



Judgments in Joined Cases C-191/14 and C-192/14 Borealis Polyolefine GmbH and OMV Refining & Marketing GmbH v Bundesminister für Land-, und Forstwirtschaft, Umwelt und Wasserwirtschaft, Case C-295/14 DOW Benelux BV and Others v Staatssecretaris van Infrastructuur en Milieu and Others, and Joined Cases C-389/14, C-391/14 to C-393/14 Esso Italiana Srl and Others, Api Raffineria di Ancona SpA, Lucchini in Amministrazione Straordinaria SpA and Dalmine SpA v Comitato nazionale per la gestione della direttiva 2003/87/CE e per il supporto nella gestione delle attività di progetto del protocollo di Kyoto and Others

Press and Information

The Court declares invalid the maximum annual amount of free allowances for greenhouse gas emissions determined by the Commission for the period 2013-2020

The Commission is granted 10 months to establish a new amount, it being understood that the previous allocations of allowances cannot be called into question

In the context of the Kyoto Protocol, the Emissions Trading Directive¹ aims to reduce greenhouse gases² significantly with a view to protecting the environment. According to the directive, the Member States may allocate, to undertakings which emit greenhouse gases, emissions permits known as allowances.³ A proportion of the available allowances⁴ is allocated free of charge. Where the quantity of free allowances allocated provisionally by the Member States is greater than the maximum amount of free allowances determined by the Commission, a uniform cross-sectoral correction factor ('correction factor') is applied to make those values equal and to reduce the number of allowances allocated provisionally.⁵

A number of undertakings which emit greenhouse gases brought actions before the courts in Italy, the Netherlands and Austria against the national authorities entrusted with the allocation of greenhouse gas emission allowances. They dispute the validity of the national allocation decisions for the period 2013-2020 and, indirectly, the maximum annual amount of allowances (and the correction factor) determined by the Commission in two decisions in 2011 and 2013.⁶ The national courts before which those actions are pending made requests to the Court of Justice for preliminary rulings on the validity of those Commission decisions.

In today's judgment the Court finds, first of all, that the Commission's 2011 decision, which precludes the taking into account of emissions from electricity generators in the determination of the maximum annual amount of allowances, is valid. It is apparent from the directive that, **unlike**

¹ 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).

² The main gas responsible for global warming is carbon dioxide (CO₂).

³ An allowance corresponds to the emission of the equivalent of one tonne of carbon dioxide into the atmosphere.

⁴ The **total amount of available allowances** is calculated on the basis of an examination of all earlier emissions and, as from 2010, an **annual reduction of 1.74% ('linear factor')**.

⁵ It is possible for there to be less demand than the maximum amount of allowances available. Where that is the case, the difference between the two is auctioned off and the correction factor is not applied. The directive also provides for the **gradual reduction of free allowances** with a view to **reaching no free allocation in 2027**. From that point on the only allowances available will thus be those sold at auction.

⁶ 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 (OJ 2011 L 130, p. 1), and 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).

emissions generated by industrial installations, emissions from electricity generators are never taken into account to determine the maximum annual amount of allowances. **The Commission is granted no discretion in that respect.** Such asymmetrical treatment of emissions, which limits the number of available allowances, is consistent with the objectives of the directive.

As regards the Commission's 2013 decision, namely the one determining the correction factor, the Court notes, first, that the scope of the directive has been broadened from 1 January 2013 onwards so as to include, inter alia, emissions from the production of aluminium and from certain sectors of the chemicals industry. Next, the Court points out that, according to the directive and in spite of the various language versions – which have affected the uniformity of its interpretation and its application by the different Member States – **the Commission, when calculating the maximum annual amount of allowances, is required to refer only to the emissions of the installations included in the Community system from 2013 onwards**, and not to all of the emissions included from then onwards. Thus, the Commission should have ensured that the Member States communicated the relevant data to it. At the very least, in so far as that data did not enable it to determine the maximum annual amount of allowances and, consequently, the correction factor, it should have requested the Member States to make the necessary corrections. However, the Commission took account of data of certain Member States which, unlike others, communicated to it data concerning emissions generated by new activities carried out in installations already subject to the allowance trading scheme before 2013. **The Commission's decision is invalid in that respect.**

Consequently, depending on the information to be provided by the Member States on the basis of the criteria set out by the Court, the maximum annual amount of allowances could be higher or lower than that thus far determined by the Commission.

So far as concerns the period up until today's judgment, the Court declares, in order to avoid serious repercussions on a high number of legal relations entered into in good faith, that the annulment of the correction factor is not to affect definitive allocations which have already taken place in the Member States on the basis of rules deemed to be valid.

In respect of the period following the date of delivery of the judgment, the declaration of invalidity creates a temporary legal vacuum which is liable to interrupt the implementation of the allowance trading scheme and, consequently, the attainment of the objectives pursued by the directive. The Court thus declares that its judgment will not produce effects until ten months following the date of delivery of the judgment so as to enable the Commission to adopt the necessary measures.

NOTE: A reference for a preliminary ruling allows the courts and tribunals of the Member States, in disputes which have been brought before them, to refer questions to the Court of Justice about the interpretation of European Union law or the validity of a European Union act. The Court of Justice does not decide the dispute itself. It is for the national court or tribunal to dispose of the case in accordance with the Court's decision, which is similarly binding on other national courts or tribunals before which a similar issue is raised.

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The [full text](#) of the judgment is published on the CURIA website on the day of delivery.

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