JUDGMENT OF THE COURT (Sixth Chamber)

8 September 2016 (*)

(Reference for a preliminary ruling — Scheme for greenhouse gas emission allowance trading within the European Union — Directive 2003/87/EC — Article 10a — Method of allocating free allowances — Calculation of the uniform cross-sectoral correction factor — Decision 2013/448/EU — Article 4 — Annex II — Validity — Determination of the product benchmark for hot metal — Decision 2011/278/EU — Annex I — Validity — Article 3(c) — Article 7 — Article 10(1) to (3) and 8 – Annex IV — Free allowances for the consumption and for the export of heat — Measurable heat exported to private households — Prohibition on double-counting of emissions and of double allocation of allowances)

In Case C-180/15,

REQUEST for a preliminary ruling under Article 267 TFEU from the Nacka tingsrätt — Mark- och miljödomstolen (Court of First Instance of Nacka — Property and Environmental Affairs Chamber, Sweden), made by decision of 16 April 2015, received at the Court on 21 April 2015, in the proceedings

Borealis AB,

Kubikenborg Aluminum AB,

Yara AB,

SSAB EMEA AB,

Lulekraft AB,

Värmevärden i Nynäshamn AB,

Cementa AB,

Höganäs Sweden AB

v

Naturvårdsverket,

THE COURT (Sixth Chamber),

composed of A. Arabadjiev, President of the Chamber, J.-C. Bonichot (Rapporteur) and E. Regan, Judges,

Advocate General: E. Sharpston,

Registrar: A. Calot Escobar,

having regard to the written procedure,

after considering the observations submitted on behalf of:

– Borealis AB and Others, by M. Tagaeus, advokat, and J. Nilsson, jur. kand.,

– SSAB EMEA AB and Lulekraft AB, by R. Setterlid, advokat,

– Värmevärden i Nynäshamn AB, by M. Hägglöf, advokat,

– the German Government, by T. Henze and K. Petersen, acting as Agents,

– the Netherlands Government, by M. Bulterman and C. Schillemans, acting as Agents,

– the European Commission, by E. White, K. Mifsud-Bonnici and M. Johansson, acting as Agents,

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

gives the following

Judgment

1 This request for a preliminary ruling concerns, in the first place, the validity of 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 (OJ 2011 L 130, p. 1), in the second place, the validity of Article 4 of, and Annex II to, Commission Decision 2013/448/EU of 5 September 2013 concerning national implementation measures for the transitional free allocation of greenhouse gas emission allowances in accordance with Article 11(3) of Directive 2003/87/EC of the European Parliament and of the Council (OJ 2013 L 240, p. 27), in the third place, interpretation of Article 10a(1),(2), (4) and (5) of Directive 2003/87/EC of the European Parliament and of the Council of 13 October 2003 establishing a scheme for greenhouse gas emission allowance trading within the Community and amending Council Directive 96/61/EC (OJ 2003 L 275, p. 32), as amended by Directive 2009/29/EC of the European Parliament and of the Council of 23 April 2009 (OJ 2009 L 140, p. 63) (‘Directive 2003/87’), and, in the last place, the interpretation of Article 3(c), Article 10(3) and (8) of, and Annex IV to, Decision 2011/278.

2 The request was made in the context of proceedings between several operators of greenhouse gas-emitting installations, namely, Borealis AB, Kubikenborg Aluminium AB, Yara AB, SSAB EMEA AB, Lulekraft AB, Värmevärden i Nynäshamn AB, Cementa AB and Höganäs Sweden AB, on the one hand, and the Naturvårdsverket (Swedish Environmental Protection Agency), on the other hand, regarding the legality of the decision adopted by that agency on 21 November 2013 (‘the decision of 21 November 2013’) on the final allocation of greenhouse gas emission allowances (‘allowances’) for the period of 2013 to 2020, after the application of uniform cross-sectoral correction factor referred to in Article 10a(5) of Directive 2003/87 (the ‘correction factor’).

Legal context

Directive 2003/87

3 Article 1 of Directive 2003/87 provides:

‘This Directive establishes a scheme for greenhouse gas emission allowance trading within the Community (hereinafter referred to as the “Community scheme”) in order to promote reductions of greenhouse gas emissions in a cost-effective and economically efficient manner.

This Directive also provides for the reductions of greenhouse gas emissions to be increased so as to contribute to the levels of reductions that are considered scientifically necessary to avoid dangerous climate change.

...’

4 Article 3 of that directive is worded as follows:

‘For the purposes of this directive:

(a) “allowance” means an allowance to emit one tonne of carbon dioxide equivalent during a specified period, which shall be valid only for the purposes of meeting the requirements of this Directive and shall be transferable in accordance with the provisions of this Directive;

(b) “emissions” means the release of greenhouse gases into the atmosphere from sources in an installation or the release from an aircraft performing an aviation activity listed in Annex I of the gases specified in respect of that activity;

...

(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;

...

(f) “operator” means any person who operates or controls an installation or, where this is provided for in national legislation, to whom decisive economic power over the technical functioning of the installation has been delegated;

...

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

(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”.’

5 Article 10a of Directive 2003/87, entitled ‘Transitional Community — wide rules for harmonised free allocation’, provides:

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

...

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 CO2, where such facilities are available, and shall not provide incentives to increase emissions. No free allocation shall be made in respect of any electricity production, except for cases falling within Article 10c and electricity produced from waste gases.

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

throughout each production process of the sector or the subsector concerned.

In defining the principles for setting ex-ante benchmarks in individual sectors and subsectors, the Commission shall consult the relevant stakeholders, including the sectors and subsectors concerned.

...

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. The Commission shall consult the relevant stakeholders, including the sectors and subsectors concerned.

The regulations pursuant to Articles 14 and 15 shall provide for harmonised rules on monitoring, reporting and verification of production-related greenhouse gas emissions with a view to determining the ex-ante benchmarks.

3. 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 CO2, to pipelines for transport of CO2 or to CO2 storage sites.

4. Free allocation shall be given to district heating as well as to high efficiency cogeneration, as defined by Directive 2004/8/EC, 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.

5. 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;

(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.

...

11. Subject to Article 10b, the amount of allowances allocated free of charge under paragraphs 4 to 7 of this Article in 2013 shall be 80% of the quantity determined in accordance with the measures referred to in paragraph 1. Thereafter the free allocation shall decrease each year by equal amounts resulting in 30% free allocation in 2020, with a view to reaching no free allocation in 2027.

...’

Decision 2011/278

6 Recital 8 of Decision 2011/278 is drafted in the following terms:

‘For the determination of benchmark values, the Commission has used as a starting point the arithmetic average of the greenhouse gas performance of the 10% most greenhouse gas efficient installations in 2007 and 2008 for which data has been collected. In addition, the Commission has in accordance with Article 10a(1) of Directive [2003/87] analysed for all sectors for which a product benchmark is provided

for in Annex I, on the basis of additional information received from several sources and on the basis of a dedicated study analysing most efficient techniques and reduction potentials at European and international level, whether these starting points sufficiently reflect the most efficient techniques, substitutes, alternative production processes, high efficiency cogeneration, efficient energy recovery of waste gases, use of biomass and capture and storage of carbon dioxide, where such facilities are available. Data used for determining the benchmark values has been collected from a wide range of sources in order to cover a maximum of installations producing a benchmarked product in the years 2007 and 2008. First, data on the greenhouse gas performance of [emissions trading system] installations producing benchmarked products has been collected by or on behalf of the respective European sector associations based on defined rules, so-called 'sector rule books'. As reference for these rule books, the Commission provided guidance on quality and verification criteria for benchmarking data for the [emissions trading system]. Second, to complement the data collection by European sector associations, consultants on behalf of the European Commission collected data from installations not covered by industry's data and also competent authorities of Member States provided data and analyses.'

7 Recital 11 of that decision states:

'In case no data or no data collected in compliance with the benchmarking methodology has been available, information on present levels of emissions and consumptions and on most efficient techniques, mainly derived from the Reference Documents on Best Available Techniques (BREF) established in accordance with Directive 2008/1/EC of the European Parliament and of the Council of 15 January 2008 concerning integrated pollution prevention and control [(OJ 2008 L 24, p. 8)] has been used to derive benchmark values. In particular, due to a lack of data on the treatment of waste gases, heat exports and electricity production, the values for the product benchmarks for coke and hot metal have been derived from calculations of direct and indirect emissions based on information on relevant energy flows provided by the relevant BREF and default emission factors set out in Commission Decision 2007/589/EC of 18 July 2007 establishing guidelines for the monitoring and reporting of greenhouse gas emissions pursuant to Directive [2003/87 [(OJ 2007 L 229, p. 1)].'

8 Recital 12 of that decision is worded as follows:

'Where deriving a product benchmark was not feasible, but greenhouse gases eligible for the free allocation of emission allowances occur, those allowances should be allocated on the basis of generic fallback approaches. A hierarchy of three fallback approaches has been developed in order to maximise greenhouse gas emission reductions and energy savings for at least parts of the production processes concerned. The heat benchmark is applicable for heat consumption processes where a measurable heat carrier is used. The fuel benchmark is applicable where non-measurable heat is consumed. ...'

9 Pursuant to recital 18 of Decision 2011/278:

'In order to avoid any distortion of competition and to ensure an orderly functioning of the carbon market, Member States should ensure that when determining the allocation of individual installations no double counting and no double allocation takes place. …'

10 Recital 32 of that decision reads as follows:

'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.'

11 Article 3 of Decision 2011/278 provides:

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

...

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

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

– consumed within the installation's boundaries for the production of products, for the production of mechanical energy other than used for the production of electricity, for heating or cooling with the exception of the consumption for the production of electricity, or

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

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

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

...

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

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

...

(q) "private household" means a residential unit in which persons make arrangements, individually or in groups, for providing themselves with measurable heat;

...'

12 Article 6 of Decision No 2011/278 provides:

‘1. For the purposes of this Decision, Member States shall divide each installation eligible for the free allocation of emission allowances under Article 10a of Directive 2003/87/EC into one or more of the following sub-installations, as required:

(a) a product benchmark sub-installation;

(b) a heat benchmark sub-installation;

(c) a fuel benchmark sub-installation;

(d) a process emissions sub-installation.

Sub-installations shall correspond, to the extent possible, to physical parts of the installation.

…

2. The sum of the inputs, outputs and emissions of each sub-installation shall not exceed the inputs, outputs and total emissions of the installation.’

13 Article 7 of that decision provides:

‘1. For each incumbent installation eligible for the free allocation of emission allowances under Article 10a of Directive [2003/87], including installations that are operated only occasionally, in particular, installations that are kept in reserve or on standby and installations operating on a seasonal schedule, Member States shall, for all years of the period from 1 January 2005 to 31 December 2008, or 1 January 2009 to 31 December 2010 where applicable, during which the installation has been operating, collect from the operator all relevant information and data regarding each parameter listed in Annex IV.

2. Member States shall collect data for each sub-installation separately. If necessary, Member States may require the operator to submit more data.

...

7. Member States shall require operators to submit complete and consistent data and to ensure that there are no overlaps between sub-installations and no double counting. Member States shall, in particular, ensure that operators exercise due diligence and submit data that presents highest achievable accuracy so as to enable reasonable assurance of the integrity of data.

...’

14 Article 10 of Decision 2011/278, entitled ‘Allocation at installation level’, provides:

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

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

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

(b) for:

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

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

(iii) the process emissions sub-installation, the preliminary annual number of emission allowances allocated free of charge for a given year shall correspond to the process-related historical activity level multiplied by 0,9700.

3. To the extent that measurable heat is exported to private households and the preliminary annual number of emission allowances determined in accordance with paragraph 2(b), point (i), for 2013 is lower than the median annual historical emissions related to the production of measurable heat exported to private households by that sub-installation in the period from 1 January 2005 to 31 December 2008, the preliminary annual number of emission allowances for 2013 shall be adjusted by the difference. In each of the years 2014 to 2020, the preliminary annual number of emission allowances determined in accordance with paragraph 2(b), point (i), shall be adjusted to the extent that the preliminary annual number of emission allowances for that year is lower than a percentage of the abovementioned median annual historical emissions. This percentage shall be 90% in 2014 and decline by 10 percentage points each subsequent year.

...

7. The preliminary total annual amount of emission allowances allocated free of charge for each installation shall be the sum of all sub-installations' preliminary annual numbers of emission allowances allocated free of charge calculated in accordance with paragraphs 2, 3, 4, 5 and 6.

...

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

9. The final total annual amount of emission allowances allocated free of charge for each incumbent installation, except for installations covered by Article 10a(3) of Directive 2003/87/EC, shall be the preliminary total annual amount of emission allowances allocated free of charge for each installation determined in accordance with paragraph 7 multiplied by the cross-sectoral correction factor as determined in accordance with Article 15(3).

For installations covered by Article 10a(3) of Directive [2003/87] and eligible for the allocation of free emission allowances, the final total annual amount of emission allowances allocated free of charge shall correspond to the preliminary total annual amount of emission allowances allocated free of charge for each installation determined in accordance with paragraph 7 annually adjusted by the linear factor referred to in Article 10a(4) of Directive [2003/87], using the preliminary total annual amount of emission allowances allocated free of charge for the installation concerned for 2013 as a reference.'

15 Article 15 of Decision No 2011/278 provides:

‘1. In accordance with Article 11(1) of Directive [2003/87], Member States shall submit to the Commission by 30 September 2011 a list of installations covered by Directive [2003/87] in their territory, including installations identified pursuant to Article 5, using an electronic template provided by the Commission.

...

3. 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.

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]. 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.

4. If the Commission does not reject an installation’s inscription on this list, including the corresponding preliminary total annual amounts of emission allowances allocated free of charge for this installation, the Member State concerned shall proceed to the determination of the final annual amount of emission allowances allocated free of charge for each year over the period from 2013 to 2020 in accordance with Article 10(9) of this Decision.

...’

16 Under the heading ‘Product Benchmarks’, Annex I to Decision 2011/278 provides, at point 1 thereof, itself entitled ‘Definition of product benchmarks and system boundaries without consideration of exchangeability of fuel and electricity’:

‘Product benchmark	Definition of products covered	Definition of processes and emissions covered (system boundaries)	...	Benchmark value (allowances/t)
Coke	...	...	...	0,286
...	...	...	...	…
Hot metal	...	...	...	1,328
...	...	...	...	...

...’

17 Annex IV of that Decision, entitled ‘Parameters for baseline data collection for incumbent installations’, provides:

‘For the purposes of the baseline data collection referred to in Article 7(1), Member States shall require the operator to submit at least the following data at installation and sub-installation level for all calendar years

of the baseline period chosen in accordance with Article 9(1) (2005-2008 or 2009-2010). In accordance with Article 7(2), Member States may request additional data if necessary:

Parameter	...
...	...
Total greenhouse gas emissions	...
...	...
Measurable heat exported	...
...	...’

Regulation (EU) No 601/2012

18 Commission Regulation (EU) No 601/2012 of 21 June 2012 on the monitoring and reporting of greenhouse gas emissions pursuant to Directive 2003/87/EC (OJ 2012 L 181, p. 30) provides, at Annex IV, point 1(A) thereto:

‘...

The operator shall not monitor and report emissions from internal combustion engines for transportation purposes. … The operator shall not assign emissions associated with the production of heat or electricity that is imported from other installations to the importing installation.

...’

Decision 2013/448

19 Article 4 of Decision 2013/448 provides:

‘The [correction factor] referred to in Article 10a(5) of Directive [2003/87] and determined in accordance with Article 15(3) of Decision [2011/278] is set out in Annex II to this Decision.’

20 Annex II to Decision 2013/448 provides:

‘Year	Cross-sectoral correction factor
2013	94,272151%
2014	92,634731%
2015	90,978052%
2016	89,304105%
2017	87,612124%
2018	85,903685%
2019	84,173950%
2020	82,438204%’

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

21 By decision of 21 November 2013, the Swedish Environmental Protection Agency determined the final amount of emission allowances to be allocated free of charge for the trading period from 2013 to 2020. Eight operators of installations emitting greenhouse gases, namely Borealis AB, Kubikenborg Aluminium AB, Yara AB, SSAB EMEA AB, Lulekraft AB, Värmevärden i Nynäshamn AB, Cementa AB and Höganäs Sweden AB, brought an action seeking annulment of that decision.

22 In support of their actions, those operators raised, first, several pleas alleging errors of law vitiating Decisions 2011/278 and 2013/448.

23 They consider, inter alia, that the correction factor, determined on the basis of Article 15(3) of Decision 2011/278 and set out in Article 4 and Annex II of Decision 2013/448, is contrary to the requirements arising from Article 10a(5) of Directive 2003/87. To the extent that the decision of 21 November 2013 was adopted with the correction factor as its basis, the latter is also invalid.

24 Furthermore, in Annex I to Decision 2011/278, the Commission set the product benchmark for hot metal in breach of the limits laid down in Article 10a(2) of Directive 2003/87. According to that provision, the starting point for determining the benchmark is the average performance of the 10% most efficient installations in a sector. During the implementation of this rule, the Commission overestimated the performance of the installations producing hot metal. Similarly, while the Commission took into account the fact that the waste gases emitted during hot metal production are likely to be used as fuel substitute, the adjustment, which allows the difference in energy content between those gases and natural gas to be taken into account, is too high. Since the benchmarks are decisive for the allocation of free allowances, those errors affect the validity of the decision of 21 November 2013.

25 Second, the applicants at issue in the main proceedings claim that that decision is, in itself, contrary to several provisions of Directive 2003/87 and Decision 2011/278.

26 Accordingly, since the Swedish Environmental Protection Agency failed to take into account, when allocating allowances for emissions from the production of heat delivered to private households in connection with district heating, emissions actually resulting from the combustion of waste gases to the extent that they exceed the heat benchmark, the decision of 21 November 2013 infringes Article 10(2(b), and Article 10(3) of Decision 2011/278. The Swedish Environmental Protection Agency considers, on the contrary, that it could not allocate more allowances than those provided for by that benchmark. Furthermore, according to the agency, the emissions resulting from the combustion of waste gases were taken into account when determining the benchmark values for hot metal and coke where those values are superior to those of the fuel benchmark.

27 Furthermore, the applicants in the main proceedings submit that the decision of 21 November 2013 is invalid to the extent that it does not conform to the rules for allocating free allowances for the production and consumption of heat.

28 First, the refusal of the Swedish Environmental Protection Agency to allocate free allowances when a sub-installation consumes heat produced in another sub-installation to which a fuel benchmark applies is contrary to one of the objectives of Article 10a(1) of Directive 2003/87. The provision aims, inter alia, at providing incentives for energy efficient techniques, by taking account of efficient energy recovery of waste gases. The Swedish Environmental Protection Agency considers that its refusal was justified by the obligation to avoid double allocations. The emissions from a fuel-burning sub-installation could not be counted a second time when recovering heat by another heat benchmark sub-installation.

29 Second, the applicants in main proceedings consider that the decision of 21 November 2013 is also invalid in so far as it disregards the rule that, when exporting heat to a heat distributor which supplies it, through its network, to several undertakings, free allowances should be allocated to the heat producer, not the consumer. The Swedish Environmental Protection Agency does not contest this principle, but considers

that, in the specific case at issue, the network operator is not a heat distributor since it itself uses most of the heat in one of its installations and therefore cannot be qualified as a mere intermediary.

30 In these circumstances the Nacka tingsrätt — Mark- och miljödomstolen (Court of First Instance of Nacka — Property and Environmental Affairs Chamber) decided to stay proceedings and refer to the Court the following questions:

‘(1) In the calculation of the cross-sectoral correction factor for the industrial sector, is it compatible with Article 10a(1) and (4) of Directive 2003/87 to attribute all emissions from incineration of waste gases for electricity production to the auction pot and not to the industry ceiling, despite the fact that emissions from residual gas are eligible for free allocation of allowances under Article 10a(1) of that directive?

(2) In the calculation of the cross-sectoral correction factor for the industrial sector, is it compatible with Article 10a(1) and (4) of Directive 2003/87 to attribute all emissions produced in heat production in cogeneration installations for onward delivery to installations covered by the EU emissions trading system to the auction pot and not to the industry ceiling, despite the fact that the emissions from heat production are eligible for allocation of free allowances under Article 10a(4) of Directive 2003/87?

(3) If the answers to questions 1 and 2 are negative, is the calculation, in that case, of the industries’ share (34.78%) of the total emissions in the reference period correct?

(4) Is Commission Decision 2013/448/EU invalid and incompatible with the [second] subparagraph of Article 10a(5) of Directive 2003/87, since the Commission’s calculation of the industry ceiling means that a cross-sectoral correction factor must inevitably be applied instead of being applied ‘if necessary’?

(5) Has the product benchmark for hot metal been established in accordance with Article 10a(2) of Directive 2003/87 on the basis of the fact that, in defining the principles for setting *ex ante* benchmarks, the starting point is to be the average performance of the 10% most efficient installations in the relevant sector?

(6) As regards the free allocation of allowances for the export of heating to private households, is it compatible with Article 10a(4) of Directive 2003/87 not to grant allocation of free allowances in respect of heating which is exported to private households?

(7) In connection with applications for the free allocation of allowances, is it compatible with Annex IV to Commission Decision 2011/278/EU, as the Swedish Environmental Protection Agency has done, not to state all greenhouse gas emissions arising from the production of heating which is exported to private households?

(8) In the allocation of free allowances for the export of heating to private households, is it compatible with Article 10a(1) and (4) of Directive 2003/87 and Article 10(3) of Commission Decision 2011/278/EU not to give allocation of extra free allowances in respect of the fossil-fuel emissions which exceed the allocation given for heating exported to private households?

(9) In connection with applications for allocation of free allowances, is it compatible with Annex IV to Commission Decision 2011/278/EU, as the Swedish Environmental Protection Agency has done, to adjust the figures in an application so that the greenhouse gas emissions attributable to the incineration of waste gases are equated to those attributable to the incineration of natural gas?

(10) Does Article 10(8) of Commission Decision 2011/278/EU mean that an operator cannot obtain an allocation of free allowances in respect of heat consumption in a heat benchmark sub-installation produced in a different fuel benchmark sub-installation?

(11) If the answer to question 10 is affirmative, does Article 10(8) of Commission Decision 2011/278/EU run counter to Article 10a(1) of Directive 2003/87?

(12) In the allocation of free allowances in respect of heat consumption, is it compatible with Directive 2003/87 and Guidance Documents No 2 and 6 to have regard in the assessment to the heat source which produces the heat consumed?

(13) Is Commission Decision 2013/448/EU invalid and incompatible with Article 290 TFEU and Article 10a(1) and (5) of Directive 2003/87 on the basis that it alters the calculation method set out in Article 10a(5), [first] subparagraph, (a) and (b) of Directive 2003/87 by excluding from the basis of calculation emissions which are caused by the incineration of waste gases and the production of combined heat and power, despite the fact that the free allocation of allowances is permitted in that regard pursuant to Article 10a(1) and (4) of Directive 2003/87 and Commission Decision 2011/278/EU?

(14) Is measurable heat in the form of steam from an [EU emissions trading system] installation which is delivered to a steam network with many consumers of steam, of which at least one is not an [EU emissions trading system] installation, to be regarded as constituting a heat benchmark sub-installation under Article 3(c) of Commission Decision 2011/278/EU?

(15) Is it relevant to the answer to question 14:

(a) whether the steam network is owned by the largest consumer of steam in the network and that consumer is an [EU emissions trading system] installation,

(b) what share of the total heat delivery to the steam network is used by the largest consumer,

(c) how many suppliers and consumers of steam there are in the steam network,

(d) whether there is uncertainty as to who has produced the measurable heat which the respective consumers of steam acquire, and

(e) whether the allocation of steam usage within the network can be altered in such a way that a number of consumers of steam which are not [EU emissions trading system] installations join it or the existing non- [EU emissions trading system] installations' usage increases?

(16) If the answer to question 14 depends on the facts of the individual case, to which facts is particular weight to be given?'

The questions for a preliminary ruling

The validity of Article 15(3) of Decision 2011/278

The 1st, 2nd and 13th questions

31 By its 1st, 2nd and 13th questions, the referring court, in essence, asks the Court to rule on the validity of Decision 2013/448 inasmuch as, when determining the correction factor, emissions from waste gases that are used to generate electricity and emissions from the production of heat through cogeneration were not included in the maximum annual amount of allowances pursuant to Article 10a(5) of the Directive 2003/87 ('maximum annual amount of allowances')

32 As a preliminary point, it must be observed that, under the procedure laid down by Article 267 TFEU, providing for cooperation between national courts and the Court of Justice, it is for the latter to provide the national court with an answer which will be of use to it and enable it to determine the case before it. To that end, the Court may have to reformulate the questions referred to it. The Court may also find it

necessary to consider provisions of EU law which the national court has not referred to in its questions (judgment of 11 February 2015, *Marktgemeinde Straßwalchen and Others*, C-531/13, EU:C:2015:79, paragraph 37).

33 In that regard, it should be noted that it is clear from Article 3(u) of Directive 2003/87 that an installation that produces electricity for sale to third parties and in which none of the activities listed in Annex I to that directive, other than fuel combustion, have taken place must be classified as an electricity generator.

34 Since the waste gases were burned by electricity producers, the corresponding emissions were not taken into account for determining the maximum annual amount of allowances (see, in that regard, judgment of 28 April 2016, *Borealis Polyolefine and Others*, C-191/14, C-192/14, C-295/14, C-389/14 and C-391/14 to C-393/14, EU:C:2016:311, paragraph 74).

35 Similarly, it is clear from Article 10a(3) and (5) of Directive 2003/87 that the emissions generated by the production of heat produced in cogeneration were not taken into account for the purposes of determining the maximum annual amount of allowances in so far as they come from electricity generators (see, to that effect, judgment of 28 April 2016, *Borealis Polyolefine and Others*, C-191/14, C-192/14, C-295/14, C-389/14 and C-391/14 to C-393/14, EU:C:2016:311, paragraph 75).

36 Article 15(3) of Decision 2011/278 adopted to implement Article 10a(5) of Directive 2003/87, does not permit the taking into account of the emissions of electricity generators in determining the maximum annual amount of allowances (see, to that effect, judgment of 28 April 2016, *Borealis Polyolefine and Others*, C-191/14, C-192/14, C-295/14, C-389/14 and C-391/14 to C-393/14, EU:C:2016:311, paragraph 68).

37 It follows that, by its 1st, 2nd and 13th questions, the referring court asks the Court, in essence, whether Article 15(3) of that decision is valid in so far as it excludes the taking into account of emissions from electricity generators for the purposes of determining the maximum annual amount of allowances.

38 In its judgment of 28 April 2016, *Borealis Polyolefine and Others* (C-191/14, C-192/14, C-295/14, C-389/14 and C-391/14 to C-393/14, EU:C:2016:311), the Court had to rule on a question which was, in essence, identical and the reply in that judgment is fully applicable to the present case.

39 The Court held in that judgment that, in not permitting the taking into account of the emissions of electricity generators in determining the maximum annual amount of allowances, Article 15(3) of Decision 2011/278 is consistent with the wording of Article 10a(5) of Directive 2003/87, read in conjunction with Article 10a(3) of that directive (see judgment of 28 April 2016, *Borealis Polyolefine and Others*, C-191/14, C-192/14, C-295/14, C-389/14 and C-391/14 to C-393/14, EU:C:2016:311, paragraph 68).

40 That interpretation is also consistent with the broad logic of Directive 2003/87 and the objectives which it pursues (judgment of 28 April 2016, *Borealis Polyolefine and Others*, C-191/14, C-192/14, C-295/14, C-389/14 and C-391/14 to C-393/14, EU:C:2016:311, paragraph 69).

41 In those circumstances, for identical reasons to those set out in paragraphs 62 to 83 of the judgment of 28 April 2016, *Borealis Polyolefine and Others* (C-191/14, C-192/14, C-295/14, C-389/14 and C-391/14 to C-393/14, EU:C:2016:311), the examination of the 1st, 2nd and 13th questions has revealed no factor of such a kind as to affect the validity of Article 15(3) of Decision 2011/278.

The third question

42 In the light of the answer given to the 1st, 2nd and 13th questions, there is no need to reply to the 3rd question.

The validity of Annex I of Decision 2011/278

The fifth question

43 By its fifth question, the referring court, in essence, asks the Court to rule on the validity of Annex I of Decision 2011/278 in so far as the product benchmark for hot metal has been determined in breach of the requirements arising from Article 10a(2) of Directive 2003/87.

44 SSAB EMEA AB and Lulekraft AB contend that it follows from that provision that benchmarks must be established on the basis of the performance of the 10% most efficient installations in the sector concerned by the benchmark. During the implementation of this rule, the Commission overestimated the performance of installations producing hot metal. In addition, although the benchmark in question reflects the fact that the waste gases generated during the production of hot metal can be a fuel substitute, the adjustment, for the purposes of taking into account the difference in energy content between these gases and natural gas, is too high.

45 In that regard, it should be noted that the Commission has a wide discretion to determine the benchmarks in individual sectors or sub-sectors under Article 10a(2) of Directive 2003/87. That exercise entails on its part, choices as well as complex technical and economic assessments. The legality of a measure adopted in that area can be affected only if the measure is manifestly inappropriate (see, by analogy, judgment of 22 December 2010, *Gowan Comércio Internacional e Serviços*, C-77/09, EU:C:2010:803, paragraph 82).

46 According to recital 8 of Decision 2011/278, the Commission used, for the determination of benchmark values, as a starting point the arithmetic average of the greenhouse gas performance of the 10% most greenhouse gas efficient installations in 2007 and 2008 for which data were collected. It verified that the starting point sufficiently reflected the most efficient techniques, substitutes, alternative production processes, high efficiency cogeneration, efficient energy recovery of waste gases, use of biomass, and the capture and storage of carbon dioxide, where such facilities are available. Subsequently, the Commission supplemented those data by using, in particular, the data collected by or on behalf of the various European sector associations, based on defined rules, so-called ‘sector rule books’. As reference for these rule books, the Commission provided guidance on quality and verification criteria.

47 In addition, it is clear from recital 11 of Decision 2011/278 that, where no data were available or the data collected did not comply with the benchmarking methodology, information on present levels of emissions and consumptions and on most efficient techniques, mainly derived from the Reference Documents on Best Available Techniques (BREF) established in accordance with Directive 2008/1 was used to derive benchmark values. In particular, due to a lack of data on the treatment of waste gases, heat exports and electricity production, the values for the product benchmarks for coke and hot metal were derived from calculations of direct and indirect emissions based on information on relevant energy flows provided by the relevant BREF and default emission factors set out in Decision 2007/589.

48 As for waste gases generated during the production of hot metal, according to recital 32 of Decision 2011/278 the product benchmarks take account of the efficient energy recovery of waste gases and emissions related to use of those gases. To that end, for the determination of the benchmark values for products of which the production generates waste gases, the carbon content of those waste gases has been taken into account to a large extent.

49 In those circumstances it does not appear that the Commission, in determining the benchmarks according to Article 10a(2) of Directive 2003/87, exceeded the limits of its discretion.

50 In the light of all the foregoing considerations, it must be held that the examination of the fifth question referred has revealed no factor of such a kind as to affect the validity of Annex I to Decision 2011/278.

The validity of Decision 2013/448

The fourth question

51 By its fourth question, the referring court, in essence, asks the Court to rule on the validity of Article 4 of, and Annex II to, Decision 2013/448 fixing the correction factor.

52 In that regard, it should be noted that the Court has already held that since the Commission did not determine the maximum annual amount of allowances in accordance with the requirements of subparagraph (b) of Article 10a(5) of Directive 2003/87, the correction factor laid down in Article 4 of, and Annex II to, Decision 2013/448 is also contrary to that provision (judgment of 28 April 2016, *Borealis Polyolefine and Others*, C-191/14, C-192/14, C-295/14, C-389/14 and C-391/14 to C-393/14, EU:C:2016:311, paragraph 98).

53 In those circumstances, the answer to the fourth question is that Article 4 of, and Annex II to, Decision 2013/448 fixing the correction factor are invalid (judgment of 28 April 2016, *Borealis Polyolefine and Others*, C-191/14, C-192/14, C-295/14, C-389/14 and C-391/14 to C-393/14, EU:C:2016:311, paragraph 99).

Limitation of the temporal effects

54 It follows from paragraph 111 of the judgment of 28 April 2016, *Borealis Polyolefine and Others* (C-191/14, C-192/14, C-295/14, C-389/14 and C-391/14 to C-393/14, EU:C:2016:311) that the Court limited the temporal effects of the declaration of invalidity of Article 4 of, and Annex II to, Decision 2013/448 so that, first, that declaration does not produce effects until 10 months following the date of delivery of that judgment of 28 April 2016 so as to enable the Commission to adopt the necessary measures and, second, measures adopted during that period on the basis of the invalidated provisions cannot be called into question.

The interpretation of Directive 2003/87 and of Decision 2011/278

The sixth question

55 By its sixth question the referring court asks whether Article 10a(4) of Directive 2003/87 must be interpreted as not allowing free allowances to be allocated for heat exported to private households.

56 As was recalled in paragraph 32 above, in the context of the procedure established by Article 267 TFEU providing for cooperation between national courts and the Court of Justice, it is for the latter to provide the national court with an answer which will be of use to it and enable it to determine the case before it. To that end, the Court may have to reformulate the questions referred to it.

57 According to the order for reference, the sixth question concerns the situation of an undertaking which, by burning fuel, heats slab steel to roll it into sheet steel. The heat which it can recover as part of this process is transferred to two other of the undertaking's heat benchmark sub-installations, one of which exports that heat to a district heating network.

58 It also appears from that decision that in order to avoid, when allocating free allowances, the emissions generated from fuel combustion being taken into account a second time as heat consumed or exported, the Swedish Environmental Protection Agency deducted that heat from the historical level of activity of the heat benchmark sub-installations.

59 In that context, by its question, the referring court wishes to know, in essence, whether Article 10a of Directive 2003/87 and Article 10(1) to (3) and (8) of Decision 2011/278 must be interpreted as permitting, in order to avoid a double allocation, that allowances not be allocated to a heat benchmark sub-installation when it exports, to private households, heat which it has recovered from a fuel benchmark sub-installation.

60 In that regard, it must be noted that the first subparagraph of Article 10a(1) of Directive 2003/87 provides that the Commission must adopt Union-wide and fully-harmonised implementing measures for the

allocation of allowances. According to subparagraph 2 of that article, the Commission is to determine in this context benchmarks by sector or subsector.

61 As is clear from Article 10(1) and (2) of Decision 2011/278, by multiplying those benchmarks with the level of historical activity of each sub-installation, Member States are to determine the preliminary annual number of emission allowances allocated free of charge. To this end, they are required to distinguish, in accordance with Article 6 of that decision, the sub-installations based on their activity, in order to determine whether it is necessary to apply a product benchmark, a heat benchmark, a fuel benchmark or a specific factor for process emissions installations.

62 In that regard, it should be noted that the definitions of product benchmark sub-installations, heat benchmark sub-installations, fuel benchmark sub-installations and process emissions sub-installations are mutually exclusive, as is clear from Article 3(b), (c), (d) and (h) of Decision 2011/278.

63 Article 3(b) of Decision 2011/278 provides that product benchmark sub-installations include only inputs, outputs and corresponding emissions relating to the production of a product for which a benchmark has been set in Annex I.

64 Article 3(c) of Decision 2011/278 defines heat benchmark sub-installations as inputs, outputs and corresponding emissions not covered by a product benchmark sub-installation relating to the production, the import from an installation or other entity covered by the Union scheme of measurable heat. This heat must, inter alia, be consumed for the production of products or exported to an installation or other entity not covered by the Union scheme with the exception of export for the production of electricity.

65 As for fuel benchmark sub-installations, Article 3(d) of Decision 2011/278 defines them as inputs, outputs and corresponding emissions not covered by a product benchmark sub-installation relating to the production of non-measurable heat by fuel combustion consumed, inter alia, for the production of products or for the production of mechanical energy other than that used for the production of electricity.

66 A ‘process emissions sub-installation’ is qualified as such with regard solely to the generation of specific types of emissions referred to in Article 3(h)(i) to (vi) of Decision 2011/278.

67 According to recital 12 of that decision where deriving a product benchmark has not been feasible, but greenhouse gases eligible for the free allocation of emission allowances occur, those allowances should be allocated on the basis of generic fallback approaches. To that end, a hierarchy of three fallback approaches has been developed in order to maximise greenhouse gas emission reductions and energy savings for at least parts of the production processes concerned.

68 In the light of those explanations, it follows from a combined reading of the definitions in Article 3(b), (c), (d) and (h) of that decision that it is only where a product benchmark cannot be applied to a sub-installation that the allocation of free allowances must occur on the basis of one of the other three options, namely the heat benchmark, the fuel benchmark or the process emissions.

69 It also appears from those provisions that the combustion of a fuel cannot lead to several different benchmarks being applied since a single activity could only be found in one of the categories of sub-installations provided for in Article 3(b), (c), (d) and (h) of Decision 2011/278, due to those categories being, as has already been noted in paragraph 62 above, mutually exclusive. Any other approach would be contrary to the prohibition on the double counting of emissions and of the double allocation of allowances, enshrined in several provisions of that decision.

70 Under Article 6(2) of Decision 2011/278 the sum of the inputs, outputs and emissions of each sub-installation is not to exceed the inputs, outputs and total emissions of the installation. Furthermore, the first subparagraph of Article 7(7) of the decision provides that the operators of installations producing greenhouse gases are required when communicating baseline data, to ensure that ‘there are no overlaps between sub-installations and no double counting’. This obligation on operators corresponds to that on

Member States, under Article 10(8) of Decision 2011/278, to ensure that ‘emissions are not double counted’.

71 Thus, in so far as the heat imported by a heat benchmark sub-installation comes from a fuel benchmark sub-installation, it is necessary to avoid emissions actually related to the production of that heat being taken into account twice in the allocation of free allowances. The application of the fuel benchmark to heat production and the heat benchmark to the consumption of that heat would result in double counting which is precluded by the provisions listed in the preceding paragraph.

72 That interpretation of Decision 2011/278 is supported by specific monitoring rules for emissions from combustion processes contained in Annex IV, point (1A) of Regulation No 601/2012, which provide, in particular, that ‘[t]he operator shall not assign emissions associated with the production of heat or electricity that is imported from other installations to the importing installation’.

73 That interpretation is also consistent with the main objective of Directive 2003/87, which is to protect the environment by means of a reduction of greenhouse gas emissions (see judgment of 28 April 2016, *Borealis Polyolefine and Others*, C-191/14, C-192/14, C-295/14, C-389/14 and C-391/14 to C-393/14, EU:C:2016:311, paragraph 79) and the objective set out in recital 18 of Decision 2011/278 which requires Member States to ensure no double counting and double allocation in order to avoid any distortion of competition and to ensure an orderly functioning of the carbon market.

74 Furthermore, Article 10a of Directive 2003/87 contains nothing to support the contention that that provision provides for an exception to the rule prohibiting the double counting of emissions. In particular, the fact that Article 10a(4) provides for the allocation of free allowances for the production of heat-related emissions for district heating does not rebut that finding. That paragraph does not determine the amount of allowances to be allocated and does not further require that emissions already covered under another sub-installation give rise to a double allocation for exported heat.

75 That finding also is not rebutted by the explanations provided in a document entitled ‘Guidance Document No 6 on the harmonised free allocation methodology for the EU-ETS post 2012 Cross-Boundary Heat Flows’ that the Commission published on its website. According to what is expressly indicated in that document, the document is not legally binding and does not reflect the official position of the Commission. In addition, while it is true, as indicated in that document, that neither Directive 2003/87 nor Decision 2011/278 provide separate rules for allocating free allowances for heat consumption based on the source of that heat, that does not mean that a double allocation for heat production and consumption is authorised.

76 As to the rule laid down in Article 10(3) of Decision 2011/278, its purpose is the adjustment of the allocation of allowances for measurable heat exported to private households when the amount of allowances determined based on the heat benchmark is lower than the median annual historical emissions related to the production of that heat.

77 However, the median annual historical emissions related to the production of heat could not include emissions other than those taken into account when applying the heat benchmark to the historical activities of the sub-installation concerned, which excludes, in this context, the taking into account of the emissions linked to the historical activities of a fuel benchmark sub-installation.

78 That interpretation of Article 10(3) of Decision 2011/278 results from the prohibition on double counting of emissions and double allocation of allowances that precludes, as is clear from paragraphs 70 to 71 above, the production of heat-related emissions being taken into account twice, namely when the free allowances are allocated, first, to the installation that produces that heat and, second, to the installation that consumes or exports the heat. Thus, in so far as the heat exported by a fuel benchmark sub-installation is not part of the historical activity of the heat benchmark sub-installation, the median annual historical emissions of that sub-installation can be determined from the emissions related to the production of that heat.

79 Given the considerations in paragraphs 71 and 76 to 78 above, the Court finds it conceivable that the application of the prohibition on double counting of emissions can lead the national authority responsible for allocating allowances not allocating allowances for heat exported to private households.

80 In the light of all the foregoing considerations, the answer to the sixth question is that Article 10a of Directive 2003/87 and Article 10(1) to (3) and 8 of Decision 2011/278 must be interpreted as permitting, in order to avoid a double allocation, non-allocation of allowances to a heat benchmark sub-installation when it exports, to private households, heat which it has recovered from a fuel benchmark sub-installation.

The 10th question

81 By its 10th question, the referring court asks, in essence, whether Article 10(8) of Decision 2011/278 must be interpreted as precluding free allowances being allocated to an operator for the consumption, in a heat benchmark sub-installation, of heat produced in a fuel benchmark sub-installation.

82 As has already been stated in paragraph 70 above, under Article 10(8) of that decision, Member States must ensure that ‘emissions are not double counted’.

83 In that regard, as stated in paragraph 71 above, in so far as the heat imported by a heat benchmark sub-installation comes from a fuel benchmark sub-installation, it is necessary to avoid emissions actually related to the production of that heat being taken into account twice in the allocation of free allowances. The application of the fuel benchmark to heat production and the heat benchmark to the consumption of that heat would result in double counting which is prohibited.

84 In view of all the foregoing considerations, the answer to the 10th question is that Article 10(8) of Decision 2011/278 must be interpreted as precluding free allowances being allocated to an operator for the consumption, in a heat benchmark sub-installation, of heat taken into account in connection with a fuel benchmark sub-installation.

The 11th and 12th questions

85 Given the reply to the 6th and 10th questions, there is no longer any need to answer the 11th and 12th questions.

The seventh question

86 By its seventh question, the referring court asks whether, in connection with applications for the free allocation of allowances, it is compatible with Annex IV to Decision 2011/278, as the Swedish Environmental Protection Agency has done, not to state all greenhouse gas emissions arising from the production of heating which is exported to private households.

87 As a preliminary point, it should be noted that the seventh question has the same factual background as the sixth question, as described in paragraphs 57 and 58 above.

88 Furthermore, Article 7(1) of Decision 2011/278 provides for the obligation on Member States to collect, for installations eligible for the free allocation of allowances under Article 10a of Directive 2003/87, ‘all relevant information and data regarding each parameter listed in Annex IV’ to that decision. Those parameters include, in particular, the ‘measurable heat exported’ and the ‘total greenhouse gas emissions’. Under Article 7(9) of Decision 2011/278, those data are to be made available to the Commission upon the latter’s request.

89 In that context, by its question, the referring court wishes to know, in essence, whether Article 7 of, and Annex IV to, that decision must be interpreted as allowing a Member State, when collecting the data covered by those provisions, not to take into account all the emissions related to the heat production exported by a heat benchmark sub-installation to private households in order to avoid double counting.

90 When collecting those data, Member States are obliged to ensure, in accordance with Article 7(7) of Decision 2011/278, 'that there are no overlaps between sub-installations and no double counting'. As a result, in case of the double counting of emissions, the competent authorities are entitled to request that the data submitted to them by the operators be rectified.

91 Annex IV to Decision 2011/278 does not preclude that rule. That annex contains only a list which provides, in detail, the minimum information which the operators concerned must communicate to the Member States in accordance with Article 7 of that decision.

92 In the light of all the foregoing considerations, the answer to the seventh question is that Article 7 of, and Annex IV to, Decision 2011/278 must be interpreted as allowing a Member State, when collecting the data covered by those provisions, not to take into account all the emissions related to the heat production exported by a heat benchmark sub-installation to private households in order to avoid double counting.

The eighth question

93 By its eighth question, the referring court asks whether Article 10a(1) and (4) of Directive 2003/87 and Article 10(3) of Decision 2011/278 must be interpreted as allowing the non-allocation of extra free allowances in respect of the fossil-fuel emissions when they exceed the allocation of allowances given for heating exported to private households.

94 According to the order for reference, the eighth question referred for a preliminary ruling concerns the situation of an undertaking, namely SSAB EMEA AB, which supplies heating to a district heating network serving individuals. That heat is produced by the combustion of waste gases in the production of hot metal.

95 For exported heating, the Swedish Environmental Protection Agency, in order to determine the amount of allowances to be allocated free of charge, applied the heat benchmark. It did not allocate allowances beyond that permitted by that benchmark, since it considers the emissions which exceed the value set by the fuel benchmark to be, in the case of waste gases, imputed to the producers of those gases. Those emissions are taken into account under the hot metal benchmark.

96 In the light of the above, and paragraph 76 above, the referring court asks, in essence, whether Article 10a(1) and (4) of Directive 2003/87 and Article 10(3) of Decision 2011/278 must be interpreted as permitting the non-allocation of free allowances for emission related to the production of measurable heat by burning waste gases that were generated by a hot metal benchmark installation, when the amount of allowances determined based on the heat benchmark is lower than the median annual historical emissions related to the production of that heat.

97 It should be noted that the Court has already held it is apparent from recital 32 of Decision 2011/278 that, pursuant to the third subparagraph of Article 10a(1) of Directive 2003/87, the Commission took account of emissions which are related to the efficient energy recovery of waste gases. The Commission adapted, to that end, certain product benchmarks, namely those for coke, hot metal and sintered ore. It thereby seeks to encourage undertakings to reuse or sell the waste gases generated during the manufacture of those products. It is further apparent from recital 32 of Decision 2011/278, first, that their reuse, in another process by an industrial installation, results, in principle, in the entitlement to additional free allowances on the basis of the heat or fuel benchmark and, second, that the sale of such gases allows the producer to save on allowances (see, to that effect, judgment of 28 April 2016, *Borealis Polyolefine and Others*, C-191/14, C-192/14, C-295/14, C-389/14 and C-391/14 to C-393/14, EU:C:2016:311, paragraph 73).

98 In accordance with those considerations, pursuant to the second indent of Article 3(c) and Article 10(2)(b) of Decision 2011/278, the combustion of waste gases for the supply of heat to a district heating network permits the allocation of free allowances on the basis of the heat benchmark.

99 The prohibition on double counting of emissions and of double allocation of allowances does not preclude that rule.

100 While the hot metal benchmark takes account of the combustion of waste gases to some extent, the emissions generated by their actual combustion by a heat benchmark sub-installation are not, in principle, imputable to the historical activity of the hot metal benchmark sub-installation. As is clear from the definition set out in Article 3(b) of Decision 2011/278, a product benchmark sub-installation includes only the ‘inputs, outputs and corresponding emissions relating to the production of a product for which a benchmark has been set in Annex I to [that decision]’. Such is not the case of emissions linked to the combustion of waste gases by an installation qualified as a heat benchmark sub-installation within the meaning of Article 3(c) of Decision 2011/278.

101 Thus, unlike the recovery of heat produced by a fuel benchmark sub-installation, the combustion of waste gas by a heat benchmark sub-installation is a process separate from producing the product which generated those gases.

102 This interpretation of the second indent of Article 3(c), and Article 10, paragraph 2(b) of Decision 2011/278 corresponds to the objective of Article 10a(1) of Directive 2003/87 to incentivise the reduction of greenhouse gas emissions by improving energy efficiency, by taking account of the most efficient techniques, including, in particular, the fullest energy recovery from gas waste.

103 As to the application of Article 10(3) of Decision 2011/278, it should be noted that, in so far as the prohibition on double counting of emissions and of double allocation of allowances is respected, a heat benchmark sub-installation may be allocated extra allowances if the conditions for application of that provision are fulfilled.

104 However, the written observation submitted in this case by the German Government and the explanations of the Swedish Environmental Protection Agency, as reproduced in the order for reference, indicate that the hot metal benchmark includes emissions from the combustion of waste gases in so far as they exceed the emissions that result from the combustion of natural gas.

105 In this regard, it appears from the document entitled ‘Guidance Document No 8 on the harmonised free allocation methodology for the EU-ETS post 2012, Waste gases and process emissions sub-installation’, published on the Commission website, as in the case of waste gases generated within a product benchmark sub-installation, that that benchmark includes the allocation of allowances for emissions related to the production of waste gases and their safety flaring. According to the same document, for the purpose of allocating emission allowances related to the production of waste gases, emissions exceeding those generated during the combustion of natural gas are taken into account.

106 In so far as the hot metal benchmark therefore in fact takes account of the emissions related to the production of waste gases, it is, in the present case, contrary to the prohibition on double counting of emissions and of double allocation of allowances to allocate, on the basis of Article 10(3) of Decision 2011/278, extra allowances for measurable heat exported to private households on the grounds that the amount of allowances determined based on the heat benchmark is lower than the median annual historical emissions related to the production of that heat.

107 In the light of all the foregoing considerations, the answer to the eighth question is that Article 10a(1) and (4) of Directive 2003/87 and Article 10(3) of Decision 2011/278 must be interpreted as permitting the non-allocation of additional free allowances for emissions related to the production of measurable heat by burning waste gases generated by a hot metal benchmark installation, when the amount of allowances determined based on the heat benchmark is lower than the median annual historical emissions related to the production of that heat.

The ninth question

108 As a preliminary point, it should be noted that the ninth question has the same factual background as the eighth question, as described in paragraphs 94 and 95 above.

109 Furthermore, it was found, in paragraph 88 above, that Article 7(1) of Decision 2011/278 provides for the obligation on Member States to collect, for installations eligible for the free allocation of allowances under Article 10a of Directive 2003/87, ‘all relevant information and data regarding each parameter listed in Annex IV’ to that decision. Those parameters include, in particular, the ‘measurable heat exported’ and the ‘total greenhouse gas emissions’. Under Article 7(9) of Decision 2011/278, those data are to be made available to the Commission upon the latter’s request.

110 Thus, by its ninth question, the referring court asks, in essence, whether Article 7 of, and Annex IV to, that decision must be interpreted as not precluding a Member State, when collecting the data covered by those provisions, from adjusting the figures obtained by the Member State so that the greenhouse gas emissions attributable to the combustion of waste gases by a heat benchmark sub-installation are equivalent to those from the combustion of natural gas.

111 As has been found, in paragraph 90 above, when collecting the data covered by Article 7 of, and Annex IV to, Decision 2011/278, Member States are obliged to ensure, in accordance with Article 7(7) of Decision 2011/278, ‘that there are no overlaps between sub-installations and no double counting’. As a result, in case of the double counting of emissions, the competent authorities are entitled to request that the data submitted to them by the operators be rectified.

112 In this regard, as has been found at paragraph 105 above, it appears from the document entitled ‘Guidance Document No 8 on the harmonized free allocation methodology for the EU-ETS post 2012, Waste gases and process emissions sub-installation’, as in the case of waste gases generated within a product benchmark sub-installation, that that benchmark includes, inter alia, the allocation of allowances for emissions related to the production of waste gases and that, for the purpose of allocating those emission allowances, emissions exceeding those generated during the combustion of natural gas are taken into account.

113 In the light of all the foregoing considerations, the answer to the ninth question is that Article 7 of, and Annex IV to, Decision 2011/278 must be interpreted as not precluding a Member State, when collecting the data covered by those provisions, from adjusting the figures obtained by the Member State so that the greenhouse gas emissions attributable to the combustion of waste gases by a heat benchmark sub-installation are equivalent to those from the combustion of natural gas, in so far as a product benchmark takes account of emissions linked to the production of waste gases.

On the 14th to 16th questions

114 By its 14th to 16th questions, the referring court asks, in essence, whether Article 3(c) of Decision 2011/278 must be interpreted as meaning that the notion of ‘heat benchmark sub-installation’ includes the activity of exporting the measurable heat from an installation subject to the EU emissions trading system to a steam network.

115 According to the order for reference, those questions concern the case of a cogeneration installation which supplies a steam distribution network. Three consumers, including a refinery which consumes about 90% of the steam delivered by the network, are connected to that network. The Swedish Environmental Protection Agency found that that network is in reality part of the refinery and cannot be regarded as a heat distributor. Therefore, that agency has, pursuant to Article 3(c) of Decision 2011/278, refused to allocate allowances to the cogeneration installation.

116 In that regard, it has been found, in paragraph 64 above, that Article 3(c) of Decision 2011/278 defines heat benchmark sub-installations as inputs, outputs and corresponding emissions not covered by a product benchmark sub-installation relating to the production, the import from an installation or other entity covered by the Union scheme of measurable heat. That heat must, inter alia, be consumed for the production of products or exported to an installation or other entity not covered by the Union scheme with the exception of the export for the production of electricity.

117 It is clear from this definition that an installation which exports the heat which it produces can be allocated allowances for that heat when it exports the heat ‘to an installation or other entity not covered by the Union scheme’. However, it cannot claim an allowance allocation for this heat when it transfers the heat to another installation subject to the emissions trading scheme.

118 It follows from this that a heat distributor which does not consume the heat which it imports but distributes it to other installations or entities, whether or not they are subject to emissions trading scheme, must be regarded as an ‘installation or other entity not covered by the Union scheme’ within the meaning of Article 3(c) of Decision 2011/278.

119 However, when a distribution network is, in fact, an integral part of an installation for the purposes of Article 3(e) of Directive 2003/87 which is subject to the emissions trading scheme, that network cannot be regarded as an ‘installation or other entity not covered by the Union scheme’ within the meaning of Article 3(c) of Decision 2011/278. Thus, where a producer of heat transmits heat to such a network, it provides the heat to the installation subject to the emissions trading scheme.

120 The same is true where there is a heating supply contract between the producer and consumer of that heat since, in such a case, that heat is not delivered to an ‘installation or other entity not covered by the Union scheme’.

121 It is for the referring court to assess, in the light of the foregoing considerations, the facts of the main proceedings to determine whether the cogeneration installation at issue exports heat to an ‘installation or other entity not covered by the Union scheme’ within the meaning of Article 3(c) of Decision 2011/278. The circumstances listed in its 15th question are irrelevant in that regard.

122 In the light of all the foregoing considerations, the answer to the 14th to 16th questions is that Article 3(c) of Decision 2011/278 must be interpreted as meaning that the concept of ‘heat benchmark sub-installation’ includes the activity of exporting the measurable heat from an installation subject to the emissions trading system to a steam network when the latter network can be qualified as an ‘installation or other entity not covered by the Union scheme’.

Costs

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

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

1. **Examination of the 1st, 2nd and 13th questions has revealed no factor of such a kind as to affect the validity 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.**

2. **Examination of the fifth question referred has revealed no factor of such a kind as to affect the validity of Annex I to Decision 2011/278.**

3. **Article 4 of, and Annex II to, 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 are invalid.**

4. **The temporal effects of the declaration of invalidity of Article 4 of, and Annex II to, Decision 2013/448 are limited so that, first, that declaration does not produce effects until 10 months**

following the date of delivery of the judgment in *Borealis Polyolefine and Others* (C-191/14, C-192/14, C-295/14, C-389/14 and C-391/14 to C-393/14, EU:C:2016:311), so as to enable the European Commission to adopt the necessary measures and, second, measures adopted during that period on the basis of the invalidated provisions cannot be called into question.

5. **Article 10a of Directive 2003/87/EC of the European Parliament and of the Council of 13 October 2003 establishing a scheme for greenhouse gas emission allowance trading within the Community and amending Council Directive 96/61/EC as amended by Directive 2009/29/EC of the European Parliament and of the Council of 23 April 2009, and Article 10(1) to (3) and (8) of Decision 2011/278 must be interpreted as permitting, in order to avoid a double allocation, non-allocation of allowances to a heat benchmark sub-installation when it exports, to private households, heat which it has recovered from a fuel benchmark sub-installation.**

6. **Article 10(8) of Decision 2011/278 must be interpreted as precluding free greenhouse gas emission allowances being allocated to an operator for the consumption, in a heat benchmark sub-installation, of heat taken into account in connection with a fuel benchmark sub-installation.**

7. **Article 7 of, and Annex IV to, Decision 2011/278 must be interpreted as allowing a Member State, when collecting the data covered by those provisions, not to take into account all the emissions related to the heat production exported by a heat benchmark sub-installation to private households in order to avoid double counting.**

8. **Article 10a(1) and (4) of Directive 2003/87, as amended by Directive 2009/29, and Article 10(3) of Decision 2011/278 must be interpreted as permitting the non-allocation of additional free greenhouse gas emission allowances related to the production of measurable heat by burning waste gases generated by a hot metal benchmark installation, when the amount of greenhouse gas emission allowances determined based on the heat benchmark is lower than the median annual historical emissions related to the production of that heat.**

9. **Article 7 of, and Annex IV to, Decision 2011/278 must be interpreted as not precluding a Member State, when collecting the data covered by those provisions, from adjusting the figures obtained by the Member State so that the greenhouse gas emissions attributable to the combustion of waste gases by a heat benchmark sub-installation are equivalent to those from the combustion of natural gas, in so far as a product benchmark takes account of emissions linked to the production of waste gases.**

10. **Article 3(c), of Decision 2011/278 must be interpreted as meaning that the concept of 'heat benchmark sub-installation' includes the activity of exporting the measurable heat from an installation subject to the greenhouse gas emissions trading system to a steam network when the latter network can be qualified as an 'installation or other entity not covered by the Union scheme'.**

[Signatures]

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* Language of the case: Swedish.