Article 10a(1) of Directive 2003/87 requires that that procedure be applied only to measures designed to amend non-essential elements of that directive by supplementing it. As the foregoing submissions show, however, the determination of the correction factor is not such a measure.

188. The examination of the questions concerning the failure to apply the regulatory procedure with scrutiny has not therefore revealed anything that would call into question the legality of the determination of the correction factor in Article 4 of, and Annex II to, Decision 2013/448.

51 — See the judgment in *Parliament* v *Commission* (C-65/13, EU:C:2014:2289, paragraph 46).

52 — See the judgments in *Parliament* v *Commission* (C-65/13, EU:C:2014:2289, paragraph 45) and *Commission* v *Parliament and Council* (C-88/14, EU:C:2015:499, paragraph 31).

53 — See also the judgment in *Commission* v *Parliament and Council* (C-88/14, EU:C:2015:499, paragraph 44).

54 — Regulation of the European Parliament and of the Council of 16 February 2011 laying down the rules and general principles concerning mechanisms for control by Member States of the Commission's exercise of implementing powers (OJ 2011 L 55, p. 13).

G – *The possibility of direct recourse to the EU judicature*

189. By its first question, the Raad van State asks whether operators of existing industrial installations to which the rules on emission trading laid down in Directive 2003/87 have applied since 2013 could beyond doubt have brought before the General Court an action for the annulment of the correction factor laid down in Decision 2013/448.

190. That question relates to the settled case-law to the effect that the recognition of a party's right to plead the invalidity of an act of the Union before national courts presupposes that that party did not have the right to bring, under Article 263 TFEU, a direct action for the annulment of that act before the EU judicature. [55] Were it to be accepted that a party who beyond doubt had standing to institute proceedings under the fourth paragraph of Article 263 TFEU for the annulment of an act of the Union could, after the expiry of the time limit for bringing proceedings laid down in the sixth paragraph of Article 263 TFEU, challenge before the national courts the validity of that act, that would amount to enabling the person concerned to circumvent the fact that that act is final as against him once the time limit for his bringing an action has expired. [56]

191. Consequently, the relevance of the questions examined above concerning the validity of the determination of the correction factor in Decision 2013/448 would be in doubt if the applicants in the main proceedings could have brought actions before the EU judicature and had beyond doubt had standing to bring such actions. I shall show, however, that that is not the case.

192. In accordance with the fourth paragraph of Article 263 TFEU, any natural or legal person may institute proceedings against an act addressed to that person (first scenario) or which is of direct and individual concern to that person (second scenario), and against a regulatory act which is of direct concern to them and does not entail implementing measures (third scenario).

193. The applicants in the main proceedings do not have standing to bring an action under the first or third scenarios provided for in the fourth paragraph of Article 263 TFEU. Decision 2013/448 is addressed not to them but, pursuant to Article 5 thereof, to the Member States. Moreover, the correction factor laid down in Article 4 of that decision requires the adoption of implementing measures by the Member States, that is to say with a view to adjusting the preliminary calculation of the quantity of allowances to be allocated free of charge.

194. The applicants could therefore have standing to bring an action for the annulment of Decision 2013/448 before the EU judicature only under the second scenario provided for in the fourth paragraph of Article 263 TFEU. This presupposes that the decision is of direct and individual concern to them.

195. Persons other than those to whom a decision is addressed may claim to be individually concerned only if that decision affects them by reason of certain attributes which are peculiar to them or by reason of circumstances in which they are differentiated from all other persons and by virtue of these factors distinguishes them individually just as in the case of the person addressed by such a decision. [57]

55 — Judgments in *TWD Textilwerke Deggendorf* (C-188/92, EU:C:1994:90, paragraph 23); *Pringle* (C-370/12, EU:C:2012:756, paragraph 41); and *Banco Privado Português and Massa Insolvente do Banco Privado Português* (C-667/13, EU:C:2015:151, paragraph 28).

56 — Judgments in *TWD Textilwerke Deggendorf* (C-188/92, EU:C:1994:90, paragraphs 18 and 24); *Pringle* (C-370/12, EU:C:2012:756, paragraph 41); and *Banco Privado Português and Massa Insolvente do Banco Privado Português* (C-667/13, EU:C:2015:151, paragraph 28).

57 — Judgments in *Plaumann* v *Commission* (25/62, EU:C:1963:17, 238); *Sahlstedt and Others* v *Commission* (C-362/06 P, EU:C:2009:243, paragraph 26); *Stichting Woonpunt and Others* v *Commission* (C-132/12 P, EU:C:2014:100, paragraph 57); and *T & L Sugars and Sidul Açúcares* v *Commission* (C-456/13 P, EU:C:2015:284, paragraph 63).

196. It is true that the correction factor is of potential concern to anyone, since it is also applicable to installations which are new entrants to the emission allowance trading scheme. However, the fact that a provision is, by its nature and scope, a provision of general application inasmuch as it applies to the economic operators concerned in general, does not of itself prevent that provision from being of individual concern to some. [58]

197. In the present case, there is a definable group of persons to whom the correction factor is of concern, that is to say the existing industrial installations. They are the subject of a preliminary calculation of the quantity of emission allowances to be allocated to them free of charge which is then reduced in accordance with the correction factor. Furthermore, Article 4 of Directive 2003/87 provides that all installations covered by the trading scheme require a permit for the release of greenhouse gas emissions.

198. The case-law on the question of whether the members of such a definable group are individually concerned is not very clear, however.

199. On the one hand, the Court has held that, where a decision affects a group of persons who were identified or identifiable when that measure was adopted by reason of criteria specific to the members of the group, those persons might be individually concerned by that measure inasmuch as they form part of a limited class of traders. [59] That can be the case particularly when the decision alters rights acquired by the individual *prior to its adoption*. [60]

200. Contrary to the view taken by the Netherlands, however, the owners of the installations concerned did not acquire any emission rights prior to the decision on the correction factor, since the earlier calculation of allowances under Articles 10(2) and 15(2)(e) of Decision 2011/278 was provisional. [61] Rather, as the Commission rightly submits, the rights enjoyed by the undertakings could not be determined until the correction factor had been calculated. In this regard, the situation here differs from the situation at issue in judgments such as that in *Codorniu*, which concerned a provision affecting existing trade mark rights, [62] or that in *Infront*, which concerned existing rights to televise sporting events. [63]

201. It is appropriate, therefore, to look at the opposing body of case-law. In this, the Court held that the fact that it is possible to determine more or less precisely the number, or even the identity, of the persons to whom a measure applies by no means implies that that measure must be regarded as being of individual concern to those persons where it is established that that application takes effect by virtue of an objective legal or factual situation defined by the measure in question itself. [64] The General Court understands this to mean that, where the class of persons concerned results from the very nature of the system established by the contested legislation, the person concerned cannot be distinguished individually by belonging to that class. [65]

58 — Judgment in *Sahlstedt and Others* v *Commission* (C-362/06 P, EU:C:2009:243, paragraph 29).

59 — Judgment in *Sahlstedt and Others* v *Commission* (C-362/06 P, EU:C:2009:243, paragraph 30).

60 — Judgment in *Stichting Woonpunt and Others* v *Commission* (C-132/12 P, EU:C:2014:100, paragraph 59).

61 — See point 163 above.

62 — Judgment in *Codorniu* v *Council* (C-309/89, EU:C:1994:197, paragraphs 21 and 22).

63 — Judgment in *Commission* v *Infront WM* (C-125/06 P, EU:C:2008:159, paragraphs 73 to 77).

64 — Judgments in *Sahlstedt and Others* v *Commission* (C-362/06 P, EU:C:2009:243, paragraph 31); *Stichting Woonpunt and Others* v *Commission* (C-132/12 P, EU:C:2014:100, paragraph 58); and *T & L Sugars and Sidul Açúcares* v *Commission* (C-456/13 P, EU:C:2015:284, paragraph 64).

65 — Judgment in *T & L Sugars and Sidul Açúcares* v *Commission* (T-279/11, EU:T:2013:299, paragraph 84).

202. It was for that reason that the Court recently held in a very similar case that the measure at issue was not of individual concern. That case concerned the fixing of an allocation coefficient to be applied to applications in the sugar market which had been submitted over the course of a particular period. Although the number of applicants was thus definitively determined,[66] the coefficient was calculated solely on the basis of the available quantity and the requested quantity and did not take into account the content of individual applications or the specific situation of applicants.[67]

203. The situation is exactly the same in the present case: the correction factor is calculated on the basis of the information provided by the Member States with respect to the recognised need of industrial installations and in accordance with the benchmarks and the industry ceiling, with no account being taken of the situation of the individual installations. In accordance with the Court's case-law, therefore, it must be concluded that, despite the existence of a definable group of economic operators, the measure at issue here is not of individual concern. Consequently, the applicants did not have standing to bring an action before the EU judicature.

204. Whether or not the Court shares that view, the foregoing analysis demonstrates that any standing to bring an action before the EU judicature would not in any event have existed beyond doubt. It would not therefore preclude the questions concerning the validity of the correction factor.

205. Consequently, the answer to the first question in *Dow Benelux* must be that operators of installations to which the rules on emission trading laid down in Directive 2003/87 have applied since 2013, with the exception of operators of installations within the meaning of Article 10a(3) of that directive and of new entrants, could not beyond doubt have brought before the General Court, under the fourth paragraph of Article 263 TFEU, an action for the annulment of Decision 2013/448 in so far as that decision determines the correction factor.

H – *The consequences of the illegality of Decision 2013/448*

206. By its seventh question, the Landesverwaltungsgericht Niederösterreich wishes to ascertain whether the finding that the correction factor is invalid precludes its application. It therefore asks whether, in the event that the correction factor is annulled by the Court, the installations will receive the quantity of allowances to be allocated free of charge as it was provisionally calculated and without any reduction.

207. This question arises because I have submitted above that Article 4 of, and Annex II to, Decision 2013/448 are invalid. A judgment to that effect by the Court would have retroactive effect in the same way as a judgment ordering the annulment of a measure.[68] A finding of invalidity would also be sufficient reason for any national court to regard the act concerned as void for the purposes of measures to be pronounced by it.[69]

208. It might therefore be assumed that, if the correction factor is annulled, a final, unreduced allocation based on the preliminary calculation will have to be made. This would mean that, for the years 2013 to 2015, installations would each receive between 6% and 10% more free allowances per year. It is not inconceivable that the allocation of additional allowances in this way would necessitate

66 — For further clarification, see the judgment in *T & L Sugars and Sidul Açúcares* v *Commission* (T-279/11, EU:T:2013:299, paragraph 81).

67 — Judgment in *T & L Sugars and Sidul Açúcares* v *Commission* (C-456/13 P, EU:C:2015:284, paragraphs 65 and 66).

68 — Judgments in *Roquette Frères* (C-228/92, EU:C:1994:168, paragraph 17) and *Centre d'exportation du livre français et ministre de la Culture et de la Communication* (C-199/06, EU:C:2008:79, paragraphs 61 and 63).

69 — Judgment in *International Chemical Corporation* (66/80, EU:C:1981:102, paragraph 13) and order in *Fratelli Martini and Cargill* (C-421/06, EU:C:2007:662, paragraph 54).

a corresponding increase in the quantity of allowances available generally, at least so far as previous years are concerned, since any allowances not allocated free of charge have probably already been auctioned. In the years to come, there would be an even greater quantity of additional free allowances, although the latter could be deducted from the quantity of allowances for auction.

209. The allocation of additional free allowances in this way would clearly be inappropriate. After all, in accordance with the answers to the questions referred for a preliminary ruling which I have proposed here, the quantity of allowances allocated free of charge had proved to be too high, not too low. [70]

210. Germany rebuts the foregoing understanding of the consequences of the invalidity of the correction factor with the further argument that the determination of the correction factor is a precondition for the establishment of a definitive allocation. In those circumstances, the annulment of the correction factor would call into question the legal basis of previous definitive allocations and preclude future definitive allocations. This could seriously impair the functional viability of the scheme.

211. Ultimately, however, the effect of the absence of a correction factor should be immaterial. After all, it must be recalled that, where the Court rules, in proceedings under Article 267 TFEU, that a measure adopted by an EU authority is invalid, the competent EU institutions are required to take the necessary measures to remedy the illegality. The obligation laid down in Article 266 TFEU in the case of a judgment annulling a measure applies in such a situation by analogy. [71]

212. The annulment of the correction factor would therefore be only temporary. The Commission would have to recalculate it immediately, in the light of the judgment on the present requests for a preliminary ruling.

213. For the avoidance of legal uncertainty up until such time as the Commission adopts a new decision, the Court should therefore, as the Commission contends in the alternative, make provision for transitional arrangements at the same time as annulling the correction factor. Where it is justified by overriding considerations of legal certainty, the second paragraph of Article 264 TFEU, which is also applicable by analogy to a request under Article 267 TFEU for a preliminary ruling on the validity of a measure adopted by the EU institutions, confers on the Court a discretion to decide, in each particular case, which specific effects of such a measure must be regarded as definitive. [72]

214. For that reason, it is therefore imperative that the effects of the previous correction factor be maintained at least until it has been recalculated.

215. The Court should also rule that, for the most part, allowances which have already been allocated and those that continue to be allocated up until such time as the correction factor is recalculated do not have to be amended on the basis of the new correction factor.

70 — See above, point 110 et seq.

71 — Judgments in *FIAMM and Others* v *Council and Commission* (C-120/06 P and C-121/06 P, EU:C:2008:476, paragraph 123) and *Régie Networks* (C-333/07, EU:C:2008:764, paragraph 124).

72 — Judgments in *Parliament* v *Council* (C-22/96, EU:C:1998:258, paragraph 42) and *Régie Networks* (C-333/07, EU:C:2008:764, paragraph 121).

216. Such a limitation of the effects of a judgment is possible where, first, there is a risk of serious economic repercussions owing in particular to the large number of legal relationships entered into in good faith on the basis of rules considered to be validly in force and where, secondly, it appears that individuals and national authorities had been led to adopt practices which did not comply with EU legislation by reason of objective, significant uncertainty regarding the implications of EU provisions, to which the conduct of other Member States or the Commission of the European Communities may even have contributed.[73]

217. Those conditions are met in the present case. A retroactive *reduction* would be prejudicial to the legitimate expectation on the part of many installation operators that the final allocations are definitive. Moreover, during the period between the judgment given by the Court of Justice and the adoption of a new correction factor, they would be exposed to an unjustified cost risk if the future free allocations were to be subject to reductions.

218. However, if the Court does restrict the temporal application of the correctly calculated correction factor in this way, the Commission will have to determine that correction factor as soon as possible. The Court should therefore set a time limit for its determination. One year seems appropriate here.

V – **Conclusion**

219. I therefore propose that the Court should:

(1) join Cases C-191/14 and C-192/14, C-295/14 and C-389/14, and C-391/14 to C-393/14 for the purposes of judgment;

(2) find that operators of installations to which the rules of Directive 2003/87/EC of the European Parliament and of the Council of 13 October 2003 establishing a scheme for greenhouse gas emission allowance trading within the Community and amending Council Directive 96/61/EC, in the version of the Treaty on the Accession of Croatia, have applied since 2013, with the exception of operators of installations within the meaning of Article 10a(3) of that directive and of new entrants, could not beyond doubt have brought before the General Court of the European Union, under the fourth paragraph of Article 263 TFEU, an action for the 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 in so far as that decision determines the uniform cross-sectoral correction factor;

(3) annul Article 4 of, and Annex II to, Decision 2013/448;

(4) order that the effects of Article 4 of, and Annex II to, Decision 2013/448 be maintained until the Commission, within an appropriate time limit not exceeding one year, has adopted a new decision pursuant to Article 10a(5) of Directive 2003/87 and Article 15(3) 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**. That new decision may not be applied to allocations predating its adoption.

73 — Judgments in *Bidar* (C-209/03, EU:C:2005:169, paragraph 69) and *Richards* (C-423/04, EU:C:2006:256, paragraph 42).