Case C-189/19

Request for a preliminary ruling

Date lodged:

26 February 2019

Referring court:

Bundesverwaltungsgericht (Germany)

Date of the decision to refer:

22 November 2018

Applicant and appellant on a point of law:

Spenner GmbH & Co. KG

Defendant and respondent in the appeal on a point of law:

Bundesrepublik Deutschland

Copy

Bundesverwaltungsgericht

(Federal Administrative Court)

ORDER

[…]

[…]

In the administrative-law case

Spenner GmbH & Co. KG,

[…] 59597 Erwitte,

applicant and appellant on a point of law,

[…]

v

Bundesrepublik Deutschland (Federal Republic of Germany),

[…] 14193 Berlin,

defendant and respondent in the appeal on a point of law,

[Or. 2]

[…]

the 7th Chamber of the Bundesverwaltungsgericht,

[…],

following the hearing of 7 November 2018,

made the following order on 22 November 2018:

The proceedings before the Bundesverwaltungsgericht are stayed.

A request is made to the Court of Justice of the European Union under Article 267 TFEU for a preliminary ruling on the following questions:

1. Does Article 9(9) of Commission Decision 2011/278/EU of 27 April 2011 determining transitional Union-wide rules for harmonised free allocation of emission allowances pursuant to Article 10a of Directive 2003/87/EC of the European Parliament and of the Council presuppose that the significant capacity extension of an incumbent installation has taken place within the baseline period determined by the Member State in accordance with Article 9(1) of that decision?

2. As regards significant capacity extensions, is the first subparagraph of Article 9(9), in conjunction with Article 9(1), of Decision 2011/278/EU to be interpreted as meaning that, for the purposes of determining the historical activity levels for the baseline period from 1 January 2009 to 31 December 2010, the historical activity levels of the added capacity are to be left out of account (even) if the significant capacity extension took place in the baseline period from 1 January 2005 to 31 December 2008?

3(a) If Question 1 is to be answered in the affirmative:

Is Article 9(1) of Decision 2011/278/EU to be interpreted as meaning that the competent authority of the Member State must itself determine the baseline period from 1 January 2005 to 31 December 2008 or from 1 January 2009 to 31 December 2010 or may the Member State confer on the operator the right to choose the baseline period? **[Or. 3]**

(b) In the event that the Member State may confer on the operator the right to choose:

Must the Member State take into account the baseline period leading to the higher activity level of each installation even if the operator has the freedom under national law to choose between the baseline periods and decides to choose a baseline period with lower historical activity levels?

4. Is Commission Decision (EU) 2017/126 of 24 January 2017 amending Decision 2013/448/EU as regards the establishment of a uniform cross-sectoral factor in accordance with Article 10a of Directive 2003/87/EC of the European Parliament and of the Council to be interpreted as meaning that the cross-sectoral correction factor for allocations made before 1 March 2017 is to be applied to the years 2013-2020 in the form in which it appears in the original version of Article 4 of, and Annex II to, Decision 2013/448/EU, and, in the case of additional allocations of emission entitlements granted by judicial decision after 28 February 2017, to the full quantity of additional allowance for the years 2013 to 2020 or only to the additional allowance for the years 2018 to 2020?

G r o u n d s :

I

1 The applicant operates a rotary kiln plant for the manufacture of cement clinker which is subject to the emissions trading scheme. It seeks an allocation of further free emission allowances for the third trading period in the period from 2013 to 2020.

2 In January 2012, the applicant filed an allocation application with the Deutsche Emissionshandelsstelle (German Emissions Trading Authority) (DEHSt) under Paragraph 9 of the TEHG (Law on greenhouse gas emission allowance trading). The application form stipulates as the relevant baseline period for installation the period from 2005 to 2008 or from 2009 to 2010; the applicant selected as its baseline period the years 2009 to 2010. As regards the actual operation of the installation, the applicant ticked calendar years 2005 to 2010. The applicant also mentioned a capacity extension on 1 April 2007 and a further capacity extension on 2 May 2008, which, taken together, are significant. **[Or. 4]**

3 By decision of 17 February 2014, the DEHSt allocated 3 810 723 emission allowances free of charge for the operation of the installation. As against that allocation, the applicant raised an objection, unsuccessfully, and then brought a legal action, which it withdrew in part in the light of the judgment of Court of Justice of the European Union of 26 October 2016 (C-506/14) finding that the cross-sectoral correction factor had been established in a manner contrary to EU law. In that connection, the Verwaltungsgericht (Administrative Court) discontinued the proceedings in part and dismissed the remainder of the action: the admissible action was unfounded. The first sentence of Paragraph 8(8) of the

ZuV (regulation on the allocation of greenhouse gas emission allowances) 2020 was to be interpreted as meaning that, in the case of significant capacity extensions, the determination of the relevant activity level was dependent on the choice of the baseline period as provided for in Paragraph 8(1) of the ZuV 2020. The first sentence of Paragraph 8(8) of the ZuV 2020 referred to subparagraphs 2 to 5, each of which refers in turn to the baseline period selected in accordance with Paragraph 8(1) of the ZuV 2020.

4 The fact that operators are given the right to choose in Paragraph 8(1) of the ZuV 2020 was in conformity with EU law. The wording in Article 9(1) of Decision 2011/278/EU to the effect that 'Member States shall determine' was not necessarily to be understood as meaning that it is the task of the Member State to determine the historical activity levels by reference to the baseline period giving rise to the higher value. That part of the sentence was to be viewed in the light of the fact that Decision 2011/278/EU is addressed to the Member States, in accordance with Article 25 thereof. It was therefore for the Member States to determine the historical activity levels by transposing Decision 2011/278/EU. Since that provision did not stipulate how this was to be achieved, transposition such as that effected in Germany by Paragraph 8(1) of the ZuV 2020, whereby the choice of baseline period is left to operators, was covered by Article 9(1) of Decision 2011/278/EU.

5 The European Commission's Guidance Document No 2 supports the permissibility of conferring a right to choose on operators. That document contained a reference to the possibility for operators to choose that period. According to the case-law of the Court of Justice of the European Union, Guidance Document No 2, notwithstanding its lack of legal character, is significant for the purpose of interpreting Decision 2011/278/EU. Furthermore, the European Commission's model form **[Or. 5]** gives operators a right to choose the data to be collected to determine the provisional quantity of allowances for allocation.

6 The DEHSt was not under any obligation to take into account the more favourable baseline period data of its own motion or to ask the entity applying for the allocation to make such a correction.

7 Against that judgment, the applicant brought a leapfrog appeal on a point of law (*Sprungrevision*). In that appeal, it stated that the interpretation of Paragraph 8(8) of the ZuV 2020 by the Verwaltungsgericht was not compatible with the requirements of Article 9(9) of Decision 2011/278/EU. That provision had regard only to whether the capacity of an incumbent installation had been significantly extended between 1 January 2005 and 30 June 2011. There was nothing in Article 9(1) of Decision 2011/278/EU to support a right to choose on the part of operators. Rather, responsibility for determining historical activity levels was assigned to the Member States. The entire body of EU rules on the allocation of emission allowances was premised, so far as concerns the determination of the provisional annual quantity to be allocated, on an obligation to act on the part of

the Member States. In its application form, the defendant had asked for all of the annual production quantities for the years 2005 to 2010. It was therefore able to decide on the baseline period with the highest activity levels.

II

8 The proceedings must be stayed. It is necessary to obtain from the Court of Justice of the European Union ('the Court of Justice') a preliminary ruling on the questions set out in the operative part of this order (Article 267 TFEU).

9 The relevant provisions of EU law can be found in Article 10a(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 (OJ 2003 L 275, p. 32), as amended by Directive 2009/29/EC of the European Parliament and of the Council of 23 June 2009 establishing a scheme for greenhouse gas emission allowance trading within the Community (OJ 2009 L 140, p. 63), in Article 9 and recital 16 of Commission Decision 2011/278/EU **[Or. 6]** of 27 April 2011 determining transitional Union-wide rules for harmonised free allocation of emission allowances pursuant to Article 10a of Directive 2003/87/EC of the European Parliament and of the Council (OJ 2011 L 130, p. 1), in Article 4 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/EC of the European Parliament and of the Council (OJ 2013 L 240, p. 27) and in recitals 12 and 13 of Commission Decision (EU) 2017/126 of 24 January 2017 amending Decision 2013/448/EU as regards the establishment of a uniform cross-sectoral correction factor in accordance with Article 10a of Directive 2003/87/EC of the European Parliament and of the Council (OJ 2017 L 19, p. 93).

10 The relevant provisions of German law can be found in the Verordnung über die Zuteilung von Treibhausgas-Emissionsberechtigungen in der Handelsperiode 2013 bis 2020 (Regulation on the allocation of greenhouse gas emission allowances in the trading period 2013 to 2020) (Zuteilungsverordnung 2020 (Allocation regulation 2020) — ZuV 2020) of 26 September 2011 (BGBl. I S. 1921), as amended by the Law of 13 July 2017 (BGBl. I S. 2354).

Paragraph 8 of the ZuV 2020 reads:

'Relevant activity levels

(1) For incumbent installations, the relevant activity level shall be determined, on the basis of the data collected in accordance with Paragraph 5 and in a uniform manner in relation to all the allocation elements of the installation, by reference either to the baseline period from 1 January 2005 up to and including 31 December 2008 or to the baseline period from 1 January 2009 up to and including 31 December 2010, at the choice of the applicant.

(2) The relevant activity level shall, for each of the installation's products for which an allocation element within the meaning of Paragraph 3(1), point 1, must be formed, be the median value of all annual quantities of that product in the baseline period selected in accordance with subparagraph 1. […]

(3) […] **[Or. 7]** […]

(…)

(6) For the purpose of determining the median values referred to in subparagraphs 2 to 5, account shall be taken only of the calendar years in which the installation was in operation on at least one day. By way of exception to the foregoing, for the purpose of determining median values for installations, account shall be taken even of calendar years in which the installation was not in operation on at least one day in the baseline period […] [Details relating to the determination of median values]

1. […]

2. […]

3. […]

(7) By way of derogation from subparagraphs 2 to 5, the activity levels shall be calculated on the basis of the installed initial capacity of each allocation element multiplied by the relevant utilisation factor, determined in accordance with Paragraph 17(2), [conditions governing the applicability of that derogation] […]

1. […]

2. […]

3. […]

(8) For significant capacity extensions between 1 January 2005 and 30 June 2011, the relevant activity level of the allocation element shall be the sum of the median values determined in accordance with subparagraphs 2 to 5 without the significant capacity extension and the activity levels of the added capacity. In this connection, the activity level of the added capacity shall be the **[Or. 8]** difference between the installed capacity of the allocation element after the capacity extension and the installed initial capacity of the changed allocation element until the start of the changed operation, multiplied by the average capacity utilisation of the allocation element concerned during the period from 1 January 2005 to the end of the calendar year prior to the start of the changed operation. In the event of significant capacity extensions in the year 2005, these shall, on

application by the operator, be treated as not being significant capacity extensions; otherwise, the average monthly capacity utilisation in 2005 up until the calendar month prior to the start of the changed operation shall be relevant for the purposes of determining the average capacity utilisation of the allocation element concerned in such cases. In the event of there being more than one capacity extension, the average capacity utilisation of the allocation element concerned prior to the start of operation of the first change shall be relevant.

(9) [capacity reductions] […]'.

III

11 In accordance with Article 267 TFEU, it is necessary to stay the proceedings relating to the appeal on a point of law (*Revision*) and to obtain a preliminary ruling from the Court of Justice because the judgment to be given by this Chamber on the appeal on a point of law brought by the applicant depends on the answers to the questions which have been put to the Court of Justice in connection with the interpretation of Commission Decision 2011/278/EU **[Or. 9]** of 27 April 2011 and Commission Decision (EU) 2017/126 of 24 January 2017.

12 The questions referred need to be answered by the Court of Justice because the answers to them are not provided by the Court's case-law and are not obvious. It is worth bearing in mind the following considerations in relation to each of the questions referred.

13 Question 1:

The answer to Question 1 will determine whether the significant capacity extension is to be left out of account in the present case because it did not occur in the baseline period from 1 January 2009 to 31 December 2010. If the Court of Justice answers that question in the affirmative, the applicant's appeal on a point of law must be dismissed. Otherwise, the judgment of the Verwaltungsgericht must be set aside and the case referred back to the Verwaltungsgericht for further clarification.

14 The EU-law basis for Decision 2011/278/EU, Article 9 of which contains rules on the historical activity levels of incumbent installations, is Directive 2003/87/EC. In accordance with Article 10a(1) of Directive 2003/87/EC, the Commission is to adopt EU-wide and fully harmonised implementing measures for the allocation of allowances. By Decision 2011/278/EU, the Commission, acting on the basis of that directive and in accordance with Article 10a(1) thereof, established EU-wide harmonised rules on the free allocation of emission allowances. Those harmonised rules give expression to the essential requirement to minimise distortions of competition in the internal market (see Court of Justice, judgments of 22 June 2016, C-540/14 P [ECLI:EU:C:2016:469], *DK Recycling und Roheisen* v *Commission*, paragraph 53; and of 22 February 2018, C-572/16 [ECLI:EU:C:2018:100], *INEOA Köln GmbH*, paragraph 29 et seq.). This

Chamber therefore assumes that, by Decision 2011/278/EU, the allocation rules, which had previously been laid down by the Member States in a National Allocation Plan, were harmonised across the European Union (on the not exhaustively harmonised areas of the procedure for the free allocation of emission allowances, see Court of Justice, judgment of 22 February 2018, C-572/16, paragraph 40). **[Or. 10]**

15 Article 9(9) of Decision 2011/278/EU deals with the significant extension or reduction of the capacity of an incumbent installation between 1 January 2005 and 30 June 2011. According to its wording, that provision has regard only to whether the capacity of an incumbent installation was significantly extended in that period. Indirect reference is made to the baseline periods, however, in the second half of the sentence comprising the first subparagraph of Article 9(9) of Decision 2011/278/EU. According to this, the historical activity level of the incumbent installation is to be 'the sum of the median values determined in accordance with paragraph 1 without the significant capacity change'. In accordance with paragraph 1, a distinction is to be drawn between the baseline periods from 1 January 2005 to 31 December 2008 and from January 2009 to 31 December 2010 for the purposes of determining median values.

16 In accordance with the second subparagraph of Article 9(9) of Decision 2011/78/EU, the historical activity level of the added capacity is to be calculated as the difference between the initial installed capacities and the installed capacity after the extension multiplied by the average historical capacity utilisation of the installation concerned in the years prior to the start of changed operation. The sum of the historical capacity level determined in accordance with paragraph 1 and the historical capacity level of the added capacity determined in accordance with paragraph 2 represents the historical capacity level of the extended incumbent installation.

17 If that provision is to be understood as meaning that account is to be taken only of those capacity extensions that took place after the start of the relevant baseline period under paragraph 1, account cannot be taken of capacity extensions under Article 9(9) of Decision 2011/278/EU which — as here — took place in the baseline period 2005 to 2008 if the baseline period relevant for the purposes of forming the median value is 2009 to 2010 (see in this regard Questions 2 and 3).

18 In the view of the Bundesverwaltungsgericht, the answer to the question is probably that account is to be taken only of capacity extensions which are carried out in the relevant baseline period ('after the start'). The wording of the first subparagraph of Article 9(9) of Decision 2011/278/EU suggests that this is the case but is not clear in this regard. While that subparagraph refers to the **[Or. 11]** baseline periods mentioned in paragraph 1, it does not give any express indication as to whether the extension must have taken place within the baseline period relevant under paragraph 1.

19 The third sentence of recital 16 of Decision 2011/278/EU is also unclear. It does point up the objective of taking account of any significant capacity change that has taken place in the period but does not explain how this is to be achieved in a situation such as that at issue here.

20 The assumption that account is to be taken only of capacity extensions that have taken place in the relevant baseline period under Article 9(9) of Decision 2011/278/EU is supported by the fact that an extension of production volumes that occurs before the baseline period is contained in the median value of the later baseline period as part of the total installed capacity and is thus taken into account in the allocation in this way. Further recognition under Article 9(9) of Decision 2011/278/EU would cause the capacity extension to be taken into account twice. The same would apply in the case of a capacity reduction.

21 In the case of significant capacity extensions between 1 January 2005 and 30 June 2011, the national Zuteilungsverordnung 2020 (Allocation Regulation 2020) assumes that the first sentence of Paragraph 8(8) of the ZuV 2020 does not apply to significant capacity changes that take place before the baseline period selected in accordance with subparagraph 1 […]. The first sentence of Paragraph 8(8) of the ZuV 2020 refers to subparagraphs 2 to 5, each of which refers in turn to the period selected in accordance with Paragraph 8(1) of the ZuV 2020. The median value determined in accordance with Paragraph 8(2) to (5) of the ZuV 2020 therefore depends on which baseline period has been selected. In accordance with the first sentence of Paragraph 8(8) of the ZuV 2020, the total activity level is to be equal to the sum of the median value of the allocation element without the significant capacity extension and the activity level of the added capacity, determined in accordance with subparagraphs 2 to 5. The reason why the first sentence of Paragraph 8(8) of the ZuV 2020 refers to added capacity is in order to determine the ratio of the added capacity to the initial capacity for which a baseline period has been selected in accordance with Paragraph 8(1) of the ZuV 2020. Paragraph 8(8) of the ZuV 2020 is therefore applicable only if a significant capacity extension took place after the start of the relevant baseline period. **[Or. 12]**

22 Question 2:

This question is relevant to the judgment to be given if the taking into account of the significant capacity extension is independent of the determination of the baseline period in accordance with Article 9(1) of Decision 2011/278/EU. The question asks how the significant capacity extension is to be taken into account in the context of calculating the total activity level for a significant capacity change in the baseline period from 1 January 2005 to 31 December 2008 for the purposes of determining the historical activity level of the baseline period from 1 January 2009 to 31 December 2010. In the present proceedings, the significant capacity extension took place on 2 May 2008, that is to say within the baseline period from 1 January 2005 to 31 December 2008. The relevant baseline period, however, according to the defendant and the Verwaltungsgericht, is 1 January 2009 to

31 December 2010. In this case, not leaving the added capacity out of account would — as explained in connection with Question 1 — cause the capacity extension to be taken into account twice. If the significant capacity extension took place before the start of the baseline period, the median values would from the outset also include the production volumes of the capacity extension.

23 Question 3:

(a) Question 3(a) is relevant to the judgment to be given if the taking into account of the significant capacity extension is dependent on the determination of the baseline period by the Member State in accordance with Article 9(1) of Decision 2011/278/EU. In accordance with Paragraph 8(1) of the ZuV 2020, the activity level is to be determined, in a uniform manner in relation to all the allocation elements of the installation, by reference either to the baseline period from 1 January 2005 up to and including 31 December 2008 or to the baseline period from 1 January 2009 up to and including 31 December 2010, at the choice of the applicant. In the view of the defendant, the applicant is bound by the choice made (see in this regard Question 3(b)). **[Or. 13]**

24 Decision 2011/278/EU, on the other hand, states in Article 9(1) that 'Member States' are to determine the historical capacity levels of individual installations on the basis of the baseline period from 1 January 2005 to 31 December 2008 or, if those levels are higher, for the baseline period from 1 January 2009 to 31 December 2010. That form of words suggests that the Member State's authorities are alone competent to make that determination and that the applicant has no right to choose. Reference can also be made, however, to indications that support a different understanding. Thus, in accordance with the first sentence of Annex IV to Decision 2011/278/EU, the Member States are to require operators to provide data for all calendar years in the baseline period selected in accordance with Article 9(1) (2005-2008 or 2009-2010) for the purposes of the collection of baseline data under Article 7(1). The wording 'the Member States shall determine' in Article 9(1) of Decision 2011/278/EU might thus mean that the operator himself is to determine the baseline period. The model form for the collection of application data which has been published by the European Commission also refers, under point 2(a) on page 5, to the choice of baseline period that is available to the operator: 'Please select the baseline period for your installation: You are allowed to choose either 2005-2008 as baseline period, or 2009-2010. The median value of the chosen years will be used for calculating historical activity level in order to calculate the allocation to the installation'. In this context, that wording may be regarded as an indication of the Commission's intention that the relevant baseline period should be chosen by the operator. 'Guidance Document No 2 on the harmonised free allocation methodology for the EU-ETS post (2012)' also proceeds, in points 6.1 and 6.4 ('[t]he chosen baseline period …' and 'the operator needs to determine …'), on the assumption that a choice is available, whereas point 6.1 makes it clear that, in principle, the baseline period to be selected is that leading to the higher activity levels, which might militate against a free right to choose. Guidance Document No 2 is not legally binding, however, and does not

reflect the Commission's official position (p. 3, point 1.1; see also Court of Justice, judgment of 8 September 2016, C-180/15 [ECLI:EU:C:2016:647], *Borealis and Others*, paragraph 75, concerning Guidance Document No 6, and paragraph 105, concerning Guidance Document No 8). **[Or. 14]**

25 (b) Question 3 is concerned with the scenario in which the operator, although free to choose the baseline period, may make a decision which is economically unfavourable to him. The question then arises as to whether the Member must nonetheless use the baseline period that leads to the higher historical activity rate. That proposition may be supported by the fact that both Article 9(1) of Decision 2011/278/EU and the second sentence of recital 16 of that decision both look to ensure that the higher historical activity level is relevant. The purport of point 6.1 of Guidance Document No 2 is the same (see Question 3(a) above). Whether Decision 2011/278/EU supports the inference of an obligation to carry out an examination of the more favourable option is doubtful given that Article 9(1) of that decision expressly refers to the 'data collected under Article 7'. In accordance with Article 7(1) of Decision 2011/278/EU, however, Member States must collect data for only one of the two baseline periods, even though the application form used in Germany asks for information for both baseline periods. If there is no obligation on Member States to collect data for both baseline periods, this, in the view of the Bundesverwaltungsgericht, militates against an obligation on the part of the authorities of the Member State concerned to examine whether the operator has selected the baseline period that is appropriate to him, even if those data are actually available. A decision not to carry out an examination of its own motion, however, would to some extent run counter to the objective pursued by Decision 2011/278/EU, as expressed in Article 9(1) and the second sentence of recital 16 of that decision, of ensuring that account is taken of the higher historical activity level so that the baseline period will as far as possible be representative of industrial cycles.

26 Question 4:

Question 4 is relevant to the judgment to be given if the action is successful on its merits.

27 By judgment of 28 April 2016, C-191/14 et seq. [ECLI:EU:C:2016:311], *Borealis Polyolefine GmbH*, the Court of Justice held that Article 4 of, and Annex II to, Commission Decision 2013/448/EU of 5 September 2013 concerning national implementation measures for the transitional free allocation of greenhouse gas emission allowances in accordance with Article 11(3) of **[Or. 15]** Directive 2003/87/EC of the European Parliament and of the Council are invalid. The temporal effects of the invalidity of Article 4 of, and Annex II to, Decision 2013/448 were limited so that, first, that declaration does not produce effects until 10 months following the date of delivery of that judgment, so as to enable the European Commission to adopt the necessary measures, and, secondly, measures adopted during that period on the basis of the invalidated provisions cannot be called into question. As a result, the Commission, in Article 1 of Decision (EU)

2017/126 of 24 January 2017, effective from 1 March 2017 (Article 2), amended Decision 2013/448/EU as regards the establishment of a uniform cross-sectoral correction factor and laid down new provisions concerning the cross-sectoral correction factor for free allocations for the years 2013 to 2020 in Article 4 of, and Annex II to, Decision 2013/448/EU. In recital 12 of Decision (EU) 2017/126, the Commission reproduced the temporal limits laid down in the judgment of the Court of Justice of 28 April 2016. Recital 13 follows on from recital 12, which is to say that measures which the Member States adopt with respect to the allocation of allowances for the period 2013-2020 up until the entry into force of the latter decision, as well as subsequent changes and additions to those measures, are to remain valid. Furthermore, the cross-sectoral correction factor established [in the latter decision] is to apply to decisions adopted as from 1 March 2017 that create or modify allocation entitlements involving for their determination the application of the cross-sectoral factor.

28 In the view of this Chamber, therefore, the cross-sectoral correction factor for allocations made prior to 1 March 2017 is to be applied to the years 2013 to 2020 in the form in which it appears in the original version of Article 4 of, and Annex II to, Decision 2013/448/EU. So far as concerns allocations made prior to 1 March 2017, any retroactive tightening of the correction factor would have to be ruled out on grounds of legitimate expectations. The Commission too takes this view in its 'Note for the Attention of Members of the Climate Change Cross Committee' of 13 February 2017 (Ref. Ares(2017)770188 — 13/02/2017) on the implementation of the revised values for the cross-sector correction factor. According to that Note, allocation decisions made previously **[Or. 16]** should remain unchanged and the previous cross-sectoral correction factor should be applicable to all decisions adopted up until 28 February 2017. Moreover, the previous criteria are to apply, inter alia to certain official submissions made by a Member State, until 28 February 2017.

29 It is also necessary to obtain clarification as to whether the cross-sector correction factor for additional allocations of emission allowances granted by the courts after 28 February 2017 in accordance with Decision 2017/126/EU is to be applied to the full quantity of additional allowance for the years 2013 to 2020 or only to the additional allocation for the years 2018 to 2020.

[…]