Case C-113/19

Summary of the request for a preliminary ruling pursuant to Article 98(1) of the Rules of Procedure of the Court of Justice

Date lodged:

12 February 2019

Referring court:

Cour administrative (Luxembourg)

Date of the decision to refer:

7 February 2019

Applicant:

Luxaviation SA

Defendant:

Ministre de l'Environnement

I. The main proceedings

1 By application of 6 April 2018, the company Luxaviation S.A. ('Luxaviation' or 'the appellant') brought an appeal before the Cour administrative (Higher Administrative Court) (Grand Duchy of Luxembourg) against a judgment of the tribunal administratif (Administrative Court) (Grand Duchy of Luxembourg) of 28 February 2018 ('the judgment under appeal') declaring as unfounded its action of 29 November 2016 brought against an order of the ministre de l'Environnement (Minister for the Environment) ('the Minister') of 31 October 2016 ('the contested decision').

2 The contested decision requires the surrender, by 30 April 2017, of 6 428 emission allowances for the monitoring year 2015 at the Luxembourg registry of greenhouse gas emissions, and sets a fine on the excess emissions of EUR 100 per unsurrendered allowance, that is EUR 642 800 payable by 30 November 2016. The same decision orders that the appellant's name be published on the website of the Department of the Environment.

II. Legal framework

1. EU law

– 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 Union and amending Council Directive 96/61/EC (OJ 2003 L 275, p. 32)

3 Article 6(2)(e) of Directive 2003/87 provides:

‘Greenhouse gas emissions permits shall contain the following: … an obligation to surrender allowances, other than allowances issued under Chapter II, equal to the total emissions of the installation in each calendar year, as verified in accordance with Article 15, within four months following the end of that year.’

4 Article 12(3) of Directive 2003/87 provides:

‘For the period until 31 December 2020, Member States shall ensure that, by 30 April each year, the operator of each installation surrenders a number of allowances, other than allowances issued under Chapter II, that is equal to the total emissions from that installation during the preceding calendar year as verified in accordance with Article 15, and that those allowances are subsequently cancelled. ...’

5 Article 16 of the directive provides:

‘1. Member States shall lay down the rules on penalties applicable to infringements of the national provisions adopted pursuant to this Directive and shall take all measures necessary to ensure that such rules are implemented. The penalties provided for must be effective, proportionate and dissuasive. Member States shall notify these provisions to the Commission and shall notify it without delay of any subsequent amendment affecting them.

…

3. Member States shall ensure that any operator or aircraft operator who does not surrender sufficient allowances by 30 April of each year to cover its emissions during the preceding year shall be held liable for the payment of an excess emissions penalty. The excess emissions penalty shall be EUR 100 for each tonne of carbon dioxide equivalent emitted for which the operator or aircraft operator has not surrender allowances. Payment of the excess emissions penalty shall not release the operator or aircraft operator from the obligation to surrender an amount of allowances equal to those excess emissions when surrendering allowances in relation to the following calendar year.’

– Charter of Fundamental Rights of the European Union (‘the Charter’):

6 Article 20 provides:

‘Everyone is equal before the law.’

7 Article 41 provides:

‘1. Every person has the right to have his or her affairs handled impartially, fairly and within a reasonable time by the institutions, bodies, offices and agencies of the Union.

2. This right includes:

(a) the right of every person to be heard, before any individual measure which would affect him or her adversely is taken;

(b) the right of every person to have access to his or her file, while respecting the legitimate interests of confidentiality and of professional and business secrecy;

(c) the obligation of the administration to give reasons for its decisions.

…’

8 Article 47 provides:

‘Everyone whose rights and freedoms guaranteed by the law of the Union are violated has the right to an effective remedy before a tribunal in compliance with the conditions laid down in this Article.

Everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal previously established by law. Everyone shall have the possibility of being advised, defended and represented.

…’

9 Article 49(3) provides:

‘The severity of penalties must not be disproportionate to the criminal offence.’

10 Article 51(1) of the Charter provides:

‘The provisions of this Charter are addressed to the institutions, bodies, offices and agencies of the Union with due regard for the principle of subsidiarity and to the Member States only when they are implementing Union law. They shall therefore respect the rights, observe the principles and promote the application thereof in accordance with their respective powers and respecting the limits of the powers of the Union as conferred on it in the Treaties.’

2. National law

11 Directive 2003/87 was transposed into Luxembourg law by the loi du 23 décembre 2004 établissant un système d'échange de quotas d'émission de gaz à effet de serre (Law of 23 December 2004 establishing a scheme for greenhouse gas emission allowance trading), published in Mémorial luxembourgeois A-210 of 30 December 2004, p. 3792 ('the Law of 23 December 2004').

12 The Law of 23 December 2004 provides inter alia:

Article 13(2a):

'The Minister shall ensure that, by 30 April each year, each aircraft operator surrenders a number of allowances equal to the total emissions during the preceding calendar year from aviation activities listed in Annex I for which it is the aircraft operator, as verified in accordance with Article 16. The surrendered allowances shall subsequently be cancelled by the Minister.'

Article 20:

'…

3. Any operator or aircraft operator who does not surrender sufficient allowances by 30 April of each year to cover its emissions during the preceding year shall be held liable for the payment of an excess emissions penalty. The excess emissions penalty shall be EUR 100 for each tonne of carbon dioxide equivalent emitted for which the operator or aircraft operator has not surrendered allowances. Payment of the excess emissions penalty shall not release the operator or aircraft operator from the obligation to surrender an amount of allowances equal to those excess emissions when surrendering allowances in relation to the following calendar year.

…

7. Without prejudice to the foregoing provisions, the names of the operators and aircraft operators who are in breach of the requirement to surrender sufficient allowances pursuant to Article 13(2a) or (3) shall be published.'

III. Facts

13 On 5 February 2016, Luxaviation drew up a greenhouse gas emission report for the year 2015.

14 On 30 March 2013, Luxaviation received electronic notification, from the email address CLIMA-EU-ETS-REGISTRY-PROD@ec.europa.eu, that its emission report for the year 2015 had been verified. That email was worded as follows:

'Subject: Emissions approved

The emissions entered for:

23415 (Monitoring Plan for Annual Emissions)

Year(s) 2015

... have been VERIFIED'.

15 The appellant declares that, on 19 April 2016, it registered the allowances with the Luxembourg registry before transferring them, after carrying out the necessary checks. On the same day, it made the required payments and released the corresponding certificates to European account EU-100-50223942.

16 The appellant maintains that, since that date, it was certain that it had completed the allowance surrender procedure for the emissions for the year 2015 and that certainty was reinforced when it received, on 19 April 2016, an email from the address *CLIMA-EU-ETS-REGISTRY-PROD*@ec.europa.eu, worded as follows:

'The transaction EU341482 of type 10-00 Internal Transfer between:

EU-100-5023709

and:

EU-100-5023942

Involving:

Unit Type: Aviation, Unit Amount: 6428

... has ended with a status Completed.'

17 The deadline for surrendering emission allowances relating to the year 2015 was set at 30 April 2016, in accordance with Article 6(2)(e) of Directive 2003/87.

18 By letter of 27 June 2016, the Minister sent the appellant a draft order and invited it to submit any observations.

19 The appellants disputed the draft order and stated that it had learned of the failure to surrender emissions allowances for the year 2015 from the Minister's letter. It denied any intention not to fulfil its obligations and referred to 'an error committed by one of its employees or a computer malfunction'.

20 The applicant states that it relied on the email of 19 April 2016 and firmly believed at the time that it had completed the surrender procedure. It submits, furthermore, that it has caused no environmental harm.

IV Essential arguments of the parties in the main proceedings

1. The appellant's position

21 Luxaviation claims, in the first place, that Article 20(3) and (7) of the Law of 23 December 2004 is not applicable in the present case, since those provisions relate to cases of excess emissions and not to cases of mere non-surrender of allowances. It also disputes the publication of its name on the website of the Department of the Environment, which is the automatic consequence of infringement of the aforementioned provisions.

22 The appellant maintains, in the second place, that if Article 20(3) and (7) of the Law of 23 December 2004 is applicable to the present case, several questions should be submitted to the Court of Justice for a preliminary ruling.

23 The absence of mechanisms for warnings, reminders and advance surrender in Luxembourg law is contrary to the principle of proportionality, in that no intermediate stage is put in place by the Luxembourg authorities in order to assist operators in their obligations, and the flat rate penalty is applied 'automatically, immediately and without consideration of the circumstances' which led to the non-surrender of allowances.

24 Finally, in the alternative, the appellant stresses the need for a deadline for paying the fine. There is no legal deadline for payment, either in Directive 2003/87 or in the Law of 23 December 2004 and the appellant's survival is 'purely and simply' threatened by the exorbitant amount of the fine set.

2. The Minister's position

25 The appellant has been subject to the obligation to surrender its emissions allowances since 2013 and, in 2015, its first compliance cycle covered, exceptionally, the years 2013 and 2014. The surrender of the allowances for that period was carried out in accordance with the legislative provisions, so that Luxaviation benefited from the experience of a full cycle for the surrender of allowances.

26 The Minister sent several information letters to the appellants. He warned it of the risk of a fine. At a meeting between the Department of the Environment and the appellant, in January 2015, the company received information suited to its needs and a registry user manual. Finally, the Department sent it a letter in early January 2016 summarising all the stages and deadlines to be observed in order to comply with the obligations under the Law of 23 December 2004.

27 The Minister disputes the appellant's argument that Article 20(3) and (7) of the Law of 23 December 2004 does not apply to it because it had sufficient allowances on 30 April 2016 and that it is acting in good faith and did not contribute to additional pollution. In the judgment of 17 October 2013, *Billerud*

Karlsborg and Billerud Skärblacka (C-203/12, EU:C:2013:664) ('the judgment in *Billerud'*), the Court held that failure to surrender allowances was, on its own, sufficient to trigger application of the penalty provided for in Article 16(3) of Directive 2003/87. That strictness is explained by the importance attached by the EU legislature to the surrender process. Moreover, the publication of the names of operators who are in breach of the surrender obligation is an automatic consequence of infringement of Article 20(3) of the Law of 23 December 2004.

28 As regards the email of 19 April 2016, the Minister explains that it refers to an internal transfer to the appellant's EU account, as indicated by the order number '*10-00*' and the reference '*Internal Tranfer*' contained therein. A surrender transaction in accordance with the Law of 23 December 2004 should have had the code '*10-02*' corresponding to the 'surrender allowances' operation.

29 Furthermore, although Member States are permitted to introduce mechanisms for warnings, reminders and advance surrender in order to allow operators acting in good faith to be informed of their obligations and to limit the risk of fines, they are not required to do so.

30 As regards the plea alleging infringement of the principle of proportionality, Luxembourg law faithfully transposes Directive 2003/87. In the judgment in *Billerud*, the Court held that the flat rate fine provided for in Article 16(3) of Directive 2003/87 cannot be considered to be contrary to the principle of proportionality since there is no possibility for the amount to be varied by the national court.

31 The Minister concludes that the Court has already answered the questions which the appellant suggests should be referred for a preliminary ruling.

32 Finally, the Minister does not dispute that the Law of 23 December 2004 does not provide for a time limit for payment of the fine. He nevertheless considers that it is apparent from the objective of the provision and the circumstances on which Directive 2003/87 was based that payment should be made within a period close to the deadline for surrender. Otherwise, the operation of the surrender system would be compromised. However, the Minister does not preclude the setting of a longer period or of payment in instalments.

V. Assessment of the referring court

1. Application of the Charter

33 The purpose of the national provisions at issue is to implement Directive 2003/87, which imposes specific obligations on the Member States with the aim of reducing 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, judgments of 8 March 2017, *ArcelorMittal Rodange et Schifflange*, C-321/15, EU:C:2017:179, paragraph 24;

of 18 January 2018, *INEOS*, C-58/17, ECLI:EU:C:2018:19, paragraph 22, and of 28 February 2018, *Trinseo Deutschland*, C-577/16, EU:C:2018:127, paragraph 39).

34 The principal instrument for that purpose is constituted by the Community scheme for greenhouse gas emissions trading (see, inter alia, judgment of 29 March 2012, *Commission* v *Poland*, C-504/09 P, EU:C:2012:178, paragraph 77).

35 Therefore, the relevant provisions of the Law of 23 December 2004 are 'implementing Union law' within the meaning of Article 51(1) of the Charter, in so far as there is a clear connection between Directive 2003/87 and the national measure at issue which implements it (see, inter alia, judgments of 26 February 2013, *Åkerberg Fransson*, C-617/10, EU:C:2013:105, paragraph 17, and of 6 March 2014, *Siragusa*, C-206/13, EU:C:2014:126, paragraph 24).

36 Since, the present case concerns 'implementing Union law', it is necessary to examine the provisions at issue in the light of the guarantees of the Charter, in accordance with Article 51 thereof.

2. Principle of sound administration

37 The Court has held that, in the absence of binding legal provisions, the Member States remained free to introduce mechanisms for warnings, reminders and advance surrender in order to keep operators acting in good faith informed and to prevent the risk of a fine (see the judgment in *Billerud*, paragraph 41).

38 The Law of 23 December 2004 does not provide for such mechanisms. However, the Department has demonstrated that it sent a letter to the appellant in early 2016 to remind it of its obligations.

39 The national administration is responsible for a limited number of operators, 25 in total. During the discussions, the Minister confirmed that it was technically possible for the administration to access, in good time, the profile of each operator to see the progress of the surrender, but emphasised that individual verification could involve lengthy administrative procedures for its services.

40 However, during the previous surrender year, the national authority had voluntarily contacted the operator a few days before expiry of the deadlines to warn it that surrender had not yet been completed.

41 The referring court is therefore uncertain as to the interpretation to be given to the principle of sound administration, as enshrined in Article 41 of the Charter, in a situation in which the national authorities have not provided individualised monitoring — although that was reasonably possible from a material point of view — to enable the operator acting in good faith to fulfil its obligations and avoid the flat rate penalty provided for by Directive 2003/87.

3. Legitimate expectations and force majeure

42 If the Court were to consider that the principle of sound administration is not a basis for a positive obligation to assist in the present case, the referring court wonders, nevertheless, whether, by contacting the appellant during the previous surrender, the administration may have caused it to have legitimate expectations. In the absence of further direct contact, Luxaviation could reasonably have assumed that it had fulfilled its surrender obligations for the current year.

43 The referring court also wonders whether the receipt of the electronic confirmation of the transfer of allowances might reasonably have generated in the mind of the operator acting in good faith a legitimate expectation that it had completed the allowance transfer operation in accordance with the obligations laid down by Directive 2003/87.

44 In view of these circumstances which might generate legitimate expectations, the referring court would like to know whether legitimate expectations may be interpreted as constituting *force majeure*, partially or wholly exempting the operator from the penalty, provided for in Article 16(3) of Directive 2003/87, and from the penalty of automatic publication in the register, provided for in Article 20(7) of the Law 23 December 2004.

4. Principles of proportionality, equal treatment and the right to an effective remedy

45 The appellant's argument concerning the non-applicability of Article 20(3) and (7) of the Law of 23 December 2004 must be examined in conjunction with the plea relating to the proportionality of the fine provided for in Article 16(3) of Directive 2003/87.

46 In the judgment in *Billerud*, the Court held that 'Article 16(3) and (4) of the directive has as its object and effect to penalise not "polluters" generally, but rather those operators whose number of emissions for the preceding year exceeds, as at 30 April of the current year, the number of allowances listed in the section of the surrendered allowances table designated for their installations for that year in the centralised registry of the Member State to which they report ... This — and not the emissions which are per se excessive — is how the concept of "excess emissions" is to be construed' (judgment in *Billerud*, paragraph 28). Moreover, Article 16(3) is interpreted as 'precluding operators who have not surrendered, by 30 April of the current year, the carbon dioxide equivalent allowances equal to their emissions for the preceding year, from avoiding the imposition of a penalty for the excess emissions for which it provides, even where they hold a sufficient number of allowances on that date' (ibidem, paragraph 32).

47 Furthermore, contrary to the discretion given to the Member States in Article 16(1) of the directive to penalise any other infringement, the EU legislature has accorded the surrender of allowances central importance.

Moreover, the strictness of that surrender obligation has been confirmed on two further occasions (see judgment of 29 April 2015, *Nordzucker*, C-148/14, EU:C:2015:287, paragraph 30, and order of 17 December 2015, *Bitter*, C-580/14, EU:C:2015:835, paragraph 31).

48 Failure to surrender allowances is, therefore, on its own, sufficient to trigger application of the flat rate penalty provided for in Article 16(3) of Directive 2003/87 (see judgment of 29 April 2015, *Nordzucker*, C-148/14, EU:C:2015:287, paragraph 35).

49 The Court examined the compliance of the flat rate penalty with the principle of proportionality in the judgment in *Billerud* and also in the judgment of 29 April 2015, *Nordzucker* (C-148/14, EU:C:2015:287), and in the order of 17 December 2015, *Bitter* (C-580/14, ECLI:EU:C:2015:835).

50 In the judgment of 29 April 2015, *Nordzucker* (C-148/14, EU:C:2015:287), the Court held that, unlike the flat rate penalty provided for in Article 16(3) of Directive 2003/87, the penalty under Article 16(1) must be proportionate to the infringement committed. In that context, it is for the authorities of the Member States to take into account the behaviour of the operator 'as well as its good faith or its fraudulent intentions'.

51 With regard to the fine provided for in Article 16(3) of Directive 2003/87, the Court has stated that 'the relatively high level of the penalty is justified by the need to have infringements of the obligation to surrender a sufficient number of allowances treated in a stringent and consistent manner throughout the European Union (order of 17 December 2015, *Bitter*, C-580/14, EU:C:2015:835).

52 The Court has held that the legislature had weighed up the interests involved and that 'the penalty for excess emissions provided for by Directive 2003/87 cannot be considered to be contrary to the principle of proportionality on the ground that there is no possibility for the amount to be varied by a national court (judgment in *Billerud*, paragraph 38).

53 In environmental policy, the EU legislature has a broad discretion where its action involves political, economic and social choices and where it is called on to undertake complex assessments and evaluations (judgment of 16 December 2008, *Arcelor Atlantique et Lorraine and Others*, C-127/07, EU:C:2008:728, paragraph 57).

54 The Court cannot substitute its own assessment for that of the legislature in that regard and 'could, at most, find fault with its legislative choice only if it appeared manifestly incorrect or the resultant disadvantages for certain economic operators were wholly disproportionate to the advantages otherwise offered' (judgment in *Billerud*, paragraph 35).

55 However, 'even where it has such a discretion, the Community legislature is obliged to base its choice on objective criteria appropriate to the aim pursued by

the legislation in question'. Furthermore, 'when exercising its discretion, the Community legislature must, in addition to the principal objective of protecting the environment, fully take into account all the interests involved ... In examining the burdens associated with various possible measures, it must be considered that, even if the importance of the objectives pursued is such as to justify even substantial negative economic consequences for certain operators ..., the Community legislature's exercise of its discretion must not produce results that are manifestly less appropriate than those that would be produced by other measures that were also suitable for those objectives' (judgment of 16 December 2008, *Arcelor Atlantique et Lorraine and Others*, C-127/07, EU:C:2008:728, paragraphs 58 and 59).

56 It is apparent from the case-law that the overall scheme of Directive 2003/87 and, more particularly, of the Community scheme for greenhouse gas emission allowance trading, is based on the 'strict accounting of the issue, holding, transfer and cancellation of allowances' (see, inter alia, judgments of 8 March 2017, *ArcelorMittal Rodange et Schifflange*, C-321/15, EU:C:2017:179, paragraph 24; of 28 July 2016, *Vattenfall Europe Génération*, C-457/15, EU:C:2016:613, paragraph 27, and of 29 April 2015, *Nordzucker*, C-148/14, EU:C:2015:287, paragraph 28).

57 The referring court wonders, however, about the different interpretations made, in the application of the principle of proportionality, between paragraphs 1 and 3 of Article 16 of Directive 2003/87. In the two situations mentioned in those provisions, whether it be a partial surrender of allowances or non-surrender, the objective of strict accounting of the allowance system is similarly affected since the actual number of greenhouse gas emissions is not fully delivered, which affects the overall coherence of the trading system.

58 Consequently, the referring court wonders whether it is appropriate to interpret the principle of proportionality differently according to whether it applies as a general principle of EU law or as a right enshrined by the Charter in Article 49(3). Otherwise, that principle should also apply to the penalty provided for in Article 16(3) of Directive 2003/87.

59 If that is not the case, the referring court is unsure how to interpret the application of the flat rate penalty, with no variation possible, other than in cases of *force majeure*, in the light of the principle of equal treatment enshrined in Article 20 of the Charter. That general principle of EU law requires that comparable situations should not be treated differently and that different situations should not be treated in the same way, unless such different treatment is objectively justified (see judgments of 17 October 2013, *Schaible*, C-101/12, EU:C:2013:661, paragraph 76, and of 11 July 2006, *Franz Egenberger*, C-313/04, EU:C:2006:454, paragraph 33).

60 Indeed, the failure to apply the principle of proportionality constitutes a clear infringement of the principle of equal treatment, since it amounts to treating in the

same way and without justification, in the light of the general legal principles of good faith and the adage *fraus omnia corrumpit*, a fraudulent operator and an operator which is simply negligent but acting in good faith. However, the principle of proportionality enshrined in Article 49(3) of the Charter is at the core of criminal law and must, in the opinion of the referring court, be applied in order to determine administrative penalties in the same way as criminal penalties.

61 Moreover, if the Court were to hold that neither the principle of proportionality enshrined in Article 49(3) of the Charter nor the principle of equal treatment, as stated in Article 20 of the Charter, precludes the fixing of a flat rate penalty as provided for in Article 16(3) of Directive 2003/87, the referring court wonders whether that flat rate penalty is compatible with Article 47 of the Charter, which ensures that the protection conferred by Article 6 of the European Convention for the Protection of Human Rights and Fundamental Freedoms is safeguarded under EU law (see, inter alia, judgment of 13 September 2018, *UBS Europe and Others*, C-358/16, EU:C:2018:715, paragraph 50).

62 That question is all the more relevant because, given the amount of the fine and its punitive function, it could be likened to a penalty imposed in the area of criminal law in the light of the settled case-law of the European Court of Human Rights.

63 Having regard to the right to an effective remedy, the referring court has doubts as to the compatibility of the flat rate penalty with the right to a fair hearing, of which the rights of the defence are a particular aspect. These must be observed in all proceedings initiated against a person, which may well culminate in a measure adversely affecting that person (see, inter alia, judgment of 13 September 2018, *UBS Europe and Others*, C-358/16, EU:C:2018:715, paragraph 60).

64 In addition, the rights of the defence require that all the relevant facts in the case can be examined by the national court in order to meet the requirements of the right to an effective remedy. The judicial review must therefore include an examination of the level of the penalty fixed by the competent national authority.

65 However, except in cases of *force majeure*, an operator on which a penalty is imposed pursuant to Article 16(3) of Directive 2003/87 cannot properly present its case before the national court and therefore does not have an effective remedy.

66 The very existence of effective judicial review forms an integral part of the rule of law. To ensure such review, access to an independent and impartial judge is essential whenever a fundamental right is at stake.

67 As a member of the European Union Judicial Network, the Cour Administrative (Higher Administrative Court), the highest administrative court in Luxembourg, endorses the common values that underpin European integration. It is an integral part of a European Union based on the rule of law. It maintains that fundamental rights are at the heart of the legal structure of the European Union and are guaranteed by the Charter whenever EU law is implemented.

5. Concept of force majeure

68 Finally, the referring court wonders if it is permissible for the national court to include in cases of *force majeure* cases of individual hardship, particularly where a company, as in the present case, states that payment of the flat rate penalty provided for in Article 16(3) of Directive 2003/87 constitutes a considerable financial risk which could lead to its staff being made redundant or even bankruptcy.

VI. Reasons for the referral

69 In the light of all the points raised, the Cour administrative (Higher Administrative Court) is required to submit to the Court of Justice for a preliminary ruling the questions relating to the interpretation and application of those elements of EU law which are relevant to the outcome of the dispute. The penalty provided for in Article 16(3) of Directive 2003/87, transposed into Luxembourg law in Article 20(3) of the Law of 23 December 2004, and the automatic publication, provided for in Article 20(7) of that law, raise various questions of interpretation in the light of the Charter; the answers to those questions are necessary for the resolution of the dispute in the main proceedings and are not sufficiently apparent from existing case-law. Reliance on the Charter in the present case offers a new interpretation which is, to date, absent from the relevant case-law of the Court.

70 Pursuant to Article 267 TFEU, the Cour administrative de Luxembourg (Higher Administrative Court, Luxembourg) therefore asks the Court of Justice of the European Union to provide a preliminary ruling on the questions set out below.

VII. Questions referred for a preliminary ruling

1. Is Article 12(3) of Directive 2003/87/EC, which provides that Member States must ensure the surrender by their operators of the allowances issued, to be interpreted, in conjunction with Article 41 of the Charter, which enshrines the principle of sound administration, as requiring the competent national authority to carry out individual monitoring of surrender obligations, before the deadline of 30 April of the year concerned, where that same administration is responsible for monitoring a small number of operators, in this case 25 operators at national level?

2.

a. Should it be considered that an incomplete allowance surrender operation, like the one in the present case in which the operator relied on the receipt of electronic confirmation that the transfer procedure had been finalised, could reasonably have generated in the mind of the operator acting in good faith a legitimate expectation that it had

completed the surrender operation provided for in Article 6(2)(e) of Directive 2003/87/EEC?

b. Bearing in mind the answer given to the second question, can the legitimacy of that expectation be presumed to be more firmly established in the mind of an operator acting in good faith if, during the previous surrender, it was voluntarily contacted by the national administration in order to remind it, a few days before expiry of the time limits laid down in Article 6(2)(e) of Directive 2003/87/EC, that the allowance surrender procedure had not yet been completed, thereby allowing that operator reasonably to assume that it had met its surrender obligations for the current year in the absence of any direct contact by that same administration the following year?

c. In the light of the answers given to the two previous questions, whether analysed individually or together, can the principle of protection of legitimate expectations be interpreted as constituting a case of *force majeure* partially or wholly exempting the operator acting in good faith from the penalty provided for in Article 16(3) of Directive 2003/87/EEC?

3.

a. Does Article 49(3) of the Charter, which enshrines the principle of proportionality, preclude the fixing of a flat rate fine to penalise non-surrender of emissions allowances, as provided for in Article 16(3) of Directive 2003/87/EEC, where that provision does not allow the imposition of a penalty proportionate to the infringement committed by the operator?

b. If the answer to the previous question is in the negative, must the principle of equal treatment enshrined in Article 20 of the Charter, the general principle of good faith and the principle '*fraus omnia corrumpit*' be interpreted as precluding — as regards the penalty to be imposed pursuant to Article 16(3) of Directive 2003/87/EC, to which the publication provided for in Article 20(7) [of the Law of 23 December 2004] is automatically added — an operator acting in good faith, which is simply negligent and which furthermore believed that it had fulfilled its obligations to surrender emissions allowances by the relevant deadline of 30 April, from being treated in the same way as an operator which behaved fraudulently?

c. If the answer to the previous question is in the negative, is the application of the flat rate penalty, without any possibility of a variation by the national court, other than in cases of *force majeure*, [and] the automatic penalty of publication consistent with Article 47 of the Charter which guarantees the existence of an effective remedy?

d. If the answer to the previous question is in the negative, is it the case that the ratification of a financial penalty fixed on the basis of the EU legislature's intention thus expressed [and] the automatic penalty of publication, without the involvement of the principle of proportionality, except in the case of *force majeure* as strictly interpreted, amounts to an abdication by the national court before the supposed intention of the EU legislature and to an improper lack of judicial review in the light of Articles 47 and 49(3) of the Charter?

e. Bearing in mind the answer given to the previous question, is it the case that the lack of judicial review by the national court in the context of the flat rate penalty provided for in Article 16(3) of Directive 2003/87/EC [and] the automatic penalty of publication provided for in Article 20(7) [of the Law of 23 December 2004] amounts to shutting off essentially fruitful channels of communication between the CJEU and the national Supreme Courts under the influence of a pre-determined solution endorsed by the CJEU, except in the case of *force majeure* as strictly viewed, which means that the national Supreme Court, which can only ratify the penalty once it is deemed that *force majeure* has not been established, is unable to enter into an effective dialogue?

4. Bearing in mind the answers given to the previous questions, can the concept of *force majeure* be interpreted as taking into account the individual hardship of an operator acting in good faith where payment of the flat rate penalty provided for in Article 16(3) of Directive 2003/87/EC [and] the automatic penalty of publication provided for in Article 20(7) [of the Law of 23 December 2004] constitutes a considerable financial risk and loss of credit which could lead to its staff being made redundant or even bankruptcy?