JUDGMENT OF THE COURT (First Chamber)

28 February 2018 (*)

(Reference for a preliminary ruling — Environment — Scheme for greenhouse gas emission allowance trading within the European Union — Directive 2003/87/EC — Scope — Article 2(1) — Annex I — Activities subject to the trading scheme — Production of polymers — Use of heat supplied by a third-party installation — Application for free allocation of emission allowances — Period 2013-2020)

In Case C−577/16,

REQUEST for a preliminary ruling under Article 267 TFEU from the Verwaltungsgericht Berlin (Administrative Court, Berlin, Germany), made by decision of 3 November 2016, received at the Court on 16 November 2016, in the proceedings

Trinseo Deutschland Anlagengesellschaft mbH

v

Bundesrepublik Deutschland,

THE COURT (First Chamber),

composed of R. Silva de Lapuerta, President of the Chamber, C.G. Fernlund, J.−C. Bonichot, A. Arabadjiev and E. Regan (Rapporteur), Judges,

Advocate General: H. Saugmandsgaard Øe,

Registrar: K. Malacek, Administrator,

having regard to the written procedure and further to the hearing on 21 September 2017,

after considering the observations submitted on behalf of:

– Trinseo Deutschland Anlagengesellschaft mbH, by S. Altenschmidt and P.−A. Schütter, Rechtsanwälte,

– the Bundesrepublik Deutschland, by H. Barth and L. Langefeld, acting as Agents,

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

– the Netherlands Government, by M.K. Bulterman, A.M. de Ree and C.S. Schillemans, acting as Agents,

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

Agents,

after hearing the Opinion of the Advocate General at the sitting on 14 December 2017,

gives the following

Judgment

1 This request for a preliminary ruling concerns the interpretation of Article 1 of, and Annex I to, Directive 2003/87/EC of the European Parliament and of the Council of 13 October 2003 establishing a scheme for greenhouse gas emission allowance trading within the Community and amending Council Directive 96/61/EC (OJ 2003 L 275, p. 32), as amended by Directive 2009/29/EC of the European Parliament and of the Council of 23 April 2009 (OJ 2009 L 140, p. 63) ('Directive 2003/87'), and 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 Trinseo Deutschland Anlagengesellschaft mbH ('Trinseo') and the Bundesrepublik Deutschland (Federal Republic of Germany), represented by the Umweltbundesamt (Federal Environment Agency, Germany), concerning the refusal to allocate greenhouse gas emission allowances ('the emission allowances') free of charge to an installation for the production of polycarbonate.

Legal context

EU law

Directive 2003/87

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

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

…'

4 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.'

5 Article 3 of that directive, which is entitled 'Definitions', provides:

'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;

…’

6 Under the heading ‘Transitional Community-wide rules for harmonised free allocation’, Article 10a(1) of that directive provides:

‘1. By 31 December 2010, the Commission shall adopt Community-wide and fully-harmonised implementing measures for the allocation of the allowances ...’

7 Article 11 of Directive 2003/87, headed ‘National implementation measures’, provides in paragraph 1:

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

8 Annex I to that directive, entitled ‘Categories of activities to which this directive applies’, refers, inter alia, in respect of carbon dioxide (CO^2) emissions, to the following activities:

‘Combustion of fuels in installations with a total rated thermal input exceeding 20 [megawatts (MW)] …

…

’.

Decision 2011/278

9 Recital 6 of Decision 2011/278 states:

‘The benchmark values should cover all production-related direct emissions, including emissions related to the production of measurable heat used for production, regardless of whether the measurable heat was produced on-site or by another installation. ...’

10 Recital 21 of that decision states:

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

11 Article 3 of that decision 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;

…’

Decision 2013/448/EU

12 Recitals 16 and 17 of Commission Decision 2013/448/EU of 5 September 2013 concerning national implementation measures for the transitional free allocation of greenhouse gas emission allowances in accordance with Article 11(3) of Directive 2003/87 (OJ 2013 L 240, p. 27) are worded as follows.

‘(16) The Commission also notes that the list of installations set out in the German [National Implementation Measures] is incomplete and therefore contravenes Article 11(1) of Directive 2003/87/EC. The list does not include installations producing polymers, in particular S-PVC and E-PVC, and vinyl chloride monomer (VCM) with the quantities of allowances intended to be allocated to each of these installations situated within the territory of Germany, to which that Directive applies and which are referred to in Section 5.1 of the Commission’s guidance on the interpretation of Annex I to Directive [2003/87], endorsed by the Climate Change Committee on 18 March 2010. In this regard, the Commission is aware of the opinion brought forward by Germany that the production of polymers, in particular S-PVC and E-PVC, and VCM is not covered by Annex I to Directive [2003/87]. The Commission considers that polymers, including S-PVC and E-PVC, and VCM, satisfy the definition of the relevant activity (production of bulk organic chemicals) in Annex I to Directive [2003/87]. Accordingly, in close cooperation with Member States and the industry sectors concerned corresponding product benchmarks for S-PVC, E-PVC and VCM were derived as set out in Annex I to Decision [2011/278].

(17) The Commission notes that the fact that the German list of installations is incomplete has undue effects on the allocation on the basis of the heat benchmark subinstallation for installations listed in point E of Annex I to this Decision exporting heat to installations producing bulk organic chemicals. Whereas only heat exports to an installation or other entity not covered by Directive [2003/87] give rise to free allocation on the basis of the heat benchmark subinstallation, in the German NIMs, heat exports to installations carrying out activities within the scope of Annex I to Directive [2003/87] are taken into account for the allocation to installations listed in point E of Annex I to this Decision. Consequently, the proposed allocations to the installations listed in point E of Annex I are not consistent with the allocation rules. The Commission therefore objects to the allocation to the installations

listed in point E of Annex I to this Decision.'

13 Article 1 of Decision 2013/448 provides:

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

2. ...

No objections are raised should a Member State amend the preliminary total annual amounts of emission allowances allocated free of charge to installations in its territory included in the lists referred to in paragraph 1 and listed in point E of Annex I to this Decision before determining the final total annual amount for each year from 2013 to 2020 in accordance with [Decision 2011/278] to the extent that the amendment consists of excluding any allocation for heat exported to installations producing polymers, such as S-PVC and E-PVC, and VCM.

…'

14 Point E of Annex I to that decision refers to five installations submitted in the German National Implementation Measures, including the installation of Dow Deutschland Anlagengesellschaft, which were subject to the scheme for emission allowance trading, and which provide heat exclusively to polymerisation installations.

Regulation (EU) No 601/2012

15 Under the heading 'Completeness', Article 5 of 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) provides:

'Monitoring and reporting shall be complete and cover all process and combustion emissions from all emission sources and source streams belonging to activities listed in Annex I to Directive [2003/87] … and … all greenhouse gases specified in relation to those activities while avoiding double-counting.

…'

16 Article 49, headed 'Transferred CO^2', of that regulation contains, in paragraph 1, the following provisions:

'The operator shall subtract from the emissions of the installation any amount of CO^2 originating from fossil carbon in activities covered by Annex I to Directive [2003/87], which is not emitted from the installation, but transferred out of the installation to any of the following:

(a) a capture installation for the purpose of transport and long-term geological storage in a storage site permitted under Directive 2009/31/EC [of the European Parliament and of the Council of 23 April 2009 on the geological storage of carbon dioxide and amending Council

Directive 85/337/EEC, European Parliament and Council Directives 2000/60/EC, 2001/80/EC, 2004/35/EC, 2006/12/EC, 2008/1/EC and Regulation (EC) No 1013/2006 of the European Parliament and of the Council (OJ 2009 L 140, p. 114)];

(b) a transport network with the purpose of long-term geological storage in a storage site permitted under Directive [2009/31];

(c) a storage site permitted under Directive [2009/31] for the purpose of long-term geological storage.

For any other transfer of CO^2 out of the installation, no subtraction of CO^2 from the installation's emissions shall be allowed.'

17 Annex IV to that regulation, headed 'Activity-specific monitoring methodologies related to installations (Article 20(2))', contains, inter alia, the following provisions:

'1 Specific monitoring rules for emissions from combustion processes

A. Scope

…

... 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.

…'

German law

18 Article 2 of the Treibhausgas Emissionshandelsgesetz (Law on greenhouse gas emissions trading) of 21 July 2011 (BGBl. I, p. 1475, 'the TEHG'), headed '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.

…'

19 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].

…'

20 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'.

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

21 Trinseo operates 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 which is operated, on the same site, by another company, Dow Deutschland Anlagengesellschaft, which is subject to the emission allowance trading scheme established by Directive 2003/87.

22 On 23 January 2012, Trinseo applied to the Deutsche Emissionshandelsstelle (German Emissions Trading Authority)('the DEHSt') for the free allocation to that installation of emission allowances in respect of the trading period 2013–2020.

23 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, that installation does not fall within the scope of the TEHG.

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

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

26 In support of that action, Trinseo claims that, under Article 2 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.

27 In that regard, Trinseo states that it is apparent from both the Commission's document, headed 'Guidance on Interpretation of Annex I of the [Directive 2003/87] (excl. aviation activities)' of 18 March 2010, and recital 16 of Decision 2013/448 that the production of polymers falls within the scope of Directive 2003/87. Under Decision 2011/278, where an installation subject to the emissions allowance trading scheme provides heat to another installation subject to that scheme, the free allocation of emission allowances should be made to the latter, since Decision 2013/448 prohibits, moreover, the allocation of those allowances to the first installation. Since, in Trinseo's submission, point 27 of Part 2 of Annex 1 to the TEHG does not correctly transpose Directive 2003/87, Trinseo is entitled to rely on a right to allocation of such free allowances which is derived directly from that directive.

28 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 matter of principle, burdensome for the operators of installations is an argument against its direct application.

29 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?’

The application to reopen the oral procedure

30 Following the delivery of the Advocate General’s Opinion, Trinseo, by document lodged at the Court Registry on 29 December 2017, applied for the oral part of the procedure to be reopened. In support of that application, Trinseo claims, in essence, that, in his Opinion, the Advocate General overlooked certain matters of national law relating to the grant of emission allowances free of charge to installations which do not generate CO^2 emissions, which, in Trinseo’s view, required *inter partes* debate.

31 It must be recalled that the Statute of the Court of Justice of the European Union and the Rules of Procedure of the Court make no provision for interested parties to submit observations in response to the Advocate General’s Opinion (*Vnuk*, C−162/13, EU:C:2014:2146, paragraph 30 and the case-law cited).

32 Pursuant to the second paragraph of Article 252 TFEU, it is the duty of the Advocate General, acting with complete impartiality and independence, to make, in open court, reasoned submissions on cases which, in accordance with the Statute of the Court of Justice of the European Union, require the Advocate General’s involvement. The Court is not bound either by the Advocate General’s Opinion or by the reasoning on which it is based (judgment of 17 September 2015, *Mory and Others* v *Commission*, C−33/14 P, EU:C:2015:609, paragraph 25).

33 Consequently, a party’s disagreement with the Opinion of the Advocate General, irrespective of the questions that he examines in his Opinion, cannot in itself constitute grounds justifying the reopening of the oral part of the procedure (judgment of 17 September 2015, *Mory and Others* v *Commission*, C−33/14 P, EU:C:2015:609, paragraph 26).

34 However, the Court may at any time, after hearing the Advocate General, order the reopening of

the oral part of the procedure, in accordance with Article 83 of its Rules of Procedure, in particular if it considers that it lacks sufficient information or where the case must be decided on the basis of an argument which has not been debated between the parties or the interested persons referred to in Article 23 of the Statute of the Court of Justice of the European Union (judgment of 29 April 2015, *Nordzucker*, C−148/14, EU:C:2015:287, paragraph 24).

35 That is not the position in this case. Like the other interested parties who participated in these proceedings, Trinseo set out, both during the written and the oral part of the proceedings, all the matters of fact and law which it considered relevant in order to reply to the questions referred for a preliminary ruling by the referring court, in particular as regards the scope of Directive 2003/87, as defined in Article 2 thereof, as well as the scope of the provisions laid down in Decisions 2011/278 and 2013/448 regarding the grant of emission allowances free of charge. Therefore, the Court considers, after hearing the Advocate General, that it has all the necessary information to give judgment and that that information has been the subject of debate before it.

36 In the light of the foregoing, the Court considers that there is no need to reopen the oral part of the procedure.

Consideration of the questions referred

37 By its first question, the referring court asks, in essence, whether Article 2(1) of Directive 2003/87 must be interpreted as meaning that an installation for the production of polymers, in particular the polymer polycarbonate, such as the installation at issue in the main proceedings, which obtains the heat needed for that production from a third-party installation, falls within the activity of '[p]roduction of bulk organic chemicals by cracking, reforming, partial or full oxidation or by similar processes', within the meaning of Annex I to that directive, so that it must be considered to fall within the scope of the emissions allowance trading scheme established by that directive.

38 It is apparent from the order for reference that that question has been referred in the context of proceedings following the refusal of the competent national authorities to allocate to such an installation emission allowances free of charge for the trading period 2013-2020.

39 It should be noted, as a preliminary point, that Directive 2003/87 has the purpose of establishing a scheme for greenhouse gas emission allowance trading, which aims to reduce greenhouse gas emissions in the atmosphere to a level that prevents dangerous anthropogenic interference with the climate system, with the ultimate objective of protection of the environment (see, inter alia, judgment of 8 March 2017, *ArcelorMittal Rodange et Schifflange*, C 321/15, EU:C:2017:179, paragraph 24).

40 There is an economic logic underlying the scheme which encourages a participant in that scheme to emit quantities of greenhouse gases that are less than the allowances originally allocated him, in order to sell the surplus to another participant who has emitted more than his allowance (see, inter alia, judgment of 8 March 2017, *ArcelorMittal Rodange et Schifflange*, C−321/15, EU:C:2017:179, paragraph 22).

41 Directive 2003/87 therefore 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 (judgment of 8 September 2016, *E.ON Kraftwerke*, C−461/15, EU:C:2016:648, paragraph 23).

42 As provided in Article 2(1) of Directive 2003/87, which defines the scope of that directive, the latter is to apply to 'emissions from the activities listed in Annex I', which refers, inter alia, in respect of CO^2 emissions, to the '[p]roduction of bulk organic chemicals by cracking, reforming, partial or full oxidation or by similar processes, with a production capacity exceeding 100 tonnes per day'.

43 In the present case, it is not disputed that, as is apparent from the wording of the questions referred for a preliminary ruling, the installation for the production of polymers at issue in the main proceedings exceeds the production capacity threshold laid down in that annex.

44 By contrast, while Trinseo and the Commission assert that polymers can be considered to be 'bulk organic chemicals' manufactured by a 'similar process' to cracking, reforming, or oxidation, for the purposes of that annex, the Federal Environment Agency and the German and Dutch Governments submit that that type of installation does not fulfil those conditions, since, first, polymers are finished products rather than intermediate products used to produce other chemicals and, second, the polymerisation process does not display similar characteristics to cracking, reforming or oxidation.

45 It should, however, be observed at the outset that, according to the very wording of Article 2(1) of Directive 2003/87, the activities referred to in Annex I to that directive fall within the scope of that directive and, therefore, of the emissions allowance trading scheme established by that directive only if they generate greenhouse gas 'emissions' listed in Annex II to that directive.

46 Accordingly, in order to determine whether an installation for the production of polymers, such as that at issue in the main proceedings, falls within the scope of Directive 2003/87, it is first of all necessary to ascertain, in accordance with Article 2(1) of that directive, whether that installation carries out activities which generate such 'emissions'.

47 In that regard, it should be borne in mind that, according to Article 3(b) of Directive 2003/87, 'emissions' are, for the purposes of that directive, defined as the release of greenhouse gases into the atmosphere from sources in an installation.

48 It thus follows from the very wording of that provision that, for there to be an 'emission' within the meaning of that provision, a greenhouse gas must be released into the atmosphere by an installation (judgment of 19 January 2017, *Schaefer Kalk*, C−460/15, EU:C:2017:29, paragraph 32).

49 In the present case, it is apparent from the evidence submitted to the Court, and it is common ground between all the interested parties who have participated in these proceedings, that an installation for the production of polymers, such as that at issue in the main proceedings, which obtains the heat needed for polymerisation from a third-party installation does not itself generate releases of CO^2 into the atmosphere, only the production of heat by that latter installation giving rise to such releases. The polymerisation process does not release CO^2 since carbon, as the Netherlands Government explained, is specifically necessary for the production of polymers, such as polycarbonate.

50 It follows that the production of polymers by an installation, such as that at issue in the main proceedings, which does not produce, in an integrated manner, the heat needed for polymerisation, does not generate direct emissions of CO^2.

51 Or, in the absence of such emissions, an activity, even if it is referred to in Annex I to Directive 2003/87, cannot fall within the scope of that directive and, therefore, of the emissions allowance trading scheme established by that directive.

52 That conclusion is supported by the objective pursued by that directive, recalled in paragraphs 39 to 41 of this judgment, which is to encourage installations subject to the emissions allowance trading scheme to reduce their greenhouse gas emissions in order to be able to sell a surplus of emission allowances to another installation subject to that scheme. Since installations for the production of polymers do not in themselves generate any direct CO^2 emission, operators of those installations could not be encouraged to reduce their greenhouse gas emissions by the grant of emission allowances.

53 Trinseo and the Commission submit, however, that emissions arising from the production of polymers should include 'indirect' emissions from the production of heat by the third-party installation supplying that heat for the purposes of polymerisation. In their view, that approach is consistent with the objective pursued by Directive 2003/87, inasmuch as it would make it possible to encourage investments aimed at reducing energy consumption. They argue that that approach is also supported by Article 10a of that directive and Article 3(c) and recitals 6 and 21 of Decision 2011/278, which provide for the free allocation of emission allowances to the installation which uses the heat and not to the installation which produces it. Thus, they contend that it is apparent from Article 1(1) of Decision 2013/448, read in conjunction with point E of Annex I to that decision and construed in the light of recitals 16 and 17 of that decision, that polymerisation installations, rather than the heat supplier, must be allocated emission allowances free of charge. They state that Annex I to Decision 2011/278 moreover sets benchmarks for products manufactured exclusively in that type of installation.

54 That interpretation cannot be accepted, however.

55 As is already apparent from paragraphs 47 and 48 of this judgment, the 'emissions' to which Directive 2003/87 applies are, according to the very wording of Article 3(b) of that directive, solely those which give rise to the release of greenhouse gases from sources in an installation.

56 As regards CO^2 emissions arising from the production of heat, Annex I to Directive 2003/87 provides that those emissions are referred to under the activity of combustion of fuels 'in installations with a total rated thermal input exceeding 20 MW'.

57 It is thus clearly apparent from that provision that only emissions arising directly from the activity carried out by the installation itself producing the heat can be taken into account in order to determine whether that activity falls within the emissions allowance trading scheme.

58 It follows that CO^2 emissions arising from the activity of producing heat justify solely the inclusion in that scheme of installations that are the source of those emissions, such as, in the present case, the third-party installation supplying heat to the installation at issue in the main

proceedings.

59 That interpretation is supported by Annex IV to Regulation No 601/2012, the second paragraph of Point 1.A. of which provides expressly that '[t]he 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'.

60 It is thus clearly apparent from that wording that an operator which imports heat from a third-party installation cannot rely on the emissions generated by the latter.

61 Any other interpretation, as the Advocate General observed in points 50 and 51 of his Opinion, would inevitably give rise to a risk that those emissions could be counted twice, since those emissions would have to be reported by both the producer of the heat, as direct emissions, and the user of that heat, as indirect emissions.

62 Not only would that double counting be contrary to the first paragraph of Article 5 of Regulation No 601/2012, but would also undermine, given that emissions related to heat production by an installation producing its own heat in an integrated manner would have to be declared only once, the preservation of conditions of competition, which constitutes one of the sub-objectives of the scheme established by Directive 2003/87 (see, inter alia, judgment of 22 June 2016, *DK Recycling und Roheisen* v *Commission*, C−540/14 P, EU:C:2016:469, paragraph 50).

63 Moreover, it must be stated, as the Advocate General observed in points 52 and 53 of his Opinion, that, although Article 49(1) of Regulation No 601/2012 establishes a mechanism for transferring CO^2 in the three situations listed in that provision, the scheme established by Directive 2003/87 does not provide, however, for a general mechanism enabling a producer of heat to transfer CO^2 emissions to the user of that heat, and nor does it contain any provisions whose purpose is to settle the question of possible allocation of those emissions between its different users, who may, depending on the circumstances, be successive users.

64 It is true, as Trinseo and the Commission claim, that it cannot be ruled out that the grant of emission allowances to the operator of an installation for the production of polymers which obtains the heat needed for that purpose from a third-party installation might encourage such an operator to use more efficient techniques in order to improve its energy efficiency, in particular by reducing its fuel requirements. Also, the Commission provides, in recital 21 of Decision 2011/278, that free emission allowances to be allocated must be allocated to the heat consumer.

65 However, the fact remains that, as the Netherlands Government correctly pointed out, such an energy efficiency gain cannot justify the inclusion in the emissions allowance trading scheme of activities which do not fall within the scope of Directive 2003/87, as defined in Article 2(1) thereof.

66 Nor are those considerations capable of being called into question by the rules laid down by the EU legislature in respect of the allocation of free emission allowances.

67 In that regard, it should be borne in mind that the allocation of those emission allowances free of charge falls, in accordance with Article 10a of Directive 2003/87, within the scope of transitional

rules applicable solely to installations falling within certain sectors of activities; moreover the quantity of those allowances being allocated is to decrease gradually over the period 2013-2020, with a view to reaching their complete abolition in 2027 (see, to that effect, judgments of 8 September 2016, *E.ON Kraftwerke*, C−461/15, EU:C:2016:648, paragraph 24, and of 26 October 2016, *Yara Suomi and Others*, C−506/14, EU:C:2016:799, paragraph 46).

68 Only installations whose activities fall, in accordance with Article 2(1) of Directive 2003/87, within the scope of the emissions allowance trading scheme are eligible for the allocation of such free allowances. Neither Article 10a of that directive nor Decisions 2011/278 and 2013/448 can alter the scope of that directive (see, by analogy, judgment of 19 January 2017, *Schaefer Kalk*, C−460/15, EU:C:2017:29, paragraphs 40 to 42).

69 Moreover, it is apparent from the very wording of Article 3(c) of Decision 2011/278 that an installation which exports the heat which it produces must be allocated emission allowances free of charge for that heat when it exports the heat 'to an installation or other entity not covered by the Union scheme' (judgment of 8 September 2016, *Borealis and Others*, C−180/15, EU:C:2016:647, paragraph 117).

70 That is precisely the case where an installation using heat, carrying out activities which do not themselves generate emissions, within the meaning of Article 3(b) of Directive 2003/87, does not fall within the scope of Article 2(1) of that directive.

71 In that regard, it should be added that the difference in treatment resulting from the fact that an installation for the production of polymers producing, in an integrated manner, the heat needed for that purpose, unlike an installation, such as that at issue in the main proceedings, which obtains that heat from a third-party installation, is included in the emission allowance trading scheme, in respect of the '[c]ombustion of fuels', within the meaning of Annex I to Directive 2003/87, is in no way discriminatory. In the light of the objective pursued by Directive 2003/87, recalled in paragraphs 39 to 41 of this judgment, there is an objective difference between an installation whose activities generate greenhouse gas emissions into the atmosphere and an installation whose activities do not generate such emissions (see, to that effect, judgment of 19 January 2017, *Schaefer Kalk*, C−460/15, EU:C:2017:29, paragraph 47).

72 It is apparent from the foregoing that an installation for the production of polymers, such as that at issue in the main proceedings, in respect of which it is not disputed that it carries out activities not generating direct CO^2 emissions, does not fall within the scope of Directive 2003/87, as defined in Article 2(1) thereof.

73 Accordingly, such an installation — without there being any need to consider whether it carries out an activity of '[p]roduction of bulk organic chemicals by cracking, reforming, partial or full oxidation or by similar processes' within the meaning of Annex I to Directive 2003/87 — does not fall within the scope of the emissions allowance trading scheme established by that directive.

74 Consequently, the answer to the first question is that Article 2(1) of Directive 2003/87 must be interpreted as meaning that an installation for the production of polymers, in particular the polymer polycarbonate, such as the installation at issue in the main proceedings, which obtains the heat needed for that production from a third-party installation, does not fall within the scope of the

emissions allowance trading scheme established by that directive, since it does not generate direct CO^2 emissions.

75 In light of that reply, it is unnecessary to answer the second question submitted for a preliminary ruling.

Limitation of the temporal effects of the judgment

76 At the hearing, the German Government requested the Court to limit the temporal effects of this judgment both in the event that it answers the first question in the affirmative and in the negative.

77 It must, however, be stated that the German Government has not adduced any specific evidence to justify that request.

78 In those circumstances, the temporal effects of this judgment should not be limited.

Costs

79 Since these proceedings are, for the parties to the main proceedings, a step in the action pending before the referring 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 (First Chamber) hereby rules:

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, must be interpreted as meaning that an installation for the production of polymers, in particular the polymer polycarbonate, such as the installation at issue in the main proceedings, which obtains the heat needed for that production from a third-party installation, does not fall within the scope of the greenhouse gas emission allowance trading scheme established by that directive, since it does not generate direct CO2 emissions.

[Signatures]

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* Language of the case: German.