OPINION OF ADVOCATE GENERAL
SAUGMANDSGAARD ØE
delivered on 14 December 2017 (1)

Case C-577/16

Trinseo Deutschland Anlagengesellschaft mbH
v
Bundesrepublik Deutschland

(Request for a preliminary ruling from the
Verwaltungsgericht Berlin (Administrative Court, Berlin, Germany))

(Reference for a preliminary ruling — Directive 2003/87/EC — Environment — Scheme for greenhouse gas emission allowance trading within the European Union — Article 2(1) — Scope — Indirect emissions arising from the production of heat acquired from a third-party installation — The fact that they are not taken into account — Annex I - Chemical sector — Concept of production of bulk organic chemicals by cracking, reforming, partial or full oxidation or by similar processes — Production of polymers, in particular polycarbonate — Inclusion — Article 10a — Decision 2011/278/EU — Free allocation of emission allowances — Lack of direct effect)

I. Introduction

1. By decision of 3 November 2016, received at the Court on 16 November 2016, the Verwaltungsgericht Berlin (Administrative Court, Berlin, Germany) requested that the Court give a preliminary ruling on the interpretation of Article 1 of and Annex I to Directive 2003/87/EC (2) and of Decision 2011/278/EU. (3)

2. That request was made in the context of a dispute between Trinseo Deutschland Anlagengesellschaft mbH ('Trinseo') and the Bundesrepublik Deutschland (Federal Republic of Germany), represented by the Umweltbundesamt (Federal Environment Agency, Germany), concerning the refusal of the Deutsche Emissionshandelsstelle (German Emissions Trading Authority, 'the DEHSt') to allocate emission allowances free of charge to an installation for the

production of polycarbonate operated by Trinseo ('the installation at issue').

3. That refusal was based on the provisions of the German legislation transposing Directive 2009/29. That directive extended the scope of the emission allowance trading scheme to the chemical sector from the third trading period (2013-2020). To that end, that directive, inter alia, inserted the following provision into Annex I to Directive 2003/87, which lists the activities included in that trading scheme: 'production of bulk organic chemicals by cracking, reforming, partial or full oxidation or by similar processes, with a production capacity exceeding 100 tonnes per day' ('the provision at issue').

4. The provision of the German legislation transposing the provision at issue drew up an exhaustive list of the chemicals which that activity may cover, a list which does not include polymers such as those produced by the installation at issue. (4) Since the production of polymers is not covered by the trading scheme under that legislation, the DEHSt refused to allocate free allowances to that installation.

5. I note that the wording of the German legislation elicited two reactions from the European Commission.

6. First, the Commission opened an infringement procedure against the Federal Republic of Germany for incomplete transposition of Directive 2003/87, based on the non-inclusion of polymer production in the emission allowance trading scheme.(5)

7. Secondly, the Commission noted in Decision 2013/448/EU that the list of installations set out in the German national implementing measures was incomplete in that it did not include installations producing polymers. (6) Moreover, with regard to the heat supplied to such installations, the Commission considered that those measures wrongly provided for the free allocation of allowances not to those installations but to heat suppliers. (7) For that reason, the Commission rejected the free allocations provided for by the German implementing measures to those heat suppliers. (8) That rejection by the Commission, coupled with the non-inclusion in the German implementing measures of installations producing polymers such as the installation at issue, had the effect of precluding any free allocation of allowances for the production of the heat supplied to those installations.

8. In the dispute in the main proceedings, it is thus clear from the observations submitted by Trinseo that neither the installation at issue nor the company Dow Deutschland Anlagengesellschaft mbH ('Dow'), which supplies Trinseo with the heat necessary for the production of polymers, received any free allocation of allowances in respect of the production of that heat.

9. It is in that context that the referring court asks the Court, by its first question, to determine whether the production of polymers, in particular polycarbonate, falls within the scope of the provision at issue and, consequently, of Directive 2003/87.

10. I shall propose that the Court should answer to the effect that that activity indeed falls within the scope of the provision at issue but that it falls within the scope of Directive 2003/87 only if it gives rise, in itself, to carbon-dioxide (CO^2) emissions, irrespective of any indirect emissions such as those arising from the production of heat acquired from a third-party installation.

11. By its second question, the referring court essentially asks whether Article 10a of Directive 2003/87 and the provisions of Decision 2011/278, which provide for the free allocation of emissions allowances, have direct effect.

12. I shall propose that the Court should answer that question in the negative.

II. Legal context

A. European Union law

13. Article 1 of Directive 2003/87, entitled 'Subject matter', provides:

'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.

…'

14. Under the heading 'Scope', Article 2(1) of that directive provides:

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

15. Annex I of Directive 2003/87, entitled 'categories of activities to which this directive applies', contains, in particular, the provision at issue.

16. As indicated by its title, Decision 2011/278 determines transitional Union-wide rules for harmonised free allocation of emission allowances pursuant to Article 10a of Directive 2003/87.

B. German law

17. Paragraph 2 of the Gesetz über den Handel mit Berechtigungen zur Emission von Treibhausgasen (Treibhausgas-Emissionshandelsgesetz — TEHG) (Law on greenhouse gas emissions trading) of 27 July 2011 (BGBl. I, p. 1475, 'the TEHG'), entitled 'Scope', provides:

'(1) The present law shall apply to the greenhouse gas emissions referred to in Part 2 of Annex 1, resulting from the activities listed therein. The present law shall also apply to the installations referred to in Part 2 of Annex 1 where they are parts or ancillary facilities of an installation which is not listed in Part 2 of Annex 1.

…'

18. Paragraph 9 of the TEHG, entitled 'Allocation of free emission allowances to operators of installations', provides:

'(1) Installation operators shall receive an allocation of free emission 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 accordance with the principles laid down in [Decision 2011/278].

…’

19. Point 27 of Part 2 of Annex 1 to the TEHG refers to ‘installations for the production of basic organic chemicals (alkenes and chlorinated alkenes; alkines; aromatics and alkylated aromatics; phenols, alcohols; aldehydes, ketones; carboxylic acids; dicarboxylic acids; carboxylic anhydrides and dimethyl terephthalate; epoxides; vinyl acetate, acrylonitrile; caprolactam and melamine) with a production capacity exceeding 100 tonnes per day’.

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

20. Trinseo operates in Stade (Germany) an installation for the production of polycarbonate, which has an approved production capacity of over 100 tonnes of polycarbonate per day. That installation obtains the steam needed for that production from a plant subject to the emission allowance trading scheme, which is operated by another company, Dow, established on the same site.

21. On 23 January 2012, Trinseo applied to the DEHSt for the free allocation to the installation at issue of emission allowances.

22. By decision of 17 February 2014 the DEHSt refused that application, on the ground that polycarbonate is not included in the list of substances and groups of substances referred to in point 27 of Part 2 of Annex 1 to the TEHG and that, accordingly, the installation at issue does not fall within the scope of that law.

23. The administrative appeal brought by Trinseo against that decision was dismissed by the DEHSt on the same ground.

24. On 2 October 2015 Trinseo brought an action against that decision before the Verwaltungsgericht Berlin (Administrative Court, Berlin).

25. In support of that action, Trinseo claimed that, under Article 2(1) of Directive 2003/87, read in conjunction with Annex I thereto, all activity for the production of bulk organic chemicals by cracking, reforming, partial or full oxidation or by similar processes, without any limitation to specific substances, falls within the scope of that directive.

26. By contrast, the DEHSt argues that Directive 2003/87 does not impose the obligation to include polymerisation installations in the emission allowance trading scheme. Furthermore, the fact that that directive is, as a whole, burdensome for the operators of installations is an argument against its direct application.

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

‘(1) Must Article 1 of Directive [2003/87], in conjunction with Annex I thereto, be interpreted as meaning that the production of polymers and of the polymer polycarbonate in particular in installations with a production capacity exceeding 100 tonnes per day falls within the activity

defined therein as production of bulk organic chemicals by cracking, reforming, partial or full oxidation or by similar processes?

(2) If Question (1) is answered in the affirmative, does the operator of such an installation have a claim to free allocation of emissions allowances arising from a direct application of the rules of Directive [2003/87] and … Decision [2011/278], if there can be no free allocation of emissions allowances under national law solely because the Member State in question did not include installations for the production of polymers in the scope of the national law implementing Directive [2003/87] and such installations do not take part in emissions trading for that reason alone?'

IV. Procedure before the Court

28. The request for a preliminary ruling was lodged at the Registry of the Court on 16 November 2016.

29. Written observations have been submitted by Trinseo, the German and Netherlands Governments and the Commission.

30. Trinseo, the Federal Environment Agency, the German and Netherlands Governments and the Commission appeared at the hearing on 21 September 2017 in order to present oral argument.

V. Analysis

31. By its first question, the referring court asks the Court whether Article 1 of Directive 2003/87, read in conjunction with Annex I of that directive, must be interpreted as meaning that the production of polymers, in particular polycarbonate, in installations with a production capacity exceeding 100 tonnes per day falls within the scope of the provision at issue.

32. In essence, the referring court thus asks the Court whether the production of polymers, in particular polycarbonate, is covered by the provision at issue and, therefore, falls within the scope of that directive. Accordingly, I propose that the reference to Article 1 of that directive in the question referred be replaced with a reference to Article 2(1) thereof, since the purpose of the latter provision is to define the scope of that directive.

33. In that regard, the German and Netherlands Governments maintained that the production of polymers does not fall within the scope of Directive 2003/87, on the ground that the polymerisation process does not in itself produce CO^2. I shall study that argument, which in my view raises a question of principle as to whether indirect emissions should be taken into account in the scheme established by that directive, in Section A.

34. I shall then examine the scope of the provision at issue. I note, like Trinseo and the Netherlands Government, that the terms used in the wording of that provision, in particular the terms 'bulk' and 'similar processes', are not defined by Directive 2003/87. According to settled case-law, the need for the uniform application of European Union law and the principle of equality require that the terms of a provision of European Union law which makes no express reference to

the law of the Member States for the purpose of determining its meaning and scope must normally be given an autonomous and uniform interpretation throughout the European Union, which must take into account the context of the provision and the purpose of the legislation in question. (9)

35. In the present case, four requirements can be inferred from the wording of the provision at issue.

36. First, the installation must have a production capacity exceeding 100 tonnes per day. It is undisputed that that requirement is satisfied by the installation at issue and the first question referred also starts from that premiss.

37. Secondly, the installation must produce 'organic' chemicals. None of the parties which submitted observations to the Court disputed that the polymers which Trinseo produces in the installation at issue are organic chemicals. In that respect, I simply note that, according to its usual definition, the concept of organic compound refers to a compound which contains the element carbon, (10) which is obviously the case with the polycarbonate produced at that installation.

38. Thirdly, the installation must produce 'bulk' chemicals. I shall examine that requirement in Section B below.

39. Fourthly, the chemicals must be produced 'by cracking, reforming, partial or full oxidation or by similar processes'. That fourth requirement will be the subject matter of Section C.

40. At the end of that examination, and in response to the first question referred, I shall summarise in Section D the reasons why I consider that the production of polymers falls within the scope of the provision at issue. However, that activity may fall within the scope of Directive 2003/87, as defined in Article 2(1) thereof, only if that activity gives rise, in itself, to CO^2 emissions, irrespective of any indirect emissions such as those arising from the production of heat acquired from a third-party installation.

41. In response to the second question referred, I shall set out in Section E the reasons why I consider that Article 10a of Directive 2003/87 and the provisions of Decision 2011/278, which provide for the free allocation of emission allowances, do not have direct effect.

A. The fact that 'indirect' emissions, such as those arising from the production of heat acquired from a third-party installation, are not taken into account

42. The German and Netherlands Governments have argued that the production of polymers does not fall within the scope of Directive 2003/87, on the ground that the polymerisation process does not in itself produce CO^2. According to those governments, the only source of CO^2 emissions, in that context, is the production of the heat necessary for that polymerisation process, such as that acquired by the installation at issue from a third-party installation, that is from Dow.

43. Those governments conclude that, in such a context, only the heat production activity falls within the scope of that directive, since the heat may be produced by a third-party installation, as in this case, or by the polymerisation installation itself.

44. According to Trinseo and the Commission, however, emissions arising from the production

of polymers should include 'indirect' emissions from the production of the heat required for polymerisation. That approach would make it possible to encourage investments aimed at reducing energy consumption, in accordance with the objectives pursued by Directive 2003/87. They argue that that approach is also supported by Article 10a of that directive and Decision 2011/278, which provide for the free allocation of allowances to the installation which uses the heat and not to the installation which produces it. (11)

45. I would first of all point out that Annex I to Directive 2003/87 is concerned not with heat production as such but rather with the 'combustion of fuels in installations with a total rated thermal input exceeding 20 MW'.

46. Furthermore, CO^2 is the only greenhouse gas specified in Annex I, with regard both to that combustion activity and to the production of organic chemicals referred to in the provision at issue.

47. That said, the exchange of arguments described above concerns the interpretation not of the provision at issue but rather of Article 2(1) of Directive 2003/87. In essence, the question which arises is whether 'indirect' emissions, that is to say emissions which are not in themselves generated by the activity in question (which may be described as 'direct') but are the result of producing the 'inputs' (12) necessary for that activity, must be regarded as 'emissions from', within the meaning of that provision, the activities referred to in Annex I to that directive.

48. In the dispute in the main proceedings, the installation at issue obtained the heat which it needed from Dow, with the result that the emissions arising from the production of that heat are indirect emissions with respect to its polymer production activity.

49. However desirable it may be to take into account such indirect emissions in the emission allowance trading scheme in the light of the objective of environmental protection, there are, in my view, several insurmountable barriers to doing so contained in the present scheme established by that directive.

50. In the first place, taking those indirect emissions into account would create a risk that those emissions could be counted twice, being reported both by the producer (as direct emissions) and by the user of the input concerned (as indirect emissions). Thus, in the dispute in the main proceedings, there is nothing in the file before the Court to cast doubt on the fact that Dow properly reported the emissions arising from the combustion which generated the heat supplied to Trinseo. However, the position supported by Trinseo and the Commission implies that Trinseo must report those emissions a second time.

51. That risk of double counting is, in my view, incompatible both with the first paragraph of Article 5 of Regulation (EU) No 601/2012 (13) and with the preservation of the integrity of conditions of competition, which constitutes one of the ancillary objectives of the scheme established by Directive 2003/87. (14)

52. I should point out that the scheme established by that directive does not, to my knowledge, contain a general mechanism (15) for 'transferring' emissions from the producer to the user of the input, thereby relieving the producer of the reporting, monitoring and surrender obligations in relation to those emissions. (16) As regards heat, I find confirmation of that interpretation in the second paragraph of point 1(A) of Annex IV to Regulation No 601/2012, according to which 'the

operator shall assign all emissions from the combustion of fuels at the installation to the installation, regardless of exports of heat or electricity to other installations. The operator shall not assign emissions associated with the production of heat or electricity that is imported from other installations to the importing installation'.

53. In the second place, the obligation for an installation to report its indirect emissions would entail inextricable administrative problems as the scheme established stands at present. In the case of heat production by a third-party installation, as in the circumstances of the dispute in the main proceedings, there would arise, in particular, the question of the allocation of indirect emissions between the various customers of that installation. The same allocation problem would arise on the part of successive users of an input, as, for example, in the case of the production of aluminium which is successively transformed by different installations.

54. Moreover, it is appropriate to question whether an installation has the capacity to monitor its indirect emissions, in accordance with Article 14 of Directive 2003/87, when they are, by definition, generated in a third-party installation.

55. In the third place, the taking into account of indirect emissions, such as those arising from the production of the heat necessary for the production of polymers, raises fundamental questions concerning the scope of the directive. On the one hand, would it be incumbent on each installation to report all its indirect emissions, that is to say the emissions from the production of all its inputs, such as heat, electricity, steel or aluminium? On the other hand, should an undertaking be included in the trading scheme simply because it uses inputs whose production gives rise to emissions falling within the scope of the directive?

56. In the fourth place, the recitals and the provisions of Decision 2011/278 relied on by the Commission (17) are not relevant for determining the scope of Directive 2003/87. The scope of that decision is limited to the mechanism for the free allocation of emission allowances provided for in Article 10a of that directive. However, by definition, only installations falling within the scope of that directive are eligible for a free allocation of emission allowances. Accordingly, the principle that free allowances must be allocated to the heat consumer may, by definition, apply only to installations already included in the trading scheme.

57. In my view, it follows from the foregoing that indirect emissions cannot be regarded as 'emissions from', within the meaning of Article 2(1) of that directive, the activities referred to in Annex I to that directive. Therefore, in the dispute in the main proceedings, the emissions arising from the production of the heat acquired from Dow by the installation at issue do not arise 'from' the polymer production activity at that installation, in accordance with the position maintained by the German and Netherlands Governments. By contrast, those emissions, as direct emissions, arise 'from' the combustion activity within the installation operated by Dow.

58. Consequently, the installation at issue may fall within the scope of Directive 2003/87, as defined in Article 2(1) of that directive, only if the CO^2 emissions, in themselves, arise from the production of polymers, irrespective of any indirect emissions such as those arising from the production of heat acquired from a third-party installation.

59. It is true that, in the event that the production of polymers does not, in itself, emit CO^2, that

interpretation could entail a difference in treatment between a polymer production installation which itself produces the heat it needs (an 'integrated' installation) and which will in principle be included in the trading scheme on the basis of the combustion activity, and another installation which obtains that heat from a third-party installation and which, therefore, will not be included in that scheme. However, that difference in treatment is not discriminatory, since it is based on an objective difference under the scheme established by the directive, namely the emission of greenhouse gases by the first ('integrated') installation and the absence of emissions from the second installation.

60. That interpretation also appears to me to be supported by the judgment in *Schaefer Kalk*, in which the Court found that an activity could fall within the scope of Directive 2003/87, in accordance with Article 2(1) thereof and Annexes I and II thereto, only if that activity results in a release of greenhouse gases into the atmosphere(18) Similarly, the definition of the concept of 'emission' set out in Article 3(b) of that directive refers to the release of greenhouse gases into the atmosphere 'from sources in an installation'.

61. It is for the referring court to ascertain whether the production of polymers in the installation at issue gives rise, in itself, to CO^2 emissions, irrespective of any indirect emissions such as those arising from the production of heat acquired from a third-party installation.

62. If that is not the case, that court must conclude that the installation at issue does not fall within the scope of Directive 2003/87, as defined in Article 2(1) thereof, and, consequently, that that installation is not eligible for a free allocation of allowances pursuant to Article 10a of that directive and Decision 2011/278.

63. However, if that is the case, the installation at issue may fall within the scope of that directive, provided that the polymer activity is covered by the provision at issue. I shall examine that question in Sections B to D.

B. The concept of 'bulk' production in the context of the provision at issue

64. As a preliminary point, I must note that there is divergence between the language versions of the provision at issue.

65. The concept of production 'en vrac' used in the French version is also used in the English version ('*production of bulk organic chemicals*'), the Spanish version ('*fabricación de productos químicos orgánicos en bruto*'), the Dutch version ('*productie van organische bulkchemicaliën*') and the Portuguese version ('*produção de produtos químicos orgânicos a granel*'). The Italian version, for its part, refers to large-scale production ('*produzione di prodotti chemici organici su larga scala*').

66. By contrast, the German version ('*Grundchemikalien*') and Swedish version ('*baskemikalier*') refer to the production of 'basic' chemicals. Moreover, the Danish version does not provide any details in that regard ('*produktion af organiske kemikalier*').

67. According to settled case-law, the wording used in one language version of a provision of EU law cannot serve as the sole basis for the interpretation of that provision, or be made to override the other language versions. Provisions of EU law must be interpreted and applied uniformly in the

light of the versions established in all the languages of the European Union. Where there is divergence between the various language versions of an EU legislative text, the provision in question must be interpreted by reference to the general scheme and the purpose of the rules of which it forms part. (19)

68. Trinseo and the Commission have argued that the concept of 'bulk' production and/or production of 'basic' chemicals used in the provision at issue refers to the production of high volumes of chemical materials, which would exclude, inter alia, one-off production.

69. In my view, that criterion indeed follows from the terminology used in the different language versions, and in particular from the Italian version referred to above. However, that criterion is of only relative significance, since the provision at issue also states that the installation must have a production capacity exceeding 100 tonnes per day, which necessarily implies high production volumes.

70. Moreover, all the parties which have submitted observations to the Court agree that that provision relates not to finished products but to chemical intermediates, that is to say chemicals intended for use in the production of other products.

71. However, the German and Netherlands Governments have, in that regard, advocated a restrictive approach limited to chemicals used in the production of other *chemicals*. According to those governments, that approach results in the exclusion of polymer production from the scope of the provision at issue, since polymers are not used to produce other chemicals.

72. On the other hand, Trinseo and the Commission have proposed a broad interpretation, including the chemical intermediates used to produce other products regardless of their nature, in particular products of a chemical or industrial nature. That approach would lead to the inclusion of polymer production within the scope of that provision, since polymers are used to produce other products such as plastic bottles, solar panels and spotlights.

73. I consider it appropriate to adopt the broad interpretation proposed by Trinseo and the Commission for the following reasons.

74. The first reason relates to the wording of the provision at issue in its different language versions. It is true that the terms 'bulk' production and production of 'basic chemicals' indicate that the activity concerned results in the production not of finished products but of intermediate products.

75. However, there is nothing in that wording to suggest that those chemical intermediates should be intended for the production of other *chemicals*, to the exclusion of chemicals intended for the production of industrial products.

76. The second reason derives from the objectives pursued by the EU legislature when Directive 2009/29 was adopted. One of those objectives was the inclusion of the chemical industry in the emission allowance trading scheme established by Directive 2003/87. (20)

77. To that end, Annex I to that directive lists eight activities, including the production of organic chemicals covered by the provision at issue. In my opinion, that provision is of considerable

strategic importance in relation to the objective of including the chemical industry, since it refers to the only activity which is not restricted to a specific chemical. (21) In other words, the production of bulk organic chemicals is the only activity of the chemical industry listed in Annex I which is general in scope.

78. In that context, the restrictive interpretation of the provision at issue proposed by the German and Netherlands Governments would have the effect of excluding from the scope of Directive 2003/87 any activity of the chemical industry not falling within the specific activities listed in Annex I and resulting in the production of chemicals which are not used to produce other chemicals. Such an exclusion would, in my view, be contrary to the intention of the EU legislature to extend the allowance trading scheme to the chemical industry as a whole from the third trading period, without any restriction based on the intended use of the chemicals concerned. (22)

79. The third reason concerns observance of the principle of non-discrimination, as interpreted by the Court in the judgment in *Arcelor Atlantique and Lorraine and Others*. (23) In the context of the scheme established by Directive 2003/87, it would, in my view, be discriminatory to treat chemical production activities differently on the basis of the intended use of the products, even though the greenhouse gas emissions arising from those activities are all equally likely to contribute to a dangerous interference with the climate system.

80. It follows from the foregoing that the concept of 'bulk' production of chemicals and/or production of 'basic' chemicals used in the wording of the provision at issue must be interpreted as meaning that it refers to the production of high volumes of chemicals intended for use in the production of other products, in particular products of a chemical or industrial nature.

C. The concept of production 'by cracking, reforming, partial or full oxidation or by similar processes' in the context of the provision at issue

81. In the dispute in the main proceedings, it is common ground that the production of polymers within the installation at issue is not carried out by means of a cracking, reforming or oxidation process. Consequently, the resolution of the dispute in the main proceedings depends, in particular, on the interpretation of the concept of 'similar processes'.

82. Like the requirement for 'bulk' production examined in the preceding section, the concept of 'similar processes' may be interpreted broadly or restrictively.

83. The broad interpretation amounts to interpreting the concept of 'similarity' in the light of the purpose of the processes referred to above, that is to say the production of bulk organic chemicals. According to that interpretation, the term 'similar processes' includes any process for producing such chemicals, such as the cracking, reforming and oxidation processes.

84. By contrast, the restrictive interpretation would consist in interpreting the concept of 'similar processes' in the light of the technical characteristics common to the cracking, reforming and oxidation processes. That approach would require, first, the identification of those common technical characteristics and, secondly, the classification only of processes having those characteristics as 'similar processes'.

85. There is nothing in the wording of Annex I which makes it possible to reject either the broad

or the restrictive interpretation of that concept. In accordance with the case-law referred to in point 34 of this Opinion, that question must be resolved taking into account the context of the provision and the purpose of the legislation in question.

86. In my view, the context of the provision at issue and the purpose of Directive 2003/87 support a broad interpretation of the concept of 'similar processes'.

87. In the first place, the restrictive interpretation of that concept would exclude from the scope of that directive installations producing organic chemicals using processes not having technical characteristics common to the cracking, reforming and oxidation processes. In my opinion, such an exclusion would not be compatible with the intention of the EU legislature to extend the allowance trading scheme to the chemical industry as a whole. (24)

88. In the second place, a restrictive interpretation would be contrary to the principle of non-discrimination in that it entails different treatment of the chemical production activities based on the processes used, even though the greenhouse gas emissions arising from those activities are all equally likely to contribute to a dangerous interference with the climate system. (25)

89. In the third place, the broad interpretation seems to me to be more consistent with the legal certainty which must be ensured for the operators of installations. Indeed, as I explained above, the restrictive interpretation would require a definition, in the abstract, of the technical characteristics common to the cracking, reforming and oxidation processes, followed by a determination, on a case-by-case basis, of whether the processes implemented at each installation concerned have those characteristics.

90. In my view, such an approach would be marked by legal uncertainty, both with respect to identifying the common characteristics and with respect to verifying whether they are to be found within the installation concerned. The observations submitted to the Court illustrate that risk of uncertainty, as each of the parties proposed a different list of technical characteristics common to the cracking, reforming and oxidation processes. (26)

91. For those reasons, I consider that the concept of 'similar processes' used in the wording of the provision at issue should be interpreted broadly, so as to include any process for producing bulk chemicals.

D. The inclusion of polymer production within the scope of the provision at issue and within the scope of Directive 2003/87

92. It follows from Sections B and C that the provision at issue must be interpreted broadly to include the production of high volumes of organic chemicals intended for use in the production of other products, in particular products of a chemical or industrial nature, irrespective of the processes implemented for that purpose.

93. In the dispute in the main proceedings, none of the parties disputed the fact that polymers are used to produce other products, such as plastic bottles, solar panels or screens. (27) Therefore, the production of polymers falls within the scope of that provision.

94. As pointed out by Trinseo, that inclusion is supported by the classification established in

other secondary legislation, from which it is also apparent that polymers are 'basic organic chemicals'. (28)

95. However, the scheme established by Directive 2003/87 covers only greenhouse gas emissions. (29) In that regard, I have clarified in Section A the reasons why indirect emissions, such as those arising from the production of heat acquired from a third-party installation, cannot be regarded as 'emissions from', within the meaning of Article 2(1) of that directive, the activities listed in Annex I thereto.

96. Consequently, polymer production, such as that at issue in the dispute in the main proceedings, may fall within the scope of Directive 2003/87, as defined in Article 2(1) thereof, only if CO^2 emissions arise, in themselves, from that production, irrespective of any indirect emissions such as those arising from the production of heat acquired from a third-party installation.

97. For all those reasons and in reply to the first question referred, Article 2(1) of Directive 2003/87, read in conjunction with Annex I to that directive, must be interpreted as meaning that the production of polymers, in particular polycarbonate, in installations with a production capacity exceeding 100 tonnes per day falls within the scope of that directive, provided that that production gives rise, in itself, to CO^2 emissions, irrespective of any indirect emissions such as those arising from the production of heat acquired from a third-party installation.

E. Lack of direct effect of Article 10a of Directive 2003/87 and of the provisions of Decision 2011/278

98. By its second question, the referring court asks, in essence, whether Article 10a of Directive 2003/87 and the provisions of Decision 2011/278, which provide for the free allocation of emissions allowances, have direct effect.

99. According to settled case-law, whenever the provisions of a directive appear, so far as their subject matter is concerned, to be unconditional and sufficiently precise, they may be relied upon before the national courts by individuals against the State where the latter has failed to implement the directive in domestic law by the end of the period prescribed or where it has failed to implement the directive correctly. (30)

100. The same applies to the provisions of decisions which are addressed to the Member States, (31) such as Decision 2011/278.

101. It is also settled case-law that a provision of European Union law is unconditional where it sets forth an obligation which is not qualified by any condition, or subject, in its implementation or effects, to the taking of any measure either by the institutions of the European Union or by the Member States(32)

102. In the present case, however, the obligation to allocate emission allowances free of charge, which is governed by Article 10a of Directive 2003/87 and Decision 2011/278, is subject, both in its implementation and in its effects, to the taking of several measures by the Member States and the Commission.

103. As I explained in my Opinion in *INEOS*, (33) that allocation requires, inter alia, each Member

State to communicate to the Commission a list of installations in its territory which are eligible for free allowances, indicating for each installation the amount of the basic allocation and the amount of the preliminary allocation(34)

104. Having rejected preliminary allocations which are not in accordance with the provisions of Directive 2003/87 and Decision 2011/278, (35) the Commission must satisfy itself that the total sum of the basic allocations calculated for all the installations in the territory of the European Union does not exceed the cap defined in Article 10a(5) of that directive. If that cap is exceeded, the Commission is then required to make a proportional reduction by applying a 'cross-sectoral correction factor' to the allocations proposed by the Member States, which corresponds to the ratio between the cap and the sum of the basic allocations.

105. It is only after that procedure that the Member States make final allocations by applying any correction factor to the preliminary allocations which were not rejected by the Commission.

106. In my view, it is apparent from the foregoing explanations that Article 10a of Directive 2003/87 and the provisions of Decision 2011/278 are not unconditional within the meaning of the case-law cited above and, consequently, that they do not have direct effect.

VI. Conclusion

107. In the light of the foregoing, I propose that the Court should reply as follows to the questions referred for a preliminary ruling by the Verwaltungsgericht Berlin (Administrative Court, Berlin, Germany):

(1) Article 2(1) 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, read in conjunction with Annex I to that directive, must be interpreted as meaning that the production of polymers, in particular polycarbonate, in installations with a production capacity exceeding 100 tonnes per day falls within the scope of that directive, provided that that activity gives rise, in itself, to CO^2 emissions, irrespective of any indirect emissions such as those arising from the production of heat acquired from a third-party installation.

(2) Article 10a of Directive 2003/87, as amended by Directive 2009/29 and the provisions 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, as amended by Commission Decision 2012/498/EU of 17 August 2012, do not have direct effect.

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1 Original language: French.

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2 Directive 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').

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3 Commission Decision 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), as amended by Commission Decision 2012/498/EU of 17 August 2012 (OJ 2012 L 241, p. 52, 'Decision 2011/278').

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4 See point 19 of this Opinion.

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5 Infringement procedure 2013/2240, with formal notice dated 20 November 2013 and reasoned opinion dated 16 April 2014.

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6 See recital 16 of Commission Decision 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 (OJ 2013 L 240, p. 27).

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7 Where heat is exchanged between two installations included in the trading scheme, the free allowances must be allocated to the heat consumer. See recital 17 of Decision 2013/448 and recitals 6 and 21 of Decision 2011/278.

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8 See Article 1(1) and the fifth subparagraph of (2) of Decision 2013/448.

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9 See, inter alia, judgments of 19 December 2013, *Fish Legal and Shirley* (C−279/12, EU:C:2013:853, paragraph 42); of 29 September 2015, *Gmina Wrocław* (C−276/14, EU:C:2015:635, paragraph 25) and of 18 October 2016, *Nikiforidis* (C−135/15, EU:C:2016:774, paragraph 28).

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10 The concept of 'organic compound' is defined as follows, both in Article 2(4) of Directive 2004/42/EC of the European Parliament and of the Council of 21 April 2004 on the limitation of emissions of volatile organic compounds due to the use of organic solvents in certain paints and varnishes and vehicle refinishing products and amending Directive 1999/13/EC (OJ 2004 L 143, p. 87), 'any compound containing at least the element carbon and one or more of hydrogen, oxygen, sulphur, phosphorus, silicon, nitrogen, or a halogen, with the exception of carbon oxides and inorganic carbonates and bicarbonates'. See Article 3(44) of Directive 2010/75/EU of the European Parliament and of the Council of 24 November 2010 on industrial emissions (integrated pollution prevention and control) (OJ 2010 L 334, p. 17).

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11 See point 7 of this Opinion and recitals 6 and 21 of Decision 2011/278.

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12 I use the concept of input in its economic sense, as referring to all the goods and services used in a production process.

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13 Commission Regulation of 21 June 2012 on the monitoring and reporting of greenhouse gas emissions pursuant to Directive 2003/87 (OJ 2012 L 181, p. 30).

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14 See, to that effect, judgments of 29 March 2012, *Commission* v *Poland* (C−504/09 P, EU:C:2012:178, paragraph 77); of 29 March 2012, *Commission* v *Estonia* (C−505/09 P, EU:C:2012:179, paragraph 79) and 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 43). By way of illustration, that double counting risk would create a distortion of competition to the detriment of installations which obtain their inputs from third-party installations and which would therefore be required to report indirect emissions already reported as direct emissions by those third-party installations. In 'integrated' installations, which themselves produce the inputs required for their main activity, such as the heat required for the polymerisation process, emissions relating to the production of those inputs would be reported only once, as direct emissions.

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15 It is true that Article 49 of Regulation No 601/2012 establishes such a transfer mechanism, but the scope of that mechanism is limited to the transfer of CO^2 in the three situations listed in Article 49(1) thereof. See, in that regard, judgment of 19 January 2017, *Schaefer Kalk* (C−460/15, EU:C:2017:29).

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16 The reporting, monitoring and surrender obligations are laid down in Articles 12(3) and 14 of Directive 2003/87.

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17 See point 7 of this Opinion and recitals 6 and 21 of Decision 2011/278. The Commission also relied on the existence of benchmarks set out in Annex I to Decision 2011/278 for the production of polymers such as E-PVC (E-polyvinyl chloride) and S-PVC (S-polyvinyl chloride). However, the existence of those benchmarks, the sole purpose of which is to serve as a basis for the calculation of free allocations, cannot result in the inclusion in the trading scheme of a polymerisation installation if that installation does not emit CO^2.

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18 See, to that effect, judgment of 19 January 2017 (C−460/15, EU:C:2017:29, paragraph 37).

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19 See, inter alia, judgments of 26 February 2015, *Christie's France* (C−41/14, EU:C:2015:119, paragraph 26); of 1 March 2016, *Alo and Osso* (C−443/14 and C−444/14, EU:C:2016:127, paragraph 27) and of 26 July 2017, *Mengesteab* (C−670/16, EU:C:2017:587, paragraph 82).

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20 The reasons given by the Commission in its proposal for a directive referred in particular to 'CO^2

emissions from petrochemicals': see Proposal for a Directive of the European Parliament and of the Council amending Directive 2003/87 so as to improve and extend the greenhouse gas emission allowance trading system of the Community [COM(2008) 16 final, p. 4]. However, the proposed amendment to Annex I referred in general to the 'chemical industry' (ibid., p. 41). Similarly, in the impact assessment accompanying that proposal (SEC(2008) 53), the Commission refers to the inclusion of '*CO^2 emissions from petrochemicals production and other chemicals*'. In that impact assessment, the Commission emphasises that CO^2 emissions from the chemical industry predominantly arise from the petrochemical sector (ibid., footnote 45: '*This is only a very small part of all chemical industry regarding the number of substances produced, but still the major part regarding CO^2 emissions*').

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21 The other seven activities relate to specific chemicals: 1. production of carbon black; 2. production of nitric acid; 3. production of adipic acid; 4. production of glyoxal and glyoxylic acid; 5. production of ammonia; 6. production of hydrogen (H^2) and synthesis gas by reforming or partial oxidation; and 7. production of soda ash (Na^2CO^3) and sodium bicarbonate ($NaHCO^3$).

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22 See, in particular, 'EU ETS Handbook', published by the Commission, available at https://ec.europa.eu/clima/sites/clima/files/docs/ets_handbook_en.pdf: '*From phase 3 the sectoral scope was expanded to include the sectors aluminium, carbon capture and storage, petrochemicals and other chemicals*.'

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23 Judgment of 16 December 2008 (C−127/07, EU:C:2008:728). As regards the comparability assessment, see, in particular, paragraphs 34 to 38 thereof.

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24 See points 76 to 78 of this Opinion.

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25 See point 79 of this Opinion.

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26 According to those observations, the technical characteristics common to those three processes are the production and use of high intensity heat (Trinseo); the division of large molecules, a significant release of heat and the release of CO^2 (German Government); the division of molecules under the effect of significant heat or a reaction with oxygen and the release of CO^2 (Netherlands Government); and the modification of molecular structure, the use of a catalyst and high pressure and temperature conditions (Commission).

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27 The German and Netherlands Governments have argued that polymers are not used to produce other *chemicals*. See point 71 of this Opinion.

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28 See, inter alia, point 4(a)(viii) of Annex I to Regulation (EC) No 166/2006 of the European Parliament and of the Council of 18 January 2006 concerning the establishment of a European Pollutant

Release and Transfer Register and amending Council Directives 91/689/EEC and 96/61/EC (OJ 2006 L 33, p. 1).

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29 To be more specific, that scheme applies only to certain types of greenhouse gases, listed in Annex II to that directive, where their emission arises from the activities referred to in Annex I to that directive. See Article 2(1) of Directive 2003/87.

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30 See, inter alia, judgments of 24 January 2012, *Dominguez* (C−282/10, EU:C:2012:33, paragraph 33); of 15 January 2014, *Association de médiation sociale* (C−176/12, EU:C:2014:2, paragraph 31) and of 12 October 2017, *Lombard Ingatlan Lízing* (C−404/16, EU:C:2017:759, paragraph 36).

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31 See, to that effect, judgments of 6 October 1970, *Grad* (9/70, EU:C:1970:78, paragraphs 5 to 10); of 10 November 1992, *Hansa Fleisch Ernst Mundt* (C−156/91, EU:C:1992:423, paragraphs 13 and 19); of 7 June 2007, *Carp* (C−80/06, EU:C:2007:327, paragraph 21) and of 20 November 2008, *Foselev Sud-Ouest* (C−18/08, EU:C:2008:647, paragraph 11).

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32 See, inter alia, judgments of 1 July 2010, *Gassmayr* (C−194/08, EU:C:2010:386, paragraph 45); of 26 May 2011, *Stichting Natuur en Milieu and Others* (C−165/09 to C−167/09, EU:C:2011:348, paragraph 95) and of 12 October 2017, *Lombard Ingatlan Lízing* (C−404/16, EU:C:2017:759, paragraph 36).

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33 See my Opinion in *INEOS,* delivered on 23 November 2017 (C−572/16, EU:C:2017:896, points 57 to 65).

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34 See Article 11(1) of Directive 2003/87 and Article 15(1) and (2) of Decision 2011/278.

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35 In the dispute in the main proceedings, the Commission actually rejected the free allocations provided for by the German implementing measures to installations which supplied heat to installations producing polymers, such as the installation at issue. See point 7 of this Opinion.