JUDGMENT OF THE COURT (Fifth Chamber)

20 June 2019 (*)

(Reference for a preliminary ruling — Environment — Directive 2003/87/EC — Scheme for greenhouse gas emission allowance trading — Natural gas processing installation — Sulphur recovery — ‘Claus process’ — Production of electricity in a secondary facility — Production of heat — Emission of inherent carbon dioxide (CO2) — Article 2(1) — Scope — Annex I — Activity of ‘combustion of fuels’ — Article 3(u) — Concept of ‘electricity generator’ — Article 10a(3) and (4) — Transitional arrangements for the harmonised free allocation of emission allowances — Decision 2011/278/EU — Scope — Article 3(c) — Concept of ‘heat benchmark sub-installation’)

In Case C-682/17,

REQUEST for a preliminary ruling under Article 267 TFEU from the Verwaltungsgericht Berlin (Administrative Court, Berlin, Germany), made by decision of 28 November 2017, received at the Court on 6 December 2017, in the proceedings

**ExxonMobil Production Deutschland GmbH**

v

**Bundesrepublik Deutschland,**

THE COURT (Fifth Chamber),

composed of E. Regan (Rapporteur), President of the Chamber, K. Lenaerts, President of the Court, acting as a Judge of the Fifth Chamber, C. Lycourgos, E. Juhász and I. Jarukaitis, Judges,

Advocate General: H. Saugmandsgaard Øe,

Registrar: D. Dittert, Head of Unit,

having regard to the written procedure and further to the hearing on 14 November 2018,

after considering the observations submitted on behalf of:

– ExxonMobil Production Deutschland GmbH, by S. Altenschmidt, Rechtsanwalt,

– Bundesrepublik Deutschland, by M. Fleckner, acting as Agent,

– the German Government, by T. Henze and J. Möller, acting as Agents,

– the European Commission, by A.C. Becker and J.-F. Brakeland, acting as Agents,

after hearing the Opinion of the Advocate General at the sitting on 28 February 2019,

gives the following

## Judgment

1 This request for a preliminary ruling concerns the interpretation of Article 3(u) and Article 10a of, and Annex I to, Directive 2003/87/EC of the European Parliament and of the Council of 13 October 2003 establishing a scheme for greenhouse gas emission allowance trading within the Community and amending Council Directive 96/61/EC (OJ 2003 L 275, p. 32), as amended by Directive 2009/29/EC of the European Parliament and of the Council of 23 April 2009 (OJ 2009 L 140, p. 63) ('Directive 2003/87'), and of Article 3(c) and (h) 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 (OJ 2011 L 130, p. 1).

2 The request has been made in proceedings between ExxonMobil Production Deutschland GmbH ('ExxonMobil') and Bundesrepublik Deutschland (the Federal Republic of Germany) concerning an application for the allocation of greenhouse gas emission allowances ('emission allowances') free of charge to a natural gas processing installation which carries out, inter alia, sulphur recovery, in the course of which, by combustion of fuels, it generates electricity and heat, releasing carbon dioxide ($CO^2$) into the atmosphere.

## Legal context

### *EU law*

Directive 2003/87

3 Recital 8 of Directive 2003/87 is worded as follows:

'Member States should have regard when allocating allowances to the potential for industrial process activities to reduce emissions.'

4 Article 1 of Directive 2003/87, headed 'Subject matter', states:

'This Directive establishes a scheme for greenhouse gas emission allowance trading within the Community … in order to promote reductions of greenhouse gas emissions in a cost-effective and economically efficient manner.

…'

5 Article 2 of Directive 2003/87, headed 'Scope', provides in paragraph 1:

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

6 Article 3 of Directive 2003/87, headed 'Definitions', states:

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

…

(b) "emissions" means the release of greenhouse gases into the atmosphere from sources in an installation …

…

(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”.’

7 Article 10 of Directive 2003/87, headed ‘Auctioning of allowances’, provides in paragraph 1:

‘From 2013 onwards, Member States shall auction all allowances which are not allocated free of charge in accordance with Article 10a and 10c. ...’

8 Article 10a of Directive 2003/87, headed ‘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 …

…

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.

…

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 $CO^2$, to pipelines for transport of $CO^2$ or to $CO^2$ 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 [of the European Parliament and of the Council of 11 February 2004 on the promotion of cogeneration based on a useful heat demand in the internal energy market and amending Directive 92/42/EEC (OJ 2004 L 52, p. 50)], 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; 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.

…

7. ...

No free allocation shall be made in respect of any electricity production by new entrants.

…

8. Up to 300 million allowances in the new entrants' reserve shall be available until 31 December 2015 to help stimulate the construction and operation of up to 12 commercial demonstration projects that aim at the environmentally safe capture and geological storage (CCS) of $CO^2$ as well as demonstration projects of innovative renewable energy technologies, in the territory of the Union.

The allowances shall be made available for support for demonstration projects that provide for the development, in geographically balanced locations, of a wide range of CCS and innovative renewable energy technologies that are not yet commercially viable. Their award shall be dependent upon the verified avoidance of $CO^2$ emissions.

…

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.

12. Subject to Article 10b, in 2013 and in each subsequent year up to 2020, installations in sectors or subsectors which are exposed to a significant risk of carbon leakage shall be allocated, pursuant to paragraph 1, allowances free of charge at 100% of the quantity determined in accordance with the measures referred to in paragraph 1.

…

14. In order to determine the sectors or subsectors referred to in paragraph 12, the Commission shall assess, at Community level, the extent to which it is possible for the sector or subsector concerned, at the relevant level of disaggregation, to pass on the direct cost of the required allowances and the indirect costs from higher electricity prices resulting from the implementation of this Directive into product prices without significant loss of market share to less carbon efficient installations outside the Community. …

…'

9 Article 10c of Directive 2003/87 grants Member States the option, by means of an application submitted to the Commission, of issuing free emission allowances for the modernisation of electricity generation.

10 Annex I to Directive 2003/87 contains, in accordance with its heading, a table setting out the categories of activities to which the directive applies. Those activities include the 'combustion of fuels in installations with a total rated thermal input exceeding 20 [megawatts (MW)] (except in installations for the incineration of hazardous or municipal waste)'.

11 Annex II to Directive 2003/87, headed 'Greenhouse gases referred to in Articles 3 and 30', refers, inter alia, to $CO^2$.

Directive 2009/29

12 Recitals 15 and 19 of Directive 2009/29 are worded as follows:

'(15) The additional effort to be made by the Community economy requires, inter alia, that the revised Community scheme operate with the highest possible degree of economic efficiency and on the basis

of fully harmonised conditions of allocation within the Community. Auctioning should therefore be the basic principle for allocation, as it is the simplest, and generally considered to be the most economically efficient, system. This should also eliminate windfall profits and put new entrants and economies growing faster than average on the same competitive footing as existing installations.

…

(19) Consequently, full auctioning should be the rule from 2013 onwards for the power sector, taking into account its ability to pass on the increased cost of $CO^2$, and no free allocation should be given for the capture and storage of $CO^2$ as the incentive for this arises from allowances not being required to be surrendered in respect of emissions which are stored. In order to avoid distortions of competition, electricity generators may receive free allowances for district heating and cooling and for heating and cooling produced through high efficiency cogeneration as defined by Directive [2004/8] where such heat produced by installations in other sectors would be given free allocations.'

Decision 2011/278

13 Recital 31 of Decision 2011/278 states:

'Given that full auctioning should be the rule from 2013 onwards for the power sector, taking into account its ability to pass on the increased cost of [$CO^2$], and that no free allocation should be made in respect of any electricity production, except for transitional free allocation for the modernisation of electricity generation and electricity produced from waste gases, this Decision should not cover the free allocation of emission allowances related to the production or consumption of electricity. ...'

14 Article 3 of Decision 2011/278 provides:

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

…

(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;

…

(h) "process emissions sub-installation" … [$CO^2$] emissions, which occur outside the system boundaries of a product benchmark listed in Annex I, as a result of any of the following activities …:

…

(v) the use of carbon containing additives or raw materials for a primary purpose other than the generation of heat;

…'

15 Article 6 of Decision 2011/278, headed 'Division into sub-installations', 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] 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.

…’

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

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

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

…

(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;

…’

Regulation No 601/2012

17 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) defines ‘inherent $CO^2$’, in Article 3(40), as ‘$CO^2$ which is part of a fuel’.

18 Article 48(1) of Regulation No 601/2012 provides:

‘Inherent $CO^2$ which is transferred into an installation, including that contained in natural gas or a waste gas including blast furnace gas or coke oven gas, shall be included in the emission factor for that fuel.’

*German law*

19 Paragraph 9 of the Treibhausgas-Emissionshandelsgesetz (Law on greenhouse gas emissions trading) of 21 July 2011 (BGBl. 2011 I, p. 1475; ‘the TEHG’) is worded as follows:

‘(1) Installation operators shall receive an allocation of free allowances in accordance with the principles laid down in Article 10a … of Directive [2003/87] … in the version in force at the relevant time and in … Decision [2011/278].

…

(6) The final amount of allowances allocated to the installation shall be equal to the product of the preliminary amount of allowances allocated to the installation calculated pursuant to paragraphs 1 to 5 and the cross-sectoral correction factor set by the European Commission in accordance with Article 15(3) of the uniform EU allocation rules. When allocating allowances in respect of the heat produced by electricity generators, the linear factor provided for in Article 10a(4) of Directive [2003/87] shall replace the correction factor referred to in the first sentence, with the calculation being based on the preliminary annual number of allowances to be allocated free of charge to the electricity generator in question for the year 2013.'

20 Part 2 of Annex 1 to the TEHG, headed 'Activities', lists, in point 1, among the installations whose emissions fall within the scope of that law, 'combustion units intended to burn fuel with a total rated thermal input equal to or exceeding 20 MW in an installation, unless covered by one of the following points'. Also, Part 2 of that annex sets out, in points 2 to 4, various types of 'installations for the production of electricity, steam, hot water, process heat or heated waste gas' whose emissions also fall within the scope of the TEHG.

21 Paragraph 2(21) of the Verordnung über die Zuteilung von Treibhausgas-Emissionsberechtigungen in der Handelsperiode 2013 bis 2020 (Regulation on the allocation of greenhouse gas emission allowances in the 2013 to 2020 trading period) of 26 September 2011 (BGBl. 2011 I, p. 1921) ('the ZuV 2020') defines 'electricity generator' as any 'installation which, after 31 December 2004, has produced and sold electricity to third parties and in which solely one of the activities listed in points 1 to 4 of Part 2 of Annex 1 to [the TEHG] is carried out'.

22 Paragraph 2(29) and (30) of the ZuV 2020 defines the terms 'process emissions sub-installation' and 'heat benchmark sub-installation' in terms similar to those of Article 3(h) and (c) of Decision 2011/278. Paragraph 2(29)(b)(ee) of the ZuV 2020 thus corresponds to the wording of Article 3(h)(v) of Decision 2011/278.

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

23 Until the end of 2013 ExxonMobil operated a natural gas processing installation in Steyerberg (Germany) ('the installation at issue'). The installation consisted of natural gas desulphurisation and dehydration facilities, sulphur recovery facilities, called 'Claus-process' facilities, waste gas purification facilities and ancillary facilities. The ancillary facilities included a steam boiler, a gas engine facility, emergency flaring facilities and a condensing power station.

24 That power station was connected to the public electricity network, with small amounts of electricity being continuously released into the network in order to ensure continuity of electricity supply for the installation in the event of an outage of the Claus-process facilities, which would have resulted in the loss of quantities of steam. It is apparent from the electricity balance report showing data relating to the production, import, export and consumption of electricity at the installation at issue for 2005 to 2010 that in some of those years the installation consumed more electricity than it produced.

25 By decision of 24 February 2014, the Deutsche Emissionshandelsstelle (German Emissions Trading Authority; 'the DEHSt') allocated to ExxonMobil free of charge 1 179 523 emission allowances for the trading period running from 2013 to 2020. The allocation was based, in part, on the application of the heat benchmark and, in part, on the application of the fuel benchmark. The existence of a risk of carbon leakage in the sector concerned was also taken into account in the calculation of that allocation. On the other hand, the DEHSt refused to allocate to ExxonMobil the further free emission allowances which the latter applied for in respect of process emissions. By decision of the same day, the DEHSt revoked its allocation decision with effect from 1 January 2014 on the ground that ExxonMobil had ceased operating from that date. That revocation is not challenged.

26 By decision of 12 February 2016, the DEHSt dismissed the objection lodged by ExxonMobil concerning the refusal of its application for the allocation of further free emission allowances in respect of process emissions for 2013.

27 According to the grounds set out by the DEHSt in support of the decision of 12 February 2016, the application for an allocation of allowances in respect of process emissions concerned the emission of the $CO^2$ naturally present in natural gas — that is to say 'inherent $CO^2$' within the meaning of Article 3(40) of Regulation No 601/2012 — which took place at the end of the process in the Claus-process facilities ('the Claus process'). The DEHSt stated that the Claus process consists of an exothermic chemical reaction by which hydrogen sulphide ($H^2S$) is converted into elemental sulphur. The heat produced during that reaction is captured by recovery boilers before being used at the installation at issue. The use made of that heat gave rise to the free allocation of emission allowances by applying the heat benchmark. At the end of the Claus process, the inherent $CO^2$ is released into the atmosphere through a chimney. The Claus process does not produce $CO^2$ other than that naturally present in the natural gas.

28 The DEHSt took the view that, in such circumstances, free emission allowances cannot be allocated in respect of a 'process emissions sub-installation' within the meaning of Paragraph 2(29)(b)(ee) of the ZuV 2020, a provision which transposes Article 3(h)(v) of Decision 2011/78 into German law. In the view of the DEHSt, the condition, laid down in those provisions, that the emissions must result from the use of a raw material containing carbon is not met. The emissions of inherent $CO^2$ do not result from the Claus process since the $CO^2$ does not play a part in, and is all the less necessary for, the chemical reaction characterising that process. According to the DEHSt, only the $H^2S$ constitutes the raw material used to produce the sulphur and the $CO^2$ is to be regarded as only an associated gas of the $H^2S$.

29 On 10 March 2016 ExxonMobil brought an action challenging the DEHSt's decision of 12 February 2016 before the referring court, the Verwaltungsgericht Berlin (Administrative Court, Berlin, Germany).

30 By that action, ExxonMobil claims entitlement to the free allocation of emission allowances for 2013 in respect of a process emissions sub-installation, on the ground that the $CO^2$ emissions generated in connection with sulphur production resulted from the use of a raw material containing carbon in the form of $CO^2$. According to ExxonMobil, the raw material used for sulphur production was not the $H^2S$ viewed in isolation, but the sour gas, which contains, apart from $H^2S$, methane ($CH^4$), $CO^2$ and water vapour. If that sour gas had not been used in the Claus process, the inherent $CO^2$, naturally present in the natural gas, would not have been released into the atmosphere. Moreover, the extraction of $CO^2$ from the sour gas by means of that process was necessary for the recovery of pure sulphur from that gas. It is immaterial that the $CO^2$ was present from the outset in the raw material and played no part in the chemical reaction. Nor could the $CO^2$ emissions have been avoided by switching fuel or by adopting more efficient techniques.

31 ExxonMobil further submits that the fact that emission allowances have been allocated free of charge through application of the heat benchmark in respect of measurable heat produced at the installation at issue, as a side effect of the chemical reaction characterising the Claus process, does not preclude the additional allocation applied for. Although the Court held, in the judgment of 8 September 2016, *Borealis and Others* (C-180/15, EU:C:2016:647), that allocation on the basis of a product benchmark takes precedence over the three fallback approaches constituted by allocation on the basis of the heat benchmark, the fuel benchmark and process emissions, no hierarchy exists between those three approaches.

32 The DEHSt submitted for the first time before the referring court that sulphur production is not an activity subject to compulsory emission allowance trading and that the installation at issue should be classified as an 'electricity generator' since, first, electricity was produced there and sold to third parties after 31 December 2004 and, second, only the activity of 'combustion of fuels', referred to in points 1 to 4 of

Part 2 of Annex 1 to the TEHG, was carried out there. According to the DEHSt, Exxonmobil applied for and obtained an emission allowance allocation intended for electricity generators, which was reduced by applying the linear factor for electricity generators, in accordance with Paragraph 9(6) of the TEHG. However, allocation of emission allowances to electricity generators free of charge was permissible only if the conditions laid down in Article 10a of Directive 2003/87 were complied with.

33 In the view of the DEHSt, a product, such as sulphur, which is not subject to compulsory emission allowance trading cannot be taken into account in that regard, as otherwise the scope of the trading scheme would be broadened unlawfully. An allocation on the basis of process emissions, under Paragraph 2(29)(b) of the ZuV 2020, would be possible only if the allocation rules in respect of heat also provided for an allocation in respect of process emissions. However, that is not the case here. It is apparent, furthermore, from ExxonMobil's allocation application that the chemical reaction resulting from the Claus process does not generate $CO^2$ emissions. Thus, that process does not use a raw material containing carbon, as carbon plays no part in either the processes carried out or the reaction.

34 As to the remainder, the DEHSt disputes ExxonMobil's contention that the emissions at issue were unavoidable. It submits, furthermore, that a hierarchy exists between the allocation factors, the heat benchmark being followed by the fuel benchmark and then by process emissions.

35 The referring court is uncertain, first of all, whether the installation at issue is to be classified as an 'electricity generator', within the meaning of Article 3(u) of Directive 2003/87. If that were the case, the allocation of free emission allowances that was granted to ExxonMobil on the basis of the heat and fuel benchmarks would in principle be unlawful. That is so because electricity generators can obtain free emission allowances only in the cases envisaged in the third subparagraph of Article 10a(1) and Article 10a(3) and (4) of Directive 2003/87, relating, in essence, to the combustion of waste gases, district heating and high efficiency cogeneration. The Claus process does not fall within any of those cases.

36 The referring court takes the view that the term 'electricity generator' should be interpreted restrictively, because the wording of Article 3(u) of Directive 2003/87 has a scope wider than that corresponding to the directive's spirit and purpose. In the present instance, it is, moreover, doubtful whether the electricity produced in the installation at issue is intended 'for sale to third parties', within the meaning of that provision. That electricity is mainly intended to be consumed in the installation at issue and the latter is connected to the public network in order to ensure the supply of electricity in the event of an outage of the installation.

37 According to the referring court, if the term 'electricity generator' were interpreted broadly, that would result in an installation such as the installation at issue, which would be classified as an 'electricity generator', being treated differently from an installation also producing electricity but in which, in addition to the activity of 'combustion of fuels' which is referred to in points 1 to 4 of Part 2 of Annex 1 to the TEHG, another activity subject to compulsory emission allowance trading is carried out, as the latter installation would not be classified as an 'electricity generator'. Such a difference in treatment would be inconsistent, as neither of those two types of installation falls within the 'classical power sector' as referred to in recital 31 of Decision 2011/278.

38 The referring court takes the view, therefore, that the term 'electricity generator' should be limited solely to installations that produce electricity and sell it to third parties and also carry out exclusively the activity of 'combustion of fuels', to the exclusion of any other activity, whether or not it is included in Annex 1 to the TEHG.

39 Next, if that interpretation cannot be adopted, the referring court raises the question whether it is possible for the restrictions arising from Directive 2003/87 in respect of the free allocation of emission allowances to electricity generators to be overcome on the basis of the definition of the term 'heat benchmark sub-installation' in Article 3(c) of Decision 2011/278, an act which does not contain such restrictions.

40 Finally, the referring court seeks to ascertain whether the emissions resulting from the Claus process may give rise to a free allocation of emission allowances in respect of a 'process emissions sub-installation', within the meaning of Article 3(h) of Decision 2011/278. As the heat generated by that process can also be the subject of an allocation through application of the heat benchmark, it wonders whether one of those two types of allocation takes priority over the other.

41 In those circumstances, the Verwaltungsgericht Berlin (Administrative Court, Berlin) decided to stay the proceedings and refer the following questions to the Court of Justice for a preliminary ruling:

'(1) Is an installation which produces a product the production of which is not one of the activities referred to in Annex I to [Directive 2003/87] (such as, in this case, the production of sulphur), and which, at the same time, carries on the activity of "combustion of fuels in installations with a total rated thermal input exceeding 20 MW" that is subject to the emission trading scheme pursuant to Annex I to Directive [2003/87], an electricity generator within the meaning of Article 3(u) of Directive [2003/87], in the case where a secondary facility within the same installation also produces electricity for that installation and a (small) proportion of that electricity is released for consideration to the public electricity network?

(2) If the first question is answered in the affirmative:

If an installation as described in Question 1 is an electricity generator within the meaning of Article 3(u) of Directive [2003/87], is that installation eligible for an allocation for heat under [Decision 2011/278] even in the case where the heat satisfies the conditions laid down in Article 3(c) of Decision [2011/278] but does not fall within any of the categories referred to in Article 10a(1), third subparagraph, and Article 10a(3) and (4) of Directive [2003/87] — heat from the combustion of waste gases for the production of electricity, district heating and high efficiency cogeneration?

(3) If, on the basis of the answers to the first two questions, the heat produced in the installation at issue is eligible for an allocation:

Does the $CO^2$ released into the atmosphere as part of the conditioning of natural gas (in the form of sour gas) in the "Claus process", whereby the $CO^2$ inherent in natural gas is separated from the gas mixture, constitute an emission which, for the purposes of the first sentence of Article 3(h) of [Decision 2011/278], occurs as a result of the process referred to in Article 3(h)(v)?

(a) For the purposes of the first sentence of Article 3(h) of [Decision 2011/278], can $CO^2$ emissions occur "as a result of" a process in which the $CO^2$ inherent in the raw material is physically separated from the gas mixture and released into the atmosphere, even though that process as such does not give rise to additional $CO^2$, or does that provision make it mandatory for the $CO^2$ released into the atmosphere to occur for the first time as a result of that process?

(b) Is a carbon-containing raw material "used" within the meaning of Article 3(h)(v) of [Decision 2011/278] where, in the "Claus process", the naturally-occurring gas is used to produce sulphur and, in the course of that procedure, the $CO^2$ inherent in the natural gas is released into the atmosphere, even though the $CO^2$ inherent in the natural gas is not part of the chemical reaction taking place in that process, or does the term "use" make it mandatory for the carbon to be part of, or indeed essential to, the chemical reaction taking place?

(4) If Question 3 is answered in the affirmative, on the basis of which benchmark is the allocation of free emission allowances to be carried out in the case where an installation subject to the emission trading scheme satisfies both the defining conditions of a heat benchmark sub-installation and the defining conditions of a process emissions sub-installation? Does entitlement to an allocation on the basis of the heat benchmark take priority over entitlement to an allocation for process emissions or

does entitlement to an allocation for process emissions take precedence over the heat benchmark and the fuel benchmark because the latter allocation is more specific to the case in question?'

## Consideration of the questions referred

### *Preliminary observations*

42 By its questions, the referring court seeks, in essence, to establish whether and, if so, to what extent, an installation, such as the installation at issue, which engages in natural gas desulphurisation and sulphur recovery under the Claus process, is entitled to be allocated emission allowances free of charge for the $CO^2$ emitted in the course of those activities in respect of the trading period running from 2013 to 2020.

43 Those questions are thus founded on the premiss, established by that court in the order for reference, that such an installation is covered by the emission allowance trading scheme laid down by Directive 2003/87.

44 At the hearing before the Court, ExxonMobil and the Commission called that premiss into question, contending that an installation such as the installation at issue is not covered by that trading scheme since the $CO^2$ emitted by it is inherent in nature, that greenhouse gas already being present naturally in the raw material — here, in the sour gas — processed by the installation.

45 If that were the case, as the Advocate General has observed in point 36 of his Opinion, the answer to the questions referred would be of no relevance for resolving the dispute in the main proceedings and, therefore, this request for a preliminary ruling would be hypothetical. Only installations whose activities fall, in accordance with Article 2 of Directive 2003/87, within the scope of the emission allowance trading scheme are eligible for the allocation of such free allowances (judgment of 28 February 2018, *Trinseo Deutschland*, C-577/16, EU:C:2018:127, paragraph 68).

46 It should accordingly be examined whether an installation such as the installation at issue in the main proceedings falls within the scope of Directive 2003/87 and, therefore, of the emission allowance trading scheme established by that directive.

47 In that regard, it should be recalled that, by virtue of Article 2(1) of Directive 2003/87, which defines the latter's scope, the directive is to apply to 'emissions' of greenhouse gases — which are listed in Annex II thereto and include $CO^2$ — 'from the activities listed in Annex I' (see, to that effect, judgments of 28 July 2016, *Vattenfall Europe Generation*, C-457/15, EU:C:2016:613, paragraph 28; of 28 February 2018, *Trinseo Deutschland*, C-577/16, EU:C:2018:127, paragraphs 42, 45 and 46; and of 17 May 2018, *Evonik Degussa*, C-229/17, EU:C:2018:323, paragraph 31). Annex I includes, in particular, in respect of the emission of $CO^2$, the activity of combustion of fuels in an installation with a total rated thermal input exceeding 20 MW.

48 Under Article 3(b) of Directive 2003/87, 'emissions', for the purposes of the directive, involve the release, from sources in an installation, of a greenhouse gas into the atmosphere.

49 In the present instance, it is undisputed that an installation such as that at issue in the main proceedings carries out an activity of 'combustion of fuels in installations with a total rated thermal input exceeding 20 MW', within the meaning of Annex I to Directive 2003/87, as both the oxidation reaction generating the heat to which the $H^2S$ is exposed during the Claus process and the subsequent process, mentioned by the German Government in its written observations and at the hearing, of post-combustion of the gases leaving the Claus facilities, constitute such an activity in the light of Article 3(t) of that directive.

50 Furthermore, it is apparent from the information available to the Court, which has not been contested by any of the interested persons which submitted observations or were present at the hearing before the Court, that the activity of 'combustion of fuels' carried out by the installation at issue generates 'emissions', in

the present instance $CO^2$, within the meaning of Article 2(1) and Article 3(b) of Directive 2003/87, as that installation releases that greenhouse gas into the atmosphere from facilities in the installation.

51 It is true that, as ExxonMobil and the Commission have highlighted, the $CO^2$ thereby emitted by that activity of combustion of fuels is 'inherent $CO^2$', within the meaning of Article 3(40) of Regulation No 601/2012, since that greenhouse gas is present naturally in the composition of the sour gas processed by the installation at issue in the main proceedings.

52 However, such a circumstance is not capable of excluding such an installation from the scope of Directive 2003/87.

53 As is clear from paragraph 47 of the present judgment and as the Advocate General has observed in point 47 of his Opinion, according to Article 2(1) of Directive 2003/87, the wording of which is unambiguous in this regard, the directive is to apply to 'emissions from the activities listed in Annex I' thereto, without in any way requiring that the greenhouse gas emitted itself be produced in the course of those activities. Nor does Article 3(t) of the directive reduce the concept of 'combustion' solely to oxidation reactions which generate a greenhouse gas themselves.

54 This interpretation is borne out by the monitoring rules laid down by Regulation No 601/2012. Article 48(1) of that regulation expressly provides that inherent $CO^2$, as defined in Article 3(40) thereof, must, when it is contained in natural gas, be included in the emission factor for that fuel.

55 Such an interpretation is also consistent with the objective pursued by Directive 2003/87, which, as stated in Article 1 thereof, consists in promoting reductions of greenhouse gas emissions in a cost-effective and economically efficient manner (see, inter alia, judgments of 12 April 2018, *PPC Power*, C-302/17, EU:C:2018:245, paragraph 18, and of 17 May 2018, *Evonik Degussa*, C-229/17, EU:C:2018:323, paragraph 41).

56 As is apparent, inter alia, from recital 8 of Directive 2003/87, the achievement of that objective presupposes the inclusion in that scheme of activities which have some potential to reduce greenhouse gas emissions (judgment of 17 May 2018, *Evonik Degussa*, C-229/17, EU:C:2018:323, paragraph 42).

57 It is apparent from the oral exchanges at the hearing before the Court that, even though $CO^2$ is present in the composition of the sour gas, the activity of combustion of fuels carried out by an installation such as the installation at issue in the main proceedings, for the purpose of natural gas desulphurisation and sulphur recovery under the Claus process, has some potential to reduce $CO^2$ emissions since the $CO^2$ content of the sour gas is liable to vary according to the deposit. Contrary to ExxonMobil's submissions, it is irrelevant in that regard that the $CO^2$ content is not systematically foreseeable.

58 It follows that an installation such as that at issue in the main proceedings falls within the scope of Directive 2003/87 and, therefore, of the emission allowance trading scheme established by it, without it mattering whether or not the $CO^2$ from that installation's activity is present naturally in the raw material processed by it.

59 Accordingly, the referring court's questions should be answered.

***The first question***

60 By its first question, the referring court asks, in essence, whether Article 3(u) of Directive 2003/87 must be interpreted as meaning that an installation such as that at issue in the main proceedings, which produces, within the framework of its activity of 'combustion of fuels in installations with a total rated thermal input exceeding 20 MW', within the meaning of Annex I to that directive, electricity intended essentially to be used for its own needs, must be regarded as an 'electricity generator', within the meaning

of that provision, where that installation, first, carries out simultaneously an activity for producing a product which does not fall within that annex and, second, continuously feeds, for consideration, a minimal part of the electricity produced into the public electricity network, to which that installation must be permanently connected for technical reasons.

61 It is apparent from the order for reference that this question is asked in order to determine whether, in the present instance, the installation at issue in the main proceedings is entitled to be allocated free emission allowances in respect of the $CO^2$ emissions resulting from that activity of combustion of fuels, which is carried out for the purpose of natural gas desulphurisation and sulphur recovery under the Claus process.

62 In that regard, it should be recalled that Directive 2003/87 has the purpose of establishing an emission allowance trading scheme which seeks to reduce greenhouse gas emissions into the atmosphere to a level that prevents dangerous anthropogenic interference with the climate system and the ultimate objective of which is protection of the environment (see, inter alia, judgments of 8 March 2017, *ArcelorMittal Rodange et Schifflange*, C-321/15, EU:C:2017:179, paragraph 24; of 22 February 2018, *INEOS Köln*, C-572/16, EU:C:2018:100, paragraph 26; and of 28 February 2018, *Trinseo Deutschland*, C-577/16, EU:C:2018:127, paragraph 39).

63 There is an economic logic underlying the scheme that encourages a participant in the scheme to emit quantities of greenhouse gases that are less than the allowances originally allocated to it, in order to sell the surplus to another participant which has emitted more than its allowance (see, inter alia, judgments of 8 March 2017, *ArcelorMittal Rodange et Schifflange*, C-321/15, EU:C:2017:179, paragraph 22; of 22 February 2018, *INEOS Köln*, C-572/16, EU:C:2018:100, paragraph 27; and of 28 February 2018, *Trinseo Deutschland*, C-577/16, EU:C:2018:127, paragraph 40).

64 Directive 2003/87 thus aims to reduce, by 2020, the overall greenhouse gas emissions of the European Union by at least 20% in comparison with 1990 levels, in an economically efficient manner (judgments of 8 September 2016, *E.ON Kraftwerke*, C-461/15, EU:C:2016:648, paragraph 23; of 22 February 2018, *INEOS Köln*, C-572/16, EU:C:2018:100, paragraph 28; and of 28 February 2018, *Trinseo Deutschland*, C-577/16, EU:C:2018:127, paragraph 41).

65 To that end, Article 10a of Directive 2003/87 set up transitional arrangements which, in order to prevent undertakings from losing competitiveness as a result of the establishment of a scheme for emission allowance trading (see to that effect, inter alia, judgments of 26 February 2015, *ŠKO-Energo*, C-43/14, EU:C:2015:120, paragraph 28, and of 12 April 2018, *PPC Power*, C-302/17, EU:C:2018:245, paragraph 20), provide for the allocation to installations falling within certain sectors of activity of free emission allowances, the amount of which, in accordance with Article 10a(11), is decreased gradually over the period running from 2013 to 2020, with a view to reaching their complete abolition by 2027 (judgments of 8 September 2016, *E.ON Kraftwerke*, C-461/15, EU:C:2016:648, paragraph 24; of 26 October 2016, *Yara Suomi and Others*, C-506/14, EU:C:2016:799, paragraph 46; of 22 February 2018, *INEOS Köln*, C-572/16, EU:C:2018:100, paragraph 29; and of 28 February 2018, *Trinseo Deutschland*, C-577/16, EU:C:2018:127, paragraph 67).

66 As is apparent, in particular, from Article 10(1) of Directive 2003/87 and recital 15 of Directive 2009/29, the allocation of emission allowances, with a view to reducing greenhouse gas emissions, is therefore gradually required to be based exclusively on the principle of auctioning, which, according to the EU legislature, is generally considered to be the most economically efficient system.

67 By virtue of Article 10a(3) of Directive 2003/87, free emission allowances cannot be issued to ‘electricity generators’ unless the latter fulfil the conditions referred to in Article 10a(4) and (8) which respectively concern (i) the production of heating or cooling intended for district heating services or obtained by high efficiency cogeneration as defined by Directive 2004/8 and (ii) new entrants. Article 10a(3) of Directive 2003/87 applies, furthermore, without prejudice to the application of Article 10c, which permits Member States to issue free emission allowances for the modernisation of electricity generation.

68 Consequently, since 2013 the auctioning of allowances, as is clear from the intention of the EU legislature expressed in recitals 15 and 19 of Directive 2009/29, has been the rule for electricity generators (see, to that effect, judgments of 17 October 2013, *Iberdrola and Others*, C-566/11, C-567/11, C-580/11, C-591/11, C-620/11 and C-640/11, EU:C:2013:660, paragraph 40, and 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 82).

69 Accordingly, in order to determine to what extent an installation such as that at issue in the main proceedings is excluded from the right to be allocated free emission allowances under Article 10a(3) of Directive 2003/87, it should be examined whether it must be regarded as an 'electricity generator', within the meaning of that directive.

70 The concept of 'electricity generator', referred to in Article 10a(3) of Directive 2003/87, is defined in Article 3(u) of the directive.

71 In accordance with the Court's settled case-law, in interpreting a provision of EU law it is necessary to consider not only its wording but also its context and the objectives pursued by the rules of which it forms part (see, inter alia, judgment of 31 May 2018, *Länsförsäkringar Sak Försäkringsaktiebolag and Others*, C-542/16, EU:C:2018:369, paragraph 39).

72 It is apparent from Article 3(u) of Directive 2003/87 that an installation which, first, has produced electricity 'for sale to third parties' at any time from 1 January 2005 onwards and in which, second, none of the activities listed in Annex I to the directive is carried out other than the combustion of fuels with a total rated thermal input exceeding 20 MW must be classified as an 'electricity generator' (see, to that effect, judgments of 8 September 2016, *Borealis and Others*, C-180/15, EU:C:2016:647, paragraph 33, and of 26 October 2016, *Yara Suomi and Others*, C-506/14, EU:C:2016:799, paragraph 23).

73 It is undisputed that an installation such as the installation at issue in the main proceedings fulfils that second condition. As has already been pointed out in paragraph 49 of the present judgment, that installation carries out an activity of 'combustion of fuels', within the meaning of Annex I to Directive 2003/87.
Furthermore, as is clear from the very wording of the first question, it does not carry out another activity referred to in that annex. Neither sulphur production nor, moreover, the processing of natural gas are among the activities listed there.

74 As to the first condition laid down in Article 3(u) of Directive 2003/87, that is to say, the production of electricity 'for sale to third parties', it is also clear from the wording of the first question that the installation at issue in the main proceedings fulfils this condition too, as it continuously feeds into the public electricity network, for consideration, a part of the electricity that it produces for its own needs.

75 It is true that, in the present instance, only a small part of that electricity produced is sold to third parties, since feeding it into the public electricity network is justified on technical grounds, in order to ensure continuity of electricity supply for the installation at issue in the event of an outage of the Claus-process facilities.

76 However, it does not follow from the wording of Article 3(u) of Directive 2003/87 that, in order for an installation to be regarded as an 'electricity generator', the electricity which it produces should be used solely, or even mainly, to supply third parties.

77 In particular, that provision does not make the status of electricity generator conditional on any electricity production threshold; moreover, as the Advocate General has observed in point 58 of his Opinion, that status is accorded irrespective of any fluctuation over time in the ratio between the quantity of electricity sold and the quantity produced to meet the producer's own needs.

78 Consequently, even if the bulk of the electricity produced by an installation such as the installation at issue in the main proceedings is intended for its own needs, that installation must be regarded as also fulfilling the first condition set out in Article 3(u) of Directive 2003/87 where it has sold even a small part of its electricity production to third parties, by continuously feeding, for consideration, that part into the public electricity network.

79 It thus follows from the very wording of Article 3(u) of Directive 2003/87 that an installation such as the installation at issue in the main proceedings must be classified as an 'electricity generator', within the meaning of that provision, where the only activity carried out by it that falls within Annex I to Directive 2003/87 is that of 'combustion of fuels in installations with a total rated thermal input exceeding 20 MW' and it sells a part of its electricity production to third parties.

80 This interpretation is borne out by the objective pursued by Directive 2003/87 and by its general scheme.

81 It is admittedly true that, as ExxonMobil has pointed out in its written observations, the general prohibition, set out in Article 10a(3) of Directive 2003/87, preventing the Member States from allocating free emission allowances was established, as is apparent from recitals 15 and 19 of Directive 2009/29, in order to put an end to the possibility exploited by electricity generators until 2013 of making windfall profits by passing on, in the absence of sufficient competitive pressure, the value of the free emission allowances in the electricity price paid by consumers (see, to that effect, judgment of 17 October 2013, *Iberdrola and Others,* C-566/11, C-567/11, C-580/11, C-591/11, C-620/11 and C-640/11, EU:C:2013:660, paragraph 40).

82 However, it should, first of all, be borne in mind that, as is already apparent from paragraphs 65 and 66 of the present judgment, the free allocation of emission allowances which is provided for in Article 10a of Directive 2003/87 falls within the framework of a specific regime of transitional rules, which derogates from the principle that emission allowances must be allocated under the auctioning mechanism established in Article 10 of that directive (see, to that effect, judgment of 18 January 2018, *INEOS*, C-58/17, EU:C:2018:19, paragraph 36).

83 Since the rule laid down in Article 10a(3) of Directive 2003/87 results in emission allowances being allocated, in principle, to 'electricity generators', within the meaning of Article 3(u) of that directive, under such an auctioning mechanism, to the exclusion of any free emission allowance, it cannot be interpreted restrictively. That being so, the term 'electricity generator', which is in Article 3(u) of the directive, must be interpreted broadly.

84 Furthermore, it is to be noted that Article 10a(1), (3) and (5) of Directive 2003/87 lays down the division on which the directive's provisions are founded, consisting in a distinction between the installations falling within Article 10a(3), which include 'electricity generators' within the meaning of Article 3(u) of the directive, and other installations that generate greenhouse gas emissions, generally referred to as 'industrial installations' (see, to that effect, judgments 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 70, and of 28 July 2016, *Vattenfall Europe Generation*, C-457/15, EU:C:2016:613, paragraphs 40 et 41).

85 That distinction between installations that are covered by the concept of 'electricity generator', within the meaning of Article 3(u) of Directive 2003/87, and other installations that generate greenhouse gas emissions directly affects the calculation of the 'uniform cross-sectoral correction factor', provided for in Article 10a(5) of the directive, the application of which to the preliminary annual amount of free emission allowances that is calculated by the Member States determines the final annual amount of such allowances to be allocated by the Member States to the industrial installations eligible for them (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 71).

86 Under Article 10a(5) of Directive 2003/87, where the preliminary amount of emission allowances allocated free of charge to installations not covered by Article 10a(3) of that directive exceeds the industry

ceiling corresponding to the maximum annual amount of allowances that is referred to in Article 10a(5), the Member States must make a proportionate reduction of that preliminary amount by applying the 'uniform cross-sectoral correction factor' provided for in that provision, which corresponds to the ratio between the preliminary amount and the ceiling (see, to that effect, judgments 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, paragraphs 62 and 63, and of 22 February 2018, *INEOS Köln*, C-572/16, EU:C:2018:100, paragraph 37).

87 As is apparent from the express terms of Article 10a(5) of Directive 2003/87, emissions generated by electricity generators are not taken into account when calculating that factor, as those emissions are excluded from the maximum annual amount of allowances defined in that provision, which is limited to the emissions of 'installations which are not covered by [Article 10a(3)]' (see, to that effect, judgments 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, paragraphs 64, 68, 72, 74, 75 and 83, and of 26 October 2016, *Yara Suomi and Others*, C-506/14, EU:C:2016:799, paragraph 24, 26 and 32).

88 Accordingly, if the status of 'electricity generator', within the meaning of Article 3(u) of Directive 2003/87, were to depend on whether an installation's electricity sales fall within a main activity or an ancillary activity of the installation, the determination of the final amount of the free emission allowances to be allocated to the eligible installations would, in the absence of any threshold laid down by the EU legislature, be based on criteria the content of which would not be sufficiently clear and foreseeable and which, therefore, would be liable to undermine legal certainty, as they could well lead to the emission allowances allocated being challenged subsequently.

89 ExxonMobil submits, however, that this interpretation is contrary to the general principle of equal treatment, in that it results in an installation which, like the installation at issue in the main proceedings, carries out, as its only activity referred to in Annex I to Directive 2003/87, the activity of 'combustion of fuels in installations with a total rated thermal input exceeding 20 MW' being treated differently from an installation which simultaneously carries out that activity and another activity referred to in that annex.

90 In accordance with the Court's settled case-law, the principle of equal treatment, as a general principle of EU law, requires that comparable situations must not be treated differently and that different situations must not be treated in the same way unless such treatment is objectively justified (see, inter alia, judgments of 16 December 2008, *Arcelor Atlantique et Lorraine and Others*, C-127/07, EU:C:2008:728, paragraph 23, and of 29 March 2012, *Commission* v *Estonia*, C-505/09 P, EU:C:2012:179, paragraph 64).

91 However, installations producing electricity whose only activity referred to in Annex I to Directive 2003/87 is that of 'combustion of fuels in installations with a total rated thermal input exceeding 20 MW' are not in a situation that is comparable, in the light of the emission allowance trading scheme, to that of installations producing electricity which, in addition to that activity of combustion of fuels, carry out one or more other activities referred to in that annex.

92 As follows from paragraph 58 of the present judgment, an installation such as the installation at issue in the main proceedings falls within the scope of Directive 2003/87 only in respect of the $CO^2$ emissions resulting from such an activity of combustion of fuels. Therefore, it is subject to the emission allowance trading scheme only in respect of that activity, to the exclusion of other activities not falling within Annex I to the directive. On the other hand, an installation carrying out simultaneously an activity of combustion of fuels and one or more other activities referred to in Annex I is subject to that trading scheme in respect of all of its activities that produce $CO^2$ emissions. Accordingly, even though those two types of installation produce electricity, an installation of the second type, which falls within the trading scheme in respect of all its $CO^2$ emissions resulting from such activities, is entitled to obtain free allowances in respect of those emissions, unlike an installation of the first type which, since it is subject to the trading scheme only in respect of its $CO^2$ emissions resulting from the activity of combustion of fuels, does not qualify for such allowances.

93 Finally, contrary to ExxonMobil's contentions, such an interpretation of Article 3(u) of Directive 2003/87 is not incompatible with the inclusion, in point 1.4 of the annex to Commission Decision 2010/2/EU of 24 December 2009 determining, pursuant to Directive 2003/87, a list of sectors and subsectors which are deemed to be exposed to a significant risk of carbon leakage (OJ 2010 L 1, p. 10), of the extraction of natural gas in that list.

94 First, as is apparent from Article 10a(12) of Directive 2003/87, the inclusion of a sector or subsector in that list is not concerned in the slightest with derogation from Article 10a(3). Rather, such inclusion has the sole consequence that, for the trading period running from 2013 to 2020, installations in sectors or subsectors which are exposed to a significant risk of carbon leakage are to be allocated allowances free of charge representing 100% of the quantity determined in accordance with the measures referred to in Article 10a(1) (see, to that effect, judgment of 26 October 2016, *Yara Suomi and Others*, C-506/14, EU:C:2016:799, paragraph 47).

95 Second, it should be pointed out, as the Advocate General has done in point 83 of his Opinion, that the inclusion of a sector or subsector in that list means, as is apparent from Article 10a(14) of Directive 2003/87, that the inability to pass on the costs of the allowances in prices is demonstrated not, as ExxonMobil suggests, for each of the installations in the sector or subsector concerned, but following an overall assessment by the Commission of all the activities, at EU level, of the installations falling within it.

96 Consequently, the answer to the first question is that Article 3(u) of Directive 2003/87 must be interpreted as meaning that an installation, such as that at issue in the main proceedings, which produces, within the framework of its activity of 'combustion of fuels in installations with a total rated thermal input exceeding 20 MW', referred to in Annex I to that directive, electricity intended essentially to be used for its own needs, must be regarded as an 'electricity generator', within the meaning of that provision, where that installation, first, carries out simultaneously an activity for producing a product which does not fall within that annex and, second, continuously feeds, for consideration, even a small part of the electricity produced into the public electricity network, to which that installation must be permanently connected for technical reasons.

***The second question***

97 By its second question, the referring court asks, in essence, whether Article 3(c) of Decision 2011/278 must be interpreted as meaning that, in so far as an installation such as that at issue in the main proceedings must be regarded as an 'electricity generator', within the meaning of Article 3(u) of Directive 2003/87, it is entitled to be allocated free emission allowances in respect of the heat produced within the framework of its activity of 'combustion of fuels in installations with a total rated thermal input exceeding 20 MW', referred to in Annex I to that directive, where that heat is used for purposes other than the production of electricity.

98 First of all, it should be noted that this question results from an assessment made by the referring court of its own motion, since the parties to the main proceedings did not dispute the validity of the free emission allowances allocated to ExxonMobil in respect of the heat produced within the framework of its activity of combustion of fuels.

99 It would appear from the request for a preliminary ruling that the referring court may, under national law and in the context of that assessment, declare that all the free allowances allocated to ExxonMobil are unlawful.

100 That being so, and as is apparent from the order for reference, the second question is designed to determine whether, in the present instance, the installation at issue may obtain free emission allowances where its activity of combustion of fuels results in the production not only of electricity, but also and essentially of heat, by means of the chemical reaction characterising the Claus process — heat which is captured in that installation for the purpose of its activities of natural gas desulphurisation and sulphur recovery under that process.

101 In accordance with Article 10a(1) of Directive 2003/87, the Commission established, by Decision 2011/278, harmonised EU-wide rules for the free allocation of emission allowances. Those harmonised rules give concrete expression to the essential requirement that distortions of competition in the internal market be minimised (judgments of 22 June 2016, *DK Recycling und Roheisen* v *Commission*, C-540/14 P, EU:C:2016:469, paragraph 53; of 18 January 2018, *INEOS*, C-58/17, EU:C:2018:19, paragraph 26; and of 22 February 2018, *INEOS Köln*, C-572/16, EU:C:2018:100, paragraph 30).

102 Thus, pursuant to Article 10a(2) of Directive 2003/87, the Commission is to determine, within that framework, benchmarks by sector or subsector (see, to that effect, judgments of 8 September 2016, *Borealis and Others*, C-180/15, EU:C:2016:647, paragraph 60, and of 18 January 2018, *INEOS*, C-58/17, EU:C:2018:19, paragraph 27).

103 It is in that context that Article 10(1) and (2) of Decision 2011/278 provides that, by multiplying those benchmarks by the level of historical activity of each sub-installation, the Member States are to calculate the preliminary annual number of allowances to be allocated free of charge. To that end, they are required to distinguish, in accordance with Article 6 of that decision, the sub-installations on the basis of their activity, in order to be able to determine whether it is necessary to apply a ‘product benchmark’, a ‘heat benchmark’, a ‘fuel benchmark’ or a specific factor for ‘process emissions sub-installations’ (judgments of 8 September 2016, *Borealis and Others*, C-180/15, EU:C:2016:647, paragraph 61, and of 18 January 2018, *INEOS*, C-58/17, EU:C:2018:19, paragraph 28).

104 In that regard, the Court has already pointed out that the definitions, set out in Article 3 of Decision 2011/278, of product benchmark sub-installations, heat benchmark sub-installations, fuel benchmark sub-installations and process emissions sub-installations are mutually exclusive (judgments of 8 September 2016, *Borealis and Others*, C-180/15, EU:C:2016:647, paragraph 62, and of 18 January 2018, *INEOS*, C-58/17, EU:C:2018:19, paragraph 29).

105 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, or the import from an installation or other entity covered by the EU scheme, or both, of measurable heat. That provision specifies that this heat must, inter alia, be consumed for the production of products or exported to an installation or other entity not covered by the EU scheme with the exception of export for the production of electricity (judgment of 8 September 2016, *Borealis and Others*, C-180/15, EU:C:2016:647, paragraphs 64 and 116).

106 It is thus clear from the explicit wording of Article 3(c) of Decision 2011/278 that that provision prohibits the allocation of free emission allowances in respect of heat generated for the purpose of producing electricity.

107 As ExxonMobil has rightly pointed out in its written observations, Article 3(c) of Decision 2011/278 thus implements the second sentence of the third subparagraph of Article 10a(1) and the third subparagraph of Article 10a(7) of Directive 2003/87, which preclude the free allocation of emission allowances in respect of the production of electricity, with the exception of, first, cases falling within Article 10c of the directive, which grants Member States the option of issuing free allowances for the modernisation of electricity generation, and, second, electricity produced from waste gases (see, to that effect, judgment of 26 July 2017, *ArcelorMittal Atlantique et Lorraine*, C-80/16, EU:C:2017:588, paragraph 20).

108 However, as is clear from the very wording of the second question, the installation at issue seeks to obtain free emission allowances not in respect of the production of electricity but in respect of the production of measurable heat.

109 Article 3(c) of Decision 2011/278 does not explicitly preclude the allocation of free emission allowances in respect of heat produced by electricity generators for purposes other than the production of electricity.

110 Nevertheless, it is apparent from the answer given to the first question that Article 10a(3) of Directive 2003/87, read in conjunction with Article 3(u) thereof, precludes the allocation of free emission allowances to electricity generators unless — without prejudice to the cases envisaged in Article 10c of the directive — they fulfil the conditions in Article 10a(4) and (8), which relate to the production of heating or cooling intended for district heating services or obtained by high efficiency cogeneration as defined by Directive 2004/8, and to new entrants. It is, however, undisputed that the installation at issue does not fulfil the conditions in Article 10a(4) and (8) of Directive 2003/87 and that the option granted in Article 10c thereof has not been implemented by the Federal Republic of Germany.

111 In prohibiting, without prejudice to the rules laid down by other provisions, the allocation of free emission allowances to electricity generators, Article 10a(3) of Directive 2003/87 lays down a fundamental rule (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 66).

112 As is apparent from the Court's settled case-law, Decision 2011/278 must be interpreted in accordance with the provisions of that directive (see, to that effect, judgments of 19 January 2017, *Schaefer Kalk*, C-460/15, EU:C:2017:29, paragraphs 40 to 42; of 28 February 2018, *Trinseo Deutschland*, C-577/16, EU:C:2018:127, paragraph 68; and of 17 May 2018, *Evonik Degussa*, C-229/17, EU:C:2018:323, paragraph 29).

113 It follows that an installation which must be regarded as an 'electricity generator', within the meaning of Article 3(u) of Directive 2003/87, can obtain free emission allowances for the heat produced in the installation, in respect of a 'heat benchmark sub-installation' within the meaning of Article 3(c) of Decision 2011/278, only if the conditions laid down in the third subparagraph of Article 10a(1) and Article 10a(4) and (8) of that directive are complied with.

114 In this connection, it cannot be asserted that, other than where the conditions laid down in Article 10a(4) and (8) are fulfilled, Article 10a(3) of Directive 2003/87 prohibits the allocation of free emission allowances to an electricity generator only in respect of the production of electricity.

115 As the Advocate General has observed in point 94 of his Opinion, such an interpretation would render Article 10a(3) of that directive redundant as the second sentence of the third subparagraph of Article 10a(1) of that directive already expressly prohibits, at least as a rule, the allocation of free emission allowances in respect of the production of electricity.

116 Furthermore, the prohibition on allocating free emission allowances to electricity generators in respect of the heat produced is fully consistent with the objective pursued by Article 10a(3) of Directive 2003/87, noted in paragraph 68 of the present judgment, that emission allowances in principle be allocated to those producers under an auctioning mechanism.

117 It follows that an installation such as the installation at issue in the main proceedings — since, as is clear from the very wording of the second question, it is undisputed in the present instance that it does not fulfil the conditions laid down in Article 10a(4) and (8) of Directive 2003/87 — cannot derive from Decision 2011/278 any entitlement to be allocated free emission allowances in respect of its heat production activity.

118 Any other interpretation would conflict with the objectives pursued by Directive 2003/87, while conferring on the Commission powers that lack any legal basis (see, by analogy, judgment of 29 March 2012, *Commission* v *Estonia*, C-505/09 P, EU:C:2012:179, paragraph 82).

119 The German Government has nevertheless submitted that the interpretation set out in paragraph 113 of the present judgment would run counter to the principle of equal treatment and the objective pursued by Directive 2003/87 of avoiding distortions of competition, since free emission allowances are granted in respect of the heat produced by comparable installations falling within other sectors. In particular, various forms of cogeneration exist which, although they do not fulfil the high efficiency conditions as defined by Directive 2004/8, prove much more effective than installations producing only heat.

120 However, as is already clear from paragraphs 91 and 92 of the present judgment, installations which, like the installation at issue in the main proceedings, produce heat while carrying out, as the only activity falling within Annex I to Directive 2003/87, solely the activity of ‘combustion of fuels in installations with a total rated thermal input exceeding 20 MW’ are not in a situation that is comparable to that of installations which produce heat while carrying out, in addition, another activity falling within that annex. In the emission allowance trading scheme, such a difference in treatment cannot therefore be regarded as distorting competition between installations (see, by analogy, judgment of 19 January 2017, *Schaefer Kalk*, C-460/15, EU:C:2017:29, paragraph 47).

121 The same applies to the alleged difference in treatment between installations that produce heat obtained by high efficiency cogeneration, as defined by Directive 2004/8, and the other installations producing electricity and heat. As the latter do not fulfil the conditions laid down by that directive, they too are not in a situation comparable to that of the former.

122 Nor can ExxonMobil maintain that the interpretation of Article 3(c) of Decision 2011/278 set out in paragraph 113 of the present judgment results in the discriminatory treatment of installations which produce their own electricity themselves compared with those that obtain electricity from third party installations, such as high efficiency cogeneration installations.

123 First, an installation producing its own electricity is excluded from entitlement to free emission allowances in respect of the production of heat only if, in addition, it has the status of ‘electricity generator’, within the meaning of Article 3(u) of Directive 2003/87. As is clear from paragraphs 91, 92 and 120 of the present judgment, an installation having that status is not in a situation comparable to that of industrial installations. Second, an installation which obtains electricity from third parties is, in the same way, excluded from entitlement to such allowances where it has the status of electricity generator.

124 It follows from all the foregoing that, where an installation such as that in the main proceedings must be regarded as an ‘electricity generator’, within the meaning of Article 3(u) of Directive 2003/87, it cannot be allocated free emission allowances under Article 10a of that directive and the provisions of Decision 2011/278.

125 Therefore, such an installation, which, by virtue of Article 2(1) of Directive 2003/87, falls within the emission allowance trading scheme established by that directive since it carries out an activity of ‘combustion of fuels in installations with a total rated thermal input exceeding 20 MW’ as referred to in Annex I to the directive, which generates $CO^2$ emissions, is required to obtain emission allowances under the auctioning mechanism.

126 Consequently, the answer to the second question is that Article 3(c) of Decision 2011/278 must be interpreted as meaning that, in so far as an installation such as that at issue in the main proceedings must be regarded as an ‘electricity generator’, within the meaning of Article 3(u) of Directive 2003/87, it is not entitled to be allocated free emission allowances in respect of the heat produced within the framework of its activity of ‘combustion of fuels in installations with a total rated thermal input exceeding 20 MW’, referred to in Annex I to that directive, where that heat is used for purposes other than the production of electricity, since such an installation does not fulfil the conditions laid down in Article 10a(4) and (8) of the directive.

***The third and fourth questions***

127 In view of the answer given to the first two questions, there is no need to answer the third and fourth questions.

**Limitation of the temporal effects of the judgment**

128 ExxonMobil requests the Court to limit the temporal effects of the present judgment if it answers the second question in the negative.

129 It is only quite exceptionally that the Court may, in application of the general principle of legal certainty inherent in the EU legal order, decide to restrict for any person concerned the opportunity of relying on a provision which it has interpreted with a view to calling into question legal relationships established in good faith. Two essential criteria must be fulfilled before such a limitation can be imposed, namely, that those concerned should have acted in good faith and that there should be a risk of serious difficulties (see, inter alia, judgments of 27 February 2014, *Transportes Jordi Besora*, C-82/12, EU:C:2014:108, paragraph 41, and of 19 April 2018, *Oftalma Hospital*, C-65/17, EU:C:2018:263, paragraph 57).

130 ExxonMobil has put forward no specific details to justify the merits of its request, merely submitting, in general terms, that since 2013 emission allowances have been allocated free of charge to a large number of installations generating electricity for their production of heat.

131 That being so, the temporal effects of the present judgment should not be limited.

## Costs

132 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 (Fifth Chamber) hereby rules:

1. **Article 3(u) 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, must be interpreted as meaning that an installation, such as that at issue in the main proceedings, which produces, within the framework of its activity of 'combustion of fuels in installations with a total rated thermal input exceeding 20 [megawatts (MW)]', referred to in Annex I to that directive, electricity intended essentially to be used for its own needs, must be regarded as an 'electricity generator', within the meaning of that provision, where that installation, first, carries out simultaneously an activity for producing a product which does not fall within that annex and, second, continuously feeds, for consideration, even a small part of the electricity produced into the public electricity network, to which that installation must be permanently connected for technical reasons.**

2. **Article 3(c) 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 must be interpreted as meaning that, in so far as an installation such as that at issue in the main proceedings must be regarded as an 'electricity generator', within the meaning of Article 3(u) of Directive 2003/87, it is not entitled to be allocated free emission allowances in respect of the heat produced within the framework of its activity of 'combustion of fuels in installations with a total rated thermal input exceeding 20 MW', referred to in Annex I to that directive, where that heat is used for purposes other than the production of electricity, since such an installation does not fulfil the conditions laid down in Article 10a(4) and (8) of the directive.**

[Signatures]

* Language of the case: German.