Speakers' contributions

Litigating European Union Law

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COUR DE JUSTICE
DE L'UNION EUROPÉENNE

COMPOSITION, ORGANISATION AND COMPETENCES OF THE COURT OF JUSTICE OF THE EUROPEAN UNION

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Référendaire, Cabinet of Judge Marko Ilešič

Academy of European Law, 16 September 2020

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1. THE INSTITUTION

- The Court of Justice (CJEU) is the judicial authority of the EU. It was the first institution of the EU, set up in 1952

- The CJUE comprises 2 courts (formerly 3):
  - the Court of Justice (1952)
  - the General Court (1989)
  - [the Civil Service Tribunal (2005-2016)]

- More than 38.000 judgments and orders since 1952

2. THE MISSION OF THE COURT OF JUSTICE

- The Court of Justice has as its mission to ensure that EU law is interpreted and applied correctly.

- In particular:

  - It reviews the legality of the acts of the EU institutions
  - It ensures that Member States comply with obligations under the EU Treaties
  - It interprets EU law at the request of national courts and tribunals

3. THE COMPOSITION OF THE COURT OF JUSTICE

- 27 judges: appointed by common accord of Member States for a renewable term of 6 years, following opinion of Art. 255 TFEU Committee – Election of President and Vice-President for a renewable term of 3 years

- 11 Advocates General, also appointed by common accord of Member States for a term of 6 years, following opinion of Art. 255 TFEU Committee – Election of the 1st Advocate General

- 1 Registrar, appointed for a renewable term of 6 years by the CJEU (judges/AGs) based on an open competition – In charge of the Registry – Head of the administration

- Staff in chambers of Judges and Advocates General

4. THE ORGANISATION OF THE COURT OF JUSTICE

- Formations: Chambers (3/5), Grand Chamber (15) or full Court (27)
- Assignment of the case.
  - As soon as possible after the document initiating proceedings has been lodged, the President of the Court designates a Judge to act as rapporteur in the case
  - The First Advocate General assigns each case to an Advocate General.
- Deliberations: secret – uneven number of judges participating in deliberations – collegiate decisions
- General meeting of the judges

5. THE COMPOSITION OF THE GENERAL COURT

- 54 judges: as of 1 February 2020, 2 per Member State, appointed by common accord of Member States for a renewable term of 6 years – Election of President and Vice-President for a renewable term of 3 years

- No permanent Advocate General

- 1 Registrar – in charge of the Registry

6. THE ORGANISATION OF THE GENERAL COURT

- Formations: Chambers (3/5) or Grand Chamber (15). The case may also be heard and determined by a single Judge
- Assignment of the case:
  - Assignment to a Chamber of 3 Judges. Cases allocated to the Chambers in turn (‘tour de rôle’), following four separate rotas: (i) actions relating to competition, State aid or trade protection measures; (ii) intellectual property cases; (iii) staff cases; and (iv) all other cases
  - Referral of a case to a larger formation. At the General Court, a case is always initially assigned to a Chamber of three Judges
- Deliberations: secret – uneven number of judges – collegiate decisions
- Plenum

7. THE DIVISION OF COMPETENCES BETWEEN THE GENERAL COURT AND THE COURT OF JUSTICE

- Article 256 TFEU: Flexible framework for dividing competences within the CJEU: no Treaties change is required - changes can be effected by amendments of the Statute within the limits set by the TFEU (ordinary legislative procedure)
- Applications and documents filed with the wrong Court are transmitted
- Cases with similar object before both EU Courts: Article 54(3)–(4) of the Statute

COMPETENCES OF THE COURT OF JUSTICE

- Preliminary rulings (Article 267 TFEU);
- Infringement actions (Article 258 TFEU);
- Appeals brought against decisions of the General Court (Article 256(1) TFEU);
- Actions for annulment (Article 263 TFEU) brought by EU institutions or by Member States in the cases specified in Article 51 of the Statute;
- Actions for failure to act (Article 265 TFEU) brought by EU institutions or by Member States in the cases specified in Article 51 of the Statute;
- Opinions on draft international agreements (Article 218(11) TFEU);
- Other special proceedings (Art. 201-206 RoP).

COMPETENCES OF THE GENERAL COURT

- Actions for annulment (Article 263 TFEU) brought by natural or legal persons or by Member States in the cases specified in Article 51 of the Statute;
- Actions for failure to act (Article 265 TFEU) brought by natural or legal persons or by Member States in the cases specified in Article 51 of the Statute;
- Actions for damages brought under Articles 268 and 340 TFEU;
- Staff cases foreseen in Article 270 TFEU;
- Disputes where the jurisdiction is provided for in an arbitration clause under Article 272 TFEU;
- Intellectual property cases, that is, actions brought against decisions of EUIPO and the Community Plant Variety Office (CPVO).

8. THE PROCEDURE

- Rules laid down in 3 main documents (Statute/Rules of procedure of the Court of Justice/Rules of procedure of the General Court)
- Those rules are complemented in the Practice Directions of the Court of Justice and the Practice Rules of the General Court (explanations, reminders, practical information)
- The e-curia decisions provide the possibility of lodging and receiving documents via a secured electronic platform
- Essential role of the Registry (lodging of procedural documents by the parties; notification to the parties); no direct contact between the judges/AGs and the parties

8. THE PROCEDURE (CONT.)

- Written phase:
  - Preliminary ruling proceedings
    - Request for preliminary ruling from national court or tribunal
    - Translation into all official languages
    - Publication of the questions in the OJ and notification of interested parties
    - Written observations (translation into French)
    - Preliminary report submitted to the general meeting of the judges
  - Direct actions and appeals
    - Lodging of the application (translation into French)
    - Publication of the application in the OJ and notification of the defendant
    - Defense; where applicable joinder and rejoinder
    - Preliminary report submitted to the general meeting of the judges

8. THE PROCEDURE (CONT.)

- Oral phase:
  - Hearing (simultaneous interpretation)
  - Opinion of the Advocate General
- Deliberation of judges (in French)
- Translation of the judgment/order into the (authentic) language of procedure (and, where applicable, into all other official languages)
- Delivery of judgment

Questions?

*

Thank you for your attention

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Applying to the Court of Justice of the European Union

Gráinne Gilmore BL

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Direct Actions

- Cases which do not originate in proceedings before the domestic courts, but are brought directly
- Introduction to Direct Actions before the General Court and Court of Justice
- Procedural issues and practical steps

General Court – Actions brought by individuals

- Article 256 TFEU: General Court has first instance jurisdiction over direct actions brought by individuals seeking:

(a) to challenge validity of acts (Art. 263 TFEU)

(b) to review lawfulness of failure to act (Art 265 TFEU)

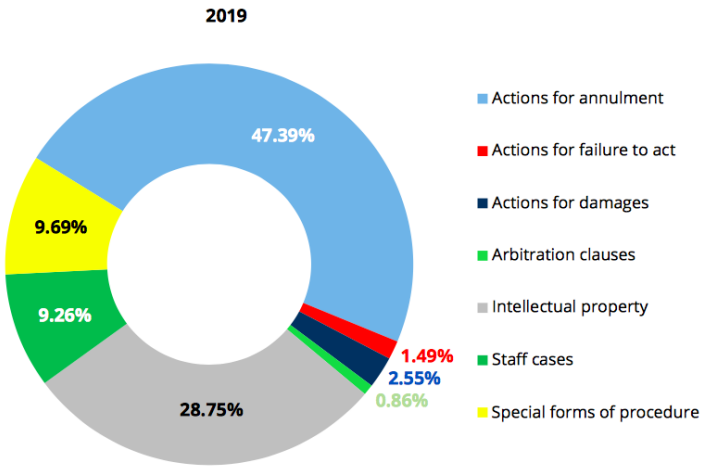
(c) payment of compensation for damage (Art 268 TFEU)

(d) adjudication of Union staff dispute (Art 270 TFEU)

(e) ruling arising from arbitration clause (Art 272 TFEU)

III. New cases — Type of action (2015-2019)

Source: Annual Report of Judicial Activity 2019 – curia.eu



Court of Justice – Enforcement Actions and Appeals

- **Article 258:** Failure of Member State to comply with reasoned opinion of the Commission
- **Article 260:**

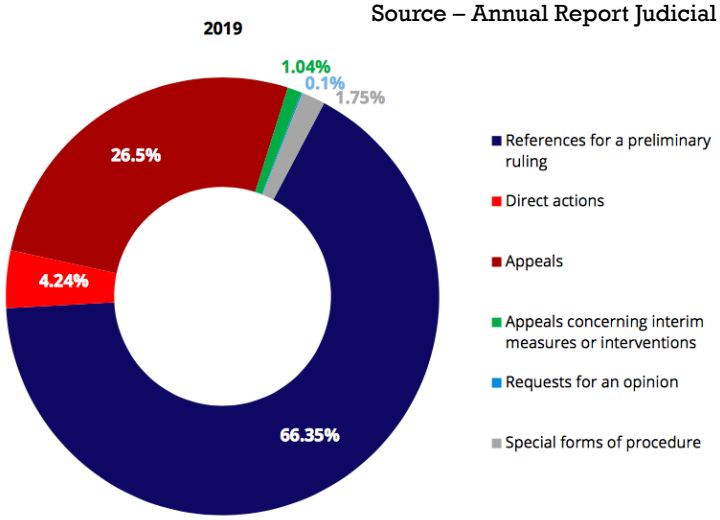
  Lump sum and/or penalty payments for

  (a) Failure to comply with judgment of the Court (Article 260(2))

  (b) Failure to comply with obligation to notify measures transposing Directive (Article 260(3)): **immediate imposition of sanctions.** [Watch this space!] [Case C-543/17 *Commission v Belgium]*
- **Article 256:** Appeals from General Court on points of law

II. New cases — Nature of proceedings (2015-2019)

Source – Annual Report Judicial Activity 2019 – curia.eu



Bringing an Action for Annulment to the General Court

Procedural Elements:

- Strict Time Limit (When?)
- **An Act susceptible to review (What?) ***
- **Standing (Who?) ***
- Grounds (Why?)

What can be challenged? (1)

- Article 263 review of "…legislative acts, of acts of the **Council**, of the **Commission** and of the European Central **Bank**, other than recommendations and opinions, and of acts of the European **Parliament** and of the **European Council** intended to produce legal effects vis-à-vis third parties" and "…of acts of **bodies**, **offices** or **agencies** of the Union intended to be produce legal effects vis-à-vis third parties"
- "All measures adopted by the institutions, whatever their form, which are intended to have legal effects" [Case C-22/70 European Road Transport Agreement]
- In truth, can be a significant obstacle

What can be challenged? (2)

ADMISSIBILITY ISSUES

Preparatory Act without legal effects such as to bring within scope of Article 263

Eg:

- T-410/18 *Silgan Closures*
- T-281/18 *ABLV Bank* v *ECB*

Acts adopted by Representatives of the Member States, acting not in their capacity as members of Council /European Council but as representatives of their governments (and thus collectively exercising the powers of the Member States)

- C-424/20 *Sharpston* (Order 10th September 2020)

Who can bring challenge? (1)

- *Privileged Applicants:* Member States, European Parliament, Council, Commission. Automatic standing [Article 263(2)]
- *Semi-privileged Applicants:* European Central Bank, Court of Auditors, Committee of the Regions [Article 263(3)]
- *Non-privileged:* Private individuals [Article 263(4)]

Article 263(4) TFEU: Any natural or legal person may institute proceedings against:

(a) an act **addressed to that person** or (b) which is of **direct and individual concern** to them, and (c) against a **regulatory act** which is of direct concern to them and does not entail implementing measures

Who can bring challenge? (2)

The three categories :

(1) Act addressed specifically to the individual [Straightforward]

(2) Act which is not addressed to the individual but is of direct and individual concern [Restrictive "Plaumann" interpretation of individual concern, major obstacle]

(3) "Regulatory Act" – regulatory in nature, requiring no implementing measures [Innovation of Lisbon Treaty, not defined in Treaty. Case C-583/11 *Inuit.*]

Confidentiality

Vis-à-vis Main Parties

- Adversarial principle (Article 64 RoP) – GC only takes into account documents provided to the parties upon which they have had opportunity to express views. However: See for example Articles 103 and 105 RoP

Vis-à-vis Public

- Article 66 RoP - anonymity and omission of certain information

Vis-à-vis Intervener

- Article 144(5) RoP
- T-185/17 PlasticsEurope v ECHA

Appeals

- **Note:** Statute and Rules of Procedure amended 1st May 2019: Appeal brought against a decision of General Court concerning decision of independent Board of Appeal of EUIPO, CPVO, ECHA, or EUASA, must be accompanied by a request (< 7 pages) that the appeal be allowed to proceed (Article 58(a)) Otherwise inadmissible.

Article 56 of Statute:

- Time limit 2 months
- Any party which has been unsuccessful in whole or in part, in its submissions (However, re interveners other than Member States and institutions - only where the decision directly affects them)
- Member State or institution, no intervention in GC

Article 58:

- Points of law only

Practical points for Applications to General Court

- Specific page limits for Application, Defence, Reply, Rejoinder, Plea of inadmissibility and Statement of Intervention (Article 105, Practice Rules)
- Content includes brief account of facts, precise wording of order sought, legal arguments grouped by reference to particular pleas, summary of pleas in law and main arguments Rules of Procedure (Article 76 Rules of Procedure)

Language

- Language of Case – Article 45 of Rules of Procedure GC
- Clear and concise language, short sentences, avoid national legal terminology.
- Legal argument must be apparent from body of written pleadings rather than buried in Annexes [T-804/16]
- Annexes – only include documents mentioned in written pleadings. In Schedule of Annex, include short description of document and page or paragraph where mentioned in pleadings.
- Oral Hearing – Sending note to Interpreters in advance
- Pace of speech

Good Luck!

LITIGATING EUROPEAN UNION LAW
PRELIMINARY RULING PROCEEDINGS

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LITIGATING EUROPEAN UNION LAW. PRELIMINARY RULING

- Is a reference for the preliminary ruling popular among the national (referring) courts?
- Why shall national courts apply the preliminary ruling procedure?
- What are the obstacles to apply the preliminary ruling procedure?
- The reference for the preliminary ruling. The right or the obligation?

LITIGATING EUROPEAN UNION LAW. PRELIMINARY RULING

Judgment of the Court 10 December 2018, C 621/18, Andy Wightman and others v Secretary of State for Exiting the European Union

44. In that respect, it must be borne in mind that the founding Treaties, which constitute the basic constitutional charter of the European Union (judgment of 23 April 1986, Les Verts v Parliament, 294/83, EU:C:1986:166, paragraph 23), established, unlike ordinary international treaties, a new legal order, possessing its own institutions, for the benefit of which the Member States thereof have limited their sovereign rights, in ever wider fields, and the subjects of which comprise not only those States but also their nationals (Opinion 2/13 (Accession of the European Union to the ECHR) of 18 December 2014, EU:C:2014:2454, paragraph 157 and the case-law cited).

45. According to settled case-law of the Court, that autonomy of EU law with respect both to the law of the Member States and to international law is justified by the essential characteristics of the European Union and its law, relating in particular to the constitutional structure of the European Union and the very nature of that law. EU law is characterised by the fact that it stems from an independent source of law, namely the Treaties, by **its primacy over the laws of the Member States**, and by the **direct effect of a whole series of provisions which are applicable to their nationals and to the Member States themselves**. Those characteristics have given rise to a structured network of principles, rules and mutually interdependent legal relations binding the European Union and its Member States reciprocally as well as binding its Member States to each other (judgment of 6 March 2018,Achmea, C-284/16, EU:C:2018:158, paragraph 33 and the case-law cited).

LITIGATING EUROPEAN UNION LAW. PRELIMINARY RULING

The basic principles governing the relationship between EU and national law are:

1. the principle of direct effect of EU law,

2. the principle of supremacy of EU law over national law.

Judgment of the Court 6 November 2018, C 619/16, Sebastian W. Kreuziger v Land Berlin

20. In that regard, it should be recalled that it is the settled case-law of the Court that, whenever the provisions of a directive appear, so far as their subject matter is concerned, to be unconditional and sufficiently precise, they may be relied upon before the national courts by individuals against the State where the latter has failed to implement the directive in domestic law by the end of the period prescribed or where it has failed to implement the directive correctly (judgment of 24 January 2012, Dominguez, C-282/10, EU:C:2012:33, paragraph 33 and the case-law cited). In addition, where a person involved in legal proceedings is able to rely on a directive against a State, he may do so regardless of the capacity in which the latter is acting, whether as an employer or as a public authority. In either case it is necessary to prevent the State from taking advantage of its own failure to comply with EU law (judgment of 24 January 2012, Dominguez, C-282/10, EU:C:2012:33, paragraph 38 and the case-law cited).

LITIGATING EUROPEAN UNION LAW. PRELIMINARY RULING

Judgment of the Court 14 June 2012, C-606/10, Association nationale d'assistance aux frontières pour les étrangers (ANAFE) v Ministre de l'Intérieur, de l'Outre-mer, des Collectivités territoriales et de l'Immigration

73. Further, in accordance with the principle of the precedence of European Union law, provisions of the FEU Treaty and directly applicable measures of the institutions have the effect, in their relations with the internal law of the Member States, merely by entering into force, of rendering automatically inapplicable any conflicting provision of national law (Case 106/77 Simmenthal [1978] ECR 629, paragraph 17; Case C 213/89 Factortame and Others [1990] ECR I 2433, paragraph 18, and Case C 409/06 Winner Wetten [2010] ECR I 8015, paragraph 53).

74. In accordance with settled case-law, a national court which is called upon, within the exercise of its jurisdiction, to apply provisions of European Union law is under a duty to give full effect to those provisions, if necessary refusing of its own motion to apply any conflicting provision of national legislation (see, inter alia, *Simmenthal*, paragraphs 21 to 24, and Case C-119/05 *Lucchini* [2007] ECR I-6199, paragraph 61).

LITIGATING EUROPEAN UNION LAW. PRELIMINARY RULING

Conformity interpretation / principle of interpreting national law in conformity with EU law/

Judgment of the Court 19 April 2016, C-441/14, Dansk Industri (DI), acting on behalf of Ajos A/S v Estate of Karsten Eigil Rasmussen.

31. It follows that, in applying national law, national courts called upon to interpret that law are required to consider the whole body of rules of law and to apply methods of interpretation that are recognised by those rules in order **to interpret it, so far as possible, in the light of the wording and the purpose of the directive concerned in order to achieve the result sought by the directive and consequently comply with the third paragraph of Article 288 TFEU** (see, inter alia, judgments in Pfeiffer and Others, C-397/01 to C-403/01, EU:C:2004:584, paragraphs 113 and 114, and Kücükdeveci, C-555/07, EU:C:2010:21, paragraph 48).

32. **It is true that the Court has stated that this principle of interpreting national law in conformity with EU law has certain limits. Thus, the obligation for a national court to refer to EU law when interpreting and applying the relevant rules of domestic law is limited by general principles of law and cannot serve as the basis for an interpretation of national law contra legem** (see judgments in Impact, C-268/06, EU:C:2008:223, paragraph 100; Dominguez, C-282/10, EU:C:2012:33, paragraph 25; and Association de médiation sociale, C-176/12, EU:C:2014:2, paragraph 39).

LITIGATING EUROPEAN UNION LAW. PRELIMINARY RULING

33. It should be noted in that connection that the requirement to interpret national law in conformity with EU law entails the obligation for national courts to change its established case-law, where necessary, if it is based on an interpretation of national law that is incompatible with the objectives of a directive (see, to that effect, judgment in Centrosteel, C-456/98, EU:C:2000:402, paragraph 17).

The obligation of pro-EU (conformity) interpretation has its limits - general principles of law, the prohibition of contra legem interpretation and, in criminal cases, the prohibition of aggravating the situation of defendants or convicted persons.

Judgment of the Court 24 June 2019, C 573/17, Daniel Adam Popławski and other parties v Openbaar Ministerie

76. Similarly, the principle of conforming interpretation cannot serve as the basis for an interpretation of national law contra legem (judgment of 29 June 2017, Popławski, C 579/15, EU:C:2017:503, paragraph 33 and the case-law cited). In other words, the obligation to interpret national law in conformity with EU law ceases when the former cannot be applied in a way that leads to a result compatible with that envisaged by the framework decision concerned (judgment of 8 November 2016, Ognyanov, C 554/14, EU:C:2016:835, paragraph 66).

LITIGATING EUROPEAN UNION LAW. PRELIMINARY RULING

77. That being so, the principle that national law must be interpreted in conformity with EU law requires that the whole body of domestic law be taken into consideration and that the interpretative methods recognised by domestic law be applied, with a view to ensuring that the framework decision concerned is fully effective and to achieving an outcome consistent with the objective pursued by it (see, to that effect, judgments of 5 September 2012, Lopes Da Silva Jorge, C-42/11, EU:C:2012:517, paragraph 56; of 29 June 2017, Popławski, C-579/15, EU:C:2017:503, paragraph 34; and of 12 February 2019, TC, C-492/18 PPU, EU:C:2019:108, paragraph 68).

78. **In that context, the Court has already held that the obligation to interpret domestic law in conformity with EU law requires national courts to change established case-law, where necessary, if it is based on an interpretation of domestic law that is incompatible with the objectives of a framework decision and to disapply, on their own authority, the interpretation adopted by a higher court which it must follow in accordance with its national law, if that interpretation is not compatible with the framework decision concerned** (see, to that effect, judgments of 19 April 2016, DI, C-441/14, EU:C:2016:278, paragraph 33, and of 29 June 2017, Popławski, C-579/15, EU:C:2017:503, paragraphs 35 and 36).

LITIGATING EUROPEAN UNION LAW. PRELIMINARY RULING

79. Consequently, **a national court cannot validly claim that it is impossible for it to interpret a provision of national law in a manner that is consistent with EU law merely because that provision has consistently been interpreted in a manner that is incompatible with EU law** (judgments of 8 November 2016, Ognyanov, C 554/14, EU:C:2016:835, paragraph 69, and of 6 November 2018, Max-Planck-Gesellschaft zur Förderung der Wissenschaften, C 684/16, EU:C:2018:874, paragraph 60) or is applied in such a manner by the relevant national authorities.

LITIGATING EUROPEAN UNION LAW. PRELIMINARY RULING

Obligation to disapply national provisions which are contrary to EU law.

Judgment of the Court of 9 March 1978. - Amministrazione delle Finanze dello Stato v Simmenthal SpA., Case 106/77.

Judgment of the Court 19 January 2010, C 555/07, Seda Kücükdeveci v Swedex GmbH & Co. KG,

53. The need to ensure the full effectiveness of the principle of non-discrimination on grounds of age, as given expression in Directive 2000/78, means that the national court, faced with a national provision falling within the scope of European Union law which it considers to be incompatible with that principle, and which cannot be interpreted in conformity with that principle, **must decline to apply that provision, without being either compelled to make or prevented from making a reference to the Court for a preliminary ruling before doing so.**

54. The possibility thus given to the national court by the second paragraph of Article 267 TFEU of asking the Court for a preliminary ruling before disapplying the national provision that is contrary to European Union law cannot, however, be transformed into an obligation because national law does not allow that court to disapply a provision it considers to be contrary to the constitution unless the provision has first been declared unconstitutional by the Constitutional Court. By reason of the principle of the primacy of European Union law, which extends also to the principle of non-discrimination on grounds of age, **contrary national legislation which falls within the scope of European Union law must be disapplied** (see, to that effect, Mangold, paragraph 77).

LITIGATING EUROPEAN UNION LAW. PRELIMINARY RULING

Judgment of the Court 24 June 2019, C-573/17, Daniel Adam Popławski v Openbaar Ministerie

61. In that regard, it should be pointed out that any national court, hearing a case within its jurisdiction, has, as an organ of a Member State, **the obligation to disapply any provision of national law which is contrary to a provision of EU law with direct effect in the case pending before it** (see, to that effect, judgments of 8 September 2010, *Winner Wetten*, C-409/06, EU:C:2010:503, paragraph 55 and the case-law cited; of 24 January 2012, *Dominguez*, C-282/10, EU:C:2012:33, paragraph 41; and of 6 November 2018, *Bauer and Willmeroth*, C-569/16 and C-570/16, EU:C:2018:871, paragraph 75).

62. On the other hand, a provision of EU law which does not have direct effect may not be relied on, as such, in a dispute coming under EU law in order to disapply a provision of national law that conflicts with it.

LITIGATING EUROPEAN UNION LAW. PRELIMINARY RULING

Obligation to grant a compensation for the breach of EU law by the member state

Judgment of the Court 19 November 1991 in Joined Cases C-6/90 and C-9/90, Andrea Francovich and Italian Republic and between Danila Bonifaci and Others and Italian Republic

37. It follows from all the foregoing that it is a principle of Community law that the Member States are obliged to make good loss and damage caused to individuals by breaches of Community law for which they can be held responsible.

LITIGATING EUROPEAN UNION LAW. PRELIMINARY RULING

The conditions of the State liability

38. Although State liability is thus required by Community law, the conditions under which that liability gives rise to a right to reparation depend on the nature of the breach of Community law giving rise to the loss and damage.

39. Where, as in this case, a Member State fails to fulfil its obligation under the third paragraph of Article 189 of the Treaty to take all the measures necessary to achieve the result prescribed by a directive, the full effectiveness of that rule of Community law requires that there should be a right to reparation provided that three conditions are fulfilled. « The first of those conditions is that the result prescribed by the directive should entail the grant of rights to individuals. The second condition is that it should be possible to identify the content of those rights on the basis of the provisions of the directive. Finally, the third condition is the existence of a causal link between the breach of the State's obligation and the loss and damage suffered by the injured parties.

41. Those conditions are sufficient to give rise to a right on the part of individuals to obtain reparation, a right founded directly on Community law.

LITIGATING EUROPEAN UNION LAW. PRELIMINARY RULING

42. Subject to that reservation, it is on the basis of the rules of national law on liability that the State must make reparation for the consequences of the loss and damage caused. In the absence of Community legislation, it is for the internal legal order of each Member State to designate the competent courts and lay down the detailed procedural rules for legal proceedings intended fully to safeguard the rights which individuals derive from Community law (see the judgments in Case 60/75 Russo v AIMA [1976] ECR 45, Case 33/76 Rewe v Landwirstschafiskammer Saarland [1976] ECR 1989 and Case 158/80 Rewew Hauptzollamt Kiel[1981] ECR 1805). 43 Further, the substantive and procedural conditions for reparation of loss and damage laid down by the national law of the Member States must not be less favourable than those relating to similar domestic claims and must not be so framed as to make it virtually impossible or excessively difficult to obtain reparation (see, in relation to the analogous issue of the repayment of taxes levied in breach of Community law, inter alia the judgment in Case 199/82 Amminis-trazione delle Finanze dello Stato v San Giorgio [1983] ECR 3595).

LITIGATING EUROPEAN UNION LAW. PRELIMINARY RULING

Judgment of the Court 30 September 2003, C-224/01, Gerhard Köbler and Republik Österreich

Conditions governing State liability

51. As to the conditions to be satisfied for a Member State to be required to make reparation for loss and damage caused to individuals as a result of breaches of Community law for which the State is responsible, the Court has held that these are threefold: **the rule of law infringed must be intended to confer rights on individuals; the breach must be sufficiently serious; and there must be a direct causal link between the breach of the obligation incumbent on the State and the loss or damage sustained by the injured parties** (*Haim*, cited above, paragraph 36).

52. State liability for loss or damage caused by a decision of a national court adjudicating at last instance which infringes a rule of Community law is governed by the same conditions.

53. With regard more particularly to the second of those conditions and its application with a view to establishing possible State liability owing to a decision of a national court adjudicating at last instance, regard must be had to the specific nature of the judicial function and to the legitimate requirements of legal certainty, as the Member States which submitted observations in this case have also contended. State liability for an infringement of Community law by a decision of a national court adjudicating at last instance can be incurred only in the exceptional case where the court has manifestly infringed the applicable law.

LITIGATING EUROPEAN UNION LAW. PRELIMINARY RULING

54. In order to determine whether that condition is satisfied, the national court hearing a claim for reparation must take account of all the factors which characterise the situation put before it.

55. Those factors include, in particular, the degree of clarity and precision of the rule infringed, whether the infringement was intentional, whether the error of law was excusable or inexcusable, the position taken, where applicable, by a Community institution and non-compliance by the court in question with its obligation to make a reference for a preliminary ruling under the third paragraph of Article 234 EC.

56. In any event, an infringement of Community law will be sufficiently serious where the decision concerned was made in manifest breach of the case-law of the Court in the matter (see to that effect *Brasserie du Pêcheur and Factortame,* cited above, paragraph 57).

57. The three conditions mentioned at paragraph 51 hereof are necessary and sufficient to found a right in favour of individuals to obtain redress, although this does not mean that the State cannot incur liability under less strict conditions on the basis of national law (see *Brasserie du Pêcheur and Factortame,* cited above, paragraph 66).

LITIGATING EUROPEAN UNION LAW. PRELIMINARY RULING

58. Subject to the existence of a right to obtain reparation which is founded directly on Community law where the conditions mentioned above are met, it is on the basis of rules of national law on liability that the State must make reparation for the consequences of the loss and damage caused, with the provison that the conditions for reparation of loss and damage laid down by the national legislation must not be less favourable than those relating to similar domestic claims and must not be so framed as to make it in practice impossible or excessively difficult to obtain reparation (*Francovich and Others*, paragraphs 41 to 43 and *Norbrook Laboratories*, paragraph 111).

59. In the light of all the foregoing, the reply to the first and second questions must be that the principle that Member States are obliged to make good damage caused to individuals by infringements of Community law for which they are responsible is also applicable where the alleged infringement stems from a decision of a court adjudicating at last instance where the rule of Community law infringed is intended to confer rights on individuals, the breach is sufficiently serious and there is a direct causal link between that breach and the loss or damage sustained by the injured parties. In order to determine whether the infringement is sufficiently serious when the infringement at issue stems from such a decision, the competent national court, taking into account the specific nature of the judicial function, must determine whether that infringement is manifest. It is for the legal system of each Member State to designate the court competent to determine disputes relating to that reparation.

LITIGATING EUROPEAN UNION LAW. PRELIMINARY RULING

Legal frames of the preliminary ruling procedure

I. art. 19.3 Treaty on European Union

The Court of Justice of the European Union shall, in accordance with the Treaties:

(a) rule on actions brought by a Member State, an institution or a natural or legal person;

(b) give preliminary rulings, at the request of courts or tribunals of the Member States, on the interpretation of Union law or the validity of acts adopted by the institutions;

(c) rule in other cases provided for in the Treaties.

LITIGATING EUROPEAN UNION LAW. PRELIMINARY RULING

II. Treaty on the Functioning of the European Union

Art. 267

The Court of Justice of the European Union shall have jurisdiction to give preliminary rulings concerning:

a. the interpretation of the Treaties;

b. the validity and interpretation of acts of the institutions, bodies, offices or agencies of the Union;

Where such a question is raised before any court or tribunal of a Member State, that court or tribunal may, if it considers that a decision on the question is necessary to enable it to give judgment, request the Court to give a ruling thereon.

Where any such question is raised in a case pending before a court or tribunal of a Member State against whose decisions there is no judicial remedy under national law, that court or tribunal shall bring the matter before the Court.

If such a question is raised in a case pending before a court or tribunal of a Member State with regard to a person in custody, the Court of Justice of the European Union shall act with the minimum of delay.

LITIGATING EUROPEAN UNION LAW. PRELIMINARY RULING

III. Protocol (No 3) on the Statute of the Court of Justice of the European Union.

IV. Consolidated version of the Rules of Procedure of the Court of Justice of 25 September 2012 – art. 93 and following ones.

V. Recommendations to national courts and tribunals in relation to the initiation of preliminary ruling proceedings.

LITIGATING EUROPEAN UNION LAW. PRELIMINARY RULING

What is the substantial idea of reference for the preliminary ruling?

Judgment of the Court, C 619/18, European Commission v Republic of Poland,

44. Likewise, it is important to recall that, in order to ensure that the specific characteristics and the autonomy of the EU legal order are preserved, the Treaties **have established a judicial system intended to ensure consistency and uniformity in the interpretation of EU law** (judgment of 6 March 2018, Achmea, C 284/16, EU:C:2018:158, paragraph 35 and the case-law cited).

45. In particular, the judicial system as thus conceived has as **its keystone the preliminary ruling procedure provided for in Article 267 TFEU**, which, by setting up a dialogue between one court and another, specifically between the Court of Justice and the courts and tribunals of the Member States, has the object of securing that consistency and that uniformity in the interpretation of EU law, thereby serving to ensure its full effect and its autonomy as well as, ultimately, the particular nature of the law established by the Treaties (see, to that effect, judgment of 6 March 2018, Achmea, C 284/16, EU:C:2018:158, paragraph 37).

LITIGATING EUROPEAN UNION LAW. PRELIMINARY RULING

46. Lastly, as is apparent from settled case-law, the European Union is a union based on the rule of law in which individuals have the right to challenge before the courts the legality of any decision or other national measure concerning the application to them of an EU act (judgments of 27 February 2018, Associação Sindical dos Juízes Portugueses, C 64/16, EU:C:2018:117, paragraph 31 and the case-law cited, and of 25 July 2018, Minister for Justice and Equality (Deficiencies in the system of justice), C 216/18 PPU, EU:C:2018:586, paragraph 49).

47. In that context, Article 19 TEU, which gives concrete expression to the value of the rule of law affirmed in Article 2 TEU, entrusts the responsibility for ensuring the full application of EU law in all Member States and judicial protection of the rights of individuals under that law to national courts and tribunals and to the Court of Justice (see, to that effect, judgments of 27 February 2018, Associação Sindical dos Juízes Portugueses, C 64/16, EU:C:2018:117, paragraph 32, and of 25 July 2018, Minister for Justice and Equality (Deficiencies in the system of justice), C 216/18 PPU, EU:C:2018:586, paragraph 50 and the case-law cited).

LITIGATING EUROPEAN UNION LAW. PRELIMINARY RULING

Judgment of the Court 24 October, C 234/17, criminal matters concerning XC, YB, ZA

39. **In order to ensure that the specific characteristics and the autonomy of the EU legal order are preserved, the Treaties have established a judicial system intended to ensure consistency and uniformity in the interpretation of EU law** (Opinion 2/13 (Accession of the EU to the ECHR) of 18 December 2014, EU:C:2014:2454, paragraph 174).

40. In that context, it is for the national courts and tribunals and for the Court of Justice to ensure the full application of EU law in all Member States and to ensure judicial protection of an individual's rights under that law (Opinion 1/09, EU:C:2011:123, paragraph 68 and the case-law cited, and Opinion 2/13 (Accession of the Union to the ECHR), of 18 December 2014, EU:C:2014:2454, paragraph 175).

41. **The judicial system as thus conceived has as its keystone the preliminary ruling procedure provided for in Article 267 TFEU, which, by setting up a dialogue between one court and another, specifically between the Court of Justice and the courts and tribunals of the Member States, has the objective of securing uniform interpretation of EU law** (see, to that effect, judgment of 5 February 1963, van Gend & Loos, 26/62, EU:C:1963:1, p. 23), thereby serving to ensure its consistency, its full effect and its autonomy as well as, ultimately, the particular nature of the law established by the Treaties (Opinion 2/13 (Accession of the Union to the ECHR), of 18 December 2014, EU:C:2014:2454, paragraph 176).

LITIGATING EUROPEAN UNION LAW. PRELIMINARY RULING

42. In accordance with settled case-law, Article 267 TFEU gives national courts **the widest discretion** in referring matters to the Court if they consider that a case pending before them raises questions involving the interpretation of provisions of EU law, or consideration of their validity, **which are necessary** for the resolution of the case before them. National courts are, moreover, free to exercise that discretion **at whatever stage of the proceedings they consider appropriate** (judgment of 5 July 2016, Ognyanov, C 614/14, EU:C:2016:514, paragraph 17 and the case-law cited).

43. In addition, it must be borne in mind that, under the third paragraph of Article 267 TFEU, when there is no judicial remedy under national law against the decision of a court or tribunal of a Member State, that court or tribunal is, in principle, obliged to bring the matter before the Court of Justice, where a question relating to the interpretation of EU law is raised before it (see, to that effect, judgment of 9 September 2015, Ferreira da Silva e Brito and Others, C 160/14, EU:C:2015:565, paragraph 37 and the case-law cited).

44. Lastly, according to the settled case-law of the Court, the national courts called upon, within the exercise of their jurisdiction, to apply provisions of EU law, are under a duty to give full effect to those provisions, if necessary refusing of their own motion to apply any conflicting provision of national law, and it is not necessary for that court to request or to await the prior setting aside of that provision of national law by legislative or other constitutional means (see, to that effect, judgments of 9 March 1978, Simmenthal, 106/77, EU:C:1978:49, paragraphs 21 and 24, and of 6 March 2018, SEGRO and Horváth, C 52/16 and C 113/16, EU:C:2018:157, paragraph 46 and the case-law cited).

LITIGATING EUROPEAN UNION LAW. PRELIMINARY RULING

Judgment of the Court, 6 March 2018, C 284/16, Slowakische Republik (Slovak Republic) v Achmea BV

37. In particular, the judicial system as thus conceived has as **its keystone** the preliminary ruling procedure provided for in Article 267 TFEU, which, by setting up a dialogue between one court and another, specifically between the Court of Justice and the courts and tribunals of the Member States, has the object of securing uniform interpretation of EU law, thereby serving to ensure its consistency, its full effect and its autonomy as well as, ultimately, the particular nature of the law established by the Treaties (Opinion 2/13 (Accession of the EU to the ECHR) of 18 December 2014, EU:C:2014:2454, paragraph 176 and the case-law cited).

Judgment of the Court, 16 December 2008, C-210/06, Cartesio Oktató és Szolgáltató bt,

90. Moreover, the Court has already held that the system established by Article 234 EC with a view to ensuring that Community law is interpreted uniformly throughout the Member States instituted direct cooperation between the Court of Justice and the national courts by means of a procedure which is completely independent of any initiative by the parties (Case C 2/06 Kempter [2008] ECR I 411, paragraph 41).

91. The system of references for a preliminary ruling is based on a dialogue between one court and another, the initiation of which depends entirely on the national court's assessment as to whether a reference is appropriate and necessary (Kempter, paragraph 42).

LITIGATING EUROPEAN UNION LAW. PRELIMINARY RULING

Judgment of the Court, 8 June 2006, C-60/05, WWF Italia and Others v Regione Lombardia

18. In that regard, it must be borne in mind that, in accordance with settled case-law, although in a reference for a preliminary ruling **the Court cannot give a ruling either on questions which fall within the national law of the Member States or on the compatibility of national provisions with Community law, it can, however, supply a ruling on the interpretation of Community law so as to enable the national court to decide the case before it** (see, inter alia, Case C-150/88 Parfümerie-Fabrik 4711 [1989] ECR I-3891, paragraph 12, and Case C-124/99 Borawitz [2000] ECR I-7293, paragraph 17).

LITIGATING EUROPEAN UNION LAW. PRELIMINARY RULING

It is for the national court solely to assess the facts of the case and to interpret national law

Judgment of the Court, 13 March 2001, C-379/98, PreussenElektra AG and others

38. It should remembered that it is settled law that in the context of the cooperation between the Court of Justice and the national courts provided for by Article 177 of the Treaty **it is solely for the national court before which the dispute has been brought, and which must assume responsibility for the subsequent judicial decision, to determine in the light of the particular circumstances of the case both the need for a preliminary ruling in order to enable it to deliver judgment and the relevance of the questions which it submits to the Court.** Consequently, where the questions submitted by the national court concern the interpretation of Community law, the Court of Justice is, in principle, bound to give a ruling (see, inter alia, Case C-415/93 Bosman [1995] ECR I-4921, paragraph 59).

39. Nevertheless, **the Court has also stated that, in exceptional circumstances, it can examine the conditions in which the case was referred to it by the national court, in order to assess whether it has jurisdiction** (see, to that effect, Case 244/80 Foglia [1981] ECR 3045, paragraph 21). The Court may refuse to rule on a question referred for a preliminary ruling by a national court only where it is quite obvious that the interpretation of Community law that is sought bears no relation to the actual facts of the main action or its purpose, where the problem is hypothetical, or where the Court does not have before it the factual or legal material necessary to give a useful answer to the questions submitted to it (see, inter alia, Bosman, paragraph 61; Case C-36/99 Idéal Tourisme [2000] ECR I-6049, paragraph 20; Case C-322/98 Kachelmann [2000] ECR I-0000, paragraph 17).

40. In this case, as regards, first, **the alleged omissions and factual errors in the order for reference, it is sufficient to note that it is not for the Court of Justice but for the national court to ascertain the facts which have given rise to the dispute and to establish the consequences which they have for the judgment which it is required to deliver** (see, in particular, Case C-435/97 World Wildlife Fund [1999] ECR I-5613, paragraph 32).

LITIGATING EUROPEAN UNION LAW. PRELIMINARY RULING

The Court is not bound by the indication of provisions of European Union law of which interpretation or assessment of validity is the subject of the question.

Judgment of the Court, 14 June 2012, C 618/10, Banco Español de Crédito SA v Joaquín Calderón Camino,

76. In that regard, it is necessary to state at the outset that, in accordance with settled case law, in proceedings under Article 267 TFEU, which are based on a clear separation of functions between the national courts and the Court of Justice, the national court alone has jurisdiction to find and assess the facts in the case before it and to interpret and apply national law. Similarly, it is solely for the national court, before which the dispute has been brought and which must assume responsibility for the judicial decision to be made, to determine, in the light of the particular circumstances of the case, both the need for and the relevance of the questions that it submits to the Court. Consequently, where the questions submitted concern the interpretation of European Union law, the Court is in principle bound to give a ruling (Case C 145/03 Keller [2005] ECR I 2529, paragraph 33; Case C 119/05 Lucchini [2007] ECR I 6199, paragraph 43; and Case C 11/07 Eckelkamp and Others [2008] ECR I 6845, paragraphs 27 and 32).

77. Thus, the Court may refuse to rule on a question referred for a preliminary ruling by a national court only where it is quite obvious that the interpretation of European Union law that is sought bears no relation to the actual facts of the main action or its purpose, where the problem is hypothetical, or where the Court does not have before it the factual or legal material necessary to give a useful answer to the questions submitted to it (see, inter alia, Joined Cases C 94/04 and C 202/04 Cipolla and Others [2006] ECR I 11421, paragraph 25, and Joined Cases C 570/07 and C 571/07 Blanco Pérez and Chao Gómez [2010] ECR I 4629, paragraph 36).

LITIGATING EUROPEAN UNION LAW. PRELIMINARY RULING

Reformulation of questions and the useful answer

Judgment of the Court, 13 March 2014, C 155/13, Società Italiana Commercio e Servizi srl (SICES) in liquidation and others v Agenzia Dogane Ufficio delle Dogane di Venezia

22. It should be recalled that, in proceedings under Article 267 TFEU, it is solely for the national court before which the dispute has been brought, and which must assume responsibility for the subsequent judicial decision, to determine, in the light of the particular circumstances of the case, both the need for a preliminary ruling in order to enable it to deliver judgment and the relevance of the questions which it submits to the Court (see, inter alia, Case C 138/10 DP grup [2011] ECR I 8369, paragraph 28).

23. **However, it is for the Court, as part of those proceedings, to provide the national court with an answer which will be of use to it and enable it to determine the case before it. To that end, the Court may have to reformulate the questions referred to it. Moreover, the Court has a duty to interpret all provisions of EU law which national courts require in order to decide the actions pending before them, even if those provisions are not expressly indicated in the questions referred to the Court of Justice by those courts** (see, inter alia, DP grup, paragraph 29).

LITIGATING EUROPEAN UNION LAW. PRELIMINARY RULING

- Preliminary ruling proceedings
- Judges and Advocates General
- Compositon of the Court
- Initiation of the preliminary ruling procedure
- Participation in the preliminary ruling proceedings
- Assignment of cases to Judge Rapportuers and Advocate General
- Procedures for dealing with cases
- Jugments and orders given by Court /posssible ways of ending the preliminary ruling proceedings/
- Binding nature of judgments and orders – precedence *de facto* or precedence *de iure*?

LITIGATING EUROPEAN UNION LAW. PRELIMINARY RULING

Judgment of the Court, 5 October 2010, C 173/09, Georgi Ivanov Elchinov v Natsionalna zdravnoosiguritelna kasa,

26. It is settled case-law that Article 267 TFEU gives national courts the widest discretion in referring matters to the Court if they consider that a case pending before them raises questions involving interpretation of provisions of European Union law, or consideration of their validity, which are necessary for the resolution of the case (see, to that effect, Case 166/73 Rheinmühlen-Düsseldorf [1974] ECR 33, paragraph 3; Case C 348/89 Mecanarte [1991] ECR I 3277, paragraph 44; Case C 261/95 Palmisani [1997] ECR I 4025, paragraph 20; Case C 210/06 Cartesio [2008] ECR I 9641, paragraph 88; and Joined Cases C 188/10 Melki and Abdeli [2010] ECR I 0000, paragraph 41). **National courts are, moreover, free to exercise that discretion at whatever stage of the proceedings they consider appropriate** (see, to that effect, Melki and Abdeli, paragraphs 52 and 57).

27. The Court has thus concluded that a rule of national law, pursuant to which courts that are not adjudicating at final instance are bound by legal rulings of a higher court, cannot take away from those courts the discretion to refer to the Court questions of interpretation of the point of European Union law concerned by such legal rulings. The Court has held that a court which is not ruling at final instance must be free, if it considers that a higher court's legal ruling could lead it to give a judgment contrary to European Union law, to refer to the Court questions which concern it (see, to that effect, Rheinmühlen-Düsseldorf, paragraphs 4 and 5; Cartesio, paragraph 94; Case C 378/08 ERG and Others [2010] ECR I 0000, paragraph 32; and Melki and Abdeli, paragraph 42).

LITIGATING EUROPEAN UNION LAW. PRELIMINARY RULING

28. However, it must be pointed out that the possibility thus given to the national court by the second paragraph of Article 267 TFEU of asking the Court for a preliminary ruling before, if necessary, disapplying directions from a higher court which prove to be contrary to European Union law cannot be transformed into an obligation (see, to that effect, Case C 555/07 Kücükdeveci [2010] ECR I 0000, paragraphs 54 and 55).

29. Secondly, it must be borne in mind that it is settled case-law that a judgment in which the Court gives a preliminary ruling is binding on the national court, as regards the interpretation or the validity of the acts of the European Union institutions in question, for the purposes of the decision to be given in the main proceedings (see, inter alia, Case 29/68 Milch-, Fett- und Eierkontor [1969] ECR 165, paragraph 3; Case 52/76 Benedetti v Munari [1977] ECR 163, paragraph 26; order in Case 69/85 Wünsche Handelsgesellschaft [1986] ECR 947, paragraph 13; and Case C 446/98 Fazenda Pública [2000] ECR I 11435, paragraph 49).

30. It follows from those considerations that the national court, having exercised the discretion conferred on it by the second paragraph of Article 267 TFEU, is bound, for the purposes of the decision to be given in the main proceedings, by the interpretation of the provisions at issue given by the Court and must, if necessary, disregard the rulings of the higher court if it considers, having regard to that interpretation, that they are not consistent with European Union law.

LITIGATING EUROPEAN UNION LAW. PRELIMINARY RULING

27. By its second question, the referring court seeks, in essence, to ascertain whether EU law, and in particular Article 267 TFEU, must be interpreted as precluding the possibility, after the delivery of the preliminary ruling, of the referring court making no change to the findings of fact or law made in the request for a preliminary ruling or, on the contrary, the possibility, after that delivery of the preliminary ruling, of the referring court hearing the parties again and undertaking further inquiries, which might lead it to alter those findings of fact or law.

28. In that regard, it must be recalled that, in accordance with settled case-law, Article 267 TFEU requires the referring court to give full effect to the interpretation of EU law provided by the Court (see, to that effect, judgment of 5 April 2016, PFE, C 689/13, EU:C:2016:199, paragraphs 38 to 40 and the case-law cited).

29. On the other hand, neither that article, nor any other provision of EU law, requires the referring court, after the delivery of the preliminary ruling, to alter the findings of fact or law made in a request for a preliminary ruling. Equally, no provision of EU law prohibits the referring court from altering, after the delivery of the preliminary ruling, its findings in respect of the relevant factual and legal context.

30. In the light of the foregoing, the answer to the second question referred is that EU law, and in particular Article 267 TFEU, must be interpreted as meaning that it does not require the referring court, after the delivery of the preliminary ruling, to hear the parties again and to undertake further inquiries, which might lead it to alter the findings of fact or law made in the request for a preliminary ruling, nor does it prohibit the referring court from doing so, provided that the referring court gives full effect to the interpretation of EU law adopted by the Court.

LITIGATING EUROPEAN UNION LAW. PRELIMINARY RULING

Further reference to the Court

Article 104 of the Rules of Procedure of the Court of Justice

Interpretation of preliminary rulings

1. Article 158 of these Rules relating to the interpretation of judgments and orders shall not apply to decisions given in reply to a request for a preliminary ruling.

2. It shall be for the national courts or tribunals to assess whether they consider that sufficient guidance is given by a preliminary ruling, **or whether it appears to them that a further reference to the Court is required.**

Order of the Court, 5 March 1986 in Case 69/85 between Wünsche Handelsgesellschaft GmbH & Co., whose registered office is in Hamburg, and Federal Republic of Germany

15. None the less, the authority of a preliminary ruling does not preclude the national court to which it is addressed from properly taking the view that it is necessary to make a further reference to the Court of Justice before giving judgment in the main proceedings. According to well-established case-law, such a procedure may be justified when the national court encounters difficulties in understanding or applying the judgment, when it refers a fresh question of law to the Court, or again when it submits new considerations which might lead the Court to give a different answer to a question submitted earlier. However, it is not permissible to use the right to refer further questions to the Court as a means of contesting the validity of the judgment delivered previously, as this would call in question the allocation of jurisdiction as between national courts and the Court of Justice under Article 177 of the Treaty.

LITIGATING EUROPEAN UNION LAW. PRELIMINARY RULING

Binding effect of a judgment for other courts

Binding effect ex tunc

Judgment of the Court, 10 November 2016, C 452/16 in the proceedings relating to the execution of a European arrest warrant issued against Krzystof Marek Poltorak,

55. It should be recalled in this connection that, according to settled case-law, the interpretation which, in the exercise of the jurisdiction conferred upon it by Article 267 TFEU, the Court gives to a rule of EU law clarifies and defines the meaning and scope of that rule as it must be, or ought to have been, understood and applied from the time of its coming into force. It follows that the rule as thus interpreted may and must be applied by the courts to legal relationships arising and established before the judgment ruling on the request for interpretation, provided that in other respects the conditions for bringing before the courts having jurisdiction an action relating to the application of that rule are satisfied (judgment of 17 September 2014, Liivimaa Lihaveis, C 562/12, EU:C:2014:2229, paragraph 80 and the case-law cited).

56. **It is only quite exceptionally that the Court may, in application of the general principle of legal certainty inherent in the EU legal order, be moved to restrict for any person concerned the opportunity of relying on a provision which it has interpreted with a view to calling into question legal relationships established in good faith. Two essential criteria must be fulfilled before such a limitation can be imposed: those concerned must have acted in good faith and there must be a risk of serious difficulties** (judgments of 27 February 2014, Transportes Jordi Besora, C 82/12, EU:C:2014:108, paragraph 41, and of 22 September 2016, Microsoft Mobile Sales International and Others, C 110/15, EU:C:2016:717, paragraph 60).

LITIGATING EUROPEAN UNION LAW. PRELIMINARY RULING

Judgment of the Court, 27 February 2014, C 82/12, Transportes Jordi Besora SL v Generalitat de Catalunya

40. In this connection, it should be recalled that, according to settled case-law of the Court, the interpretation which, in the exercise of the jurisdiction conferred on it by Article 267 TFEU, the Court gives to a rule of European Union law clarifies and defines the meaning and scope of that rule as it must be or ought to have been understood and applied from the time of its entry into force. It follows that the rule as thus interpreted may, and must, be applied by the courts even to legal relationships which arose and were established before the judgment ruling on the request for interpretation, provided that in other respects the conditions for bringing a dispute relating to the application of that rule before the courts having jurisdiction are satisfied (see, inter alia, Joined Cases C 453/02 and C 462/02 Linneweber and Akritidis [2005] ECR I 1131, paragraph 41; Case C 292/04 Meilicke and Others [2007] ECR I 1835, paragraph 34; and Joined Cases C 338/11 to C 347/11 Santander Asset Management SGIIC and Others [2012] ECR, paragraph 58).

41. **It is only quite exceptionally that the Court may, in application of the general principle of legal certainty inherent in the legal order of the European Union, decide to restrict for any person concerned the opportunity of relying on a provision which it has interpreted with a view to calling into question legal relationships established in good faith. Two essential criteria must be fulfilled before such a limitation can be imposed, namely, that those concerned should have acted in good faith and that there should be a risk of serious difficulties** (see, inter alia, Case C 402/03 Skov and Bilka [2006] ECR I 199, paragraph 51; Case C 2/09 Kalinchev [2010] ECR I 4939, paragraph 50; and Santander Asset Management SGIIC and Others, paragraph 59).

42. More specifically, the Court has taken that step only in quite specific circumstances, notably where there was a risk of serious economic repercussions owing in particular to the large number of legal relationships entered into in good faith on the basis of rules considered to be validly in force and where it appeared that individuals and national authorities had been led to adopt practices which did not comply with European Union law by reason of objective, significant uncertainty regarding the implications of European Union provisions, to which the conduct of other Member States or the Commission may even have contributed (see, inter alia, Case C 423/04 Richards [2006] ECR I 3585, paragraph 42; Kalinchev, paragraph 51; and Santander Asset Management SGIIC and Others, paragraph 60).

LITIGATING EUROPEAN UNION LAW. PRELIMINARY RULING

I. Admissibility

Article 267 TFUE

The Court of Justice of the European Union shall have jurisdiction to give preliminary rulings concerning:

(a) the interpretation of the Treaties;

(b) the validity and interpretation of acts of the institutions, bodies, offices or agencies of the Union;

Where such a question is raised before any court or tribunal of a Member State, that court or tribunal may, if it considers that a decision on the question is necessary to enable it to give judgment, request the Court to give a ruling thereon.

Where any such question is raised in a case pending before a court or tribunal of a Member State against whose decisions there is no judicial remedy under national law, that court or tribunal shall bring the matter before the Court.

If such a question is raised in a case pending before a court or tribunal of a Member State with regard to a person in custody, the Court of Justice of the European Union shall act with the minimum of delay.

LITIGATING EUROPEAN UNION LAW. PRELIMINARY RULING

II. Proper drafting of the reference for the preliminary ruling

Article 94

Content of the request for a preliminary ruling

In addition to the text of the questions referred to the Court for a preliminary ruling, the request for a preliminary ruling shall contain:

(a) a summary of the subject matter of the dispute and the relevant findings of fact as determined by the referring court or tribunal, or, at least, an account of the facts on which the questions are based;

(b) the tenor of any national provisions applicable in the case and, where appropriate, the relevant national case-law;

(c) a statement of the reasons which prompted the referring court or tribunal to inquire about the interpretation or validity of certain provisions of European Union law, and the relationship between those provisions and the national legislation applicable to the main proceedings.

Article 53

Procedures for dealing with cases

(...)2. Where it is clear that the Court has no jurisdiction to hear and determine a case or where a request or an application is manifestly inadmissible, the Court may, after hearing the Advocate General, at any time decide to give a decision by reasoned order without taking further steps in the proceedings.

LITIGATING EUROPEAN UNION LAW. PRELIMINARY RULING

The only institution that may initiate the preliminary procedure is a court.

" a court" is an autonomous notion of EU law (may differ substantially from the domestic understanding of this word).

Judgment of the Court of 30 June 1966 G.Vaassen-Göbbels (a widow) v Management of the Beambtenfonds voor het Mijnbedrijf.

The expression 'court or tribunal' in Article 177 of the EEC Treaty may in certain circumstances include bodies other than ordinary courts of law.

Judgment of the Court, C 396/14, MT Højgaard A/S, Züblin A/S

22. In paragraph 15 of the judgment of 18 November 1999, Unitron Scandinavia and 3-S (C 275/98, EU:C:1999:567), the Court accepted that Klagenævnet for Udbud (the Public Procurement Complaints Board) was a 'court or tribunal', within the meaning of Article 267 TFEU. The Danish Government states, however, that the Court, in the judgment of 9 October 2014, TDC (C 222/13, EU:C:2014:2265), nonetheless found that Teleklagenævnet (the Telecommunications Complaints Board, Denmark) was not a 'court or tribunal', and consequently asks the Court to clarify further the relevant criteria and to confirm, if appropriate, that Klagenævnet for Udbud (the Public Procurement Complaints Board) is a 'court or tribunal'.

23. **In that regard, it must be recalled that, in accordance with settled case-law, in order to assess whether a body making a reference is a 'court or tribunal', which is a question governed by EU law alone, the Court will take account of a number of factors, such as whether the body is established by law, whether it is permanent, whether its jurisdiction is compulsory, whether its procedure is inter partes, whether it applies rules of law and whether it is independent** (judgment of 6 October 2015, Consorci Sanitari del Maresme C 203/14, EU:C:2015:664, paragraph 17 and the case-law cited).

24. In the main proceedings, there is no indication in the file submitted to the Court that the referring body does not meet the criteria relating to whether the body is established by law, whether it is permanent, whether its jurisdiction is compulsory, whether its procedure is inter partes, and whether it applies rules of law.

LITIGATING EUROPEAN UNION LAW. PRELIMINARY RULING

Judgment of the Court (Grand Chamber) of 6 October 2015, C-203/14, Consorci Sanitari del Maresme v Corporació de Salut del Maresme i la Selva

17. As regards, first, the assessment of whether a body making a reference is a 'court or tribunal' within the meaning of Article 267 TFEU, which is a question governed by EU law alone, the Court will take account of a number of factors, such as whether the body is established by law, whether it is permanent, whether its jurisdiction is compulsory, whether its procedure is inter partes, whether it applies rules of law and whether it is independent (see, inter alia, judgments in Vaassen-Göbbels, 61/65, EU:C:1966:39, and Umweltanwalt von Kärnten, C 205/08, EU:C:2009:767, paragraph 35 and the case-law cited). Thus, even though, as the order for reference indicates, the Tribunal Català de Contractes del Sector Públic is regarded under Spanish law as an administrative body, that fact is not, in itself, conclusive for the purpose of the Court's assessment.

18. With regard (i) to the criteria concerning whether the body making the reference is established by law, whether it is permanent, whether its procedure is inter partes and whether it applies rules of law, the documents before the Court contain nothing which suggests that the Tribunal Català de Contractes del Sector Públic is not a 'court or tribunal' within the meaning of Article 267 TFEU.

LITIGATING EUROPEAN UNION LAW. PRELIMINARY RULING

Judgment of the Court, 16 December 2008, C-210/06, Cartesio Oktató és Szolgáltató bt

55. In that regard, it should be borne in mind that, according to settled case-law, in order to determine whether the body making a reference is a 'court or tribunal' for the purposes of Article 234 EC, which is a question governed by Community law alone, the Court takes account of a number of factors, such as whether the body is established by law, whether it is permanent, whether its jurisdiction is compulsory, whether its procedure is inter partes, whether it applies rules of law and whether it is independent (see, inter alia, Case C 96/04 Standesamt Stadt Niebüll [2006] ECR I 3561, paragraph 12 and the case-law cited).

56. With regard to the inter partes nature of the proceedings before the national court, Article 234 EC does not make reference to the Court subject to those proceedings being inter partes. None the less, it follows from that article that a national court may make a reference to the Court only if there is a case pending before it and if it is called upon to give judgment in proceedings intended to lead to a decision of a judicial nature (see to that effect, inter alia, Case C 182/00 Lutz and Others [2002] ECR I 547, paragraph 13 and the case-law cited).

57. Thus, where a court responsible for maintaining a register makes an administrative decision without being required to resolve a legal dispute, it cannot be regarded as exercising a judicial function. Such is the case, for example, where it decides an application for registration of a company in proceedings which do not have as their object the annulment of a measure which allegedly adversely affects the applicant (see to that effect, inter alia, Lutz and Others, paragraph 14 and the case-law cited).

LITIGATING EUROPEAN UNION LAW. PRELIMINARY RULING

Judgment of the Court (First Chamber) of 4 September 2019, C-347/18, Alessandro Salvoni v Anna Maria Fiermonte

25. As a preliminary point, it must be determined whether a court which has been requested to issue a certificate under Article 53 of Regulation No 1215/2012 is acting in the exercise of a judicial function within the meaning of Article 267 TFEU, or whether the procedure which it follows may be treated as a purely administrative procedure or non-contentious procedure.

26. According to the Court's settled case-law, although Article 267 TFEU does not make the reference to the Court subject to there having been an inter partes hearing in the proceedings in the course of which the national court refers the questions for a preliminary ruling, a national court may refer a question to the Court only if there is a case pending before it and if it is called upon to give judgment in proceedings intended to lead to a decision of a judicial nature (judgment of 16 June 2016, Pebros Servizi, C 511/14, EU:C:2016:448, paragraph 24 and the case-law cited).

27. The terms 'give judgment', within the meaning of the second paragraph of Article 267 TFEU, encompass the whole procedure leading to the referring court's judgment and must, therefore, be interpreted broadly in order to prevent many procedural questions from being regarded as inadmissible and from being unable to be the subject of interpretation by the Court and the latter from being unable to interpret all procedural provisions of EU law that the referring court is required to apply (see, to that effect, judgment of 16 June 2016, Pebros Servizi, C 511/14, EU:C:2016:448, paragraph 28 and the case-law cited).

LITIGATING EUROPEAN UNION LAW. PRELIMINARY RULING

Judgment of the Court, 23 May 2019, C-658/17, WB v Notariusz Przemysława Bac

18. According to settled case-law, it follows from Article 234 EC that national courts or tribunals may refer a question to the Court only if there is a case pending before them and if they are called upon to give judgment in proceedings intended to lead to a decision of a judicial nature (see, inter alia, the order in Case C 138/80 Borker [1980] ECR 1975, paragraph 4; Case C-53/03 Syfait and Others [2005] ECR I 4609, paragraph 29, and Case C 14/08 Roda Golf & Beach Resort [2009] ECR I 5439, paragraph 34).

19. Thus, when it makes an administrative decision without at the same time being required to decide a legal dispute, within the meaning of the case-law of the Court of Justice, the referring body cannot be regarded as exercising a judicial function (see, inter alia, Case C 111/94 Job Centre [1995] ECR I 3361, paragraph 11; Case C 182/00 Lutz and Others [2002] ECR I 547, paragraph 14; and Roda Golf & Beach Resort, paragraph 35).

LITIGATING EUROPEAN UNION LAW. PRELIMINARY RULING

Unlimited right of the courts to refer for the preliminary ruling regardless of the stage of the proceedings /this right can not be limited in any way by domestic regulations/

Judgment of the Court, 5 October 2010, C-173/09, Georgi Ivanov Elchinov v Natsionalna zdravnoosiguritelna kasa.

24. Accordingly, by its third question, the national court asks whether European Union law precludes a national court which is called upon to decide a case referred back to it by a higher court hearing an appeal from being bound, in accordance with national procedural law, by legal rulings of the higher court, if it considers, having regard to the interpretation which it has sought from the Court, that those rulings are inconsistent with European Union law.

25. **In that regard, it must be borne in mind, firstly, that the existence of a rule of national procedure such as that applicable in the case in the main proceedings cannot call into question the discretion of national courts not ruling at final instance to make a reference to the Court for a preliminary ruling where they have doubts, as in the present case, as to the interpretation of European Union law.**

26. It is settled case-law that Article 267 TFEU gives national courts the widest discretion in referring matters to the Court if they consider that a case pending before them raises questions involving interpretation of provisions of European Union law, or consideration of their validity, which are necessary for the resolution of the case (see, to that effect, Case 166/73 Rheinmühlen-Düsseldorf [1974] ECR 33, paragraph 3; Case C 348/89 Mecanarte [1991] ECR I 3277, paragraph 44; Case C 261/95 Palmisani [1997] ECR I 4025, paragraph 20; Case C 210/06 Cartesio [2008] ECR I 9641, paragraph 88; and Joined Cases C 188/10 Melki and Abdeli [2010] ECR I 0000, paragraph 41). National courts are, moreover, free to exercise that discretion at whatever stage of the proceedings they consider appropriate (see, to that effect, Melki and Abdeli, paragraphs 52 and 57).

LITIGATING EUROPEAN UNION LAW. PRELIMINARY RULING

Order of the Court, 12 February 2019, C-8/19, Criminal proceedings against RH

45. Thus, on the basis of settled case-law, it is clear from both the wording and the scheme of Article 267 TFEU that a national court or tribunal is not empowered to bring a matter before the Court by way of a request for a preliminary ruling unless a case is pending before it, in which it is called upon to give a decision which is capable of taking account of the preliminary ruling (order of 5 June 2014, Antonio Gramsci Shipping and Others, C 350/13 EU:C:2014:1516, paragraph 10 and the case-law cited).

46. Third, with regard to the risk of disciplinary sanctions for disobeying the mandatory instructions of a higher court mentioned by the referring court and, as regards its independence, the Court of Justice has already held that it is essential to the proper working of the judicial cooperation system embodied by the preliminary ruling mechanism under Article 267 TFEU, in that that mechanism may be activated only by a body responsible for applying EU law which satisfies, inter alia, that criterion of independence (judgment of 25 July 2018, Minister for Justice and Equality (Deficiencies in the legal system) ('LM'), C 216/18 PPU, EU:C:2018:586, paragraph 54 and the case-law cited).

47. In that connection, like guarantees regarding removal from office of members of the court concerned, or their receipt of a level of remuneration commensurate with the importance of the functions that they carry out, the requirement of independence also means that the disciplinary regime governing those who have the task of adjudicating in a dispute must contain the necessary guarantees in order to prevent any risk of its being used as a system of political control of the content of judicial decisions (judgment of 25 July 2018, Minister for Justice and Equality (Deficiencies in the legal system) ('LM'), C 216/18 PPU, EU:C:2018:586, paragraphs 64 and 67 and the case-law cited). Not being exposed to disciplinary sanctions for exercising a choice, such as sending a request for a preliminary ruling to the Court or choosing to wait for the reply to such a request before adjudicating on the substance of a dispute before them, which is exclusively within their jurisdiction, constitutes a guarantee essential to judicial independence (see, to that effect, judgment of 5 July 2016, Ognyanov, C 614/14, EU:C:2016:514, paragraphs 17 and 25 and the case-law cited).

48. It follows that the answer to the first question is that Article 267 TFEU and Article 47, second paragraph, of the Charter must be interpreted as precluding national legislation, such as that at issue in the main proceedings, which has the result that the national court is obliged to adjudicate on the legality of a pre-trial detention decision without the opportunity to make a request for a preliminary ruling to the Court of Justice or to wait for its reply.

LITIGATING EUROPEAN UNION LAW. PRELIMINARY RULING

Judgment of the Court, 26 March 2020; Miasto Łowicz and Prokurator Generalny zastępowany przez Prokuraturę Krajową, formerly Prokuratura Okręgowa w Płocku v Skarb Państwa – Wojewoda Łódzki and Others, Joined Cases C-558/18 and C-563/18

56. In accordance with equally settled case-law, Article 267 TFEU gives national courts **the widest discretion in referring matters to the Court** if they consider that a case pending before them raises questions involving the interpretation of provisions of EU law, or consideration of their validity, which are necessary for the resolution of the case before them. National courts are, moreover, **free to exercise that discretion at whatever stage of the proceedings they consider appropriate** (judgments of 5 October 2010, Elchinov, C 173/09, EU:C:2010:581, paragraph 26, and of 24 October 2018, XC and Others, C 234/17, EU:C:2018:853, paragraph 42 and the case-law cited).

57. Therefore, **a rule of national law cannot prevent a national court from using that discretion, which is an inherent part of the system of cooperation between the national courts and the Court of Justice established in Article 267 TFEU and of the functions of the court responsible for the application of EU law, entrusted by that provision to the national courts** (judgment of 19 November 2019, A. K. and Others (Independence of the Disciplinary Chamber of the Supreme Court) (C 585/18, C 624/18 and C 625/18, EU:C:2019:982, paragraph 103 and the case-law cited).

58. **Provisions of national law which expose national judges to disciplinary proceedings as a result of the fact that they submitted a reference to the Court for a preliminary ruling cannot therefore be permitted** (see, to that effect, order of the President of the Court of 1 October 2018, Miasto Łowicz and Prokuratura Okręgowa w Płocku, C 558/18 and C 563/18, not published, EU:C:2018:923, paragraph 21). Indeed, **the mere prospect, as the case may be, of being the subject of disciplinary proceedings as a result of making such a reference or deciding to maintain that reference after it was made is likely to undermine the effective exercise by the national judges concerned of the discretion and the functions referred to in the preceding paragraph.**

59. For those judges, not being exposed to disciplinary proceedings or measures for having exercised such a discretion to bring a matter before the Court, which is exclusively within their jurisdiction, also constitutes a guarantee that is essential to judicial independence (see, to that effect, order of 12 February 2019, RH, C 8/19 PPU, EU:C:2019:110, paragraph 47), which independence is, in particular, essential to the proper working of the judicial cooperation system embodied by the preliminary ruling mechanism under Article 267 TFEU (see, to that effect, judgment of 25 July 2018, Minister for Justice and Equality (Deficiencies in the system of justice), C 216/18 PPU, EU:C:2018:586, paragraph 54 and the case-law cited).

LITIGATING EUROPEAN UNION LAW. PRELIMINARY RULING

Right or obligation to refer for the preliminary ruling?

Exceptions to an obligation:

1. the question is not relevant to the case,

2. *acte eclaire*,

3. *acte claire*.

Judgment of the Court, 6 October 1982, Case 283/81, Srl CILFIT and Lanificio di Gavardo SpA v Ministry of Health

Judgment of the Court, 9 September 2015, C-160/14, João Filipe Ferreira da Silva e Brito and Others v Estado português

39. The Court has also made clear that the existence of such a possibility must be assessed in the light of the specific characteristics of EU law, the particular difficulties to which the interpretation of the latter gives rise and the risk of divergences in judicial decisions within the European Union (judgment in Intermodal Transports, C 495/03, EU:C:2005:552, paragraph 33).

40. It is true that the national court or tribunal has sole responsibility for determining whether the correct application of EU law is so obvious as to leave no scope for any reasonable doubt and for deciding, as a result, to refrain from referring to the Court a question concerning the interpretation of EU law which has been raised before it (see judgment in Intermodal Transports, C 495/03, EU:C:2005:552, paragraph 37 and the case-law cited).

LITIGATING EUROPEAN UNION LAW. PRELIMINARY RULING

41. In itself, the fact that other national courts or tribunals have given contradictory decisions is not a conclusive factor capable of triggering the obligation set out in the third paragraph of Article 267 TFEU.

42. A court or tribunal adjudicating at last instance may take the view that, although the lower courts have interpreted a provision of EU law in a particular way, the interpretation that it proposes to give of that provision, which is different from the interpretation espoused by the lower courts, is so obvious that there is no reasonable doubt.

43. However, so far as the area under consideration in the present case is concerned and as is clear from paragraphs 24 to 27 of this judgment, the question as to how the concept of a 'transfer of a business' should be interpreted has given rise to a great deal of uncertainty on the part of many national courts and tribunals which, as a consequence, have found it necessary to make a reference to the Court of Justice. That uncertainty shows not only that there are difficulties of interpretation, but also that there is a risk of divergences in judicial decisions within the European Union.

44. It follows that, in circumstances such as those of the case before the referring court, which are characterised both by conflicting lines of case-law at national level regarding the concept of a 'transfer of a business' within the meaning of Directive 2001/23 and by the fact that that concept frequently gives rise to difficulties of interpretation in the various Member States, a national court or tribunal against whose decisions there is no judicial remedy under national law must comply with its obligation to make a reference to the Court, in order to avert the risk of an incorrect interpretation of EU law.

45. Accordingly, the answer to the second question is that, in circumstances such as those of the case in the main proceedings, which are characterised both by the fact that there are conflicting decisions of lower courts or tribunals regarding the interpretation of the concept of a 'transfer of a business' within the meaning of Article 1(1) of Directive 2001/23 and by the fact that that concept frequently gives rise to difficulties of interpretation in the various Member States, the third paragraph of Article 267 TFEU must be construed as meaning that a court or tribunal against whose decisions there is no judicial remedy under national law is obliged to make a reference to the Court for a preliminary ruling concerning the interpretation of that concept.

LITIGATING EUROPEAN UNION LAW. PRELIMINARY RULING

Judgment of the Court, 4 October 2018, C-416/17, European Commission v French Republic

110. Indeed, that court is not under such an obligation when it finds that the question raised is irrelevant or that the provision of EU law in question has already been interpreted by the Court or that the correct application of EU law is so obvious as to leave no scope for any reasonable doubt, and the existence of such a possibility must be assessed in the light of the specific characteristics of EU law, the particular difficulties to which its interpretation gives rise and the risk of divergences in judicial decisions within the European Union (see, to that effect, judgments of 6 October 1982, Cilfit and Others, 283/81, EU:C:1982:335, paragraph 21; of 9 September 2015, Ferreira da Silva e Brito and Others, C 160/14, EU:C:2015:565, paragraphs 38 and 39; and of 28 July 2016, Association France Nature Environnement, C 379/15, EU:C:2016:603, paragraph 50).

LITIGATING EUROPEAN UNION LAW. PRELIMINARY RULING

Judgment of the Court, 15 March 2017, C-3/16 Lucio Cesare Aquino v Belgische Staat

43. It follows from the relationship between the second and third paragraphs of Article 267 TFEU that the courts referred to in the third paragraph have the same discretion as all other national courts as to whether a decision on a question of EU law is necessary to enable them to give judgment. They are not therefore obliged to refer a question of the interpretation of EU law raised before them if the question is not relevant, that is to say, if the answer to that question, whatever it may be, cannot have any effect on the outcome of the case (judgment of 18 July 2013, Consiglio Nazionale dei Geologi, C 136/12, EU:C:2013:489, paragraph 26).

LITIGATING EUROPEAN UNION LAW. PRELIMINARY RULING

Judgment of the Court, 4 October 2018, C-416/17, European Commission v French Republic

Declares that, since the Conseil d'État (Council of State, France) failed to make a reference to the Court of Justice of the European Union, in accordance with the procedure provided for in the third paragraph of Article 267 TFEU, in order to determine whether it was necessary to refuse to take into account, for the purpose of calculating the reimbursement of the advance payment made by a resident company in respect of the distribution of dividends paid by a non-resident company via a non-resident subsidiary, the tax incurred by that second company on the profits underlying those dividends, even though its interpretation of the provisions of EU law in the judgments of 10 December 2012, Rhodia (FR:CESSR:2012:317074.20121210), and of 10 December 2012, Accor (FR:CESSR:2012:317075.20121210), was not so obvious as to leave no scope for doubt, the French Republic failed to fulfil its obligations under the third paragraph of Article 267 TFEU.

LITIGATING EUROPEAN UNION LAW. PRELIMINARY RULING

- May the lack of the reference for the preliminary ruling violate the Convention for the Protection of Human Rights and Fundamental Freedoms when such a reference is obligatory?
- Who initates the reference for the preliminary ruling – at request or ex officio? /C-404/07 György Katz v István Roland Sós, C-98/14 Berlington Hungary Tanácsadó és Szolgáltató kft and Others v Magyar Állam, C-26/11 Belgische Petroleum Unie VZW and Others v Belgische Staat/.
- Extent of the reference for the preliminary ruling /C/585/18, C-624/18 and 625/18 A.K. and others, C-210/06 Cartesio, C-72/15 PJSC Rosneft Oil Company/.

LITIGATING EUROPEAN UNION LAW. PRELIMINARY RULING

Article 275 TFUE

The Court of Justice of the European Union shall not have jurisdiction with respect to the provisions relating to the common foreign and security policy nor with respect to acts adopted on the basis of those provisions.

However, the Court shall have jurisdiction to monitor compliance with Article 40 of the Treaty on European Union and to rule on proceedings, brought in accordance with the conditions laid down in the fourth paragraph of Article 263 of this Treaty, reviewing the legality of decisions providing for restrictive measures against natural or legal persons adopted by the Council on the basis of Chapter 2 of Title V of the Treaty on European Union.

Art. 24.1. TUE

The Union's competence in matters of common foreign and security policy shall cover all areas of foreign policy and all questions relating to the Union's security, including the progressive framing of a common defence policy that might lead to a common defence.

The common foreign and security policy is subject to specific rules and procedures. It shall be defined and implemented by the European Council and the Council acting unanimously, except where the Treaties provide otherwise. The adoption of legislative acts shall be excluded. The common foreign and security policy shall be put into effect by the High Representative of the Union for Foreign Affairs and Security Policy and by Member States, in accordance with the Treaties. The specific role of the European Parliament and of the Commission in this area is defined by the Treaties. The Court of Justice of the European Union shall not have jurisdiction with respect to these provisions, with the exception of its jurisdiction to monitor compliance with Article 40 of this Treaty and to review the legality of certain decisions as provided for by the second paragraph of Article 275 of the Treaty on the Functioning of the European Union.

LITIGATING EUROPEAN UNION LAW. PRELIMINARY RULING

- Extent of judiciary activity of the Court within the procedure of reference for the preliminary ruling / C-137/08 VB Pénzügyi Lízing Zrt. V. Ferenc Schneider, C-370/12 Thomas Pringle, 181/73 R & V Haegeman, C-266/16 Western Sahara Campaign UK, C-224/16 Asotsiatsia na balgarskite predpriyatia za mezhdunarodni prevozi i patishtata (Aebtri) v Nachalnik na Mitnitsa Burgas, C- 192/89 Z. Sevince, C-16/16 Kingdom of Belgium, 111/75 Impresa Conreuzioni comm. Quirino Mazzalai/.
- Case C-297/88 and 197/89 Massam Dzodzi v the Belgian State.

LITIGATING EUROPEAN UNION LAW. PRELIMINARY RULING

- Technical issues of the reference for the preliminary ruling,
- Rules of Procedure of the Court of Justice,
- Recommendations to national courts and tribunals in relation to the initiation of preliminary ruling proceedings,
- The form and content of the request for a preliminary ruling,
- Stages of the proceedings in front of the Court /practical and procedural issues/
- Challenges of the preliminary ruling procedure and its future
- Practical conclusions and recommendations.

LITIGATING EUROPEAN UNION LAW. PRELIMINARY RULING

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Litigating European Union Law

Direct actions before the General Court | Bram Hoorelbeke, 16 September 2020

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In 45' "*en direct*" to the General Court

1. "What you want" determines the direct action to bring
2. Basics & practicalities: How to bring an action
3. Written Procedure – Avoiding the pitfalls
5. What to expect in Luxembourg – The oral hearing
6. Judgment & costs (appeal?)

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Litigating European Union Law

Workshop on drafting an action | Bram Hoorelbeke & Marc Barennes, 16 September 2020

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Agenda

1. Introduction to the case
2. Background reading
3. Key issues & questions to consider
4. Discussion in groups
5. Outline arguments in groups
6. Present arguments & discussion

II

(Non-legislative acts)

DECISIONS

COMMISSION DECISION

of 27 April 2011

determining transitional Union-wide rules for harmonised free allocation of emission allowances pursuant to Article 10a of Directive 2003/87/EC of the European Parliament and of the Council

(notified under document C(2011) 2772)

(2011/278/EU)

THE EUROPEAN COMMISSION,

Having regard to the Treaty of the Functioning of the European Union,

Having regard 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 [1], and in particular Article 10a thereof,

Whereas:

(1) Article 10a of the Directive requires that the Community-wide and fully-harmonised implementing measures for the allocation of free emission allowances should, to the extent feasible, determine *ex-ante* benchmarks so as to ensure that the free allocation of emission allowances takes place in a manner that provides incentives for reductions in greenhouse gas emissions and energy efficient techniques, by taking account of the most efficient techniques, substitutes, alternative production processes, high efficiency cogeneration, efficient energy recovery of waste gases, use of biomass and capture and storage of carbon dioxide, where such facilities are available, and should not provide incentives to increase emissions. Allocations must be fixed prior to the trading period so as to enable the market to function properly.

(2) In defining the principles for setting *ex-ante* benchmarks in individual sectors or sub-sectors, the starting point should be the average performance of the 10 % most efficient installations in a sector or sub-sector in the EU in the years 2007-2008. The benchmarks should be calculated for products rather than for inputs, in order to maximise greenhouse gas emissions reductions and energy efficiency savings throughout each production process of the sector or the sub-sector concerned.

(3) In order to establish the benchmarks, the Commission has consulted the relevant stakeholders, including the sectors and sub-sectors concerned. Information necessary for setting the benchmarks, installation data on the production, emissions and energy use, was collected as of February 2009 from industry associations, Member States, publicly and commercially available sources and through a survey asking installations to participate.

(4) To the extent feasible, the Commission has developed benchmarks for products, as well as intermediate products that are traded between installations, produced from activities listed in Annex I to Directive 2003/87/EC. In principle, for each product one benchmark should be defined. Where a product is a direct substitute of another product, both should be covered by the same product benchmark and the related product definition.

(5) The Commission considered that setting a benchmark for a product was feasible where, taking into account the complexity of the production processes, product definitions and classifications were available that allow for verification of production data and a uniform application of the product benchmark across the Union for the purposes of allocating emission allowances. No differentiation was made on the basis of geography or on the basis of technologies, raw materials or fuels used, so as not to distort comparative advantages in carbon efficiency across the Union economy, and to enhance harmonisation of the transitional free allocation of emission allowances.

[1] OJ L 275, 25.10.2003, p. 32.

(6) 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. Emissions related to the production of electricity and to the export of measurable heat, including avoided emissions of alternative heat or electricity production in cases of exothermic processes or the production of electricity without direct emissions, were deducted when setting the benchmark values. In case the deduction of emissions related to the export of measurable heat was not feasible, this heat should not be eligible for the free allocation of emission allowances.

(7) In order to ensure that benchmarks lead to reductions in greenhouse gas emissions, for some production processes in which direct emissions eligible for the free allocation of emission allowances and indirect emissions from electricity production not eligible for free allocation on the basis of Directive 2003/87/EC are to a certain extent interchangeable, the total emissions including indirect emissions related to the production of electricity have been considered for the determination of the benchmark values to ensure a level playing field for fuel and electro-intensive installations. For the purpose of the allocation of emission allowances on the basis of the benchmarks concerned, only the share of the direct emissions in the total emissions should be taken into account in order to avoid providing free allocation of emission allowances for emissions related to electricity.

(8) For the determination of benchmark values, the Commission has used as a starting point the arithmetic average of the greenhouse gas performance of the 10 % most greenhouse gas efficient installations in 2007 and 2008 for which data has been collected. In addition, the Commission has in accordance with Article 10a(1) of Directive 2003/87/EC analysed for all sectors for which a product benchmark is provided for in Annex I, on the basis of additional information received from several sources and on the basis of a dedicated study analysing most efficient techniques and reduction potentials at European and international level, whether these starting points sufficiently reflect the most efficient techniques, substitutes, alternative production processes, high efficiency cogeneration, efficient energy recovery of waste gases, use of biomass and capture and storage of carbon dioxide, where such facilities are available. Data used for determining the benchmark values has been collected from a wide range of sources in order to cover a maximum of installations producing a benchmarked product in the years 2007 and 2008. First, data on the greenhouse gas performance of ETS installations producing benchmarked products has been collected by or on behalf of the respective European sector associations based on defined rules, so-called 'sector rule books'. As reference for these rule books, the Commission provided guidance on quality and verification criteria for benchmarking data for the EU-ETS. Second, to complement the data collection by European sector associations, consultants on behalf of the European Commission collected data from installations not covered by industry's data and also competent authorities of Member States provided data and analyses.

(9) To ensure that the benchmark values are based on correct and compliant data, the Commission, supported by consultants, carried out in-depth compliance checks of the sector rule books as well as plausibility checks of the starting point values derived from the data. As indicated in the guidance on quality and verification, data has been verified to the extent necessary by independent verifiers.

(10) Where several products are produced in one installation and an assignment of emissions to the individual products has not been regarded feasible, only single product installations have been covered by the data collection and included in the benchmark setting. This concerns the product benchmarks for lime, dolime, bottles and jars of colourless glass, bottles and jars of coloured glass, facing bricks, pavers, spray-dried powder, uncoated fine paper, tissue, testliner and fluting, uncoated carton board as well as coated carton board. To increase the significance and check the plausibility of the results, the values for the average performance of the 10 % most efficient installations have been compared against literature on most efficient techniques.

(11) In case no data or no data collected in compliance with the benchmarking methodology has been available, information on present levels of emissions and consumptions and on most efficient techniques, mainly derived from the Reference Documents on Best Available Techniques (BREF) established in accordance with Directive 2008/1/EC of the European Parliament and of the Council of 15 January 2008 concerning integrated pollution prevention and control [1] has been used to derive benchmark values. In particular, due to a lack of data on the treatment of waste gases, heat exports and electricity production, the values for the product benchmarks for coke and hot metal have been derived from calculations of direct and indirect emissions based on information on relevant energy flows provided by the relevant BREF and default emission factors set out in Commission Decision 2007/589/EC of 18 July 2007 establishing guidelines for the monitoring and reporting of greenhouse gas emissions pursuant to Directive 2003/87/EC of the European Parliament and of the Council [2]. For the product benchmark for sintered ore,

[1] OJ L 24, 29.1.2008, p. 8.
[2] OJ L 229, 31.8.2007, p. 1.

data has also been corrected based on relevant energy flows provided by the relevant BREF, taking into account the combustion of waste gases in the sector.

(12) Where deriving a product benchmark was not feasible, but greenhouse gases eligible for the free allocation of emission allowances occur, those allowances should be allocated on the basis of generic fallback approaches. A hierarchy of three fallback approaches has been developed in order to maximise greenhouse gas emission reductions and energy savings for at least parts of the production processes concerned. The heat benchmark is applicable for heat consumption processes where a measurable heat carrier is used. The fuel benchmark is applicable where non-measurable heat is consumed. The heat and fuel benchmark values have been derived based upon the principles of transparency and simplicity, using the reference efficiency of a widely available fuel that can be regarded as second-best in terms of greenhouse gas efficiency, considering energy efficient techniques. For process emissions, emission allowances should be allocated on the basis of historical emissions. In order to ensure that the free allocation of emission allowances for such emissions provides sufficient incentives for reductions in greenhouse gas emissions and to avoid any difference in treatment of process emissions that are allocated on the basis of historical emissions and those within the system boundaries of a product benchmark, the historical activity level of each installation should be multiplied by a factor equal to 0,9700 to determine the number of free emission allowances.

(13) From 2013 onwards, all free allocations pursuant to Article 10a of Directive 2003/87/EC should be done in accordance with these rules. To give effect to the transitional system provided for by Article 10a(11) of Directive 2003/87/EC, according to which the free allocation of emission allowances should decrease from 80 % of the amount that corresponded to the allowances to be allocated in 2013 to 30 % of this amount in 2020 with a view to reaching no free allocation in 2027, the factors set out in Annex VI apply. Where a sector or subsector has been put on the list determined by Commission Decision 2010/2/EU of 24 December 2009 determining, pursuant to Directive 2003/87/EC of the European Parliament and of the Council, a list of sectors and subsectors which are deemed to be exposed to a significant risk of carbon leakage [1], these factors do not apply. Allocations under this Decision will be taken into account in determining future lists of sectors or sub-sectors deemed to be exposed to a significant risk of carbon leakage.

(14) To facilitate the data collection from operators and the calculation of the emission allowances to be allocated by Member States, each installation should be divided into sub-installations where required. Member States should ensure that emissions are correctly attributed to the relevant sub-installations and that there are no overlaps between sub-installations.

(15) Member States should ensure that data collected from the operators and used for allocation purposes is complete, consistent and presents the highest achievable accuracy. It should be verified by an independent verifier so as to ensure that the free allocation of emission allowances is based on solid and reliable data. This decision should provide for specific minimum requirements for data collection and verification to facilitate a harmonised and consistent application of the allocation rules.

(16) The amount of allowances to be allocated free of charge to incumbent installations should be based on historical production data. In order to ensure that the reference period is as far as possible representative of industry cycles, covers a relevant period where good quality data is available and reduces the impact of special circumstances, such as temporary closure of installations, the historical activity levels have been based on the median production during the period from 1 January 2005 to 31 December 2008, or, where it is higher, on the median production during the period from 1 January 2009 to 31 December 2010. It is also appropriate to take account of any significant capacity change that has taken place in the relevant period. For new entrants, the determination of activity levels should be based on standard capacity utilisation based on sector-specific information or on installation-specific capacity utilisation.

(17) The information collected by Member States should facilitate the application of this Decision by competent authorities and by the Commission.

(18) In order to avoid any distortion of competition and to ensure an orderly functioning of the carbon market, Member States should ensure that when determining the allocation of individual installations no double counting and no double allocation takes place. In this context, Member States should pay particular attention to cases where a benchmarked product is produced in more than one installation, where more than one benchmarked product is produced in the same installation or where intermediate products are exchanged across installation boundaries.

[1] OJ L 1, 5.1.2010, p. 10.

(19) To ensure that the emissions trading system delivers reductions over time, Directive 2003/87/EC provides for the Union-wide quantity of allowances to decrease in a linear manner. As this decreasing Union-wide quantity is taken into account for determining the maximum annual amount of allowances pursuant to Article 10a(5) of Directive 2003/87/EC, all free emission allowances allocated on the basis of this Decision to installations not covered by this maximum annual amount referred to in Article 10a(5) should be adjusted in the same linear manner as the Union-wide quantity of allowances, using the year 2013 as a reference.

(20) The uniform cross-sectoral correction factor that is applicable in each year of the period from 2013 to 2020 to installations that are not identified as electricity generators, and that are not new entrants, pursuant to Article 10a(5) of Directive 2003/87/EC, should be determined on the basis of the preliminary total annual amount of emission allowances allocated free of charge over the period from 2013 to 2020 calculated for these installations pursuant to this Decision, including the installations that might be excluded according to Article 27 of that Directive. This amount of free emission allowances allocated in each year of the period should be compared with the annual amount of allowances that is calculated in accordance with Article 10a(5) of Directive 2003/87/EC for installations that are not electricity generator or new entrants, taking into account the relevant share of the annual Community-wide total quantity, as determined pursuant to Article 9 of that Directive, and the relevant amount of emissions that are only included in the Union scheme from 2013 onwards.

(21) 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.

(22) To enhance the significance of the available data on the greenhouse gas performance of the installations covered by the Union scheme, the product benchmarks for sulphite pulp, thermo-mechanical pulp and mechanical pulp as well as for recovered paper are based on BREF information on most efficient techniques reflecting the use of fossil start-up fuels, the use of fossil fuels (for sulphite pulp, thermo-mechanical and mechanical pulp) and of thermal energy (for recovered paper). The product benchmark for newsprint has also been based on most efficient techniques reflecting the use of thermal energy to derive a significant benchmark value.

(23) In order to take account of additional greenhouse gas emissions not reflected in the data for determining the benchmark values for some installations, in particular methane emissions, and to ensure that the allocation of free emission allowances on the basis of the product benchmark takes into account the greenhouse gas efficiency of the processes and does not provide incentives to increase emissions, the individual data points of the installations on the benchmark curve for nitric acid have been corrected on the basis of information on the average of these emissions provided by industry and of information derived from the BREF. The product benchmark for nitric acid reflects this correction.

(24) In order to take into account differences in refinery configurations, the product benchmark for the refinery sector should be based on the 'CO_2 weighted tonne' (hereinafter 'CWT') approach. Thereby the single product of the refinery is the CWT and its production has been calculated on the basis of defined generic process units each of which has been weighted with an emission factor relative to crude distillation, denoted as the CWT factor and representative of the CO_2 emission intensity at an average level of energy efficiency, for the same standard fuel type for each process unit for combustion, and for average process emissions of the process unit. On this basis, the data points used for setting the product benchmark have been derived by comparing the actual emissions to the total CWT of each refinery. The free allocation of emission allowances to refineries is then corrected to exclude electricity use and production in order to be consistent with Article 10a(1) of Directive 2003/87/EC.

(25) Given the wide range of product qualities that can be achieved, the product benchmarks for lime and dolime refer to a standard composition concerning calcium oxide and magnesium oxide. Regarding combustion emissions data for specific combustion emissions of the production of these standard products has been used based on Decision 2007/589/EC.

(26) Whereas several product benchmarks, such as the ammonia and soda ash benchmarks, assume that all CO_2 resulting from the production processes is emitted to the atmosphere, emissions should be monitored and reported in accordance with the regulation for the monitoring and reporting of emissions from the activities listed in Annex I, to be adopted by 31 December 2011 pursuant to Article 14(1) of Directive 2003/87/EC, assuming that all CO_2 produced during these production processes was emitted to the atmosphere, irrespective of any potential use of the CO_2 as feedstock in chemical production processes.

(27) The steam cracking benchmark does not cover the so-called supplemental feed, high value chemicals that are not produced in the main process as well as the related emissions, but, where applicable, supplemental feed should be considered for the free allocation of emission allowances using specific emission factors.

(28) In order to ensure a level playing field for the production of aromatics in refineries and in chemical plants, the free allocation of emission allowances for aromatics should be based on the CWT approach and the benchmark value of the refineries product benchmark should be applied.

(29) Considering that in the production of vinyl chloride monomer, hydrogen is used to some extent as fuel substituting conventional fuels such as natural gas, thus reducing the direct emissions of the combusting process, but considering also that the use of hydrogen as a feedstock is preferable in terms of total greenhouse gas efficiency, the vinyl chloride monomer benchmark accounts for the fuel use of hydrogen as if it was natural gas.

(30) In order to ensure a level playing field for the production of hydrogen and synthesis gas in refineries and in chemical plants, the benchmark for these products should be based on the CWT approach and the benchmark value of the refineries benchmark. Both product benchmarks refer to a defined volumetric concentration of hydrogen.

(31) Given that full auctioning should be the rule from 2013 onwards for the power sector, taking into account its ability to pass on the increased cost of carbon dioxide, and that no free allocation should be made in respect of any electricity production, except for transitional free allocation for the modernisation of electricity generation and electricity produced from waste gases, this Decision should not cover the free allocation of emission allowances related to the production or consumption of electricity. Nevertheless, according to Article 10a(6) of Directive 2003/87/EC, sectors or subsectors deemed to be exposed to a significant risk of carbon leakage may be compensated for costs related to greenhouse gas emissions passed on in electricity prices by financial measures adopted by Member States in accordance with state aid rules applicable and to be adopted by the Commission in this area.

(32) It is also appropriate that the product benchmarks take account of the efficient energy recovery of waste gases and emissions related to their use. To this end, for the determination of the benchmark values for products of which the production generates waste gases, the carbon content of these waste gases has been taken into account to a large extent. Where waste gases are exported from the production process outside the system boundaries of the relevant product benchmark and combusted for the production of heat outside the system boundaries of a benchmarked process as defined in Annex I, related emissions should be taken into account by means of allocating additional emission allowances on the basis of the heat or fuel benchmark. In the light of the general principle that no emission allowances should be allocated for free in respect of any electricity production, to avoid undue distortions of competition on the markets for electricity supplied to industrial installations and taking into account the inherent carbon price in electricity, it is appropriate that, where waste gases are exported from the production process outside the system boundaries of the relevant product benchmark and combusted for the production of electricity, no additional allowances are allocated beyond the share of the carbon content of the waste gas accounted for in the relevant product benchmark.

(33) The product benchmarks also take account of the historical emissions from flaring of waste gases related to the production of a given product and fuel used for safety flaring should be considered fuel used for the production of non-measurable heat in order to take account of the compulsory nature of these flares.

(34) Substantial investment efforts are necessary to combat climate change and to reduce the carbon intensity of economies. This Decision should therefore be applied in a manner to foster investment in clean technologies in each sector and sub-sector. In accordance with Directive 2003/87/EC, other policies and measures may in the future supplement this goal and encourage the effective use of allowances in order to generate substantial investments in more energy-efficient technologies. In particular, if the final annual amount of allowances allocated free of charge for all incumbent installations determined in accordance with this Decision falls significantly below the maximum annual amount of allowances referred to in Article 10a(5) of Directive 2003/87/EC, an amendment to this Decision could provide incentives for further reductions in greenhouse gas emissions in accordance with Article 10a(1) of Directive 2003/87/EC by allocating allowances to installations capable of implementing innovative technologies that further reduce greenhouse gas emissions.

(35) Investments in significant capacity extensions giving access to the reserve for new entrants provided for in Article 10a(7) of Directive 2003/87/EC should be unambiguous and of a certain scale in order to avoid an early depletion of the reserve of emission allowances created for new entrants, to avoid distortions of competition, to avoid any undue administrative burden and to ensure equal treatment of installations across Member States. It is therefore appropriate to define the threshold for a significant capacity change by 10 % of the installation's installed capacity and require that the change in the installed capacity triggers a significantly higher or lower activity level of the installation concerned. However,

incremental capacity extensions or reductions should be taken into account when assessing whether this threshold is reached.

(36) Considering the limited number of allowances in the reserve for new entrants, it is appropriate to assess, when a considerable amount of these allowances is issued to new entrants, whether a fair and equitable access to the remaining allowances in this reserve is guaranteed. In the light of the outcome of this assessment, the possibility for a queuing system may be provided. The design and the definition of the eligibility criteria of such a system should take account of different permitting practices in Member States, avoid any misuse and not provide incentives to reserve allowances over an unreasonable period of time.

(37) To ensure that no emission allowances are allocated free of charge to an installation that has ceased its operations, this Decision should provide for measures defining such installations and prohibiting the issuance of allowances, unless it can be established that the installation will resume its operations within a specified and reasonable amount of time.

(38) In order to adapt the number of emission allowances to be allocated to an installation having partially ceased operations, specific thresholds comparing the reduced activity level to the initial activity level have been defined. The number of emission allowances to be allocated should then be adjusted accordingly as of the year following the year during which the installation partially ceased operations. Where such an installation again reaches an activity level above the thresholds, the initial number of emission allowances to be allocated should be partly or even fully be reinstated depending of the installation's level of operation.

(39) Where applicable, account has been taken of the guidance on interpretation of Annex I to Directive 2003/87/EC.

(40) The measures provided for in this Decision are in accordance with the opinion of the Climate Change Committee,

HAS ADOPTED THIS DECISION:

CHAPTER I

GENERAL PROVISIONS

Article 1

Subject matter

This Decision lays down transitional Union-wide rules for the harmonised free allocation of emission allowances under Directive 2003/87/EC from 2013 onwards.

Article 2

Scope

This Decision shall apply to the free allocation of emission allowances under Chapter III (stationary installations) of Directive 2003/87/EC in trading periods from 2013 with the exception of transitional free allocation of emission allowances for the modernisation of electricity generation pursuant to Article 10c of Directive 2003/87/EC.

Article 3

Definitions

For the purposes of this Decision, the following definitions shall apply:

(a) 'incumbent installation' means any installation carrying out one or more activities listed in Annex I to Directive 2003/87/EC or an activity included in the Union scheme for the first time in accordance with Article 24 of that Directive which:

(i) obtained a greenhouse gas emission permit before 30 June 2011; or

(ii) is in fact operating, obtained all relevant environmental permits, including a permit provided for in Directive 2008/1/EC where applicable, by 30 June 2011 and fulfilled by 30 June 2011 all other criteria defined in the national legal order of the Member State concerned on the basis of which the installation would have been entitled to receive the greenhouse gas permit;

(b) 'product benchmark sub-installation' means inputs, outputs and corresponding emissions relating to the production of a product for which a benchmark has been set in Annex I;

(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;

(d) 'fuel benchmark sub-installation' means inputs, outputs and corresponding emissions not covered by a product benchmark sub-installation relating to the production of non-measurable heat by fuel combustion consumed 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, including safety flaring;

(e) 'measurable heat' means a net heat flow transported through identifiable pipelines or ducts using a heat transfer medium, such as, in particular, steam, hot air, water, oil, liquid metals and salts, for which a heat meter is or could be installed;

(f) 'heat meter' means a heat meter within the meaning of Annex MI-004 to Directive 2004/22/EC of the European Parliament and of the Council [1] or any other device to measure and record the amount of heat energy produced based upon flow volumes and temperatures;

(g) 'non-measurable heat' means all heat other than measurable heat;

(h) 'process emissions sub-installation' means greenhouse gas emissions listed in Annex I to Directive 2003/87/EC other than carbon dioxide, which occur outside the system boundaries of a product benchmark listed in Annex I, or carbon dioxide emissions, which occur outside the system boundaries of a product benchmark listed in Annex I, as a result of any of the following activities and emissions stemming from the combustion of incompletely oxidised carbon produced as a result of the following activities for the purpose of the production of measurable heat, non-measurable heat or electricity provided that emissions that would have occurred from the combustion of an amount of natural gas, equivalent to the technically usable energy content of the combusted incompletely oxidised carbon, are subtracted:

(i) the chemical or electrolytic reduction of metal compounds in ores, concentrates and secondary materials;

(ii) the removal of impurities from metals and metal compounds;

(iii) the decomposition of carbonates, excluding those for flue gas scrubbing;

(iv) chemical syntheses where the carbon bearing material participates in the reaction, for a primary purpose other than the generation of heat;

(v) the use of carbon containing additives or raw materials for a primary purpose other than the generation of heat;

(vi) the chemical or electrolytic reduction of metalloid oxides or non-metal oxides such as silicon oxides and phosphates;

(i) 'significant capacity extension' means a significant increase in a sub-installation's initial installed capacity whereby all of the following occur:

(i) one or more identifiable physical changes relating to its technical configuration and functioning other than the mere replacement of an existing production line take place; and

(ii) the sub-installation can be operated at a capacity that is at least 10 % higher compared to the initial installed capacity of the sub-installation before the change; or

(iii) the sub-installation to which the physical changes relate has a significantly higher activity level resulting in an additional allocation of emission allowances of more than 50 000 allowances per year representing at least 5 % of the preliminary annual number of emission allowances allocated free of charge for this sub -installation before the change;

(j) 'significant capacity reduction' means one or more identifiable physical changes leading to a significant decrease in a sub-installation's initial installed capacity and its activity level of the magnitude considered to constitute a significant capacity extension;

(k) 'significant capacity change' means either a significant capacity extension or a significant capacity reduction;

(l) 'added capacity' means the difference between the initial installed capacity of a sub-installation and the installed capacity of that same sub-installation after having had a significant extension determined on the basis of the average of the 2 highest monthly production volumes within the first 6 months following the start of changed operation;

(m) 'reduced capacity' means the difference between the initial installed capacity of a sub-installation and the installed capacity of that same sub-installation after having had a significant capacity reduction determined on the basis of the average of the 2 highest monthly production volumes within the first 6 months following the start of changed operation;

(n) 'start of normal operation' means the verified and approved first day of a continuous 90-day period, or, where the usual production cycle in the sector concerned does not foresee continuous production, the first day of a 90-day period split in sector-specific production cycles, during which the installation operates at least at 40 % of the capacity that the equipment is designed to accommodate taking into account, where appropriate, the installation-specific operating conditions;

(o) 'start of changed operation' means the verified and approved first day of a continuous 90-day period, or, where the usual production cycle in the sector concerned does not foresee continuous production, the first day of a 90-day period split in sector-specific production cycles, during which the changed sub-installation operates at least at 40 % of the capacity that the equipment is designed to accommodate taking into account, where appropriate, the sub-installation-specific operating conditions;

(p) 'safety flaring' means the combustion of pilot fuels and highly fluctuating amounts of process or residual gases in a unit open to atmospheric disturbances which is explicitly required for safety reasons by relevant permits for the installation;

[1] OJ L 135, 30.4.2004, p. 1.

(q) 'private household' means a residential unit in which persons make arrangements, individually or in groups, for providing themselves with measurable heat;

(r) 'verifier' means a competent, independent, person or verification body with responsibility for performing and reporting on the verification process, in accordance with the detailed requirements established by the Member State pursuant to Annex V to Directive 2003/87/EC;

(s) 'reasonable assurance' means a high but not absolute level of assurance, expressed positively in the verification opinion, whether the data subject to verification is free from material misstatement;

(t) 'level of assurance' means the degree to which the verifier is confident in the verification conclusions that it has been proved whether or not the data submitted for an installation is free from material misstatement;

(u) 'material misstatement' means a substantial misstatement (omissions, misrepresentations and errors, not considering the permissible uncertainty) in the data submitted that, according to the professional judgment of the verifier, could affect subsequent use of the data by the competent authority in the calculation of the allocation of emission allowances.

Article 4

Competent authority and rounding

1. Member States shall make the appropriate administrative arrangements, including designation of the competent authority or authorities in accordance with Article 18 of Directive 2003/87/EC, for the implementation of the rules of this Decision.

2. All calculations relating to a number of allowances carried out in accordance with this Decision shall be rounded up to the nearest allowance.

CHAPTER II

INCUMBENT INSTALLATIONS

Article 5

Identification of installations

1. Each Member State shall identify all installations in its territory and eligible for free allocation under Article 10a of Directive 2003/87/EC.

2. Each Member State shall also identify all heat producing electricity generators and small installations, which may be excluded from the Union scheme pursuant to Article 27 of Directive 2003/87/EC.

Article 6

Division into sub-installations

1. For the purposes of this Decision, Member States shall divide each installation eligible for the free allocation of emission allowances under Article 10a of Directive 2003/87/EC into one or more of the following sub-installations, as required:

(a) a product benchmark sub-installation;

(b) a heat benchmark sub-installation;

(c) a fuel benchmark sub-installation;

(d) a process emissions sub-installation.

Sub-installations shall correspond, to the extent possible, to physical parts of the installation.

For heat benchmark sub-installations, fuel benchmark sub-installations and process emissions sub-installations, Member States shall clearly distinguish on the basis of NACE and Prodcom codes between whether or not the relevant process serves a sector or subsector deemed to be exposed to a significant risk of carbon leakage as determined by Decision 2010/2/EU.

Where an installation included in the Union scheme has produced and exported measurable heat to an installation or other entity not included in the Union scheme, Member States shall consider that the relevant process of the heat benchmark sub-installation for this heat does not serve a sector or subsector deemed to be exposed to a significant risk of carbon leakage as determined by Decision 2010/2/EU unless the competent authority is satisfied that the consumer of the measurable heat belongs to a sector or subsector deemed to be exposed to a significant risk of carbon leakage as determined by Decision 2010/2/EU.

2. The sum of the inputs, outputs and emissions of each sub-installation shall not exceed the inputs, outputs and total emissions of the installation.

Article 7

Baseline data collection

1. For each incumbent installation eligible for the free allocation of emission allowances under Article 10a of Directive 2003/87/EC, including installations that are operated only occasionally, in particular, installations that are kept in reserve or on standby and installations operating on a seasonal schedule, Member States shall, for all years of the period from 1 January 2005 to 31 December 2008, or 1 January 2009 to 31 December 2010 where applicable, during which the installation has been operating, collect from the operator all relevant information and data regarding each parameter listed in Annex IV.

2. Member States shall collect data for each sub-installation separately. If necessary, Member States may require the operator to submit more data.

Where 95 % of the inputs, outputs and corresponding emissions of the heat benchmark sub-installation, of the fuel benchmark sub-installation or of the process emissions sub-installation, serve sectors or subsectors deemed to be exposed to a significant risk of carbon leakage as determined by Decision 2010/2/EU or where 95 % of the inputs, outputs and corresponding emissions of the heat benchmark sub-installation, of the fuel benchmark sub-installation or of the process emissions sub-installation serve sectors or subsectors not deemed to be exposed to a significant risk of carbon leakage, Member States may exempt the operator from providing data allowing for the distinction in terms of carbon leakage exposure.

3. Member States shall require the operator to submit the initial installed capacity of each product benchmark sub-installation, determined as follows:

(a) in principle, the initial installed capacity shall be the average of the 2 highest monthly production volumes in the period from 1 January 2005 to 31 December 2008 assuming that the sub-installation has been operating at this load 720 hours per month for 12 months per year;

(b) Where it is not possible to determine the initial installed capacity according to point (a), an experimental verification of the sub-installation's capacity under the supervision of a verifier shall take place in order to ensure that the parameters used are typical for the sector concerned and that the results of the experimental verification are representative.

4. Where a sub-installation has had a significant capacity change between 1 January 2005 and 30 June 2011, Member States shall require the operator to submit in addition to the initial installed capacity of that sub-installation, determined in accordance with paragraph 3, until the start of changed operation, the added or, where applicable, the reduced capacity as well as the installed capacity of the sub-installation after having had a significant capacity change determined on the basis of the average of the 2 highest monthly production volumes within the first 6 months following the start of changed operation. Member States shall consider this installed capacity of the sub-installation after having had a significant capacity change as the sub-installation's initial installed capacity when assessing any further significant capacity change.

5. Member States shall obtain, record and document data in a manner that enables an appropriate use of it by the competent authority.

Member States may require the operator to use an electronic template or specify a file format for submission of the data. However, Member States shall accept an operator's use of any electronic template or file format specification published by the Commission for the purpose of data collection under this Article, unless the Member State's template or file format specification requires at least input of the same data.

6. Inputs, outputs and corresponding emissions for which only data for the installation as a whole is available, shall be proportionally attributed to the relevant sub-installations, as follows:

(a) where different products are produced one after the other in the same production line, inputs, outputs and corresponding emissions shall be attributed sequentially based on the usage time per year for each sub-installation;

(b) where it is not possible to attribute inputs, outputs and corresponding emissions according to point (a), they shall be attributed based on the mass or volume of individual products produced or estimates based on the ratio of free reaction enthalpies of the chemical reactions involved or based on another suitable distribution key that is corroborated by a sound scientific methodology.

7. Member States shall require operators to submit complete and consistent data and to ensure that there are no overlaps between sub-installations and no double counting. Member States shall, in particular, ensure that operators exercise due diligence and submit data that presents highest achievable accuracy so as to enable reasonable assurance of the integrity of data.

To this end, Member States shall ensure that each operator also submits a methodology report containing, in particular, a description of the installation, the compilation methodology applied, different data sources, calculation steps and, where applicable, assumptions made and the methodology applied to attribute emissions to the relevant sub-installations in accordance with paragraph 6. Member States may order the operator to demonstrate the accuracy and completeness of the data provided.

8. Where data is missing, Member States shall require the operator to duly justify any lack of data.

Member States shall require the operator to substitute all missing data with conservative estimates, in particular, based on best industry practice, recent scientific and technical knowledge before or, at the latest, during verification by the verifier.

Where data are partly available, conservative estimate means that the value extrapolated shall be not more than 90 % of the value obtained by using the data available.

Where no data on measurable heat flows for the heat benchmark sub-installation is available, a proxy value may be derived from the corresponding energy input multiplied by the measured efficiency of the heat production as verified by a verifier. In case no such efficiency data is available, a reference efficiency of 70 % shall be applied on the corresponding energy input of the production of measurable heat.

9. Upon request, each Member State shall make the data collected on the basis of paragraph 1 to 6 available to the Commission.

Article 8

Verification

1. In the process of collecting data in accordance with Article 7, Member States shall only accept data that has been verified as satisfactory by a verifier. The verification process shall relate to the methodology report and the reported parameters referred to in Article 7 and Annex IV. The verification shall address the reliability, credibility and accuracy of the data provided by the operator and shall come to a verification opinion that states with reasonable assurance whether the data submitted is free from material misstatements.

2. Member States shall ensure that the verifier is independent of the operator, carries out his activities in a sound and objective professional manner, and understands each of the following:

(a) the provisions of this Decision, as well as relevant standards and guidance;

(b) the legislative, regulatory, and administrative requirements relevant to the activities being verified;

(c) the generation of all information related to each parameter or source of emissions in the installation, in particular, relating to the collection, measurement, calculation and reporting of the data.

3. In addition to the requirements set out in Decision 2007/589/EC, Member States shall ensure that all of the following minimum requirements are met:

(a) the verifier has planned and performed the verification with an attitude of professional scepticism recognising that circumstances may exist that cause the information and data submitted to be materially misstated;

(b) the verifier has only validated reported parameters determined with a high degree of certainty. A high degree of certainty requires the operator to show that:

(i) the reported parameters are free of inconsistencies;

(ii) the collection of the parameters has been carried out in accordance with applicable standards or guidance;

(iii) the relevant records of the installation are complete and consistent;

(c) the verifier has commenced the verification process with a strategic analysis of all relevant activities carried out in the installation and has an overview of all the activities and their significance for allocation purposes;

(d) the verifier has taken account of the information contained in the greenhouse gas emissions permit or other relevant environmental permits, such as the permit provided for in Directive 2008/1/EC, in particular when assessing the initial installed capacity of sub-installations;

(e) the verifier has analysed the inherent risks and control risks related to the scope and complexity of the operator's activities and related to allocation parameters, which could lead to material misstatements and has drawn up a verification plan following this risk analysis;

(f) the verifier has conducted a site visit, when appropriate, to inspect the operation of meters and monitoring systems, conduct interviews, and collect sufficient information and evidence. If the verifier has deemed a site visit is not appropriate, he should be able to fully justify his decision to an appropriate authority;

(g) the verifier has carried out the verification plan by gathering data in accordance with the defined sampling methods, walkthrough tests, document reviews, analytical procedures and data review procedures, including any relevant additional evidence, upon which the verifier's verification opinion will be based;

(h) the verifier has requested the operator to provide any missing data or complete missing sections of audit trails, explain variations in parameters or emissions data, or revise calculations, or adjust reported data;

(i) the verifier has prepared an internal verification report. The verification report shall record evidence showing that the strategic analysis, the risk analysis and the verification plan has been performed in full, and provide sufficient information to support verification opinions. The internal verification report shall as well facilitate a potential evaluation of the audit by the competent authority, and accreditation body;

(j) the verifier has made a judgment with respect to whether the reported parameters contain any material misstatement and whether there are other issues relevant for the verification opinion based on the findings contained in the internal verification report;

(k) the verifier has presented the verification methodology, his findings and verification opinion in a verification report, addressed to the operator, to be submitted by the operator with the methodology report and the reported parameters to the competent authority.

4. Member States shall not allocate emission allowances free of charge to an installation where data relating to this installation has not been verified as satisfactory.

Member States may only decide to allocate emission allowances free of charge to an installation where data relating to this installation has not been verified as satisfactory, if they are satisfied that the data gaps leading to the verifier's judgment are due to exceptional and unforeseeable circumstances that could not have been avoided even if all due care had been exercised and that are beyond the control of the operator of the installation concerned, in particular because of circumstances such as natural disasters, war, threats of war, terrorist acts, revolution, riot, sabotage or acts of vandalism.

5. Upon verification, Member States shall, in particular, ensure that there are no overlaps between sub-installations and no double counting.

Article 9

Historical activity level

1. For incumbent installations, Member States shall determine historical activity levels of each installation for the baseline period from 1 January 2005 to 31 December 2008, or, where they are higher, for the baseline period from 1 January 2009 to 31 December 2010, on the basis of the data collected under Article 7.

2. The product-related historical activity level shall, for each product for which a product benchmark has been determined as referred to in Annex I, refer to the median annual historical production of this product in the installation concerned during the baseline period.

3. The heat-related historical activity level shall refer to the median annual historical import from an installation covered by the Union scheme, production, or both, during the baseline period, of measurable heat 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 installations or other entity not covered by the Union scheme with the exception of the export for the production of electricity expressed as terajoule per year.

4. The fuel-related historical activity level shall refer to the median annual historical consumption of fuels used for the production of non-measurable heat consumed 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, including safety flaring, during the baseline period expressed as terajoule per year.

5. For process emissions, which occurred in relation with the production of products in the installation concerned during the baseline period referred to in paragraph 1, the process-related historical activity level shall refer to the median annual historical process emissions expressed as tonnes of carbon dioxide equivalent.

6. For the purposes of the determination of the median values referred to in paragraphs 1 to 5 only calendar years during which the installation has been operating for at least 1 day shall be taken into account.

If the installation has been operating less than 2 calendar years during the relevant baseline period, the historical activity levels shall be calculated on the basis of the initial installed capacity determined in accordance with the methodology set out in Article 7(3) of each sub-installation multiplied by the relevant capacity utilisation factor determined in accordance with Article 18(2).

7. By way of derogation from paragraph 2, Member States shall determine the product-related historical activity level for products to which the product benchmarks referred to in Annex III apply on the basis of the median annual historical production according to the formulas set out in this same Annex.

8. Incumbent installations that are operated only occasionally, including, in particular, installations that are kept in reserve or on standby and installations operating on a seasonal schedule and that have not been operating for at least 1 day in a given calendar year during the baseline period, shall be taken into account when determining the median values referred to in paragraph 1, where all of the following conditions are met:

(a) it is clearly demonstrated that the installation is used occasionally, in particular, operated regularly as standby or reserve capacity or operated regularly following a seasonal schedule;

(b) the installation is covered by a greenhouse gas emissions permit and by all other relevant permits required in the national legal order of the Member State to operate the installation;

(c) it is technically possible to start operation on short notice and maintenance is carried out on a regular basis.

9. Where an incumbent installation has had a significant capacity extension or a significant reduction of capacity between 1 January 2005 and 30 June 2011, the historical activity levels of the installation concerned shall be the sum of the median values determined in accordance with paragraph 1 without the significant capacity change and the historical activity levels of the added or reduced capacity.

The historical activity levels of the added or reduced capacity shall be the difference between the initial installed capacities of each sub-installation having had a significant capacity change determined in accordance with Article 7(3) until the start of changed operation and the installed capacity after the significant capacity change determined in accordance with Article 7(4) multiplied by the average historical capacity utilisation of the installation concerned of the years prior to the start of changed operation.

Article 10

Allocation at installation level

1. Based on the data collected in accordance with Article 7, Member States shall, for each year, calculate the number of emission allowances allocated free of charge from 2013 onwards to each incumbent installation on their territory in accordance with paragraphs 2 to 8.

2. For the purpose of this calculation, Member States shall first determine the preliminary annual number of emission allowances allocated free of charge for each sub-installation separately as follows:

(a) for each product benchmark sub-installation, the preliminary annual number of emission allowances allocated free of charge for a given year shall correspond to the value of this product benchmark as referred to in Annex I multiplied by the relevant product-related historical activity level;

(b) for:

(i) the heat benchmark sub-installation, the preliminary annual number of emission allowances allocated free of charge for a given year shall correspond to the value of the heat benchmark for measurable heat as referred to in Annex I multiplied by the heat-related historical activity level for the consumption of measurable heat;

(ii) the fuel benchmark sub-installation, the preliminary annual number of emission allowances allocated free of charge for a given year shall correspond to the value of the fuel benchmark as referred to in Annex I multiplied by the fuel-related historical activity level for the fuel consumed;

(iii) the process emissions sub-installation, the preliminary annual number of emission allowances allocated free of charge for a given year shall correspond to the process-related historical activity level multiplied by 0,9700.

3. To the extent that measurable heat is exported to private households and the preliminary annual number of emission allowances determined in accordance with paragraph 2(b), point (i), for 2013 is lower than the median annual historical emissions related to the production of measurable heat exported to private households by that sub-installation in the period from 1 January 2005 to 31 December 2008, the preliminary annual number of emission allowances for 2013 shall be adjusted by the difference. In each of the years 2014 to 2020, the preliminary annual number of emission allowances determined in accordance with paragraph 2(b), point (i), shall be adjusted to the extent that the preliminary annual number of emission allowances for that year is lower than a percentage of the abovementioned median annual historical emissions. This percentage shall be 90 % in 2014 and decline by 10 percentage points each subsequent year.

4. For the purpose of implementing Article 10a(11) of Directive 2003/87/EC, the factors referred to in Annex VI shall be applied to the preliminary annual number of emission allowances allocated free of charge determined for each sub-installation pursuant to paragraph 2 of this Article for the year concerned where the processes in those sub-installations serve sectors or subsectors deemed not to be exposed to a significant risk of carbon leakage as determined by Decision 2010/2/EU.

Where the processes in those sub-installations serve sectors or subsectors deemed to be exposed to a significant risk of carbon leakage as determined by Decision 2010/2/EU, the factor to be applied for the years 2013 and 2014 shall be 1. The sectors or subsectors for which the factor is 1 for the years 2015 to 2020 shall be determined pursuant to Article 10a(13) of Directive 2003/87/EC.

5. Where at least 95 % of the historical activity level of the heat benchmark sub-installation, of the fuel benchmark sub-installation or of the process emissions sub-installation serve sectors or subsectors deemed to be exposed to a significant risk of carbon leakage as determined by Decision 2010/2/EU, the sub-installation as a whole is deemed to be exposed to a significant risk of carbon leakage.

Where at least 95 % of the historical activity level of the heat benchmark sub-installation, of the fuel benchmark sub-installation or of the process emissions sub-installation serve sectors or subsectors not deemed to be exposed to a significant risk of carbon leakage as determined by Decision 2010/2/EU, the sub-installation as a whole is not deemed to be exposed to a significant risk carbon leakage.

6. The preliminary annual number of emission allowances allocated free of charge for sub-installations that received measurable heat from sub-installations producing products covered by the nitric acid benchmarks referred to in Annex I shall be reduced by the annual historical consumption of that heat during the baseline period referred to in Article 9(1) multiplied by the value of the heat benchmark for this measurable heat as referred to in Annex I.

7. The preliminary total annual amount of emission allowances allocated free of charge for each installation shall be the sum of all sub-installations' preliminary annual numbers of emission allowances allocated free of charge calculated in accordance with paragraphs 2, 3, 4, 5 and 6.

Where an installation encompasses sub-installations producing pulp (short fibre kraft pulp, long fibre kraft pulp, thermo-mechanical pulp and mechanical pulp, sulphite pulp or other pulp not covered by a product benchmark) exporting measurable heat to other technically connected sub-installations, the preliminary total amount of emission allowances allocated free of charge shall, without prejudice to the preliminary annual numbers of emission allowances allocated free of charge for other sub-installations of the installation concerned, only take into account the preliminary annual number of emission allowances allocated free of charge to the extent that pulp products produced by this sub-installation are placed on the market and not processed into paper in the same or other technically connected installations.

8. When determining the preliminary total annual amount of emission allowances allocated free of charge for each installation, Member States shall ensure that emissions are not double counted and that the allocation is not negative. In particular, where an intermediate product that is covered by a product benchmark according to the definition of the respective system boundaries set out in Annex I is imported by an installation, emissions shall not be double counted when determining the preliminary total annual amount of emission allowances allocated free of charge for both installations concerned.

9. The final total annual amount of emission allowances allocated free of charge for each incumbent installation, except for installations covered by Article 10a(3) of Directive 2003/87/EC, shall be the preliminary total annual amount of emission allowances allocated free of charge for each installation determined in accordance with paragraph 7 multiplied by the cross-sectoral correction factor as determined in accordance with Article 15(3).

For installations covered by Article 10a(3) of Directive 2003/87/EC and eligible for the allocation of free emission allowances, the final total annual amount of emission allowances allocated free of charge shall correspond to the preliminary total annual amount of emission allowances allocated free of charge for each installation determined in accordance with paragraph 7 annually adjusted by the linear factor referred to in Article 10a(4) of Directive 2003/87/EC, using the preliminary total annual amount of emission allowances allocated free of charge for the installation concerned for 2013 as a reference.

Article 11

Allocation in respect of steam cracking

By way of derogation from Article 10(2)(a), the preliminary annual number of emission allowances allocated free of charge for a product benchmark sub-installation relating to the production of high value chemicals (hereinafter 'HVC') shall correspond to the value of the steam cracking product benchmark referred to in Annex I multiplied by the historical activity level determined in accordance with Annex III and multiplied by the quotient of the total direct emissions including emissions from net imported heat over the baseline period referred to in Article 9(1) of this Decision expressed as tonnes of carbon dioxide equivalent and the sum of these total direct emissions and the relevant indirect emissions over the baseline period referred to in Article 9(1) of this Decision calculated in accordance with Article 14(2) To the result of this calculation, 1,78 tonnes of carbon dioxide per ton of hydrogen times the median historical production of hydrogen from supplemental feed expressed in tons of hydrogen, 0,24 tonnes of carbon dioxide per ton of ethylene times the median historical production of ethylene from supplemental feed expressed in tons of ethylene and 0,16 tonnes of carbon dioxide per ton of HVC times the median historical production of other high value chemicals than hydrogen and ethylene from supplemental feed expressed in tons of HVC shall be added.

Article 12

Allocation in respect of vinyl chloride monomer

By way of derogation from Article 10(2)(a), the preliminary annual number of emission allowances allocated free of charge for a sub-installation relating to the production of vinyl chloride monomer (hereinafter 'VCM') shall correspond to the value of the VCM benchmark multiplied by the historical activity level for VCM production expressed as tonnes and multiplied by the quotient of the direct emissions for the production of VCM including emissions from net imported heat over the baseline period referred to in Article 9(1) of this Decision, calculated in accordance with Article 14(2), expressed as tonnes of carbon dioxide equivalent and the sum of these direct emissions and the hydrogen-related emissions for the production of VCM over the baseline period referred to in Article 9(1) of this Decision expressed as tonnes of carbon dioxide equivalent calculated on the basis of the historical heat consumption stemming from hydrogen combustion expressed as terajoules (TJ) times 56,1 tonnes of carbon dioxide per TJ.

Article 13

Heat flows between installations

Where a product-benchmark sub-installation encompasses measurable heat imported from an installation or other entity not included in the Union scheme, the preliminary annual number of emission allowances allocated free of charge for the product benchmark sub-installation concerned determined pursuant to Article 10(2)(a) shall be reduced by the amount of heat historically imported from an installation or other entity not included in the Union scheme in the year concerned multiplied by the value of the heat benchmark for measurable heat set out in Annex I.

Article 14

Exchangeability of fuel and electricity

1. For each product benchmark sub-installation referred to in Annex I with consideration of exchangeability of fuel and electricity, the preliminary annual number of emission allowances allocated free of charge shall correspond to the value of the relevant product benchmark set out in Annex I multiplied by the product-related historical activity level and multiplied by the quotient of the total direct emissions including emissions from net imported heat over the baseline period referred to in Article 9(1) of this Decision expressed as tonnes of carbon dioxide equivalent and the sum of these total direct emissions and the relevant indirect emissions over the baseline period referred to in Article 9(1) of this Decision.

2. For the purposes of the calculation pursuant to paragraph 1, the relevant indirect emissions refer to the relevant electricity consumption as specified in the definition of processes and emissions covered in Annex I during the baseline period referred to in Article 9(1) of this Decision expressed in megawatt-hours for the production of the product concerned times 0,465 tonnes of carbon dioxide per megawatt-hour and expressed as tonnes of carbon dioxide.

For the purposes of the calculation pursuant to paragraph 1, the emissions from net imported heat refer to the amount of measurable heat for the production of the product concerned imported from installations covered by the Union scheme during the baseline period referred to in Article 9(1) of this Decision multiplied by the value of the heat benchmark as referred to in Annex I.

CHAPTER III

ALLOCATION DECISIONS

Article 15

National Implementation measures

1. In accordance with Article 11(1) of Directive 2003/87/EC, Member States shall submit to the Commission by 30 September 2011 a list of installations covered by Directive 2003/87/EC in their territory, including installations identified pursuant to Article 5, using an electronic template provided by the Commission.

2. The list referred to in paragraph 1 shall for each incumbent installation contain, in particular:

(a) an identification of the installation and its boundaries using the installation identification code in the CITL;

(b) an identification of each sub-installation of an installation;

(c) for each product benchmark sub-installation the initial installed capacity together with the annual production volumes of the product concerned in the period 1 January 2005 to 31 December 2008;

(d) for each installation and sub-installation information on whether or not it belongs to a sector or subsector deemed to be exposed to a significant risk of carbon leakage as determined by Decision 2010/2/EU;

(e) for each sub-installation the preliminary annual number of emission allowances allocated free of charge over the period from 2013 to 2020 as determined in accordance with Article 10(2);

(f) in addition to point (d), for sub-installations not serving a sector or subsector deemed to be exposed to a significant risk of carbon leakage as determined by Decision 2010/2/EU, the preliminary annual numbers of emission allowances allocated free of charge over the period from 2013 to 2020 decreasing by equal amounts from 80 % of the quantity in 2013 to 30 % in 2020 as determined in accordance with Article 10(4);

(g) for each installation the preliminary total annual amounts of emission allowances allocated free of charge over the period from 2013 to 2020 as determined in accordance with Article 10(6).

The list shall also identify all heat producing electricity generators, and small installations that may be excluded from the Union scheme pursuant to Article 27 of Directive 2003/87/EC.

3. Upon receipt of the list referred to in paragraph 1 of this Article, the Commission shall assess the inclusion of each installation in the list and the related preliminary total annual amounts of emission allowances allocated free of charge.

After notification by all Member States of the preliminary total annual amounts of emission allowances allocated free of charge over the period from 2013 to 2020, the Commission shall determine the uniform cross-sectoral correction factor as referred to in Article 10a(5) of Directive 2003/87/EC. It shall be determined by comparing the sum of the preliminary total annual amounts of emission allowances allocated free of charge to installations that are not electricity generators in each year over the period from 2013 to 2020 without application of the factors referred to in Annex VI with the annual amount of allowances that is calculated in accordance with Article 10a(5) of Directive 2003/87/EC for installations that are not electricity generator or new entrants, taking into account the relevant share of the annual Union-wide total quantity, as determined pursuant to Article 9 of that Directive, and the relevant amount of emissions which are only included in the Union scheme from 2013 onwards.

4. If the Commission does not reject an installation's inscription on this list, including the corresponding preliminary total annual amounts of emission allowances allocated free of charge for this installation, the Member State concerned shall proceed to the determination of the final annual amount of emission allowances allocated free of charge for each year over the period from 2013 to 2020 in accordance with Article 10(9) of this Decision.

5. After determination of the final annual amount for all incumbent installations in their territory, Member States shall submit to the Commission a list of the final annual amounts of emission allowances allocated free of charge over the period from 2013 to 2020 as determined in accordance with Article 10(9).

Article 16

Changes to carbon leakage exposure

Within 3 months of the adoption of the list referred to in Article 10a(13) of Directive 2003/87/EC for the years 2015 to 2020 or of the adoption of any addition to the list determined by Commission Decision 2010/2/EU for the years 2013 and 2014, each Member State shall revise the list referred to in Article 15(1) of this Decision clearly indicating the changes to the deemed carbon leakage exposure of installations and sub-installations and the related preliminary annual amount of free allocation where applicable and submit that list to the Commission.

CHAPTER IV

NEW ENTRANTS AND CLOSURES

Article 17

Application for free allocation

1. Upon application by a new entrant, Member States shall determine on the basis of the present rules the amount of allowances to be allocated free of charge once the installation concerned has started normal operation and its initial installed capacity has been determined.

2. Member States shall only accept applications that are submitted to the competent authority within 1 year following the start of normal operation of the installation or sub-installation concerned.

3. Member States shall divide the installation concerned in sub-installations in accordance with Article 6 of this Decision and shall require the operator to submit together with the application referred to in paragraph 1 all relevant information and data regarding each parameter listed in Annex V for each sub-installation separately to the competent authority. If necessary, Member States may require the operator to submit more disaggregated data.

4. For installations referred to in Article 3(h) of Directive 2003/87/EC, with the exception of installations that have had a significant extension after 30 June 2011, Member States shall require the operator to determine the initial installed capacity for each sub-installation according to the methodology set out in Article 7(3) using the continuous 90-day period on the basis of which the start of normal operation is determined as a reference. Member States shall approve this initial installed capacity of each sub-installation before calculating the allocation to the installation.

5. Member States shall only accept data submitted pursuant to this Article that has been verified as satisfactory by a verifier, in accordance with the requirements set out in Article 8, to ensure that reliable and correct data is reported.

Article 18

Activity levels

1. For installations referred to in Article 3(h) of Directive 2003/87/EC, with the exception of installations that have had a significant extension after 30 June 2011, Member States shall determine activity levels of each installation as follows:

(a) the product-related activity level shall, for each product for which a product benchmark has been determined as referred to in Annex I, be the initial installed capacity for the production of this product of the installation concerned multiplied by the standard capacity utilisation factor;

(b) the heat-related activity level shall be the initial installed capacity for the import from installations covered by the Union scheme, production, or both, of measurable heat 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 multiplied by the relevant capacity utilisation factor;

(c) the fuel-related activity level shall be the initial installed capacity for the consumption of fuels used for the production of non-measurable heat consumed 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, including safety flaring, of the installation concerned multiplied by the relevant capacity utilisation factor;

(d) the process emissions-related activity level shall be the initial installed capacity for the production of process emissions of the process unit multiplied by the relevant capacity utilisation factor.

2. The standard capacity utilisation factor referred to in paragraph 1(a) shall be determined and published by the Commission on the basis of the data collection carried out by Member States in accordance with Article 7 of this Decision. For each product benchmark set out in Annex I, it shall be the 80-percentile of the average annual capacity utilisation factors of all installations producing the product concerned. The average annual capacity utilisation factor of each installation producing the product concerned shall correspond to the average annual production of the period 2005 to 2008 divided by the initial installed capacity.

The relevant capacity utilisation factor referred to in paragraphs 1(b) to (d) shall be determined by Member States on the basis of duly substantiated and independently verified information on the installation's intended normal operation, maintenance, common production cycle, energy efficient techniques and typical capacity utilisation in the sector concerned compared to sector-specific information.

When determining the relevant capacity utilisation factor referred to in paragraph 1(d) in accordance with the previous sentence, Member States shall also take account of duly substantiated and independently verified information on the emission intensity of the input and greenhouse gas efficient techniques.

3. For installations which had a significant capacity extension after 30 June 2011, Member States shall determine in accordance with paragraph 1 the activity levels only for the added capacity of the sub-installations to which the significant capacity extension relates.

For installations which had a significant capacity reduction after 30 June 2011, Member States shall determine in accordance with paragraph 1 the activity levels only for the reduced capacity of the sub-installations to which the significant capacity reduction relates.

Article 19

Allocation to new entrants

1. For the purposes of the allocation of emission allowances to new entrants, with the exception of allocations to installations referred to in the third indent of Article 3(h) of Directive 2003/87/EC, Member States shall calculate the preliminary annual number of emission allowances allocated free of charge as of the start of normal operation of the installation for each sub-installation separately, as follows:

(a) for each product benchmark sub-installation, the preliminary annual number of emission allowances allocated free of charge for a given year shall correspond to the value of that product benchmark multiplied by the product-related activity level;

(b) for each heat benchmark sub-installation, the preliminary annual number of emission allowances allocated free of charge shall correspond to the value of the heat benchmark for this measurable heat as referred to in Annex I multiplied by the heat-related activity level;

(c) for each fuel benchmark sub-installation, the preliminary annual number of emission allowances allocated free of charge shall correspond to the value of the fuel benchmark as referred to in Annex I multiplied by the fuel-related activity level;

(d) for each process emissions sub-installation, the preliminary annual number of emission allowances allocated free of charge for a given year shall correspond to the process-related activity level multiplied by 0,9700.

Articles 10(4) to (6) and (8), 11, 12, 13 and 14 of this Decision shall apply mutatis mutandis to the calculation of the preliminary annual number of emission allowances allocated free of charge.

2. For independently verified emissions of the new entrant which occurred prior to the start of normal operation, additional allowances shall be allocated on the basis of historic emissions expressed as tonnes of carbon dioxide equivalent.

3. The preliminary total annual amount of emission allowances allocated free of charge shall be the sum of all sub-installations' preliminary annual numbers of emission allowances allocated free of charge calculated in accordance with paragraph 1 and the additional allowances referred to in paragraph 2. The second sentence of Article 10(7) shall apply.

4. Member States shall notify to the Commission without delay the preliminary total annual amount of emission allowances allocated free of charge. Emission allowances from the new entrants reserve created pursuant to Article 10a(7) of Directive 2003/87/EC shall be allocated on a first come, first served basis with regard to the receipt of this notification.

The Commission may reject the preliminary total annual amount of emission allowances allocated free of charge for the installation concerned. If the Commission does not reject this preliminary total annual amount of emission allowances allocated free of charge, the Member State concerned shall proceed to the determination of the final annual amount of emission allowances allocated free of charge.

5. The final annual amount of emission allowances allocated free of charge shall correspond to the preliminary total annual amount of emission allowances allocated free of charge for each installation determined in accordance with paragraph 3 of this Article annually adjusted by the linear reduction factor referred to in Article 10a(7) of Directive 2003/87/EC, using the preliminary total annual amount of emission allowances allocated free of charge for the installation concerned for 2013 as a reference.

6. When half of the amount of allowances set aside for new entrants pursuant to Article 10a(7) of Directive 2003/87/EC, notwithstanding the amount of allowances available pursuant to Article 10a(8) of Directive 2003/87/EC, is issued or to be issued until 2020 to new entrants, the Commission shall assess whether a queuing system should be put in place to ensure that access to the reserve is managed in a fair way.

Article 20

Allocation as new entrant following a significant capacity extension

1. Where an installation has had a significant capacity extension after 30 June 2011, Member States shall, upon application by the operator and without prejudice to the allocation to an installation pursuant to Article 10, determine on the basis of the methodology set out in Article 19 the number of free emission allowances to be allocated, in so far as the extension is concerned.

2. Member States shall require the operator to submit together with the application evidence demonstrating that the criteria for a significant capacity extension have been met and to provide the information referred to in Article 17(3) to support any allocation decision. In particular, Member States shall require the operator to submit the added capacity and the installed capacity of the sub-installation after having had a significant capacity extension verified as satisfactory by a verifier, in accordance with the requirements set out in Article 8. Member States shall consider this installed capacity of the sub-installation after having had a significant capacity extension as the sub-installation's initial installed capacity when assessing any subsequent significant capacity change.

Article 21

Significant capacity reduction

1. Where an installation has had a significant capacity reduction after 30 June 2011, Member States shall determine the amount by which the number of allowances to be allocated for free is reduced, in so far as this reduction is concerned. To this end, the Member States shall require the operator to submit the reduced capacity and the installed capacity of the sub-installation after having had a significant capacity reduction verified as satisfactory by a verifier, in accordance with the requirements set out in Article 8. Member States shall consider this installed capacity of the sub-installation after having had a significant capacity reduction as the sub-installation's initial installed capacity when assessing any subsequent significant capacity change.

2. Member States shall reduce the preliminary annual number of emission allowances allocated free of charge for each sub-installation by the preliminary annual number of emission allowances allocated free of charge for the sub-installation concerned calculated in accordance with Article 19(1) in so far as the significant capacity reduction is concerned.

Member States shall then determine the preliminary total annual amount of the installation concerned according to the methodology applied to determine the preliminary total annual amount prior to the significant capacity reduction and the final total annual amount of emission allowances allocated free of charge to the installation concerned in accordance with Article 10(9).

3. The allocation to the installation shall be adjusted accordingly as of the year following the one during which the capacity reduction took place or as of 2013, if the significant capacity reduction took place before 1 January 2013.

Article 22

Cessation of operations of an installation

1. An installation is deemed to have ceased operations, where any of the following conditions is met:

(a) the greenhouse gas emissions permit, the permit in force in accordance with Directive 2008/1/EC or any other relevant environmental permit has expired;

(b) the permits referred to under point (a) have been withdrawn;

(c) operation of the installation is technically impossible;

(d) the installation is not operating, but has been operating before and it is technically impossible to resume operation;

(e) the installation is not operating, but has been operating before and the operator cannot establish that this installation will resume operation at the latest within 6 months after having ceased operations. Member States may extent this period up to a maximum of 18 months if the operator can establish that the installation cannot resume operation within 6 months due to exceptional and unforeseeable circumstances that could not have been avoided even if all due care had been exercised and that are beyond the control of the operator of the installation concerned, in particular because of circumstances such as natural disasters, war, threats of war, terrorist acts, revolution, riot, sabotage or acts of vandalism.

2. Paragraph 1(e) shall not apply to installations that are kept in reserve or standby and installations that are operated on a seasonal schedule, where all of the following conditions are fulfilled:

(a) the operator holds a greenhouse gas emissions permit and all other relevant permits;

(b) it is technically possible to start operations without making physical changes to the installation;

(c) regular maintenance is carried out.

3. Where an installation has ceased operation, the Member State concerned shall not issue emission allowances to this installation as of the year following the cessation of operations.

4. Member States may suspend the issuance of the emission allowances to installations referred to in paragraph 1(e) as long as it is not established that the installation will resume operations.

Article 23

Partial cessation of operations of an installation

1. An installation is deemed to have partially ceased operations, provided that one sub-installation, which contributes to at least 30 % of the installation's final annual amount of emission allowances allocated free of charge or to the allocation of more than 50 000 allowances, reduces its activity level in a given calendar year by at least 50 % compared to the activity level used for calculating the sub-installation's allocation in accordance with Article 9 or, where applicable, with Article 18 (hereinafter 'initial activity level').

2. The allocation of emission allowances to an installation that partially ceases operations shall be adjusted as of the year following the year during which it partially ceased operations or as of 2013, if the partial cessation took place before 1 January 2013, as follows:

if the activity level of the sub-installation referred to in paragraph 1 is reduced by 50 % to 75 % compared to the initial activity level, the sub-installation shall only receive half of the initially allocated allowances;

if the activity level of the sub-installation referred to in paragraph 1 is reduced by 75 % to 90 % compared to the initial activity level, the sub-installation shall only receive 25 % of the initially allocated allowances;

if the activity level of the sub-installation referred to in paragraph 1 is reduced by 90 % or more compared to the initial activity level, no allowances shall be allocated free of charge in respect of the sub-installation concerned.

3. If the activity level of the sub-installation referred to in paragraph 1 reaches an activity level of more than 50 % compared to the initial activity level, the installation having partially ceased operations shall receive the allowances initially allocated to it as of the year following the calendar year during which the activity level exceeded the threshold of 50 %.

4. If the activity level of the sub-installation referred to in paragraph 1 reaches an activity level of more than 25 % compared to the initial activity level, the installation having partially ceased operations shall receive half of the allowances initially allocated to it as of the year following the calendar year during which the activity level exceeded the threshold of 25 %.

Article 24

Changes to the operation of an installation

1. Member States shall ensure that all relevant information about any planned or effective changes to the capacity, activity level and operation of an installation is submitted by the operator to the competent authority by 31 December of each year.

2. Where there is a change to an installation's capacity, activity level or operation which has an impact on the installation's allocation, Member States shall submit, using an electronic template provided by the Commission, all relevant information, including the revised preliminary total annual amount of emission allowances allocated free of charge for the installation concerned determined in accordance with this Decision, to the Commission before determining the final total annual amount of emission allowances allocated free of charge. The Commission may reject the revised preliminary total annual amount of emission allowances allocated free of charge for the installation concerned.

CHAPTER V

FINAL PROVISION

Article 25

Addressees

This Decision is addressed to the Member States.

Done at Brussels, 27 April 2011.

For the Commission

Connie HEDEGAARD

Member of the Commission

ANNEX I

PRODUCT BENCHMARKS

1. **Definition of product benchmarks and system boundaries without consideration of exchangeability of fuel and electricity**

Product benchmark	Definition of products covered	Definition of processes and emissions covered (system boundaries)	Carbon leakage exposure as determined by Decision 2010/2/EU for the years 2013 and 2014	Benchmark value (allowances/t)
Coke	Coke-oven coke (obtained from the carbonisation of coking coal, at high temperature) or gas-works coke (by-product of gas-works plants) expressed as tons of dry coke. Lignite coke is not covered by this benchmark	All processes directly or indirectly linked to the process units coke ovens, H_2S/NH_3 incineration, coal preheating (defreezing), coke gas extractor, desulphurisation unit, distillation unit, steam generation plant, pressure control in batteries, biological water treatment, miscellaneous heating of by-products and hydrogen separator are included. Coke oven gas cleaning is included	yes	0,286
Sintered ore	Agglomerated iron-bearing product containing iron ore fines, fluxes and iron-containing recycling materials with the chemical and physical properties such as the level of basicity, mechanical strength and permeability required to deliver iron and necessary flux materials into iron ore reduction processes	All processes directly or indirectly linked to the process units sinter strand, ignition, feedstock preparation units, hot screening unit, sinter cooling unit, cold screening unit and steam generation unit are included	yes	0,171
Hot metal	Liquid iron saturated with carbon for further processing	All processes directly or indirectly linked to the process units blast furnace, hot metal treatment units, blast furnace blowers, blast furnace hot stoves, basic oxygen furnace, secondary metallurgy units, vacuum ladles, casting units (including cutting), slag treatment unit, burden preparation, BF gas treatment unit, dedusting units, scrap pre-heating, coal drying for PCI, vessels preheating stands, casting ingots preheating stands, compressed air production, dust treatment unit (briquetting), sludge treatment unit (briquetting), steam injection in BF unit, steam generation plant, converter BOF gas cooling and miscellaneous are included	yes	1,328

Product benchmark	Definition of products covered	Definition of processes and emissions covered (system boundaries)	Carbon leakage exposure as determined by Decision 2010/2/EU for the years 2013 and 2014	Benchmark value (allowances/t)
Pre-bake anode	Anodes for aluminium electrolysis use consisting of petrol coke, pitch and normally recycled anodes, which are formed to shape specifically intended for a particular smelter and baked in anode baking ovens to a temperature of around 1 150 °C	All processes directly or indirectly linked to the production of pre-bake anodes are included	yes	0,324
Aluminium	unwrought non-alloy liquid aluminium from electrolysis	All processes directly or indirectly linked to the production step electrolysis are included	yes	1,514
Grey cement clinker	Grey cement clinker as total clinker produced	All processes directly or indirectly linked to the production of grey cement clinker are included	yes	0,766
White cement clinker	White cement clinker for use as main binding component in the formulation of materials such as joint filers, ceramic tile adhesives, insulation, and anchorage mortars, industrial floor mortars, ready mixed plaster, repair mortars, and water-tight coatings with maximum average contents of 0,4 mass-% Fe_2O_3, 0,003 mass-% Cr_2O_3 and 0,03 mass-% Mn_2O_3	All processes directly or indirectly linked to the production of white cement clinker are included	yes	0,987
Lime	Quicklime: calcium oxide (CaO) produced by the decarbonation of limestone ($CaCO_3$) as 'standard pure' lime with a free CaO content of 94,5 %. Lime produced and consumed in the same installation for purification processes is not covered by this product benchmark	All processes directly or indirectly linked to the production of lime are included	yes	0,954

Product benchmark	Definition of products covered	Definition of processes and emissions covered (system boundaries)	Carbon leakage exposure as determined by Decision 2010/2/EU for the years 2013 and 2014	Benchmark value (allowances/t)
Dolime	Dolime or calcined dolomite as mixture of calcium and magnesium oxides produced by the decarbonation of dolomite ($CaCO_3.MgCO_3$) with a residual CO_2 exceeding 0,25 %, a free MgO content between 25 % and 40 % and a bulk density of the commercial product below 3,05 g/cm^3. Dolime shall be expressed as 'standard pure dolime' quality with a free CaO content of 57,4 % and a free MgO content of 38,0 %	All processes directly or indirectly linked to the production of dolime are included	yes	1,072
Sintered dolime	Mixture of calcium and magnesium oxides used solely for the production of refractory bricks and other refractory products with a minimum bulk density of 3,05 g/cm^3	All processes directly or indirectly linked to the production of sintered dolime are included	yes	1,449
Float glass	Float/ground/polish glass (as tons of glass exiting the lehr)	All processes directly or indirectly linked to the production steps melter, refiner, working end, bath and lehr are included	yes	0,453
Bottles and jars of colourless glass	Bottles of colourless glass of a nominal capacity < 2,5 litres, for beverages and foodstuffs (excluding bottles covered with leather or composition leather; infant's feeding bottles) except extra-white flint products with an iron oxide content expressed as percent Fe_2O_3 by weight lower than 0,03 % and colour coordinates of L in the range 100 to 87, of a in the range 0 to − 5 and of b in the range 0 to 3 (using the CIELAB advocated by the Commission internationale d'éclairage) expressed as tons of packed product	All processes directly or indirectly linked to the production steps materials handling, melting, forming, downstream processing, packaging and ancillary processes are included	yes	0,382

Product benchmark	Definition of products covered	Definition of processes and emissions covered (system boundaries)	Carbon leakage exposure as determined by Decision 2010/2/EU for the years 2013 and 2014	Benchmark value (allowances/t)
Bottles and jars of coloured glass	Bottles of coloured glass of a nominal capacity < 2,5 litres, for beverages and foodstuffs (excluding bottles covered with leather or composition leather; infant's feeding bottles) expressed as tons of packed product	All processes directly or indirectly linked to the production steps materials handling, melting, forming, downstream processing, packaging and ancillary processes are included	yes	0,306
Continuous filament glass fibre products	Melted glass for the production of continuous filament glass fibre products namely chopped strands, rovings, yarns and staple glass fibre and mats (expressed as tons of melted glass exiting the foreheath). Mineral wool products for thermal, acoustic and fire insulation are not included	All processes directly or indirectly linked to the production processes glass melting in the furnaces and glass refining in the foreheaths are included. Downstream processes to convert the fibres into sellable products are not included in this product benchmark	yes	0,406
Facing bricks	Facing bricks with a density > 1 000 kg/m^3 used for masonry based on EN 771-1, excluding pavers, clinker bricks and blue braised facing bricks	All processes directly or indirectly linked to the production processes raw material preparation, component mixing, forming and shaping of ware, drying of ware, firing of ware, product finishing and flue gas cleaning are included	no	0,139
Pavers	Clay bricks used for flooring according to EN 1344	All processes directly or indirectly linked to the production processes raw material preparation, component mixing, forming and shaping of ware, drying of ware, firing of ware, product finishing and flue gas cleaning are included	no	0,192
Roof tiles	Clay roofing tiles as defined in EN 1304:2005 excluding blue braised roof tiles and accessories	All processes directly or indirectly linked to the production processes raw material preparation, component mixing, forming and shaping of ware, drying of ware, firing of ware, product finishing and flue gas cleaning are included	no	0,144

Product benchmark	Definition of products covered	Definition of processes and emissions covered (system boundaries)	Carbon leakage exposure as determined by Decision 2010/2/EU for the years 2013 and 2014	Benchmark value (allowances/t)
Spray-dried powder	Spray-dried powder for the production of dry-pressed wall and floor tiles in tonnes of powder produced	All processes directly or indirectly linked to the production of spray-dried powder are included	yes	0,076
Plaster	Plasters consisting of calcined gypsum or calcium sulphate (including for use in building, for use in dressing woven fabrics or surfacing paper, for use in dentistry, for use in land remediation), in tonnes of stucco. Alpha plaster is not covered by this product benchmark	All processes directly or indirectly linked to the production steps milling, drying and calcining are included	no	0,048
Dried secondary gypsum	Dried secondary gypsum (synthetic gypsum produced as a recycled by-product of the power industry or recycled material from construction waste and demolition) expressed as tons of product	All processes directly or indirectly linked to the drying of secondary gypsum are included	no	0,017
Short fibre kraft pulp	Short fibre kraft pulp is a wood pulp produced by the sulphate chemical process using cooking liquor, characterised by fibre lengths of 1-1,5 mm, which is mainly used for products which require specific smoothness and bulk, as tissue and printing paper, expressed as net saleable production in Adt (Air Dried Tonnes)	All processes which are part of the pulp production process (in particular the pulp mill, recovery boiler, pulp drying section and lime kiln and connected energy conversion units (boiler/CHP)) are included. Other activities on site that are not part of this process such as sawmilling activities, woodworking activities, production of chemicals for sale, waste treatment (treating waste onsite instead of offsite (drying, pelletising, incinerating, landfilling), PCC (precipitated calcium carbonate) production, treatment of odorous gases, and district heating are not included	yes	0,12

Product benchmark	Definition of products covered	Definition of processes and emissions covered (system boundaries)	Carbon leakage exposure as determined by Decision 2010/2/EU for the years 2013 and 2014	Benchmark value (allowances/t)
Long fibre kraft pulp	Long fibre kraft pulp is a wood pulp produced by the sulphate chemical process using cooking liquor, characterised by fibre lengths of 3-3,5 mm, which is mainly used for products for which strength is important, as packaging paper, expressed as net saleable production in Adt (Air Dried Tonnes)	All processes which are part of the pulp production process (in particular the pulp mill, recovery boiler, pulp drying section and lime kiln and connected energy conversion units (boiler/CHP)) are included. Other activities on site that are not part of this process such as sawmilling activities, woodworking activities, production of chemicals for sale, waste treatment (treating waste onsite instead of offsite (drying, pelletising, incinerating, landfilling), PCC (precipitated calcium carbonate) production, treatment of odorous gases, and district heating are not included	yes	0,06
Sulphite pulp, thermo-mechanical and mechanical pulp	Sulphite pulp produced by a specific pulp making process, e.g. pulp produced by cooking wood chips in a pressure vessel in the presence of bisulphite liquor expressed as net saleable production in Adt. Sulphite pulp can be either bleached or unbleached. Mechanical pulp grades: TMP (thermomechanical pulp) and groundwood as net saleable production in Adt. Mechanical pulp can be either bleached or unbleached. Not covered by this group are the smaller subgroups of semi-chemical pulp CTMP — chemi-thermomechanical pulp and dissolving pulp	All processes which are part of the pulp production process (in particular the pulp mill, recovery boiler, pulp drying section and lime kiln and connected energy conversion units (boiler/CHP)) are included. Other activities on site that are not part of this process such as sawmilling activities, woodworking activities, production of chemicals for sale, waste treatment (treating waste onsite instead of offsite (drying, pelletising, incinerating, landfilling), PCC (precipitated calcium carbonate) production, treatment of odorous gases, and district heating are not included	yes	0,02
Recovered paper pulp	Pulps of fibres derived from recovered (waste and scrap) paper or paperboard or of other fibrous cellulosic material expressed as net saleable production in Adt	All processes which are part of the production of pulp from recovered paper and connected energy conversion units (boiler/CHP)) are included. Other activities on site that are not part of this process such as sawmilling activities, woodworking activities, production of chemicals for sale, waste treatment (treating waste onsite instead of offsite (drying, pelletising, incinerating, landfilling), PCC (precipitated calcium carbonate) production, treatment of odorous gases, and district heating are not included	yes	0,039

Product benchmark	Definition of products covered	Definition of processes and emissions covered (system boundaries)	Carbon leakage exposure as determined by Decision 2010/2/EU for the years 2013 and 2014	Benchmark value (allowances/t)
Newsprint	Specific paper grade (in rolls or sheets) expressed as net saleable production in Adt used for printing newspapers produced from groundwood and/or mechanical pulp or recycled fibres or any percentage of combinations of these two. Weights usually range from 40 to 52 g/m^2 but can be as high as 65 g/m^2. Newsprint is machine-finished or slightly calendered, white or slightly coloured and is used in reels for letterpress, offset or flexo-printing	All processes which are part of the paper production process (in particular paper or board machine and connected energy conversion units (boiler/CHP) and direct process fuel use) are included. Other activities on site that are not part of this process such as sawmilling activities, woodworking activities, production of chemicals for sale, waste treatment (treating waste onsite instead of offsite (drying, pelletising, incinerating, landfilling), PCC (precipitated calcium carbonate) production, treatment of odorous gases, and district heating are not included	yes	0,298
Uncoated fine paper	Uncoated fine paper, covering both uncoated mechanical and uncoated woodfree expressed as net saleable production in Adt: 1. Uncoated woodfree papers suitable for printing or other graphic purposes made from a variety of mainly virgin fibre furnishes, with variable levels of mineral filler and a range of finishing processes. This grade includes most office papers, such as business forms, copier, computer, stationery and book papers. 2. Uncoated mechanical papers cover the specific paper grades made from mechanical pulp, used for packaging or graphic purposes/magazines	All processes which are part of the paper production process (in particular paper or board machine and connected energy conversion units (boiler/CHP) and direct process fuel use) are included. Other activities on site that are not part of this process such as sawmilling activities, woodworking activities, production of chemicals for sale, waste treatment (treating waste onsite instead of offsite (drying, pelletising, incinerating, landfilling), PCC (precipitated calcium carbonate) production, treatment of odorous gases, and district heating are not included	yes	0,318
Coated fine paper	Coated fine paper covering both coated mechanical and coated woodfree papers expressed as net saleable production in Adt: 1. Coated woodfree papers made of fibres produced mainly by a chemical pulping process which are coated in process for different applications and	All processes which are part of the paper production process (in particular paper or board machine and connected energy conversion units (boiler/CHP) and direct process fuel use) are included. Other activities on site that are not part of this process such as sawmilling activities, woodworking activities, production of chemicals for sale, waste treatment (treating waste onsite instead of offsite (drying, pelletising, incinerating, landfilling), PCC	yes	0,318

Product benchmark	Definition of products covered	Definition of processes and emissions covered (system boundaries)	Carbon leakage exposure as determined by Decision 2010/2/EU for the years 2013 and 2014	Benchmark value (allowances/t)
	are also known as coated freesheet. This group focuses mainly on publication papers. 2. Coated mechanical papers made from mechanical pulp, used for graphic purposes/magazines. The group is also known as coated groundwood	(precipitated calcium carbonate) production, treatment of odorous gases, and district heating are not included		
Tissue	Tissue papers expressed as net saleable production of parent reel cover a wide range of tissue and other hygienic papers for use in households or commercial and industrial premises such as toilet paper and facial tissues, kitchen towels, hand towels and industrial wipes, the manufacture of baby nappies, sanitary towels, etc. TAD — Through Air Dried Tissue is not part of this group	All processes which are part of the paper production process (in particular paper or board machine and connected energy conversion units (boiler/CHP) and direct process fuel use) are included. Other activities on site that are not part of this process such as sawmilling activities, woodworking activities, production of chemicals for sale, waste treatment (treating waste onsite instead of offsite (drying, pelletising, incinerating, landfilling), PCC (precipitated calcium carbonate) production, treatment of odorous gases, and district heating are not included. The conversion of parent reel weight to finished products is not part of this product benchmark	yes	0,334
Testliner and fluting	Testliner and fluting expressed as net saleable production in Adt: 1. Testliner covers types of paperboard that meet specific tests adopted by the packaging industry to qualify for use as the outer facing layer for corrugated board, from which shipping containers are made. Testliner is made primarily from fibres obtained from recycled fibres. 2. Fluting refers to the centre segment of corrugated shipping containers, being faced with linerboard (testliner/kraftliner) on both sides. Fluting covers	All processes which are part of the paper production process (in particular paper or board machine and connected energy conversion units (boiler/CHP) and direct process fuel use) are included. Other activities on site that are not part of this process such as sawmilling activities, woodworking activities, production of chemicals for sale, waste treatment (treating waste onsite instead of offsite (drying, pelletising, incinerating, landfilling), PCC (precipitated calcium carbonate) production, treatment of odorous gases, and district heating are not included	yes	0,248

Product benchmark	Definition of products covered	Definition of processes and emissions covered (system boundaries)	Carbon leakage exposure as determined by Decision 2010/2/EU for the years 2013 and 2014	Benchmark value (allowances/t)
	mainly papers made from recycled fibre but this group also holds paperboard that is made from chemical and semi-chemical pulp			
Uncoated carton board	This benchmark covers a wide range of uncoated products (expressed as net saleable production in Adt) which may be single or multiply. Uncoated carton board is mainly used for packaging applications which the main needed characteristic is strength and stiffness, and for which the commercial aspects as information carrier are of a second order of importance. Carton board is made from virgin and/or recovered fibres, has good folding properties, stiffness and scoring ability. It is mainly used in cartons for consumer products such as frozen food, cosmetics and for liquid containers; also known as solid board, folding box board, boxboard or carrier board or core board	All processes which are part of the paper production process (in particular paper or board machine and connected energy conversion units (boiler/CHP) and direct process fuel use) are included. Other activities on site that are not part of this process such as sawmilling activities, woodworking activities, production of chemicals for sale, waste treatment (treating waste onsite instead of offsite (drying, pelletising, incinerating, landfilling), PCC (precipitated calcium carbonate) production, treatment of odorous gases, and district heating are not included	yes	0,237
Coated carton board	This benchmark covers a wide range of coated products (expressed as net saleable production in Adt) which may be single or multiply. Coated carton board is mainly used for commercial applications that need to bring commercial information printed on the packaging to the shelf in the store in applications such as food, pharma, cosmetics, and other. Carton board is made from virgin and/or recovered fibres, and has good folding properties, stiffness and scoring ability. It is mainly	All processes which are part of the paper production process (in particular paper or board machine and connected energy conversion units (boiler/CHP) and direct process fuel use) are included. Other activities on site that are not part of this process such as sawmilling activities, woodworking activities, production of chemicals for sale, waste treatment (treating waste onsite instead of offsite (drying, pelletising, incinerating, landfilling), PCC (precipitated calcium carbonate) production, treatment of odorous gases, and district heating are not included	yes	0,273

Product benchmark	Definition of products covered	Definition of processes and emissions covered (system boundaries)	Carbon leakage exposure as determined by Decision 2010/2/EU for the years 2013 and 2014	Benchmark value (allowances/t)
	used in cartons for consumer products such as frozen food, cosmetics and for liquid containers; also known as solid board, folding box board, boxboard or carrier board or core board			
Nitric acid	Nitric acid (HNO_3), to be recorded in tons HNO_3 (100 %)	All processes directly or indirectly linked to the production of the benchmarked product as well as the N_2O destruction process are included except the production of ammonia	yes	0,302
Adipic acid	Adipic acid to be recorded in tons of dry purified adipic acid stored in silos or packed in (big)bags	All processes directly or indirectly linked to the production of the benchmarked product as well as the N_2O destruction process are included	yes	2,79
Vinyl chloride monomer (VCM)	Vinyl chloride (chloroethylene)	All processes directly or indirectly linked to the production steps direct chlorination, oxychlorination and EDC cracking to VCM are included	yes	0,204
Phenol/ acetone	Sum of phenol, acetone and the by-product alpha-methyl styrene as total production	All processes directly or indirectly linked to the production of phenol and acetone are included, in particular air compression, hydroperoxidation, cumene recovery from spent air, concentration and cleavage, production fractionation and purification, tar cracking, acetophenone recovery and purification, AMS recovery for export, AMS hydrogenation for ISB recycle, initial waste water purification (first waste water stripper), cooling water generation (e.g. cooling towers), cooling water utilisation (circulation pumps), flare and incinerators (even if physically located OSB) as well as any support fuel consumption	yes	0,266
S-PVC	Polyvinyl chloride; not mixed with any other substances consisting of PVC particles with a mean size between 50 and 200 μm	All processes directly or indirectly linked to the production of S-PVC are included except the production of VCM	yes	0,085
E-PVC	Polyvinyl chloride; not mixed with any other substances consisting of PVC particles with a mean size between 0,1 and 3 μm	All processes directly or indirectly linked to the production of E-PVC are included except the production of VCM	yes	0,238

Product benchmark	Definition of products covered	Definition of processes and emissions covered (system boundaries)	Carbon leakage exposure as determined by Decision 2010/2/EU for the years 2013 and 2014	Benchmark value (allowances/t)
Soda ash	Disodium carbonate as total gross production except dense soda ash obtained as by-product in a caprolactam production network	All processes directly or indirectly linked to the process units brine purification, limestone calcination and milk of lime production, absorption of ammonia, precipitation of $NaHCO_3$, filtration or Separation of $NaHCO_3$ crystals from mother liquor, decomposition of $NaHCO_3$ to Na_2CO_3, recovery of ammonia and densification or production of dense soda ash are included	yes	0,843

If no other reference is given, all product benchmarks refer to 1 ton of product produced expressed as saleable (net) production and to 100 % purity of the substance concerned.

All definitions of processes and emissions covered (system boundaries) include flares where they occur.

The carbon leakage exposure of the benchmarked products is based on Decision 2010/2/EU and is valid for 2013 and 2014. In respect of 2013 and 2014, further sectors might be added to this list by Commission Decision.

2. **Definition of product benchmarks and system boundaries with consideration of exchangeability of fuel and electricity**

Product benchmark	Definition of products covered	Definition of processes and emissions covered (system boundaries)	Carbon leakage exposure as determined by Decision 2010/2/EU for the years 2013 and 2014	Benchmark value (allowances/t)
Refinery products	Mix of refinery products with more than 40 % light products (motor spirit (gasoline) including aviation spirit, spirit type (gasoline type) jet fuel, other light petroleum oils/light preparations, kerosene including kerosene type jet fuel, gas oils) expressed as CO_2 weighted tonne (CWT)	All processes of a refinery matching the definition of one of the CWT process units as well as ancillary non-process facilities operating inside the refinery fence-line such as tankage, blending, effluent treatment, etc. are included. For the determination of indirect emissions, the total electricity consumption within the system boundaries shall be considered	yes	0,0295
EAF carbon steel	Steel containing less than 8 % metallic alloying elements and tramp elements to such levels limiting the use to those applications where no high surface quality and processability is required	All processes directly or indirectly linked to the process units electric arc furnace, secondary metallurgy, casting and cutting, post-combustion unit, dedusting unit, vessels heating stands, casting ingots preheating stands, scrap drying and scrap preheating are included. For the determination of indirect emissions, the total electricity consumption within the system boundaries shall be considered	yes	0,283

Product benchmark	Definition of products covered	Definition of processes and emissions covered (system boundaries)	Carbon leakage exposure as determined by Decision 2010/2/EU for the years 2013 and 2014	Benchmark value (allowances/t)
EAF high alloy steel	Steel containing 8 % or more metallic alloying elements or where high surface quality and processability is required	All processes directly or indirectly linked to the process units electric arc furnace, secondary metallurgy, casting and cutting, post-combustion unit, dedusting unit, vessels heating stands, casting ingots preheating stands, slow cooling pit, scrap drying and scrap preheating are included. The process units FeCr converter and cryogenic storage of industrial gases are not included. For the determination of indirect emissions, the total electricity consumption within the system boundaries shall be considered	yes	0,352
Iron casting	Casted iron expressed as tons of liquid iron ready alloyed, skinned, and ready for casting	All processes directly or indirectly linked to the process steps melting shop, casting shop, core shop and finishing are included. For the determination of indirect emissions, only the electricity consumption of melting processes within the system boundaries shall be considered	yes	0,325
Mineral wool	Mineral wool insulation products for thermal, acoustic and fire applications manufactured using glass, rock or slag	All processes directly or indirectly linked to the production steps melting, fibreising and injection of binders, curing and drying and forming are included. For the determination of indirect emissions, the total electricity consumption within the system boundaries shall be considered	no	0,682
Plasterboard	The benchmark covers boards, sheets, panels, tiles, similar articles of plaster/compositions based on plaster, (not) faced/reinforced with paper/paperboard only, excluding articles agglomerated with plaster, ornamented (in tonnes of stucco). High-density gypsum fibreboards not covered by this product benchmark	All processes directly or indirectly linked to the production steps milling, drying, calcining and board drying are included. For the determination of indirect emissions, only the electricity consumption of heat pumps applied in the drying stage shall be considered	no	0,131

Product benchmark	Definition of products covered	Definition of processes and emissions covered (system boundaries)	Carbon leakage exposure as determined by Decision 2010/2/EU for the years 2013 and 2014	Benchmark value (allowances/t)
Carbon black	Furnace carbon black. Gas- and lamp black products are not covered by this benchmark	All processes directly or indirectly linked to the production of furnace carbon black as well as finishing, packaging and flaring are included. For the determination of indirect emissions, the total electricity consumption within the system boundaries shall be considered	yes	1,954
Ammonia	Ammonia (NH_3), to be recorded in tons produced	All processes directly or indirectly linked to the production of the ammonia and the intermediate product hydrogen are included. For the determination of indirect emissions, the total electricity consumption within the system boundaries shall be considered	yes	1,619
Steam cracking	Mix of high value chemicals (HVC) expressed as total mass of acetylene, ethylene, propylene, butadiene, benzene and hydrogen excluding HVC from supplemental feed (hydrogen, ethylene, other HVC) with an ethylene content in the total product mix of at least 30 mass-percent and a content of HVC, fuel gas, butenes and liquid hydrocarbons of together at least 50 mass-percent of the total product mix	All processes directly or indirectly linked to the production of high value chemicals as purified product or intermediate product with concentrated content of the respective HVC in the lowest tradable form (raw C4, unhydrogenated pygas) are included except C4 extraction (butadiene plant), C4-hydrogenation, hydrotreating of pyrolysis gasoline and aromatics extraction and logistics/storage for daily operation. For the determination of indirect emissions, the total electricity consumption within the system boundaries shall be considered	yes	0,702
Aromatics	Mix of aromatics expressed as CO_2 weighted tonne (CWT)	All processes directly or indirectly linked to the aromatics sub-units pygas hydrotreater, benzene/toluene/xylene (BTX) extraction, TDP, HDA, xylene isomerisation, P-xylene units, cumene production and Cyclo-hexane production are included. For the determination of indirect emissions, the total electricity consumption within the system boundaries shall be considered	yes	0,0295

Product benchmark	Definition of products covered	Definition of processes and emissions covered (system boundaries)	Carbon leakage exposure as determined by Decision 2010/2/EU for the years 2013 and 2014	Benchmark value (allowances/t)
Styrene	Styrene monomer (vinyl benzene, CAS number: 100-42-5)	All processes directly or indirectly linked to the production of styrene as well as the intermediate product ethylbenzene (with the amount used as feed for the styrene production) are included. For the determination of indirect emissions, the total electricity consumption within the system boundaries shall be considered	yes	0,527
Hydrogen	Pure hydrogen and mixtures of hydrogen and carbon monoxide having a hydrogen content ≥ 60 % mole fraction of total contained hydrogen plus carbon monoxide based on the aggregation of all hydrogen- and carbon-monoxide-containing product streams exported from the sub-installation concerned expressed as 100 % hydrogen	All relevant process elements directly or indirectly linked to the production of hydrogen and the separation of hydrogen and carbon monoxide are included. These elements lie between: (a) the point(s) of entry of hydrocarbon feedstock(s) and, if separate, fuel(s); (b) the points of exit of all product streams containing hydrogen and/or carbon monoxide; (c) the point(s) of entry or exit of import or export heat. For the determination of indirect emissions, the total electricity consumption within the system boundaries shall be considered	yes	8,85
Synthesis gas	Mixtures of hydrogen and carbon monoxide having a hydrogen content < 60 % mole fraction of total contained hydrogen plus carbon monoxide based on the aggregation of all hydrogen- and carbon-monoxide-containing product streams exported from the sub-installation concerned referred to 47 volume-percent hydrogen	All relevant process elements directly or indirectly linked to the production of syngas and the separation of hydrogen and carbon monoxide are included. These elements lie between: (a) the point(s) of entry of hydrocarbon feedstock(s) and, if separate, fuel(s); (b) the points of exit of all product streams containing hydrogen1 and/or carbon monoxide1; (c) the point(s) of entry or exit of import or export heat. For the determination of indirect emissions, the total electricity consumption within the system boundaries shall be considered	yes	0,242

Product benchmark	Definition of products covered	Definition of processes and emissions covered (system boundaries)	Carbon leakage exposure as determined by Decision 2010/2/EU for the years 2013 and 2014	Benchmark value (allowances/t)
Ethylene oxide/ ethylene glycols	The ethylene oxide/ethylene glycol benchmark covers the products ethylene oxide (EO, high purity), monoethylene glycol (MEG, standard grade + fibre grade (high purity)), diethylene glycol (DEG), triethylene glycol (TEG). The total amount of products is expressed in terms of EO-equivalents (EOE), which are defined as the amount of EO (in mass) that is embedded in one mass unit of the specific glycol	All processes directly or indirectly linked to the process units EO production, EO purification and glycol section are included. The total electricity consumption (and the related indirect emissions) within the system boundaries is covered by this product benchmark	yes	0,512

If no other reference is given, all product benchmarks refer to 1 ton of product produced expressed as saleable (net) production and to 100 % purity of the substance concerned.

All definitions of processes and emissions covered (system boundaries) include flares where they occur.

The carbon leakage exposure status of the benchmarked products is based on Decision 2010/2/EU and is valid for 2013 and 2014. Further sectors might be added to this list by Commission Decision.

3. **Heat and fuel benchmarks**

Benchmark	Benchmark value (allowances/TJ)
Heat benchmark	62,3
Fuel benchmark	56,1

ANNEX II

SPECIFIC PRODUCT BENCHMARKS

1. **Refineries benchmark: CWT functions**

CWT function	Description	Basis (kt/a)	CWT factor
Atmospheric Crude Distillation	Mild Crude Unit, Standard Crude Unit	F	1,00
Vacuum Distillation	Mild Vacuum Fractionation, Standard Vacuum Column, Vacuum Fractionating Column Vacuum distillation factor also includes average energy and emissions for Heavy Feed Vacuum (HFV) unit. Since this is always in series with the MVU, HFV capacity is not counted separately	F	0,85
Solvent Deasphalting	Conventional Solvent, Supercritical Solvent	F	2,45
Visbreaking	Atmospheric Residuum (w/o a Soaker Drum), Atmospheric Residuum (with a Soaker Drum), Vacuum Bottoms Feed (w/o a Soaker Drum), Vacuum Bottoms Feed (with a Soaker Drum) Visbreaking factor also includes average energy and emissions for Vacuum Flasher Column (VAC VFL) but capacity is not counted separately	F	1,40
Thermal Cracking	Thermal cracking factor also includes average energy and emissions for Vacuum Flasher Column (VAC VFL) but capacity is not counted separately	F	2,70
Delayed Coking	Delayed Coking	F	2,20
Fluid Coking	Fluid Coking	F	7,60
Flexicoking	Flexicoking	F	16,60
Coke Calcining	Vertical-Axis Hearth, Horizontal-Axis Rotary Kiln	P	12,75
Fluid Catalytic Cracking	Fluid Catalytic Cracking, Mild Residuum Catalytic Cracking, Residual Catalytic Cracking	F	5,50
Other Catalytic Cracking	Houdry Catalytic Cracking, Thermofor Catalytic Cracking	F	4,10
Distillate/Gasoil Hydrocracking	Mild Hydrocracking, Severe Hydrocracking, Naphtha Hydrocracking	F	2,85
Residual Hydrocracking	H-Oil, LC-Fining™ and Hycon	F	3,75
Naphtha/Gasoline Hydrotreating	Benzene Saturation, Desulphurisation of C4–C6 Feeds, Conventional Naphtha H/T, Diolefin to Olefin Saturation, Diolefin to Olefin Saturation of Alkylation Feed, FCC Gasoline hydrotreating with minimum octane loss, Olefinic Alkylation of Thio S, S-Zorb™ Process, Selective H/T of Pygas/Naphtha, Pygas/Naphtha Desulphurisation, Selective H/T of Pygas/Naphtha Naphtha hydrotreating factor includes energy and emissions for Reactor for Selective H/T (NHYT/RXST) but capacity is not counted separately	F	1,10

CWT function	Description	Basis (kt/a)	CWT factor
Kerosene/Diesel Hydrotreating	Aromatic Saturation, Conventional H/T, Solvent aromatics hydrogenation, Conventional Distillate H/T, High Severity Distillate H/T, Ultra-High Severity H/T, Middle Distillate Dewaxing, S-Zorb™ Process, Selective Hydrotreating of Distillates	F	0,90
Residual Hydro-treating	Desulphurisation of Atmospheric Residuum Desulphurisation of Vacuum Residuum	F	1,55
VGO Hydrotreating	Hydrodesulphurisation/denitrification, Hydrodesulphurisation	F	0,90
Hydrogen Production	Steam Methane Reforming, Steam Naphtha Reforming, Partial Oxidation Units of Light Feeds Factor for hydrogen production includes energy and emissions for purification (H_2PURE), but capacity is not counted separately	P	300,00
Catalytic Reforming	Continuous Regeneration, Cyclic, Semi-Regenerative, AROMAX	F	4,95
Alkylation	Alkylation with HF Acid, Alkylation with Sulfuric Acid, Polymerisation C3 Olefin Feed, Polymerisation C3/C4 Feed, Dimersol Factor for alkylation/polymerisation includes energy and emissions for acid regeneration (ACID), but capacity is not counted separately	P	7,25
C4 Isomerisation	C4 Isomerisation Factor also includes energy and emissions related to average EU-27 special fractionation (DIB) correlated with C4 isomerisation	R	3,25
C5/C6 Isomerisation	C5/C6 Isomerisation Factor also includes energy and emissions related to average EU-27 special fractionation (DIH) correlated with C5 isomerisation	R	2,85
Oxygenate Production	MBTE Distillation Units, MTBE Extractive Units, ETBE, TAME, Isooctene Production	P	5,60
Propylene Production	Chemical Grade, Polymer grade	F	3,45
Asphalt Manufacture	Asphalt and Bitumen Manufacture Production figure should include Polymer-Modified Asphalt. CWT factor includes blowing	P	2,10
Polymer-Modified Asphalt Blending	Polymer-Modified Asphalt Blending	P	0,55
Sulphur Recovery	Sulphur Recovery Factor for sulfur recovery includes energy and emissions for tail gas recovery (TRU) and H2S Springer Unit (U32), but capacity is not counted separately	P	18,60
Aromatic Solvent Extraction	ASE: Extraction Distillation, ASE: Liquid/Liquid Extraction, ASE: Liq/Liq w/Extr. Distillation CWT factor cover all feeds including Pygas after hydrotreatment. Pygas hydrotreating should be accounted under naphtha hydrotreatment	F	5,25
Hydrodealkylation	Hydrodealkylation	F	2,45

CWT function	Description	Basis (kt/a)	CWT factor
TDP/TDA	Toluene Disproportionation/Dealkylation	F	1,85
Cyclohexane production	Cyclohexane production	P	3,00
Xylene Isomerisation	Xylene Isomerisation	F	1,85
Paraxylene production	Paraxylene Adsorption, Paraxylene Crystallisation Factor also includes energy and emissions for Xylene Splitter and Orthoxylene Rerun Column	P	6,40
Metaxylene production	Metaxylene production	P	11,10
Phtalic anhydride production	Phtalic anhydride production	P	14,40
Maleic anhydride production	Maleic anhydride production	P	20,80
Ethylbenzene production	Ethylbenzene production Factor also includes energy and emissions for Ethylbenzene distillation	P	1,55
Cumene production	Cumene production	P	5,00
Phenol production	Phenol production	P	1,15
Lube solvent extraction	Lube solvent extraction: Solvent is Furfural, Solvent is NMP, Solvent is Phenol, Solvent is SO_2	F	2,10
Lube solvent dewaxing	Lube solvent dewaxing: Solvent is Chlorocarbon, Solvent is MEK/Toluene, Solvent is MEK/MIBK, Solvent is propane	F	4,55
Catalytic Wax Isomerisation	Catalytic Wax Isomerisation and Dewaxing, Selective Wax Cracking	F	1,60
Lube Hydrocracker	Lube Hydrocracker w/Multi-Fraction Distillation, Lube Hydrocracker w/Vacuum Stripper	F	2,50
Wax Deoiling	Wax Deoiling: Solvent is Chlorocarbon, Solvent is MEK/Toluene, Solvent is MEK/MIBK, Solvent is Propane	P	12,00
Lube/Wax Hydrotreating	Lube H/F w/Vacuum Stripper, Lube H/T w/Multi-Fraction Distillation, Lube H/T w/Vacuum Stripper, Wax H/F w/Vacuum Stripper, Wax H/T w/Multi-Fraction Distillation, Wax H/T w/Vacuum Stripper	F	1,15
Solvent Hydrotreating	Solvent Hydrotreating	F	1,25
Solvent Fractionation	Solvent Fractionation	F	0,90
Mol sieve for C10 + paraffins	Mol sieve for C10 + paraffins	P	1,85

CWT function	Description	Basis (kt/a)	CWT factor
Partial Oxidation of Residual Feeds (POX) for Fuel	POX Syngas for Fuel	SG	8,20
Partial Oxidation of Residual Feeds (POX) for Hydrogen or Methanol	POX Syngas for Hydrogen or Methanol, POX Syngas for Methanol Factor includes energy and emissions for CO Shift and H_2 Purification (U71) but capacity is not counted separately	SG	44,00
Methanol from syngas	Methanol	P	– 36,20
Air Separation	Air Separation	P (MNm^3 O_2)	8,80
Fractionation of purchased NGL	Fractionation of purchased NGL	F	1,00
Flue gas treatment	DeSOx and deNOx	F (MNm^3)	0,10
Treatment and Compression of Fuel Gas for Sales	Treatment and Compression of Fuel Gas for Sales	kW	0,15
Seawater Desalination	Seawater Desalination	P	1,15

Basis for CWT factors: Net fresh feed (F), Reactor feed (R, includes recycle), Product feed (P), Synthesis gas production for POX units (SG).

2. **Aromatics benchmark: CWT functions**

CWT function	Description	Basis (kt/a)	CWT factor
Naphtha/gasoline hydrotreater	Benzene Saturation, Desulphurisation of C4–C6 Feeds, Conventional Naphtha H/T, Diolefin to Olefin Saturation, Diolefin to Olefin Saturation of Alkylation Feed, FCC Gasoline hydrotreating with minimum octane loss, Olefinic Alkylation of Thio S, S-Zorb™ Process, Selective H/T of Pygas/Naphtha, Pygas/Naphtha Desulphurisation, Selective H/T of Pygas/Naphtha Naphtha hydrotreating factor includes energy and emissions for Reactor for Selective H/T (NHYT/RXST) but capacity is not counted separately	F	1,10
Aromatic solvent extraction	ASE: Extraction Distillation, ASE: Liquid/Liquid Extraction, ASE: Liq/Liq w/Extr. Distillation CWT factor cover all feeds including Pygas after hydrotreatment. Pygas hydrotreating should be accounted under naphtha hydrotreatment	F	5,25
TDP/TDA	Toluene Disproportionation/Dealkylation	F	1,85
Hydrodealkylation	Hydrodealkylation	F	2,45

CWT function	Description	Basis (kt/a)	CWT factor
Xylene isomerisation	Xylene Isomerisation	F	1,85
Paraxylene production	Paraxylene Adsorption, Paraxylene Crystallisation Factor also includes energy and emissions for Xylene Splitter and Orthoxylene Rerun Column	P	6,40
Cyclohexane production	Cyclohexane production	P	3,00
Cumene production	Cumene production	P	5,00

Basis for CWT factors: Net fresh feed (F), Product feed (P).

ANNEX III

HISTORICAL ACTIVITY LEVEL FOR SPECIFIC PRODUCT BENCHMARKS AS REFERRED TO IN ARTICLE 9(7)

1. Member States shall determine the product-related historical activity level for the baseline period for products to which the refinery benchmark as referred to in Annex I applies on the basis of the different CWT functions, their definitions, the basis for throughput as well as the CWT factors as listed in Annex II according to the following formula:

$$HAL_{CWT} = MEDIAN\left(1{,}0183 \cdot \sum_{i=1}^{n} (TP_{i,k} \times CWT_i) + 298 + 0{,}315 \cdot TP_{AD,k}\right)$$

with:

HAL_{CWT}: historical activity level expressed as CWT

$TP_{i,k}$: throughput of the CWT function i in year k of the baseline period

CWT_i: CWT factor of the CWT function i

$TP_{AD,k}$: throughput of the CWT function 'Atmospheric Crude Distillation' in year k of the baseline period

2. Member States shall determine the product-related historical activity level for the baseline period for products to which the lime product benchmark as referred to in Annex I applies according to the following formula:

$$HAL_{lime,standard} = MEDIAN\left(\frac{785 \cdot m_{CaO,k} + 1\,092 \cdot m_{MgO,k}}{751{,}7} \cdot HAL_{lime,uncorrected,k}\right)$$

with:

$HAL_{lime,standard}$: historical activity level for lime production expressed in tons of standard pure lime

$m_{CaO,k}$: content of free CaO in the produced lime in year k of the baseline period expressed as mass-%

In case no data on the content of free CaO is available, a conservative estimate not lower than 85 % shall be applied

$m_{MgO,k}$: content of free MgO in the produced lime in year k of the baseline period expressed as mass-%

In case no data on the content of free MgO is available, a conservative estimate not lower than 0,5 % shall be applied

$HAL_{lime,uncorrected,k}$: uncorrected historical activity level for lime production in year k of the baseline period expressed in tons of lime

3. Member States shall determine the product-related historical activity level for the baseline period for products to which the dolime product benchmark as referred to in Annex I applies according to the following formula:

$$HAL_{dolime,standard} = MEDIAN\left(\frac{785 \cdot m_{CaO,k} + 1\,092 \cdot m_{MgO,k}}{865{,}6} \cdot HAL_{dolime,uncorrected,k}\right)$$

with:

$HAL_{dolime,standard}$: historical activity level for dolime production expressed in tons of standard pure dolime

$m_{CaO,k}$: content of free CaO in the produced dolime in year k of the baseline period expressed as mass-%

In case no data on the content of free CaO is available, a conservative estimate not lower than 52 % shall be applied

$m_{MgO,k}$: content of free MgO in the produced dolime in year k of the baseline period expressed as mass-%

In case no data on the content of free MgO is available, a conservative estimate not lower than 33 % shall be applied

$HAL_{dolime,uncorrected,k}$: uncorrected historical activity level for dolime production in year k of the baseline period expressed in tons of lime

4. Member States shall determine the product-related historical activity level for the baseline period for products to which the steam cracking product benchmark as referred to in Annex I applies according to the following formula:

$$HAL_{HVC,net} = MEDIAN\left(HAL_{HVC,total,k} - HSF_{H,k} - HSF_{E,k} - HSF_{O,k}\right)$$

with:

$HAL_{HVC,net}$: historical activity level for high value chemicals net of high value chemicals produced from supplemental feed expressed in tons of HVC

$HAL_{HVC,total,k}$: historical activity level for total high value chemicals production in year k of the baseline period expressed in tons of HVC

$HSF_{H,k}$: historical supplemental feed of hydrogen in year k of the baseline period expressed in tons of hydrogen

$HSF_{E,k}$: historical supplemental feed of ethylene in year k of the baseline period expressed in tons of ethylene

$HSF_{O,k}$: historical supplemental feed of other high value chemicals than hydrogen and ethylene in year k of the baseline period expressed in tons of HVC

5. Member States shall determine the product-related historical activity level for the baseline period for products to which the aromatics product benchmark as referred to in Annex I applies on the basis of the different CWT functions, their definitions, the basis for throughput as well as the CWT factors as listed in Annex II according to the following formula:

$$HAL_{CWT} = MEDIAN\left(\sum_{i=1}^{n}\left(TP_{i,k} \times CWT_i\right)\right)$$

with:

HAL_{CWT}: historical activity level expressed as CWT

$TP_{i,k}$: throughput of the CWT function i in year k of the baseline period

CWT_i: CWT factor of the CWT function i

6. Member States shall determine the product-related historical activity level for the baseline period for products to which the hydrogen product benchmark as referred to in Annex I applies according to the following formula:

$$HAL_{H2} = MEDIAN\left(HAL_{H2+CO,k} \cdot \left(1 - \frac{1 - VF_{H2,k}}{0{,}4027}\right) \cdot 0{,}00008987\,\frac{t}{Nm^3}\right)$$

with:

HAL_{H2}: historical activity level for hydrogen production referred to 100 % hydrogen

$VF_{H2,k}$: historical production volume fraction of pure hydrogen in year k of the baseline period

$HAL_{H2+CO,k}$: historical activity level for hydrogen production referred to historical hydrogen content expressed as norm cubic meters per year referring to 0 °C and 101,325 kPa in year k of the baseline period

7. Member States shall determine the product-related historical activity level for the baseline period for products to which the synthesis gas (syngas) product benchmark as referred to in Annex I applies according to the following formula:

$$HAL_{syngas} = MEDIAN\left(HAL_{H2+CO,k} \cdot \left(1 - \frac{0,47 - VF_{H2,k}}{0,0863}\right) \cdot 0,0007047 \frac{t}{Nm^3}\right)$$

with:

HAL_{syngas}: historical activity level for synthesis gas production referred to 47 % hydrogen

$VF_{H2,k}$: historical production volume fraction of pure hydrogen in year k of the baseline period

$HAL_{H2+CO,k}$: historical activity level for synthesis gas production referred to historical hydrogen content expressed as norm cubic meters per year referring to 0 °C and 101,325 kPa in year k of the baseline period

8. Member States shall determine the product-related historical activity level for the baseline period for products to which the ethylene oxide/ethylene glycols product benchmark as referred to in Annex I applies according to the following formula:

$$HAL_{EO/EG} = MEDIAN\left(\sum_{i=1}^{n}\left(HAL_{i,k} \times CF_{EOE,i}\right)\right)$$

with:

$HAL_{EO/EG}$: historical activity level for ethylene oxide/ethylene glycols production expressed in tons of ethylene oxide equivalents

$HAL_{i,k}$: historical activity level for the production of the ethylene oxide or glycol i in year k of the baseline period expressed in tons

$CF_{EOE,i}$: conversion factor for the ethylene oxide or glycol i relative to ethylene oxide

Following conversion factors shall be applied:

Ethylene oxide: 1,000

Monoethylene glycol: 0,710

Diethylene glycol: 0,830

Triethylene glycol: 0,880

ANNEX IV

PARAMETERS FOR BASELINE DATA COLLECTION FOR INCUMBENT INSTALLATIONS

For the purposes of the baseline data collection referred to in Article 7(1), Member States shall require the operator to submit at least the following data at installation and sub-installation level for all calendar years of the baseline period chosen in accordance with Article 9(1) (2005-2008 or 2009-2010). In accordance with Article 7(2), Member States may request additional data if necessary:

Parameter	Remarks
Initial installed capacity	Only for each product benchmark sub-installation, expressed in the unit defined for the product concerned in Annex I
The added or reduced capacity as well as the installed capacity of the sub-installation after having had a significant capacity change in case of a significant capacity change between 1 January 2009 and 30 June 2011	Capacities shall be expressed: (1) for the product benchmark sub-installation in the unit defined for the product concerned in Annex I; (2) for the heat benchmark sub-installation as terajoule of measurable heat consumed for the production of products or the production of mechanical energy other than the production of electricity, heating or cooling within the installation's boundaries per year; (3) for the fuel benchmark sub-installation as terajoule of fuel input per year; (4) for the production of process emissions as tonnes of carbon dioxide equivalent emitted per year
Name of product(s)	
NACE code of activity	
PRODCOM codes of product(s)	
Identification as electricity generator	
Historical activity levels	According to type of sub-installation; including for product benchmark sub-installations all annual production volumes on the basis of which the median has been determined
Throughput of all relevant CWT functions	For refinery and aromatics product benchmarks only
Data used for the calculation of the historical activity levels	At least for the lime, dolime, steam cracking, hydrogen and synthesis gas product benchmarks
Total greenhouse gas emissions	Direct emissions only; only if not all emissions in the installation stem from benchmarked products
Greenhouse gas emissions from fuels	Direct emissions only; only if not all emissions in the installation stem from benchmarked products
Greenhouse gas emissions from processes	Only if not all emissions in the installation stem from benchmarked products
Total energy input from fuels within the installation	Only if not all emissions in the installation stem from benchmarked products
Energy input from fuels within the installation not used for production of measurable heat	Only if not all emissions in the installation stem from benchmarked products
Energy input from fuels within the installation used for production of measurable heat	Only if not all emissions in the installation stem from benchmarked products

Parameter	Remarks
Measurable heat consumed	Only if not all emissions in the installation stem from benchmarked products
Measurable heat imported	
Greenhouse gas emissions related to heat production exported to private households	
Measurable heat exported	Only to consumers not covered by the Union scheme, clearly indicating whether or not the consumer is a private household
Electricity consumed in accordance with the relevant system boundary definition (Annex I)	Only for sub-installations belonging to a benchmark where the exchangeability of heat and electricity is relevant
Hydrogen used as fuel for the production of vinyl chloride monomer	Only for sub-installations belonging to the vinyl chloride monomer benchmark

ANNEX V

Parameters for data collection for new entrants

Parameter	Remarks
Name of product(s)	
NACE code of activity	
PRODCOM codes of product(s)	
Initial installed capacity before the significant extension	Only for sub-installations which claim a significant extension of capacity
Added capacity (in case of significant extension)	Only for sub-installations which claim a significant extension of capacity
Installed capacity after the significant extension	Only for sub-installations which claim a significant extension of capacity
Initial installed capacity	Only for new entrants carrying out one or more of the activities indicated in Annex I to Directive 2003/87/EC, which have obtained a greenhouse gas emissions permit for the first time after 30 June 2011, or carrying out an activity which is included in the Community scheme pursuant to Article 24(1) or (2) for the first time; expressed: (1) for the product benchmark sub-installation in the unit defined for the product concerned in Annex I; (2) for the heat benchmark sub-installation as terajoule of measurable heat consumed for the production of products or the production of mechanical energy other than for the production of electricity, heating or cooling within the installation's boundaries per year; (3) for the fuel benchmark sub-installation as terajoule of fuel input per year; (4) for the production of process emissions as tonnes of carbon dioxide equivalent emitted per year
Relevant Capacity Utilisation Factor (RCUF)	For sub-installations other than product benchmark sub-installations
Projected measurable heat imported	
Projected electricity consumed in accordance with the relevant system boundary definition (Annex I)	Only for sub-installations belonging to a benchmark where the exchangeability of heat and electricity is relevant
Projected hydrogen used as fuel for the production of vinyl chloride monomer	Only for sub-installations belonging to the vinyl chloride monomer benchmark
Start of normal operation	Expressed in a date
Date of start-up	
Greenhouse gas emissions	Prior to the start of normal operation expressed in t CO_2eq

ANNEX VI

FACTOR ENSURING THE TRANSITIONAL SYSTEM LEADING TO A DECREASE OF FREE ALLOCATION PURSUANT TO ARTICLE 10a(11) OF DIRECTIVE 2003/87/EC

Year	Value of the factor
2013	0,8000
2014	0,7286
2015	0,6571
2016	0,5857
2017	0,5143
2018	0,4429
2019	0,3714
2020	0,3000

►B 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

(Text with EEA relevance)

(OJ L 275, 25.10.2003, p. 32)

Amended by:

		Official Journal		
		No	page	date
►M1	Directive 2004/101/EC of the European Parliament and of the Council of 27 October 2004	L 338	18	13.11.2004
►M2	Directive 2008/101/EC of the European Parliament and of the Council of 19 November 2008	L 8	3	13.1.2009
►M3	Regulation (EC) No 219/2009 of the European Parliament and of the Council of 11 March 2009	L 87	109	31.3.2009
►M4	Directive 2009/29/EC of the European Parliament and of the Council of 23 April 2009	L 140	63	5.6.2009

▼B

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

(Text with EEA relevance)

THE EUROPEAN PARLIAMENT AND THE COUNCIL OF THE EUROPEAN UNION,

Having regard to the Treaty establishing the European Community, and in particular Article 175(1) thereof,

Having regard to the proposal from the Commission ([1]),

Having regard to the opinion of the European Economic and Social Committee ([2]),

Having regard to the opinion of the Committee of the Regions ([3]),

Acting in accordance with the procedure laid down in Article 251 of the Treaty ([4]),

Whereas:

(1) The Green Paper on greenhouse gas emissions trading within the European Union launched a debate across Europe on the suitability and possible functioning of greenhouse gas emissions trading within the European Union. The European Climate Change Programme has considered Community policies and measures through a multi-stakeholder process, including a scheme for greenhouse gas emission allowance trading within the Community (the Community scheme) based on the Green Paper. In its Conclusions of 8 March 2001, the Council recognised the particular importance of the European Climate Change Programme and of work based on the Green Paper, and underlined the urgent need for concrete action at Community level.

(2) The Sixth Community Environment Action Programme established by Decision No 1600/2002/EC of the European Parliament and of the Council ([5]) identifies climate change as a priority for action and provides for the establishment of a Community-wide emissions trading scheme by 2005. That Programme recognises that the Community is committed to achieving an 8 % reduction in emissions of greenhouse gases by 2008 to 2012 compared to 1990 levels, and that, in the longer-term, global emissions of greenhouse gases will need to be reduced by approximately 70 % compared to 1990 levels.

(3) The ultimate objective of the United Nations Framework Convention on Climate Change, which was approved by Council Decision 94/69/EC of 15 December 1993 concerning the conclusion of the United Nations Framework Convention on Climate Change ([6]), is to achieve stabilisation of greenhouse gas concentrations in the atmosphere at a level which prevents dangerous anthropogenic interference with the climate system.

([1]) OJ C 75 E, 26.3.2002, p. 33.
([2]) OJ C 221, 17.9.2002, p. 27.
([3]) OJ C 192, 12.8.2002, p. 59.
([4]) Opinion of the European Parliament of 10 October 2002 (not yet published in the Official Journal), Council Common Position of 18 March 2003 (OJ C 125 E, 27.5.2003, p. 72), Decision of the European Parliament of 2 July 2003 (not yet published in the Official Journal) and Council Decision of 22 July 2003.
([5]) OJ L 242, 10.9.2002, p. 1.
([6]) OJ L 33, 7.2.1994, p. 11.

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(4) Once it enters into force, the Kyoto Protocol, which was approved by Council Decision 2002/358/EC of 25 April 2002 concerning the approval, on behalf of the European Community, of the Kyoto Protocol to the United Nations Framework Convention on Climate Change and the joint fulfilment of commitments thereunder ([1]), will commit the Community and its Member States to reducing their aggregate anthropogenic emissions of greenhouse gases listed in Annex A to the Protocol by 8 % compared to 1990 levels in the period 2008 to 2012.

(5) The Community and its Member States have agreed to fulfil their commitments to reduce anthropogenic greenhouse gas emissions under the Kyoto Protocol jointly, in accordance with Decision 2002/358/EC. This Directive aims to contribute to fulfilling the commitments of the European Community and its Member States more effectively, through an efficient European market in greenhouse gas emission allowances, with the least possible diminution of economic development and employment.

(6) Council Decision 93/389/EEC of 24 June 1993 for a monitoring mechanism of Community CO_2 and other greenhouse gas emissions ([2]), established a mechanism for monitoring greenhouse gas emissions and evaluating progress towards meeting commitments in respect of these emissions. This mechanism will assist Member States in determining the total quantity of allowances to allocate.

(7) Community provisions relating to allocation of allowances by the Member States are necessary to contribute to preserving the integrity of the internal market and to avoid distortions of competition.

(8) Member States should have regard when allocating allowances to the potential for industrial process activities to reduce emissions.

(9) Member States may provide that they only issue allowances valid for a five-year period beginning in 2008 to persons in respect of allowances cancelled, corresponding to emission reductions made by those persons on their national territory during a three-year period beginning in 2005.

(10) Starting with the said five-year period, transfers of allowances to another Member State will involve corresponding adjustments of assigned amount units under the Kyoto Protocol.

(11) Member States should ensure that the operators of certain specified activities hold a greenhouse gas emissions permit and that they monitor and report their emissions of greenhouse gases specified in relation to those activities.

(12) Member States should lay down rules on penalties applicable to infringements of this Directive and ensure that they are implemented. Those penalties must be effective, proportionate and dissuasive.

(13) In order to ensure transparency, the public should have access to information relating to the allocation of allowances and to the results of monitoring of emissions, subject only to restrictions provided for in Directive 2003/4/EC of the European Parliament and of the Council of 28 January 2003 on public access to environmental information ([3]).

(14) Member States should submit a report on the implementation of this Directive drawn up on the basis of Council Directive

([1]) OJ L 130, 15.5.2002, p. 1.
([2]) OJ L 167, 9.7.1993, p. 31. Decision as amended by Decision 1999/296/EC (OJ L 117, 5.5.1999, p. 35).
([3]) OJ L 41, 14.2.2003, p. 26.

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91/692/EEC of 23 December 1991 standardising and rationalising reports on the implementation of certain Directives relating to the environment ([1]).

(15) The inclusion of additional installations in the Community scheme should be in accordance with the provisions laid down in this Directive, and the coverage of the Community scheme may thereby be extended to emissions of greenhouse gases other than carbon dioxide, *inter alia* from aluminium and chemicals activities.

(16) This Directive should not prevent any Member State from maintaining or establishing national trading schemes regulating emissions of greenhouse gases from activities other than those listed in Annex I or included in the Community scheme, or from installations temporarily excluded from the Community scheme.

(17) Member States may participate in international emissions trading as Parties to the Kyoto Protocol with any other Party included in Annex B thereto.

(18) Linking the Community scheme to greenhouse gas emission trading schemes in third countries will increase the cost-effectiveness of achieving the Community emission reductions target as laid down in Decision 2002/358/EC on the joint fulfilment of commitments.

(19) Project-based mechanisms including Joint Implementation (JI) and the Clean Development Mechanism (CDM) are important to achieve the goals of both reducing global greenhouse gas emissions and increasing the cost-effective functioning of the Community scheme. In accordance with the relevant provisions of the Kyoto Protocol and Marrakech Accords, the use of the mechanisms should be supplemental to domestic action and domestic action will thus constitute a significant element of the effort made.

(20) This Directive will encourage the use of more energy-efficient technologies, including combined heat and power technology, producing less emissions per unit of output, while the future directive of the European Parliament and of the Council on the promotion of cogeneration based on useful heat demand in the internal energy market will specifically promote combined heat and power technology.

(21) Council Directive 96/61/EC of 24 September 1996 concerning integrated pollution prevention and control ([2]) establishes a general framework for pollution prevention and control, through which greenhouse gas emissions permits may be issued. Directive 96/61/EC should be amended to ensure that emission limit values are not set for direct emissions of greenhouse gases from an installation subject to this Directive and that Member States may choose not to impose requirements relating to energy efficiency in respect of combustion units or other units emitting carbon dioxide on the site, without prejudice to any other requirements pursuant to Directive 96/61/EC.

(22) This Directive is compatible with the United Nations Framework Convention on Climate Change and the Kyoto Protocol. It should be reviewed in the light of developments in that context and to take into account experience in its implementation and progress achieved in monitoring of emissions of greenhouse gases.

(23) Emission allowance trading should form part of a comprehensive and coherent package of policies and measures implemented at Member State and Community level. Without prejudice to the application of Articles 87 and 88 of the Treaty, where activities

([1]) OJ L 377, 31.12.1991, p. 48.
([2]) OJ L 257, 10.10.1996, p. 26.

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are covered by the Community scheme, Member States may consider the implications of regulatory, fiscal or other policies that pursue the same objectives. The review of the Directive should consider the extent to which these objectives have been attained.

(24) The instrument of taxation can be a national policy to limit emissions from installations temporarily excluded.

(25) Policies and measures should be implemented at Member State and Community level across all sectors of the European Union economy, and not only within the industry and energy sectors, in order to generate substantial emissions reductions. The Commission should, in particular, consider policies and measures at Community level in order that the transport sector makes a substantial contribution to the Community and its Member States meeting their climate change obligations under the Kyoto Protocol.

(26) Notwithstanding the multifaceted potential of market-based mechanisms, the European Union strategy for climate change mitigation should be built on a balance between the Community scheme and other types of Community, domestic and international action.

(27) This Directive respects the fundamental rights and observes the principles recognised in particular by the Charter of Fundamental Rights of the European Union.

(28) The measures necessary for the implementation of this Directive should be adopted in accordance with Council Decision 1999/468/EC of 28 June 1999 laying down the procedures for the exercise of implementing powers conferred on the Commission ([1]).

(29) As the criteria (1), (5) and (7) of Annex III cannot be amended through comitology, amendments in respect of periods after 2012 should only be made through codecision.

(30) Since the objective of the proposed action, the establishment of a Community scheme, cannot be sufficiently achieved by the Member States acting individually, and can therefore by reason of the scale and effects of the proposed action be better achieved at Community level, the Community may adopt measures, in accordance with the principle of subsidiarity as set out in Article 5 of the Treaty. In accordance with the principle of proportionality, as set out in that Article, this Directive does not go beyond what is necessary in order to achieve that objective,

HAVE ADOPTED THIS DIRECTIVE:

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(23) Transitional free allocation to installations should be provided for through harmonised Community-wide rules (exante benchmarks) in order to minimise distortions of competition with the Community.

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CHAPTER I

GENERAL PROVISIONS

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Article 1

Subject matter

This Directive establishes a scheme for greenhouse gas emission allowance trading within the Community (hereinafter referred to as

([1]) OJ L 184, 17.7.1999, p. 23.

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the ‘Community scheme’) in order to promote reductions of greenhouse gas emissions in a cost-effective and economically efficient manner.

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This Directive also provides for the reductions of greenhouse gas emissions to be increased so as to contribute to the levels of reductions that are considered scientifically necessary to avoid dangerous climate change.

This Directive also lays down provisions for assessing and implementing a stricter Community reduction commitment exceeding 20 %, to be applied upon the approval by the Community of an international agreement on climate change leading to greenhouse gas emission reductions exceeding those required in Article 9, as reflected in the 30 % commitment endorsed by the European Council of March 2007.

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Article 2

Scope

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

2. This Directive shall apply without prejudice to any requirements pursuant to Directive 96/61/EC.

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3. The application of this Directive to the airport of Gibraltar is understood to be without prejudice to the respective legal positions of the Kingdom of Spain and the United Kingdom with regard to the dispute over sovereignty over the territory in which the airport is situated.

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Article 3

Definitions

For the purposes of this Directive the following definitions shall apply:

(a) ‘allowance’ means an allowance to emit one tonne of carbon dioxide equivalent during a specified period, which shall be valid only for the purposes of meeting the requirements of this Directive and shall be transferable in accordance with the provisions of this Directive;

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(b) ‘emissions’ means the release of greenhouse gases into the atmosphere from sources in an installation or the release from an aircraft performing an aviation activity listed in Annex I of the gases specified in respect of that activity;

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(c) ‘greenhouse gases’ means the gases listed in Annex II and other gaseous constituents of the atmosphere, both natural and anthropogenic, that absorb and re-emit infrared radiation;

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(d) ‘greenhouse gas emissions permit’ means the permit issued in accordance with Articles 5 and 6;

(e) ‘installation’ means a stationary technical unit where one or more activities listed in Annex I are carried out and any other directly associated activities which have a technical connection with the activities carried out on that site and which could have an effect on emissions and pollution;

(f) ‘operator’ means any person who operates or controls an installation or, where this is provided for in national legislation, to whom

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decisive economic power over the technical functioning of the installation has been delegated;

(g) ‘person’ means any natural or legal person;

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(h) ‘new entrant’ means:

— any installation carrying out one or more of the activities indicated in Annex I, which has obtained a greenhouse gas emissions permit for the first time after 30 June 2011,

— any installation carrying out an activity which is included in the Community scheme pursuant to Article 24(1) or (2) for the first time, or

— any installation carrying out one or more of the activities indicated in Annex I or an activity which is included in the Community scheme pursuant to Article 24(1) or (2), which has had a significant extension after 30 June 2011, only in so far as this extension is concerned;

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(i) ‘the public’ means one or more persons and, in accordance with national legislation or practice, associations, organisations or groups of persons;

(j) ‘tonne of carbon dioxide equivalent’ means one metric tonne of carbon dioxide (CO_2) or an amount of any other greenhouse gas listed in Annex II with an equivalent global-warming potential;

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(k) ‘Annex I Party’ means a Party listed in Annex I to the United Nations Framework Convention on Climate Change (UNFCCC) that has ratified the Kyoto Protocol as specified in Article 1(7) of the Kyoto Protocol;

(l) ‘project activity’ means a project activity approved by one or more Annex I Parties in accordance with Article 6 or Article 12 of the Kyoto Protocol and the decisions adopted pursuant to the UNFCCC or the Kyoto Protocol;

(m) ‘emission reduction unit’ or ‘ERU’ means a unit issued pursuant to Article 6 of the Kyoto Protocol and the decisions adopted pursuant to the UNFCCC or the Kyoto Protocol;

(n) ‘certified emission reduction’ or ‘CER’ means a unit issued pursuant to Article 12 of the Kyoto Protocol and the decisions adopted pursuant to the UNFCCC or the Kyoto Protocol;

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(o) ‘aircraft operator’ means the person who operates an aircraft at the time it performs an aviation activity listed in Annex I or, where that person is not known or is not identified by the owner of the aircraft, the owner of the aircraft;

(p) ‘commercial air transport operator’ means an operator that, for remuneration, provides scheduled or non-scheduled air transport services to the public for the carriage of passengers, freight or mail;

(q) ‘administering Member State’ means the Member State responsible for administering the Community scheme in respect of an aircraft operator in accordance with Article 18a;

(r) ‘attributed aviation emissions’ means emissions from all flights falling within the aviation activities listed in Annex I which depart from an aerodrome situated in the territory of a Member State and those which arrive in such an aerodrome from a third country;

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(s) ‘historical aviation emissions’ means the mean average of the annual emissions in the calendar years 2004, 2005 and 2006 from aircraft performing an aviation activity listed in Annex I;

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(t) ‘combustion’ means any oxidation of fuels, regardless of the way in which the heat, electrical or mechanical energy produced by this process is used, and any other directly associated activities, including waste gas scrubbing;

(u) ‘electricity generator’ means an installation that, on or after 1 January 2005, has produced electricity for sale to third parties, and in which no activity listed in Annex I is carried out other than the ‘combustion of fuels’.

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CHAPTER II

AVIATION

Article 3a

Scope

The provisions of this Chapter shall apply to the allocation and issue of allowances in respect of aviation activities listed in Annex I.

Article 3b

Aviation activities

By 2 August 2009, the Commission shall, in accordance with the regulatory procedure referred to in Article 23(2), develop guidelines on the detailed interpretation of the aviation activities listed in Annex I.

Article 3c

Total quantity of allowances for aviation

1. For the period from 1 January 2012 to 31 December 2012, the total quantity of allowances to be allocated to aircraft operators shall be equivalent to 97 % of the historical aviation emissions.

2. For the period referred to in ►M4 Article 13(1) ◄ beginning on 1 January 2013, and, in the absence of any amendments following the review referred to in Article 30(4), for each subsequent period, the total quantity of allowances to be allocated to aircraft operators shall be equivalent to 95 % of the historical aviation emissions multiplied by the number of years in the period.

This percentage may be reviewed as part of the general review of this Directive.

3. The Commission shall review the total quantity of allowances to be allocated to aircraft operators in accordance with Article 30(4).

4. By 2 August 2009, the Commission shall decide on the historical aviation emissions, based on best available data, including estimates based on actual traffic information. That decision shall be considered within the Committee referred to in Article 23(1).

Article 3d

Method of allocation of allowances for aviation through auctioning

1. In the period referred to in Article 3c(1), 15 % of allowances shall be auctioned.

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2. From 1 January 2013, 15 % of allowances shall be auctioned. This percentage may be increased as part of the general review of this Directive.

3. A Regulation shall be adopted containing detailed provisions for the auctioning by Member States of allowances not required to be issued free of charge in accordance with paragraphs 1 and 2 of this Article or Article 3f(8). The number of allowances to be auctioned in each period by each Member State shall be proportionate to its share of the total attributed aviation emissions for all Member States for the reference year reported pursuant to Article 14(3) and verified pursuant to Article 15. For the period referred to in Article 3c(1), the reference year shall be 2010 and for each subsequent period referred to in Article 3c the reference year shall be the calendar year ending 24 months before the start of the period to which the auction relates.

That Regulation, designed to amend non-essential elements of this Directive by supplementing it, shall be adopted in accordance with the regulatory procedure with scrutiny referred to in Article 23(3).

4. It shall be for Member States to determine the use to be made of revenues generated from the auctioning of allowances. Those revenues should be used to tackle climate change in the EU and third countries, *inter alia*, to reduce greenhouse gas emissions, to adapt to the impacts of climate change in the EU and third countries, especially developing countries, to fund research and development for mitigation and adaptation, including in particular in the fields of aeronautics and air transport, to reduce emissions through low-emission transport and to cover the cost of administering the Community scheme. The proceeds of auctioning should also be used to fund contributions to the Global Energy Efficiency and Renewable Energy Fund, and measures to avoid deforestation.

Member States shall inform the Commission of actions taken pursuant to this paragraph.

5. Information provided to the Commission pursuant to this Directive does not free Member States from the notification obligation laid down in Article 88(3) of the Treaty.

Article 3e

Allocation and issue of allowances to aircraft operators

1. For each period referred to in Article 3c, each aircraft operator may apply for an allocation of allowances that are to be allocated free of charge. An application may be made by submitting to the competent authority in the administering Member State verified tonne-kilometre data for the aviation activities listed in Annex I performed by that aircraft operator for the monitoring year. For the purposes of this Article, the monitoring year shall be the calendar year ending 24 months before the start of the period to which it relates in accordance with Annexes IV and V or, in relation to the period referred to in Article 3c(1), 2010. Any application shall be made at least 21 months before the start of the period to which it relates or, in relation to the period referred to in Article 3c(1), by 31 March 2011.

2. At least 18 months before the start of the period to which the application relates or, in relation to the period referred to in Article 3c (1), by 30 June 2011, Member States shall submit applications received under paragraph 1 to the Commission.

3. At least 15 months before the start of each period referred to in Article 3c(2) or, in relation to the period referred to in Article 3c(1), by 30 September 2011, the Commission shall calculate and adopt a decision setting out:

(a) the total quantity of allowances to be allocated for that period in accordance with Article 3c;

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(b) the number of allowances to be auctioned in that period in accordance with Article 3d;

(c) the number of allowances in the special reserve for aircraft operators in that period in accordance with Article 3f(1);

(d) the number of allowances to be allocated free of charge in that period by subtracting the number of allowances referred to in points (b) and (c) from the total quantity of allowances decided upon under point (a); and

(e) the benchmark to be used to allocate allowances free of charge to aircraft operators whose applications were submitted to the Commission in accordance with paragraph 2.

The benchmark referred to in point (e), expressed as allowances per tonne-kilometre, shall be calculated by dividing the number of allowances referred to in point (d) by the sum of the tonne-kilometre data included in applications submitted to the Commission in accordance with paragraph 2.

4. Within three months from the date on which the Commission adopts a decision under paragraph 3, each administering Member State shall calculate and publish:

(a) the total allocation of allowances for the period to each aircraft operator whose application it submitted to the Commission in accordance with paragraph 2, calculated by multiplying the tonne-kilometre data included in the application by the benchmark referred to in paragraph 3(e); and

(b) the allocation of allowances to each aircraft operator for each year, which shall be determined by dividing its total allocation of allowances for the period calculated under point (a) by the number of years in the period for which that aircraft operator is performing an aviation activity listed in Annex I.

5. By 28 February 2012 and by 28 February of each subsequent year, the competent authority of the administering Member State shall issue to each aircraft operator the number of allowances allocated to that aircraft operator for that year under this Article or Article 3f.

Article 3f

Special reserve for certain aircraft operators

1. In each period referred to in Article 3c(2), 3 % of the total quantity of allowances to be allocated shall be set aside in a special reserve for aircraft operators:

(a) who start performing an aviation activity falling within Annex I after the monitoring year for which tonne-kilometre data was submitted under Article 3e(1) in respect of a period referred to in Article 3c(2); or

(b) whose tonne-kilometre data increases by an average of more than 18 % annually between the monitoring year for which tonne-kilometre data was submitted under Article 3e(1) in respect of a period referred to in Article 3c(2) and the second calendar year of that period;

and whose activity under point (a), or additional activity under point (b), is not in whole or in part a continuation of an aviation activity previously performed by another aircraft operator.

2. An aircraft operator who is eligible under paragraph 1 may apply for a free allocation of allowances from the special reserve by making an application to the competent authority of its administering Member State. Any application shall be made by 30 June in the third year of the period referred to in Article 3c(2) to which it relates.

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An allocation to an aircraft operator under paragraph 1(b) shall not exceed 1 000 000 allowances.

3. An application under paragraph 2 shall:

(a) include verified tonne-kilometre data in accordance with Annexes IV and V for the aviation activities listed in Annex I performed by the aircraft operator in the second calendar year of the period referred to in Article 3c(2) to which the application relates;

(b) provide evidence that the criteria for eligibility under paragraph 1 are fulfilled; and

(c) in the case of aircraft operators falling within paragraph 1(b), state:

(i) the percentage increase in tonne-kilometres performed by that aircraft operator between the monitoring year for which tonne-kilometre data was submitted under Article 3e(1) in respect of a period referred to in Article 3c(2) and the second calendar year of that period;

(ii) the absolute growth in tonne-kilometres performed by that aircraft operator between the monitoring year for which tonne-kilometre data was submitted under Article 3e(1) in respect of a period referred to in Article 3c(2) and the second calendar year of that period; and

(iii) the absolute growth in tonne-kilometres performed by that aircraft operator between the monitoring year for which tonne-kilometre data was submitted under Article 3e(1) in respect of a period referred to in Article 3c(2) and the second calendar year of that period which exceeds the percentage specified in paragraph 1(b).

4. No later than six months from the deadline for making an application under paragraph 2, Member States shall submit applications received under that paragraph to the Commission.

5. No later than 12 months from the deadline for making an application under paragraph 2, the Commission shall decide on the benchmark to be used to allocate allowances free of charge to aircraft operators whose applications were submitted to the Commission in accordance with paragraph 4.

Subject to paragraph 6, the benchmark shall be calculated by dividing the number of the allowances in the special reserve by the sum of:

(a) the tonne-kilometre data for aircraft operators falling within paragraph 1(a) included in applications submitted to the Commission in accordance with paragraphs 3(a) and 4; and

(b) the absolute growth in tonne-kilometres exceeding the percentage specified in paragraph 1(b) for aircraft operators falling within paragraph 1(b) included in applications submitted to the Commission in accordance with paragraphs 3(c)(iii) and 4.

6. The benchmark referred to in paragraph 5 shall not result in an annual allocation per tonne-kilometre greater than the annual allocation per tonne-kilometre to aircraft operators under Article 3e(4).

7. Within three months from the date on which the Commission adopts a decision under paragraph 5, each administering Member State shall calculate and publish:

(a) the allocation of allowances from the special reserve to each aircraft operator whose application it submitted to the Commission in accordance with paragraph 4. This allocation shall be calculated by multiplying the benchmark referred to in paragraph 5 by:

(i) in the case of an aircraft operator falling within paragraph 1(a), the tonne-kilometre data included in the application submitted to the Commission under paragraphs 3(a) and 4;

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(ii) in the case of an aircraft operator falling within paragraph 1(b), the absolute growth in tonne-kilometres exceeding the percentage specified in paragraph 1(b) included in the application submitted to the Commission under paragraphs 3(c)(iii) and 4; and

(b) the allocation of allowances to each aircraft operator for each year, which shall be determined by dividing its allocation of allowances under point (a) by the number of full calendar years remaining in the period referred to in Article 3c(2) to which the allocation relates.

8. Any unallocated allowances in the special reserve shall be auctioned by Member States.

9. The Commission may establish detailed rules on the operation of the special reserve under this Article, including the assessment of compliance with eligibility criteria under paragraph 1. Those measures, designed to amend non-essential elements of this Directive by supplementing it, shall be adopted in accordance with the regulatory procedure with scrutiny referred to in Article 23(3).

Article 3g

Monitoring and reporting plans

The administering Member State shall ensure that each aircraft operator submits to the competent authority in that Member State a monitoring plan setting out measures to monitor and report emissions and tonne-kilometre data for the purpose of an application under Article 3e and that such plans are approved by the competent authority in accordance with ►M4 the regulation referred to in Article 14 ◄.

CHAPTER III

STATIONARY INSTALLATIONS

Article 3h

Scope

The provisions of this Chapter shall apply to greenhouse gas emissions permits and the allocation and issue of allowances in respect of activities listed in Annex I other than aviation activities.

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Article 4

Greenhouse gas emissions permits

Member States shall ensure that, from 1 January 2005, no installation carries out any activity listed in Annex I resulting in emissions specified in relation to that activity unless its operator holds a permit issued by a competent authority in accordance with Articles 5 and 6, or the installation is excluded from the Community scheme pursuant to Article 27. This shall also apply to installations opted in under Article 24.

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Article 5

Applications for greenhouse gas emissions permits

An application to the competent authority for a greenhouse gas emissions permit shall include a description of:

(a) the installation and its activities including the technology used;

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(b) the raw and auxiliary materials, the use of which is likely to lead to emissions of gases listed in Annex I;

(c) the sources of emissions of gases listed in Annex I from the installation; and

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(d) the measures planned to monitor and report emissions in accordance with the regulation referred to in Article 14.

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The application shall also include a non-technical summary of the details referred to in the first subparagraph.

Article 6

Conditions for and contents of the greenhouse gas emissions permit

1. The competent authority shall issue a greenhouse gas emissions permit granting authorisation to emit greenhouse gases from all or part of an installation if it is satisfied that the operator is capable of monitoring and reporting emissions.

A greenhouse gas emissions permit may cover one or more installations on the same site operated by the same operator.

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The competent authority shall, at least every five years, review the greenhouse gas emissions permit and make any amendments as are appropriate.

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2. Greenhouse gas emissions permits shall contain the following:

(a) the name and address of the operator;

(b) a description of the activities and emissions from the installation;

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(c) a monitoring plan that fulfils the requirements under the regulation referred to in Article 14. Member States may allow operators to update monitoring plans without changing the permit. Operators shall submit any updated monitoring plans to the competent authority for approval;

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(d) reporting requirements; and

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(e) 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.

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Article 7

Changes relating to installations

The operator shall inform the competent authority of any planned changes to the nature or functioning of the installation, or any extension or significant reduction of its capacity, which may require updating the greenhouse gas emissions permit. Where appropriate, the competent authority shall update the permit. Where there is a change in the identity of the installation's operator, the competent authority shall update the permit to include the name and address of the new operator.

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Article 8

Coordination with Directive 96/61/EC

Member States shall take the necessary measures to ensure that, where installations carry out activities that are included in Annex I to Directive 96/61/EC, the conditions of, and procedure for, the issue of a greenhouse gas emissions permit are coordinated with those for the permit provided for in that Directive. The requirements of Articles 5, 6 and 7 of this Directive may be integrated into the procedures provided for in Directive 96/61/EC.

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Article 9

Community-wide quantity of allowances

The Community-wide quantity of allowances issued each year starting in 2013 shall decrease in a linear manner beginning from the mid-point of the period from 2008 to 2012. The quantity shall decrease by a linear factor of 1,74 % compared to the average annual total quantity of allowances issued by Member States in accordance with the Commission Decisions on their national allocation plans for the period from 2008 to 2012.

The Commission shall, by 30 June 2010, publish the absolute Community-wide quantity of allowances for 2013, based on the total quantities of allowances issued or to be issued by the Member States in accordance with the Commission Decisions on their national allocation plans for the period from 2008 to 2012.

The Commission shall review the linear factor and submit a proposal, where appropriate, to the European Parliament and to the Council as from 2020, with a view to the adoption of a decision by 2025.

Article 9a

Adjustment of the Community-wide quantity of allowances

1. In respect of installations that were included in the Community scheme during the period from 2008 to 2012 pursuant to Article 24(1), the quantity of allowances to be issued from 1 January 2013 shall be adjusted to reflect the average annual quantity of allowances issued in respect of those installations during the period of their inclusion, adjusted by the linear factor referred to in Article 9.

2. In respect of installations carrying out activities listed in Annex I, which are only included in the Community scheme from 2013 onwards, Member States shall ensure that the operators of such installations submit to the relevant competent authority duly substantiated and independently verified emissions data in order for them to be taken into account for the adjustment of the Community-wide quantity of allowances to be issued.

Any such data shall be submitted, by 30 April 2010, to the relevant competent authority in accordance with the provisions adopted pursuant to Article 14 (1).

If the data submitted are duly substantiated, the competent authority shall notify the Commission thereof by 30 June 2010 and the quantity of allowances to be issued, adjusted by the linear factor referred to in Article 9, shall be adjusted accordingly. In the case of installations emitting greenhouse gases other than CO_2, the competent authority may notify a lower amount of emissions according to the emission reduction potential of those installations.

3. The Commission shall publish the adjusted quantities referred to in paragraphs 1 and 2 by 30 September 2010.

4. In respect of installations which are excluded from the Community scheme in accordance with Article 27, the Community-wide quantity of

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allowances to be issued from 1 January 2013 shall be adjusted downwards to reflect the average annual verified emissions of those installations in the period from 2008 to 2010, adjusted by the linear factor referred to in Article 9.

Article 10

Auctioning of allowances

1. From 2013 onwards, Member States shall auction all allowances which are not allocated free of charge in accordance with Article 10a and 10c. By 31 December 2010, the Commission shall determine and publish the estimated amount of allowances to be auctioned.

2. The total quantity of allowances to be auctioned by each Member State shall be composed as follows:

(a) 88 % of the total quantity of allowances to be auctioned being distributed amongst Member States in shares that are identical to the share of verified emissions under the Community scheme for 2005 or the average of the period from 2005 to 2007, whichever one is the highest, of the Member State concerned;

(b) 10 % of the total quantity of allowances to be auctioned being distributed amongst certain Member States for the purpose of solidarity and growth within the Community, thereby increasing the amount of allowances that those Member States auction under point (a) by the percentages specified in Annex IIa; and

(c) 2 % of the total quantity of allowances to be auctioned being distributed amongst Member States the greenhouse gas emissions of which were, in 2005, at least 20 % below their emissions in the base year applicable to them under the Kyoto Protocol. The distribution of this percentage amongst the Member States concerned is set out in Annex IIb.

For the purposes of point (a), in respect of Member States which did not participate in the Community scheme in 2005, their share shall be calculated using their verified emissions under the Community scheme in 2007.

If necessary, the percentages referred to in points (b) and (c) shall be adapted in a proportional manner to ensure that the distribution is 10 % and 2 % respectively.

3. Member States shall determine the use of revenues generated from the auctioning of allowances. At least 50 % of the revenues generated from the auctioning of allowances referred to in paragraph 2, including all revenues from the auctioning referred to in paragraph 2, points (b) and (c), or the equivalent in financial value of these revenues, should be used for one or more of the following:

(a) to reduce greenhouse gas emissions, including by contributing to the Global Energy Efficiency and Renewable Energy Fund and to the Adaptation Fund as made operational by the Poznan Conference on Climate Change (COP 14 and COP/MOP 4), to adapt to the impacts of climate change and to fund research and development as well as demonstration projects for reducing emissions and for adaptation to climate change, including participation in initiatives within the framework of the European Strategic Energy Technology Plan and the European Technology Platforms;

(b) to develop renewable energies to meet the commitment of the Community to using 20 % renewable energies by 2020, as well as to develop other technologies contributing to the transition to a safe and sustainable low-carbon economy and to help meet the commitment of the Community to increase energy efficiency by 20 % by 2020;

(c) measures to avoid deforestation and increase afforestation and reforestation in developing countries that have ratified the international

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agreement on climate change, to transfer technologies and to facilitate adaptation to the adverse effects of climate change in these countries;

(d) forestry sequestration in the Community;

(e) the environmentally safe capture and geological storage of CO_2, in particular from solid fossil fuel power stations and a range of industrial sectors and subsectors, including in third countries;

(f) to encourage a shift to low-emission and public forms of transport;

(g) to finance research and development in energy efficiency and clean technologies in the sectors covered by this Directive;

(h) measures intended to increase energy efficiency and insulation or to provide financial support in order to address social aspects in lower and middle income households;

(i) to cover administrative expenses of the management of the Community scheme.

Member States shall be deemed to have fulfilled the provisions of this paragraph if they have in place and implement fiscal or financial support policies, including in particular in developing countries, or domestic regulatory policies, which leverage financial support, established for the purposes set out in the first subparagraph and which have a value equivalent to at least 50 % of the revenues generated from the auctioning of allowances referred to in paragraph 2, including all revenues from the auctioning referred to in paragraph 2, points (b) and (c).

Member States shall inform the Commission as to the use of revenues and the actions taken pursuant to this paragraph in their reports submitted under Decision No 280/2004/EC.

4. By 30 June 2010, the Commission shall adopt a regulation on timing, administration and other aspects of auctioning to ensure that it is conducted in an open, transparent, harmonised and non-discriminatory manner. To this end, the process should be predictable, in particular as regards the timing and sequencing of auctions and the estimated volumes of allowances to be made available.

Auctions shall be designed to ensure that:

(a) operators, and in particular any SMEs covered by the Community scheme, have full, fair and equitable access;

(b) all participants have access to the same information at the same time and that participants do not undermine the operation of the auction;

(c) the organisation and participation in auctions is cost-efficient and undue administrative costs are avoided; and

(d) access to allowances is granted for small emitters.

That measure, designed to amend non-essential elements of this Directive by supplementing it, shall be adopted in accordance with the regulatory procedure with scrutiny referred to in Article 23(3).

Member States shall report on the proper implementation of the auctioning rules for each auction, in particular with respect to fair and open access, transparency, price formation and technical and operational aspects. These reports shall be submitted within one month of the auction concerned and shall be published on the Commission's website.

5. The Commission shall monitor the functioning of the European carbon market. Each year, it shall submit a report to the European Parliament and to the Council on the functioning of the carbon market including the implementation of the auctions, liquidity and the volumes traded. If necessary, Member States shall ensure that any

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relevant information is submitted to the Commission at least two months before the Commission adopts the report.

Article 10a

Transitional Community-wide rules for harmonised free allocation

1. By 31 December 2010, the Commission shall adopt Community-wide and fully-harmonised implementing measures for the allocation of the allowances referred to in paragraphs 4, 5, 7 and 12, including any necessary provisions for a harmonised application of paragraph 19.

Those measures, designed to amend non-essential elements of this Directive by supplementing it, shall be adopted in accordance with the regulatory procedure with scrutiny referred to in Article 23(3).

The measures referred to in the first subparagraph shall, to the extent feasible, determine Community-wide ex-ante benchmarks so as to ensure that allocation takes place in a manner that provides incentives for reductions in greenhouse gas emissions and energy efficient techniques, by taking account of the most efficient techniques, substitutes, alternative production processes, high efficiency cogeneration, efficient energy recovery of waste gases, use of biomass and capture and storage of CO_2, where such facilities are available, and shall not provide incentives to increase emissions. No free allocation shall be made in respect of any electricity production, except for cases falling within Article 10c and electricity produced from waste gases.

For each sector and subsector, in principle, the benchmark shall be calculated for products rather than for inputs, in order to maximise greenhouse gas emissions reductions and energy efficiency savings throughout each production process of the sector or the subsector concerned.

In defining the principles for setting ex-ante benchmarks in individual sectors and subsectors, the Commission shall consult the relevant stakeholders, including the sectors and subsectors concerned.

The Commission shall, upon the approval by the Community of an international agreement on climate change leading to mandatory reductions of greenhouse gas emissions comparable to those of the Community, review those measures to provide that free allocation is only to take place where this is fully justified in the light of that agreement.

2. In defining the principles for setting ex-ante benchmarks in individual sectors or subsectors, the starting point shall be the average performance of the 10 % most efficient installations in a sector or subsector in the Community in the years 2007-2008. The Commission shall consult the relevant stakeholders, including the sectors and subsectors concerned.

The regulations pursuant to Articles 14 and 15 shall provide for harmonised rules on monitoring, reporting and verification of production-related greenhouse gas emissions with a view to determining the ex-ante benchmarks.

3. Subject to paragraphs 4 and 8, and notwithstanding Article 10c, no free allocation shall be given to electricity generators, to installations for the capture of CO_2, to pipelines for transport of CO_2 or to CO_2 storage sites.

4. Free allocation shall be given to district heating as well as to high efficiency cogeneration, as defined by Directive 2004/8/EC, for economically justifiable demand, in respect of the production of heating or cooling. In each year subsequent to 2013, the total allocation to such installations in respect of the production of that heat shall be adjusted by the linear factor referred to in Article 9.

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5. The maximum annual amount of allowances that is the basis for calculating allocations to installations which are not covered by paragraph 3 and are not new entrants shall not exceed the sum of:

(a) the annual Community-wide total quantity, as determined pursuant to Article 9, multiplied by the share of emissions from installations not covered by paragraph 3 in the total average verified emissions, in the period from 2005 to 2007, from installations covered by the Community scheme in the period from 2008 to 2012; and

(b) the total average annual verified emissions from installations in the period from 2005 to 2007 which are only included in the Community scheme from 2013 onwards and are not covered by paragraph 3, adjusted by the linear factor, as referred to in Article 9.

A uniform cross-sectoral correction factor shall be applied if necessary.

6. Member States may also adopt financial measures in favour of sectors or subsectors determined to be exposed to a significant risk of carbon leakage due to costs relating to greenhouse gas emissions passed on in electricity prices, in order to compensate for those costs and where such financial measures are in accordance with state aid rules applicable and to be adopted in this area.

Those measures shall be based on ex-ante benchmarks of the indirect emissions of CO_2 per unit of production. The ex-ante benchmarks shall be calculated for a given sector or subsector as the product of the electricity consumption per unit of production corresponding to the most efficient available technologies and of the CO_2 emissions of the relevant European electricity production mix.

7. Five percent of the Community-wide quantity of allowances determined in accordance with Articles 9 and 9a over the period from 2013 to 2020 shall be set aside for new entrants, as the maximum that may be allocated to new entrants in accordance with the rules adopted pursuant to paragraph 1 of this Article. Allowances in this Community-wide reserve that are neither allocated to new entrants nor used pursuant to paragraph 8, 9 or 10 of this Article over the period from 2013 to 2020 shall be auctioned by the Member States, taking into account the level to which installations in Member States have benefited from this reserve, in accordance with Article 10(2) and, for detailed arrangements and timing, Article 10(4), and the relevant implementing provisions.

Allocations shall be adjusted by the linear factor referred to in Article 9.

No free allocation shall be made in respect of any electricity production by new entrants.

By 31 December 2010, the Commission shall adopt harmonised rules for the application of the definition of ‘new entrant’, in particular in relation to the definition of ‘significant extensions’.

Those measures, designed to amend non-essential elements of this Directive by supplementing it, shall be adopted in accordance with the regulatory procedure with scrutiny referred to in Article 23(3).

8. Up to 300 million allowances in the new entrants’ reserve shall be available until 31 December 2015 to help stimulate the construction and operation of up to 12 commercial demonstration projects that aim at the environmentally safe capture and geological storage (CCS) of CO_2 as well as demonstration projects of innovative renewable energy technologies, in the territory of the Union.

The allowances shall be made available for support for demonstration projects that provide for the development, in geographically balanced locations, of a wide range of CCS and innovative renewable energy technologies that are not yet commercially viable. Their award shall be dependent upon the verified avoidance of CO_2 emissions.

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Projects shall be selected on the basis of objective and transparent criteria that include requirements for knowledge-sharing. Those criteria and the measures shall be adopted in accordance with the regulatory procedure with scrutiny referred to in Article 23(3), and shall be made available to the public.

Allowances shall be set aside for the projects that meet the criteria referred to in the third subparagraph. Support for these projects shall be given via Member States and shall be complementary to substantial co-financing by the operator of the installation. They could also be co-financed by the Member State concerned, as well as by other instruments. No project shall receive support via the mechanism under this paragraph that exceeds 15 % of the total number of allowances available for this purpose. These allowances shall be taken into account under paragraph 7.

9. Lithuania, which, pursuant to Article 1 of Protocol No 4 on the Ignalina nuclear power plant in Lithuania, annexed to the 2003 Act of Accession, has committed to the closure of unit 2 of the Ignalina Nuclear Power Plant by 31 December 2009, may, if the total verified emissions of Lithuania in the period from 2013 to 2015 within the Community scheme exceed the sum of the free allowances issued to installations in Lithuania for electricity production emissions in that period and three-eighths of the allowances to be auctioned by Lithuania for the period from 2013 to 2020, claim allowances from the new entrants reserve for auctioning in accordance with the regulation referred to in Article 10(4). The maximum amount of such allowances shall be equivalent to the excess emissions in that period to the extent that this excess is due to increased emissions from electricity generation, minus any quantity by which allocations in that Member State in the period from 2008 to 2012 exceeded verified emissions within the Community scheme in Lithuania during that period. Any such allowances shall be taken into account under paragraph 7.

10. Any Member State with an electricity network which is interconnected with Lithuania and which, in 2007, imported more than 15 % of its domestic electricity consumption from Lithuania for its own consumption, and where emissions have increased due to investment in new electricity generation, may apply paragraph 9 mutatis mutandis under the conditions set out in that paragraph.

11. Subject to Article 10b, the amount of allowances allocated free of charge under paragraphs 4 to 7 of this Article in 2013 shall be 80 % of the quantity determined in accordance with the measures referred to in paragraph 1. Thereafter the free allocation shall decrease each year by equal amounts resulting in 30 % free allocation in 2020, with a view to reaching no free allocation in 2027.

12. Subject to Article 10b, in 2013 and in each subsequent year up to 2020, installations in sectors or subsectors which are exposed to a significant risk of carbon leakage shall be allocated, pursuant to paragraph 1, allowances free of charge at 100 % of the quantity determined in accordance with the measures referred to in paragraph 1.

13. By 31 December 2009 and every five years thereafter, after discussion in the European Council, the Commission shall determine a list of the sectors or subsectors referred to in paragraph 12 on the basis of the criteria referred to in paragraphs 14 to 17.

Every year the Commission may, at its own initiative or at the request of a Member State, add a sector or subsector to the list referred to in the first subparagraph if it can be demonstrated, in an analytical report, that this sector or subsector satisfies the criteria in paragraphs 14 to 17, following a change that has a substantial impact on the sector's or subsector's activities.

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For the purpose of implementing this Article, the Commission shall consult the Member States, the sectors or subsectors concerned and other relevant stakeholders.

Those measures, designed to amend non-essential elements of this Directive by supplementing it, shall be adopted in accordance with the regulatory procedure with scrutiny referred to in Article 23(3).

14. In order to determine the sectors or subsectors referred to in paragraph 12, the Commission shall assess, at Community level, the extent to which it is possible for the sector or subsector concerned, at the relevant level of disaggregation, to pass on the direct cost of the required allowances and the indirect costs from higher electricity prices resulting from the implementation of this Directive into product prices without significant loss of market share to less carbon efficient installations outside the Community. These assessments shall be based on an average carbon price according to the Commission's impact assessment accompanying the package of implementation measures for the EU's objectives on climate change and renewable energy for 2020 and, if available, trade, production and value added data from the three most recent years for each sector or subsector.

15. A sector or subsector shall be deemed to be exposed to a significant risk of carbon leakage if:

(a) the sum of direct and indirect additional costs induced by the implementation of this Directive would lead to a substantial increase of production costs, calculated as a proportion of the gross value added, of at least 5 %; and

(b) the intensity of trade with third countries, defined as the ratio between the total value of exports to third countries plus the value of imports from third countries and the total market size for the Community (annual turnover plus total imports from third countries), is above 10 %.

16. Notwithstanding paragraph 15, a sector or subsector is also deemed to be exposed to a significant risk of carbon leakage if:

(a) the sum of direct and indirect additional costs induced by the implementation of this Directive would lead to a particularly high increase of production costs, calculated as a proportion of the gross value added, of at least 30 %; or

(b) the intensity of trade with third countries, defined as the ratio between the total value of exports to third countries plus the value of imports from third countries and the total market size for the Community (annual turnover plus total imports from third countries), is above 30 %.

17. The list referred to in paragraph 13 may be supplemented after completion of a qualitative assessment, taking into account, where the relevant data are available, the following criteria:

(a) the extent to which it is possible for individual installations in the sector or subsector concerned to reduce emission levels or electricity consumption, including, as appropriate, the increase in production costs that the related investment may entail, for instance on the basis of the most efficient techniques;

(b) current and projected market characteristics, including when trade exposure or direct and indirect cost increase rates are close to one of the thresholds mentioned in paragraph 16;

(c) profit margins as a potential indicator of long-run investment or relocation decisions.

18. The list referred to in paragraph 13 shall be determined after taking into account, where the relevant data are available, the following:

(a) the extent to which third countries, representing a decisive share of global production of products in sectors or subsectors deemed to be

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at risk of carbon leakage, firmly commit to reducing greenhouse gas emissions in the relevant sectors or subsectors to an extent comparable to that of the Community and within the same time-frame; and

(b) the extent to which the carbon efficiency of installations located in these countries is comparable to that of the Community.

19. No free allocation shall be given to an installation that has ceased its operations, unless the operator demonstrates to the competent authority that this installation will resume production within a specified and reasonable time. Installations for which the greenhouse gas emissions permit has expired or has been withdrawn and installations for which the operation or resumption of operation is technically impossible shall be considered to have ceased operations.

20. The Commission shall, as part of the measures adopted under paragraph 1, include measures for defining installations that partially cease to operate or significantly reduce their capacity, and measures for adapting, as appropriate, the level of free allocations given to them accordingly.

Article 10b

Measures to support certain energy-intensive industries in the event of carbon leakage

1. By 30 June 2010, the Commission shall, in the light of the outcome of the international negotiations and the extent to which these lead to global greenhouse gas emission reductions, and after consulting with all relevant social partners, submit to the European Parliament and to the Council an analytical report assessing the situation with regard to energy-intensive sectors or subsectors that have been determined to be exposed to significant risks of carbon leakage. This shall be accompanied by any appropriate proposals, which may include:

(a) adjustment of the proportion of allowances received free of charge by those sectors or subsectors under Article 10a;

(b) inclusion in the Community scheme of importers of products which are produced by the sectors or subsectors determined in accordance with Article 10a;

(c) assessment of the impact of carbon leakage on Member States' energy security, in particular where the electricity connections with the rest of the Union are insufficient and where there are electricity connections with third countries, and appropriate measures in this regard.

Any binding sectoral agreements which lead to global greenhouse gas emissions reductions of the magnitude required to effectively address climate change, and which are monitorable, verifiable and subject to mandatory enforcement arrangements shall also be taken into account when considering what measures are appropriate.

2. The Commission shall assess, by 31 March 2011, whether the decisions made regarding the proportion of allowances received free of charge by sectors or subsectors in accordance with paragraph 1, including the effect of setting ex-ante benchmarks in accordance with Article 10a(2), are likely to significantly affect the quantity of allowances to be auctioned by Member States in accordance with Article 10(2)(b), compared to a scenario with full auctioning for all sectors in 2020. It shall, if appropriate, submit adequate proposals to the European Parliament and to the Council, taking into account the possible distributional effects of such proposals.

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Article 10c

Option for transitional free allocation for the modernisation of electricity generation

1. By derogation from Article 10a(1) to (5), Member States may give a transitional free allocation to installations for electricity production in operation by 31 December 2008 or to installations for electricity production for which the investment process was physically initiated by the same date, provided that one of the following conditions is met:

(a) in 2007, the national electricity network was not directly or indirectly connected to the network interconnected system operated by the Union for the Coordination of Transmission of Electricity (UCTE);

(b) in 2007, the national electricity network was only directly or indirectly connected to the network operated by UCTE through a single line with a capacity of less than 400 MW; or

(c) in 2006, more than 30 % of electricity was produced from a single fossil fuel, and the GDP per capita at market price did not exceed 50 % of the average GDP per capita at market price of the Community.

The Member State concerned shall submit to the Commission a national plan that provides for investments in retrofitting and upgrading of the infrastructure and clean technologies. The national plan shall also provide for the diversification of their energy mix and sources of supply for an amount equivalent, to the extent possible, to the market value of the free allocation with respect to the intended investments, while taking into account the need to limit as far as possible directly linked price increases. The Member State concerned shall submit to the Commission, every year, a report on investments made in upgrading infrastructure and clean technologies. Investment undertaken from 25 June 2009 may be counted for this purpose.

2. Transitional free allocations shall be deducted from the quantity of allowances that the respective Member State would otherwise auction pursuant to Article 10(2). In 2013, the total transitional free allocation shall not exceed 70 % of the annual average verified emissions in 2005-2007 from such electricity generators for the amount corresponding to the gross final national consumption of the Member State concerned and shall gradually decrease, resulting in no free allocation in 2020. For those Member States which did not participate in the Community scheme in 2005, the relevant emissions shall be calculated using their verified Community scheme emissions under the Community scheme in 2007.

The Member State concerned may determine that the allowances allocated pursuant to this Article may only be used by the operator of the installation concerned for surrendering allowances pursuant to Article 12(3) with respect to emissions of the same installation during the year for which the allowances are allocated.

3. Allocations to operators shall be based on the allocation under the verified emissions in 2005-2007 or an ex-ante efficiency benchmark based on the weighted average of emission levels of most greenhouse gas efficient electricity production covered by the Community scheme for installations using different fuels. The weighting may reflect the shares of the different fuels in electricity production in the Member State concerned. The Commission shall, in accordance with the regulatory procedure referred to in Article 23(2), provide guidance to ensure that the allocation methodology avoids undue distortions of competition and minimises negative impacts on the incentives to reduce emissions.

4. Any Member State applying this Article shall require benefiting electricity generators and network operators to report every 12 months on the implementation of their investments referred to in the national

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plan. Member States shall report on this to the Commission and shall make such reports public.

5. Any Member State that intends to allocate allowances on the basis of this Article shall, by 30 September 2011, submit to the Commission an application containing the proposed allocation methodology and individual allocations. An application shall contain:

(a) evidence that the Member State meets at least one of the conditions set out in paragraph 1;

(b) a list of the installations covered by the application and the amount of allowances to be allocated to each installation in accordance with paragraph 3 and the Commission guidance;

(c) the national plan referred to in the second subparagraph of paragraph 1;

(d) monitoring and enforcement provisions with respect to the intended investments pursuant to the national plan;

(e) information showing that the allocations do not create undue distortions of competition.

6. The Commission shall assess the application taking into account the elements set out in paragraph 5 and may reject the application, or any aspect thereof, within six months of receiving the relevant information.

7. Two years before the end of the period during which a Member State may give transitional free allocation to installations for electricity production in operation by 31 December 2008, the Commission shall assess the progress made in the implementation of the national plan. If the Commission considers, on request of the Member State concerned, that there is a need for a possible extension of that period, it may submit to the European Parliament and to the Council appropriate proposals, including the conditions that would have to be met in the case of an extension of that period.

Article 11

National implementation measures

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.

2. By 28 February of each year, the competent authorities shall issue the quantity of allowances that are to be allocated for that year, calculated in accordance with Articles 10, 10a and 10c.

3. Member States may not issue allowances free of charge under paragraph 2 to installations whose inscription in the list referred to in paragraph 1 has been rejected by the Commission.

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CHAPTER IV

PROVISIONS APPLYING TO AVIATION AND STATIONARY INSTALLATIONS

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Article 11a

Use of CERs and ERUs from project activities in the Community scheme before the entry into force of an international agreement on climate change

1. Without prejudice to the application of Article 28(3) and (4), paragraphs 2 to 7 of this Article shall apply.

2. To the extent that the levels of CER and ERU use, allowed to operators or aircraft operators by Member States for the period from 2008 to 2012, have not been used up or an entitlement to use credits is granted under paragraph 8, operators may request the competent authority to issue allowances to them valid from 2013 onwards in exchange for CERs and ERUs issued in respect of emission reductions up until 2012 from project types which were eligible for use in the Community scheme during the period from 2008 to 2012.

Until 31 March 2015, the competent authority shall make such an exchange on request.

3. To the extent that the levels of CER and ERU use, allowed to operators or aircraft operators by Member States for the period from 2008 to 2012, have not been used up or an entitlement to use credits is granted under paragraph 8, competent authorities shall allow operators to exchange CERs and ERUs from projects that were registered before 2013 issued in respect of emission reductions from 2013 onwards for allowances valid from 2013 onwards.

The first subparagraph shall apply to CERs and ERUs for all project types which were eligible for use in the Community scheme during the period from 2008 to 2012.

4. To the extent that the levels of CER and ERU use, allowed to operators or aircraft operators by Member States for the period from 2008 to 2012, have not been used up or an entitlement to use credits is granted under paragraph 8, competent authorities shall allow operators to exchange CERs issued in respect of emission reductions from 2013 onwards for allowances from new projects started from 2013 onwards in LDCs.

The first subparagraph shall apply to CERs for all project types which were eligible for use in the Community scheme during the period from 2008 to 2012, until those countries have ratified a relevant agreement with the Community or until 2020, whichever is the earlier.

5. To the extent that the levels of CER and ERU use, allowed to operators or aircraft operators by Member States for the period from 2008 to 2012, have not been used up or an entitlement to use credits is granted under paragraph 8 and in the event that the negotiations on an international agreement on climate change are not concluded by 31 December 2009, credits from projects or other emission reducing activities may be used in the Community scheme in accordance with agreements concluded with third countries, specifying levels of use. In accordance with such agreements, operators shall be able to use credits from project activities in those third countries to comply with their obligations under the Community scheme.

6. Any agreements referred to in paragraph 5 shall provide for the use of credits in the Community scheme from project types which were eligible for use in the Community scheme during the period from 2008 to 2012, including renewable energy or energy efficiency technologies which promote technological transfer and sustainable development. Any such agreement may also provide for the use of credits from projects

▼M4

where the baseline used is below the level of free allocation under the measures referred to in Article 10a or below the levels required by Community legislation.

7. Once an international agreement on climate change has been reached, only credits from projects from third countries which have ratified that agreement shall be accepted in the Community scheme from 1 January 2013.

8. All existing operators shall be allowed to use credits during the period from 2008 to 2020 up to either the amount allowed to them during the period from 2008 to 2012, or to an amount corresponding to a percentage, which shall not be set below 11 %, of their allocation during the period from 2008 to 2012, whichever is the highest.

Operators shall be able to use credits beyond the 11 % provided for in the first subparagraph, up to an amount which results in their combined free allocation in the period from 2008 to 2012 and overall project credits entitlement equal to a certain percentage of their verified emissions in the period from 2005 to 2007.

New entrants, including new entrants in the period from 2008 to 2012 which received neither free allocation nor an entitlement to use CERs and ERUs in the period from 2008-2012, and new sectors shall be able to use credits up to an amount corresponding to a percentage, which shall not be set below 4,5 %, of their verified emissions during the period from 2013 to 2020. Aircraft operators shall be able to use credits up to an amount corresponding to a percentage, which shall not be set below 1,5 %, of their verified emissions during the period from 2013 to 2020.

Measures shall be adopted to specify the exact percentages which shall apply under the first, second and third subparagraphs. At least one-third of the additional amount which is to be distributed to existing operators beyond the first percentage referred to in the first subparagraph shall be distributed to the operators which had the lowest level of combined average free allocation and project credit use in the period from 2008 to 2012.

Those measures shall ensure that the overall use of credits allowed does not exceed 50 % of the Community-wide reductions below the 2005 levels of the existing sectors under the Community scheme over the period from 2008 to 2020 and 50 % of the Community-wide reductions below the 2005 levels of new sectors and aviation over the period from the date of their inclusion in the Community scheme to 2020.

Those measures, designed to amend non-essential elements of this Directive by supplementing it, shall be adopted in accordance with the regulatory procedure with scrutiny referred to in Article 23(3).

9. From 1 January 2013, measures may be applied to restrict the use of specific credits from project types.

Those measures shall also set the date from which the use of credits under paragraphs 1 to 4 shall be in accordance with these measures. That date shall be, at the earliest, six months from the adoption of the measures or, at the latest, three years from their adoption.

Those measures, designed to amend non-essential elements of this Directive by supplementing it, shall be adopted in accordance with the regulatory procedure with scrutiny referred to in Article 23(3). The Commission shall consider submitting to the Committee a draft of the measures to be taken where a Member State so requests.

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Article 11b

Project activities

1. Member States shall take all necessary measures to ensure that baselines for project activities, as defined by subsequent decisions adopted under the UNFCCC or the Kyoto Protocol, undertaken in countries having signed a Treaty of Accession with the Union fully comply with the *acquis communautaire*, including the temporary derogations set out in that Treaty of Accession.

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The Community and its Member States shall only authorise project activities where all project participants have headquarters either in a country that has concluded the international agreement relating to such projects or in a country or sub-federal or regional entity which is linked to the Community scheme pursuant to Article 25.

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2. Except as provided for in paragraphs 3 and 4, Member States hosting project activities shall ensure that no ERUs or CERs are issued for reductions or limitations of greenhouse gas emissions from ►M2 activities ◄ falling within the scope of this Directive.

3. Until 31 December 2012, for JI and CDM project activities which reduce or limit directly the emissions of an installation falling within the scope of this Directive, ERUs and CERs may be issued only if an equal number of allowances is cancelled by the operator of that installation.

4. Until 31 December 2012, for JI and CDM project activities which reduce or limit indirectly the emission level of installations falling within the scope of this Directive, ERUs and CERs may be issued only if an equal number of allowances is cancelled from the national registry of the Member State of the ERUs' or CERs' origin.

5. A Member State that authorises private or public entities to participate in project activities shall remain responsible for the fulfilment of its obligations under the UNFCCC and the Kyoto Protocol and shall ensure that such participation is consistent with the relevant guidelines, modalities and procedures adopted pursuant to the UNFCCC or the Kyoto Protocol.

6. In the case of hydroelectric power production project activities with a generating capacity exceeding 20 MW, Member States shall, when approving such project activities, ensure that relevant international criteria and guidelines, including those contained in the World Commission on Dams November 2000 Report 'Dams and Development — A New Framework for Decision-Making', will be respected during the development of such project activities.

▼M3

7. Provisions for the implementation of paragraphs 3 and 4, particularly in respect of the avoidance of double counting, shall be adopted by the Commission in accordance with the regulatory procedure referred to in Article 23(2). The Commission shall adopt provisions for the implementation of paragraph 5 of this Article where the host party meets all eligibility requirements for JI project activities. Those measures, designed to amend non-essential elements of this Directive, by supplementing it, shall be adopted in accordance with the regulatory procedure with scrutiny referred to in Article 23(3).

▼B

Article 12

Transfer, surrender and cancellation of allowances

1. Member States shall ensure that allowances can be transferred between:

(a) persons within the Community;

▼B

(b) persons within the Community and persons in third countries, where such allowances are recognised in accordance with the procedure referred to in Article 25 without restrictions other than those contained in, or adopted pursuant to, this Directive.

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1a. The Commission shall, by 31 December 2010, examine whether the market for emissions allowances is sufficiently protected from insider dealing or market manipulation and, if appropriate, shall bring forward proposals to ensure such protection. The relevant provisions of Directive 2003/6/EC of the European Parliament and of the Council of 28 January 2003 on insider dealing and market manipulation (market abuse) ([1]) may be used with any appropriate adjustments needed to apply them to trade in commodities.

▼B

2. Member States shall ensure that allowances issued by a competent authority of another Member State are recognised for the purpose ►M2 of meeting an aircraft operator's obligations under paragraph 2a or ◄ of meeting an operator's obligations under paragraph 3.

▼M2

2a. Administering Member States 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 15. Member States shall ensure that allowances surrendered in accordance with this paragraph are subsequently cancelled.

3. 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, equal to the total emissions from that installation during the preceding calendar year as verified in accordance with Article 15, and that these are subsequently cancelled.

▼M4

3a. An obligation to surrender allowances shall not arise in respect of emissions verified as captured and transported for permanent storage to a facility for which a permit is in force in accordance with Directive 2009/31/EC of the European Parliament and of the Council of 23 April 2009 on the geological storage of carbon dioxide ([2]).

▼B

4. Member States shall take the necessary steps to ensure that allowances will be cancelled at any time at the request of the person holding them.

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5. Paragraphs 1 and 2 apply without prejudice to Article 10c.

Article 13

Validity of allowances

1. Allowances issued from 1 January 2013 onwards shall be valid for emissions during periods of eight years beginning on 1 January 2013.

2. Four months after the beginning of each period referred to in paragraph 1, allowances which are no longer valid and have not been surrendered and cancelled in accordance with Article 12 shall be cancelled by the competent authority.

([1]) OJ L 96, 12.4.2003, p. 16.
([2]) OJ L 140, 5.6.2009, p. 114.

▼M4

Member States shall issue allowances to persons for the current period to replace any allowances held by them which are cancelled in accordance with the first subparagraph.

Article 14

Monitoring and reporting of emissions

1. By 31 December 2011, the Commission shall adopt a regulation for the monitoring and reporting of emissions and, where relevant, activity data, from the activities listed in Annex I, for the monitoring and reporting of tonne-kilometre data for the purpose of an application under Articles 3e or 3f, which shall be based on the principles for monitoring and reporting set out in Annex IV and shall specify the global warming potential of each greenhouse gas in the requirements for monitoring and reporting emissions for that gas.

That measure, designed to amend non-essential elements of this Directive by supplementing it, shall be adopted in accordance with the regulatory procedure with scrutiny referred to in Article 23(3).

2. The regulation referred to in paragraph 1 shall take into account the most accurate and up-to-date scientific evidence available, in particular from the IPCC, and may also specify requirements for operators to report on emissions associated with the production of goods produced by energy intensive industries which may be subject to international competition. That regulation may also specify requirements for this information to be verified independently.

Those requirements may include reporting on levels of emissions from electricity generation covered by the Community scheme associated with the production of such goods.

3. Member States shall ensure that each operator of an installation or an aircraft operator monitors and reports the emissions from that installation during each calendar year, or, from 1 January 2010, the aircraft which it operates, to the competent authority after the end of that year in accordance with the regulation referred to in paragraph 1.

4. The regulation referred to in paragraph 1 may include requirements on the use of automated systems and data exchange formats to harmonise communication on the monitoring plan, the annual emission report and the verification activities between the operator, the verifier and competent authorities.

▼M2

Article 15

►M4 Verification and accreditation ◄

Member States shall ensure that the reports submitted by operators and aircraft operators pursuant to Article 14(3) are verified in accordance with the criteria set out in Annex V and any detailed provisions adopted by the Commission in accordance with this Article, and that the competent authority is informed thereof.

Member States shall ensure that an operator or aircraft operator whose report has not been verified as satisfactory in accordance with the criteria set out in Annex V and any detailed provisions adopted by the Commission in accordance with this Article by 31 March each year for emissions during the preceding year cannot make further transfers of allowances until a report from that operator or aircraft operator has been verified as satisfactory.

The Commission may adopt detailed provisions for the verification of reports submitted by aircraft operators pursuant to Article 14(3) and applications under Articles 3e and 3f, including the verification procedures to be used by verifiers, in accordance with the regulatory procedure referred to in Article 23(2).

▼M4

By 31 December 2011, the Commission shall adopt a regulation for the verification of emission reports based on the principles set out in Annex V and for the accreditation and supervision of verifiers. It shall specify conditions for the accreditation and withdrawal of accreditation, for mutual recognition and peer evaluation of accreditation bodies, as appropriate.

That measure, designed to amend non-essential elements of this Directive by supplementing it, shall be adopted in accordance with the regulatory procedure with scrutiny referred to in Article 23(3).

Article 15a

Disclosure of information and professional secrecy

Member States and the Commission shall ensure that all decisions and reports relating to the quantity and allocation of allowances and to the monitoring, reporting and verification of emissions are immediately disclosed in an orderly manner ensuring non-discriminatory access.

Information covered by professional secrecy may not be disclosed to any other person or authority except by virtue of the applicable laws, regulations or administrative provisions.

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Article 16

Penalties

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 ►M2 ———— ◄ and shall notify it without delay of any subsequent amendment affecting them.

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2. Member States shall ensure publication of the names of operators and aircraft operators who are in breach of requirements to surrender sufficient allowances under this Directive.

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 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.

▼M4

4. The excess emissions penalty relating to allowances issued from 1 January 2013 onwards shall increase in accordance with the European index of consumer prices.

▼M2

5. In the event that an aircraft operator fails to comply with the requirements of this Directive and where other enforcement measures have failed to ensure compliance, its administering Member State may request the Commission to decide on the imposition of an operating ban on the aircraft operator concerned.

6. Any request by an administering Member State under paragraph 5 shall include:

(a) evidence that the aircraft operator has not complied with its obligations under this Directive;

▼M2

(b) details of the enforcement action which has been taken by that Member State;

(c) a justification for the imposition of an operating ban at Community level; and

(d) a recommendation for the scope of an operating ban at Community level and any conditions that should be applied.

7. When requests such as those referred to in paragraph 5 are addressed to the Commission, the Commission shall inform the other Member States through their representatives on the Committee referred to in Article 23(1) in accordance with the Committee's Rules of Procedure.

8. The adoption of a decision following a request pursuant to paragraph 5 shall be preceded, when appropriate and practicable, by consultations with the authorities responsible for regulatory oversight of the aircraft operator concerned. Whenever possible, consultations shall be held jointly by the Commission and the Member States.

9. When the Commission is considering whether to adopt a decision following a request pursuant to paragraph 5, it shall disclose to the aircraft operator concerned the essential facts and considerations which form the basis for such decision. The aircraft operator concerned shall be given an opportunity to submit written comments to the Commission within 10 working days from the date of disclosure.

10. At the request of a Member State, the Commission may, in accordance with the regulatory procedure referred to in Article 23(2), adopt a decision to impose an operating ban on the aircraft operator concerned.

11. Each Member State shall enforce, within its territory, any decisions adopted under paragraph 10. It shall inform the Commission of any measures taken to implement such decisions.

12. Where appropriate, detailed rules shall be established in respect of the procedures referred to in this Article. Those measures, designed to amend non-essential elements of this Directive by supplementing it, shall be adopted in accordance with the regulatory procedure with scrutiny referred to in Article 23(3).

▼M1

Article 17

Access to information

Decisions relating to the allocation of allowances, information on project activities in which a Member State participates or authorises private or public entities to participate, and the reports of emissions required under the greenhouse gas emissions permit and held by the competent authority, shall be made available to the public in accordance with Directive 2003/4/EC.

▼B

Article 18

Competent authority

Member States shall make the appropriate administrative arrangements, including the designation of the appropriate competent authority or authorities, for the implementation of the rules of this Directive. Where more than one competent authority is designated, the work of these authorities undertaken pursuant to this Directive must be coordinated.

▼M1

Member States shall in particular ensure coordination between their designated focal point for approving project activities pursuant to

▼M1

Article 6 (1)(a) of the Kyoto Protocol and their designated national authority for the implementation of Article 12 of the Kyoto Protocol respectively designated in accordance with subsequent decisions adopted under the UNFCCC or the Kyoto Protocol.

▼M2

Article 18a

Administering Member State

1. The administering Member State in respect of an aircraft operator shall be:

(a) in the case of an aircraft operator with a valid operating licence granted by a Member State in accordance with the provisions of Council Regulation (EEC) No 2407/92 of 23 July 1992 on licensing of air carriers ([1]), the Member State which granted the operating licence in respect of that aircraft operator; and

(b) in all other cases, the Member State with the greatest estimated attributed aviation emissions from flights performed by that aircraft operator in the base year.

2. Where in the first two years of any period referred to in Article 3c, none of the attributed aviation emissions from flights performed by an aircraft operator falling within paragraph 1(b) of this Article are attributed to its administering Member State, the aircraft operator shall be transferred to another administering Member State in respect of the next period. The new administering Member State shall be the Member State with the greatest estimated attributed aviation emissions from flights performed by that aircraft operator during the first two years of the previous period.

3. Based on the best available information, the Commission shall:

(a) before 1 February 2009, publish a list of aircraft operators which performed an aviation activity listed in Annex I on or after 1 January 2006 specifying the administering Member State for each aircraft operator in accordance with paragraph 1; and

(b) before 1 February of each subsequent year, update the list to include aircraft operators which have subsequently performed an aviation activity listed in Annex I.

4. The Commission may, in accordance with the regulatory procedure referred to in Article 23(2), develop guidelines relating to the administration of aircraft operators under this Directive by administering Member States.

5. For the purposes of paragraph 1, ‘base year’ means, in relation to an aircraft operator which started operating in the Community after 1 January 2006, the first calendar year of operation, and in all other cases, the calendar year starting on 1 January 2006.

Article 18b

Assistance from Eurocontrol

For the purposes of carrying out its obligations under Articles 3c(4) and 18a, the Commission may request the assistance of Eurocontrol or another relevant organisation and may conclude to that effect any appropriate agreements with those organisations.

([1]) OJ L 240, 24.8.1992, p. 1.

▼B

Article 19

Registries

▼M4

1. Allowances issued from 1 January 2012 onwards shall be held in the Community registry for the execution of processes pertaining to the maintenance of the holding accounts opened in the Member State and the allocation, surrender and cancellation of allowances under the Commission Regulation referred to in paragraph 3.

Each Member State shall be able to fulfil the execution of authorised operations under the UNFCCC or the Kyoto Protocol.

▼B

2. Any person may hold allowances. The registry shall be accessible to the public and shall contain separate accounts to record the allowances held by each person to whom and from whom allowances are issued or transferred.

▼M3

3. In order to implement this Directive, the Commission shall adopt a Regulation for a standardised and secured system of registries in the form of standardised electronic databases containing common data elements to track the issue, holding, transfer and cancellation of allowances, to provide for public access and confidentiality as appropriate and to ensure that there are no transfers which are incompatible with the obligations resulting from the Kyoto Protocol. That Regulation shall also include provisions concerning the use and identification of CERs and ERUs in the Community scheme and the monitoring of the level of such use. That measure, designed to amend non-essential elements of this Directive by supplementing it, shall be adopted in accordance with the regulatory procedure with scrutiny referred to in Article 23(3).

▼M4

4. The Regulation referred to in paragraph 3 shall contain appropriate modalities for the Community registry to undertake transactions and other operations to implement arrangements referred to in Article 25(1b). That Regulation shall also include processes for the change and incident management for the Community registry with regard to issues in paragraph 1 of this Article. It shall contain appropriate modalities for the Community registry to ensure that initiatives of the Member States pertaining to efficiency improvement, administrative cost management and quality control measures are possible.

▼B

Article 20

Central Administrator

1. The Commission shall designate a Central Administrator to maintain an independent transaction log recording the issue, transfer and cancellation of allowances.

2. The Central Administrator shall conduct an automated check on each transaction in registries through the independent transaction log to ensure there are no irregularities in the issue, transfer and cancellation of allowances.

3. If irregularities are identified through the automated check, the Central Administrator shall inform the Member State or Member States concerned who shall not register the transactions in question or any further transactions relating to the allowances concerned until the irregularities have been resolved.

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Article 21

Reporting by Member States

1. Each year the Member States shall submit to the Commission a report on the application of this Directive. ►M4 That report shall pay particular attention to the arrangements for the allocation of allowances, the operation of registries, the application of the implementing measures on monitoring and reporting, verification and accreditation and issues relating to compliance with this Directive and on the fiscal treatment of allowances, if any. ◄ The first report shall be sent to the Commission by 30 June 2005. The report shall be drawn up on the basis of a questionnaire or outline drafted by the Commission in accordance with the procedure laid down in Article 6 of Directive 91/692/EEC. The questionnaire or outline shall be sent to Member States at least six months before the deadline for the submission of the first report.

2. On the basis of the reports referred to in paragraph 1, the Commission shall publish a report on the application of this Directive within three months of receiving the reports from the Member States.

▼M4

3. The Commission shall organise an exchange of information between the competent authorities of the Member States concerning developments relating to issues of allocation, the use of ERUs and CERs in the Community scheme, the operation of registries, monitoring, reporting, verification, accreditation, information technology, and compliance with this Directive.

▼M1

Article 21a

Support of capacity-building activities

In accordance with the UNFCCC, the Kyoto Protocol and any subsequent decision adopted for their implementation, the Commission and the Member States shall endeavour to support capacity-building activities in developing countries and countries with economies in transition in order to help them take full advantage of JI and the CDM in a manner that supports their sustainable development strategies and to facilitate the engagement of entities in JI and CDM project development and implementation.

▼M4

Article 22

Amendments to the Annexes

The Annexes to this Directive, with the exception of Annexes I, IIa and IIb, may be amended in the light of the reports provided for in Article 21 and of the experience of the application of this Directive. Annexes IV and V may be amended in order to improve the monitoring, reporting and verification of emissions.

Those measures, designed to amend non-essential elements of this Directive, inter alia, by supplementing it, shall be adopted in accordance with the regulatory procedure with scrutiny referred to in Article 23(3).

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Article 23

Committee

1. The Commission shall be assisted by the committee instituted by Article 8 of Decision 93/389/EEC.

2. Where reference is made to this paragraph, Articles 5 and 7 of Decision 1999/468/EC shall apply, having regard to the provisions of Article 8 thereof.

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The period laid down in Article 5(6) of Decision 1999/468/EC shall be set at three months.

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3. Where reference is made to this paragraph, Article 5a(1) to (4) and Article 7 of Decision 1999/468/EC shall apply, having regard to the provisions of Article 8 thereof.

▼M4

4. Where reference is made to this paragraph, Article 4 and 7 of Decision 1999/468/EC shall apply, having regard to the provisions of Article 8 thereof.

Article 24

Procedures for unilateral inclusion of additional activities and gases

1. From 2008, Member States may apply emission allowance trading in accordance with this Directive to activities and to greenhouse gases which are not listed in Annex I, taking into account all relevant criteria, in particular the effects on the internal market, potential distortions of competition, the environmental integrity of the Community scheme and the reliability of the planned monitoring and reporting system, provided that inclusion of such activities and greenhouse gases is approved by the Commission

(a) in accordance with the regulatory procedure referred to in Article 23(2), if the inclusion refers to installations which are not covered by Annex I; or

(b) in accordance with the regulatory procedure with scrutiny referred to in Article 23(3), if the inclusion refers to activities and greenhouse gases which are not listed in Annex I. Those measures are designed to amend non-essential elements of this Directive by supplementing it.

2. When the inclusion of additional activities and gases is approved, the Commission may at the same time authorise the issue of additional allowances and may authorise other Member States to include such additional activities and gases.

3. On the initiative of the Commission or at the request of a Member State, a regulation may be adopted on the monitoring of, and reporting on, emissions concerning activities, installations and greenhouse gases which are not listed as a combination in Annex I, if that monitoring and reporting can be carried out with sufficient accuracy.

That measure, designed to amend non-essential elements of this Directive by supplementing it, shall be adopted in accordance with the regulatory procedure with scrutiny referred to in Article 23(3).

Article 24a

Harmonised rules for projects that reduce emissions

1. In addition to the inclusions provided for in Article 24, implementing measures for issuing allowances or credits in respect of projects administered by Member States that reduce greenhouse gas emissions not covered by the Community scheme may be adopted.

Those measures, designed to amend non-essential elements of this Directive by supplementing it, shall be adopted in accordance with the regulatory procedure with scrutiny referred to in Article 23(3).

Any such measures shall not result in the double-counting of emission reductions nor impede the undertaking of other policy measures to reduce emissions not covered by the Community scheme. Measures shall only be adopted where inclusion is not possible in accordance with Article 24, and the next review of the Community scheme shall consider harmonising the coverage of those emissions across the Community.

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2. Implementing measures that set out the details for crediting in respect of Community-level projects referred to in paragraph 1 may be adopted.

Those measures, designed to amend non-essential elements of this Directive by supplementing it, shall be adopted in accordance with the regulatory procedure with scrutiny referred to in Article 23(3).

3. A Member State can refuse to issue allowances or credits in respect of certain types of projects that reduce greenhouse gas emissions on its own territory.

Such projects will be executed on the basis of the agreement of the Member State in which the project takes place.

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Article 25

Links with other greenhouse gas emissions trading schemes

1. Agreements should be concluded with third countries listed in Annex B to the Kyoto Protocol which have ratified the Protocol to provide for the mutual recognition of allowances between the Community scheme and other greenhouse gas emissions trading schemes in accordance with the rules set out in Article 300 of the Treaty.

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1a. Agreements may be made to provide for the recognition of allowances between the Community scheme and compatible mandatory greenhouse gas emissions trading systems with absolute emissions caps established in any other country or in sub-federal or regional entities.

1b. Non-binding arrangements may be made with third countries or with sub-federal or regional entities to provide for administrative and technical coordination in relation to allowances in the Community scheme or other mandatory greenhouse gas emissions trading systems with absolute emissions caps.

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2. Where an agreement referred to in paragraph 1 has been concluded, the Commission shall adopt any necessary provisions relating to the mutual recognition of allowances under that agreement. Those measures, designed to amend non-essential elements of this Directive, by supplementing it, shall be adopted in accordance with the regulatory procedure with scrutiny referred to in Article 23(3).

▼M2

Article 25a

Third country measures to reduce the climate change impact of aviation

1. Where a third country adopts measures for reducing the climate change impact of flights departing from that country which land in the Community, the Commission, after consulting with that third country, and with Member States within the Committee referred to in Article 23(1), shall consider options available in order to provide for optimal interaction between the Community scheme and that country's measures.

Where necessary, the Commission may adopt amendments to provide for flights arriving from the third country concerned to be excluded from the aviation activities listed in Annex I or to provide for any other amendments to the aviation activities listed in Annex I which are required by an agreement pursuant to the fourth subparagraph. Those measures, designed to amend non-essential elements of this

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Directive, shall be adopted in accordance with the regulatory procedure with scrutiny referred to in Article 23(3).

The Commission may propose to the European Parliament and the Council any other amendments to this Directive.

The Commission may also, where appropriate, make recommendations to the Council in accordance with Article 300(1) of the Treaty to open negotiations with a view to concluding an agreement with the third country concerned.

2. The Community and its Member States shall continue to seek an agreement on global measures to reduce greenhouse gas emissions from aviation. In the light of any such agreement, the Commission shall consider whether amendments to this Directive as it applies to aircraft operators are necessary.

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Article 26

Amendment of Directive 96/61/EC

In Article 9(3) of Directive 96/61/EC the following subparagraphs shall be added:

‘Where emissions of a greenhouse gas from an installation are specified in 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 (*) in relation to an activity carried out in that installation, the permit shall not include an emission limit value for direct emissions of that gas unless it is necessary to ensure that no significant local pollution is caused.

For activities listed in Annex I to Directive 2003/87/EC, Member States may choose not to impose requirements relating to energy efficiency in respect of combustion units or other units emitting carbon dioxide on the site.

Where necessary, the competent authorities shall amend the permit as appropriate.

The three preceding subparagraphs shall not apply to installations temporarily excluded from the scheme for greenhouse gas emission allowance trading within the Community in accordance with Article 27 of Directive 2003/87/EC.

(*) OJ L 275, 25.10.2003, p. 32.’

▼M4

Article 27

Exclusion of small installations subject to equivalent measures

1. Following consultation with the operator, Member States may exclude from the Community scheme installations which have reported to the competent authority emissions of less than 25 000 tonnes of carbon dioxide equivalent and, where they carry out combustion activities, have a rated thermal input below 35 MW, excluding emissions from biomass, in each of the three years preceding the notification under point (a), and which are subject to measures that will achieve an equivalent contribution to emission reductions, if the Member State concerned complies with the following conditions:

(a) it notifies the Commission of each such installation, specifying the equivalent measures applying to that installation that will achieve an equivalent contribution to emission reductions that are in place, before the list of installations pursuant to Article 11(1) has to be

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submitted and at the latest when this list is submitted to the Commission;

(b) it confirms that monitoring arrangements are in place to assess whether any installation emits 25 000 tonnes or more of carbon dioxide equivalent, excluding emissions from biomass, in any one calendar year. Member States may allow simplified monitoring, reporting and verification measures for installations with average annual verified emissions between 2008 and 2010 which are below 5 000 tonnes a year, in accordance with Article 14;

(c) it confirms that if any installation emits 25 000 tonnes or more of carbon dioxide equivalent, excluding emissions from biomass, in any one calendar year or the measures applying to that installation that will achieve an equivalent contribution to emission reductions are no longer in place, the installation will be reintroduced into the Community scheme;

(d) it publishes the information referred to in points (a), (b) and (c) for public comment.

Hospitals may also be excluded if they undertake equivalent measures.

2. If, following a period of three months from the date of notification for public comment, the Commission does not object within a further period of six months, the exclusion shall be deemed approved.

Following the surrender of allowances in respect of the period during which the installation is in the Community scheme, the installation shall be excluded and the Member State shall no longer issue free allowances to the installation pursuant to Article 10a.

3. When an installation is reintroduced into the Community scheme pursuant to paragraph 1(c), any allowances issued pursuant to Article 10a shall be granted starting with the year of the reintroduction. Allowances issued to these installations shall be deducted from the quantity to be auctioned pursuant to Article 10(2) by the Member State in which the installation is situated.

Any such installation shall stay in the Community scheme for the rest of the trading period.

4. For installations which have not been included in the Community scheme during the period from 2008 to 2012, simplified requirements for monitoring, reporting and verification may be applied for determining emissions in the three years preceding the notification under paragraph 1 point (a).

Article 28

Adjustments applicable upon the approval by the Community of an international agreement on climate change

1. Within three months of the signature by the Community of an international agreement on climate change leading, by 2020, to mandatory reductions of greenhouse gas emissions exceeding 20 % compared to 1990 levels, as reflected in the 30 % reduction commitment as endorsed by the European Council of March 2007, the Commission shall submit a report assessing, in particular, the following elements:

(a) the nature of the measures agreed upon in the framework of the international negotiations as well as the commitments made by other developed countries to comparable emission reductions to those of the Community and the commitments made by economically more advanced developing countries to contributing adequately according to their responsibilities and respective capabilities;

(b) the implications of the international agreement on climate change, and consequently, options required at Community level, in order to

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move to the more ambitious 30 % reduction target in a balanced, transparent and equitable way, taking into account work under the Kyoto Protocol's first commitment period;

(c) the Community manufacturing industries' competitiveness in the context of carbon leakage risks;

(d) the impact of the international agreement on climate change on other Community economic sectors;

(e) the impact on the Community agriculture sector, including carbon leakage risks;

(f) the appropriate modalities for including emissions and removals related to land use, land use change and forestry in the Community;

(g) afforestation, reforestation, avoided deforestation and forest degradation in third countries in the event of the establishment of any internationally recognised system in this context;

(h) the need for additional Community policies and measures in view of the greenhouse gas reduction commitments of the Community' and of Member States.

2. On the basis of the report referred to in paragraph 1, the Commission shall, as appropriate, submit a legislative proposal to the European Parliament and to the Council amending this Directive pursuant to paragraph 1, with a view to the amending Directive entering into force upon the approval by the Community of the international agreement on climate change and in view of the emission reduction commitment to be implemented under that agreement.

The proposal shall be based upon the principles of transparency, economic efficiency and cost-effectiveness, as well as fairness and solidarity in the distribution of efforts between Member States.

3. The proposal shall allow, as appropriate, operators to use, in addition to the credits provided for in this Directive, CERs, ERUs or other approved credits from third countries which have ratified the international agreement on climate change.

4. The proposal shall also include, as appropriate, any other measures needed to help reach the mandatory reductions in accordance with paragraph 1 in a transparent, balanced and equitable way and, in particular, shall include implementing measures to provide for the use of additional types of project credits by operators in the Community scheme to those referred to in paragraphs 2 to 5 of Article 11a or the use by such operators of other mechanisms created under the international agreement on climate change, as appropriate.

5. The proposal shall include the appropriate transitional and suspensive measures pending the entry into force of the international agreement on climate change.

Article 29

Report to ensure the better functioning of the carbon market

If, on the basis of the regular reports on the carbon market referred to in Article 10(5), the Commission has evidence that the carbon market is not functioning properly, it shall submit a report to the European Parliament and to the Council. The report may be accompanied, if

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appropriate, by proposals aiming at increasing transparency of the carbon market and addressing measures to improve its functioning.

Article 29a

Measures in the event of excessive price fluctuations

1. If, for more than six consecutive months, the allowance price is more than three times the average price of allowances during the two preceding years on the European carbon market, the Commission shall immediately convene a meeting of the Committee established by Article 9 of Decision No 280/2004/EC.

2. If the price evolution referred to in paragraph 1 does not correspond to changing market fundamentals, one of the following measures may be adopted, taking into account the degree of price evolution:

(a) a measure which allows Member States to bring forward the auctioning of a part of the quantity to be auctioned;

(b) a measure which allows Member States to auction up to 25 % of the remaining allowances in the new entrants reserve.

Those measures shall be adopted in accordance with the management procedure referred to in Article 23(4).

3. Any measure shall take utmost account of the reports submitted by the Commission to the European Parliament and to the Council pursuant to Article 29, as well as any other relevant information provided by Member States.

4. The arrangements for the application of these provisions shall be laid down in the regulation referred to in Article 10(4).

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Article 30

Review and further development

1. On the basis of progress achieved in the monitoring of emissions of greenhouse gases, the Commission may make a proposal to the European Parliament and the Council by 31 December 2004 to amend Annex I to include other activities and emissions of other greenhouse gases listed in Annex II.

2. On the basis of experience of the application of this Directive and of progress achieved in the monitoring of emissions of greenhouse gases and in the light of developments in the international context, the Commission shall draw up a report on the application of this Directive, considering:

(a) how and whether Annex I should be amended to include other relevant sectors, *inter alia* the chemicals, aluminium and transport sectors, activities and emissions of other greenhouse gases listed in Annex II, with a view to further improving the economic efficiency of the scheme;

(b) the relationship of Community emission allowance trading with the international emissions trading that will start in 2008;

(c) further harmonisation of the method of allocation (including auctioning for the time after 2012) and of the criteria for national allocation plans referred to in Annex III;

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(d) the use of credits from project activities, including the need for harmonisation of the allowed use of ERUs and CERs in the Community scheme;

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(e) the relationship of emissions trading with other policies and measures implemented at Member State and Community level, including taxation, that pursue the same objectives;

(f) whether it is appropriate for there to be a single Community registry;

(g) the level of excess emissions penalties, taking into account, *inter alia*, inflation;

(h) the functioning of the allowance market, covering in particular any possible market disturbances;

(i) how to adapt the Community scheme to an enlarged European Union;

(j) pooling;

(k) the practicality of developing Community-wide benchmarks as a basis for allocation, taking into account the best available techniques and cost-benefit analysis;

▼M1

(l) the impact of project mechanisms on host countries, particularly on their development objectives, whether JI and CDM hydroelectric power production project activities with a generating capacity exceeding 500 MW and having negative environmental or social impacts have been approved, and the future use of CERs or ERUs resulting from any such hydroelectric power production project activities in the Community scheme;

(m) the support for capacity-building efforts in developing countries and countries with economies in transition;

(n) the modalities and procedures for Member States' approval of domestic project activities and for the issuing of allowances in respect of emission reductions or limitations resulting from such activities from 2008;

(o) technical provisions relating to the temporary nature of credits and the limit of 1 % for eligibility for land use, land-use change and forestry project activities as established in Decision 17/CP.7, and provisions relating to the outcome of the evaluation of potential risks associated with the use of genetically modified organisms and potentially invasive alien species by afforestation and reforestation project activities, to allow operators to use CERs and ERUs resulting from land use, land-use change and forestry project activities in the Community scheme from 2008, in accordance with the decisions adopted pursuant to the UNFCCC or the Kyoto Protocol.

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The Commission shall submit this report to the European Parliament and the Council by 30 June 2006, accompanied by proposals as appropriate.

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3. In advance of each period referred to in Article 11(2), each Member State shall publish in its national allocation plan its intended use of ERUs and CERs and the percentage of the allocation to each installation up to which operators are allowed to use ERUs and CERs in the Community scheme for that period. The total use of ERUs and CERs shall be consistent with the relevant supplementarity obligations under the Kyoto Protocol and the UNFCCC and the decisions adopted thereunder.

▼M1

Member States shall, in accordance with Article 3 of Decision No 280/2004/EC of the European Parliament and of the Council of 11 February 2004 concerning a mechanism for monitoring Community greenhouse gas emissions and for implementing the Kyoto Protocol ([1]), report to the Commission every two years on the extent to which domestic action actually constitutes a significant element of the efforts undertaken at national level, as well as the extent to which use of the project mechanisms is actually supplemental to domestic action, and the ratio between them, in accordance with the relevant provisions of the Kyoto Protocol and the decisions adopted thereunder. The Commission shall report on this in accordance with Article 5 of the said Decision. In the light of this report, the Commission shall, if appropriate, make legislative or other proposals to complement provisions adopted by Member States to ensure that use of the mechanisms is supplemental to domestic action within the Community.

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4. By 1 December 2014 the Commission shall, on the basis of monitoring and experience of the application of this Directive, review the functioning of this Directive in relation to aviation activities in Annex I and may make proposals to the European Parliament and the Council pursuant to Article 251 of the Treaty as appropriate. The Commission shall give consideration in particular to:

(a) the implications and impacts of this Directive as regards the overall functioning of the Community scheme;

(b) the functioning of the aviation allowance market, covering in particular any possible market disturbances;

(c) the environmental effectiveness of the Community scheme and the extent by which the total quantity of allowances to be allocated to aircraft operators under Article 3c should be reduced in line with overall EU emissions reduction targets;

(d) the impact of the Community scheme on the aviation sector, including issues of competitiveness, taking into account in particular the effect of climate change policies implemented for aviation outside the EU;

(e) continuing with the special reserve for aircraft operators, taking into account the likely convergence of growth rates across the industry;

(f) the impact of the Community scheme on the structural dependency on aviation transport of islands, landlocked regions, peripheral regions and the outermost regions of the Community;

(g) whether a gateway system should be included to facilitate the trading of allowances between aircraft operators and operators of installations whilst ensuring that no transactions would result in a net transfer of allowances from aircraft operators to operators of installations;

(h) the implications of the exclusion thresholds as specified in Annex I in terms of certified maximum take-off mass and number of flights per year performed by an aircraft operator;

(i) the impact of the exemption from the Community scheme of certain flights performed in the framework of public service obligations imposed in accordance with Council Regulation (EEC) No 2408/92 of 23 July 1992 on access for Community air carriers to intra-Community air routes ([2]);

(j) developments, including the potential for future developments, in the efficiency of aviation and in particular the progress towards meeting the Advisory Council for Aeronautics Research in Europe

([1]) OJ L 49, 19.2.2004, p. 1.
([2]) OJ L 240, 24.8.1992, p. 8.

▼M2

(ACARE) goal to develop and demonstrate technologies able to reduce fuel consumption by 50 % by 2020 and whether further measures to increase efficiency are necessary;

(k) developments in scientific understanding on the climate change impacts of contrails and cirrus clouds caused by aviation with a view to proposing effective mitigation measures.

The Commission shall then report to the European Parliament and the Council.

CHAPTER V

FINAL PROVISIONS

▼B

Article 31

Implementation

1. Member States shall bring into force the laws, regulations and administrative provisions necessary to comply with this Directive by 31 December 2003 at the latest. They shall forthwith inform the Commission thereof. The Commission shall notify the other Member States of these laws, regulations and administrative provisions.

When Member States adopt these measures, they shall contain a reference to this Directive or be accompanied by such a reference on the occasion of their official publication. The methods of making such reference shall be laid down by Member States.

2. Member States shall communicate to the Commission the text of the provisions of national law which they adopt in the field covered by this Directive. The Commission shall inform the other Member States thereof.

Article 32

Entry into force

This Directive shall enter into force on the day of its publication in the *Official Journal of the European Union*.

Article 33

Addressees

This Directive is addressed to the Member States.

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ANNEX I

CATEGORIES OF ACTIVITIES TO WHICH THIS DIRECTIVE APPLIES

1. Installations or parts of installations used for research, development and testing of new products and processes and installations exclusively using biomass are not covered by this Directive.

2. The thresholds values given below generally refer to production capacities or outputs. Where several activities falling under the same category are carried out in the same installation, the capacities of such activities are added together.

3. When the total rated thermal input of an installation is calculated in order to decide upon its inclusion in the Community scheme, the rated thermal inputs of all technical units which are part of it, in which fuels are combusted within the installation, are added together. These units could include all types of boilers, burners, turbines, heaters, furnaces, incinerators, calciners, kilns, ovens, dryers, engines, fuel cells, chemical looping combustion units, flares, and thermal or catalytic post-combustion units. Units with a rated thermal input under 3 MW and units which use exclusively biomass shall not be taken into account for the purposes of this calculation. 'Units using exclusively biomass' includes units which use fossil fuels only during start-up or shut-down of the unit.

4. If a unit serves an activity for which the threshold is not expressed as total rated thermal input, the threshold of this activity shall take precedence for the decision about the inclusion in the Community scheme.

5. When the capacity threshold of any activity in this Annex is found to be exceeded in an installation, all units in which fuels are combusted, other than units for the incineration of hazardous or municipal waste, shall be included in the greenhouse gas emission permit.

6. From 1 January 2012 all flights which arrive at or depart from an aerodrome situated in the territory of a Member State to which the Treaty applies shall be included.

Activities	Greenhouse gases
Combustion of fuels in installations with a total rated thermal input exceeding 20 MW (except in installations for the incineration of hazardous or municipal waste)	Carbon dioxide
Refining of mineral oil	Carbon dioxide
Production of coke	Carbon dioxide
Metal ore (including sulphide ore) roasting or sintering, including pelletisation	Carbon dioxide
Production of pig iron or steel (primary or secondary fusion) including continuous casting, with a capacity exceeding 2,5 tonnes per hour	Carbon dioxide
Production or processing of ferrous metals (including ferro-alloys) where combustion units with a total rated thermal input exceeding 20 MW are operated. Processing includes, inter alia, rolling mills, re-heaters, annealing furnaces, smitheries, foundries, coating and pickling	Carbon dioxide
Production of primary aluminium	Carbon dioxide and perfluorocarbons
Production of secondary aluminium where combustion units with a total rated thermal input exceeding 20 MW are operated	Carbon dioxide

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Activities	Greenhouse gases
Production or processing of non-ferrous metals, including production of alloys, refining, foundry casting, etc., where combustion units with a total rated thermal input (including fuels used as reducing agents) exceeding 20 MW are operated	Carbon dioxide
Production of cement clinker in rotary kilns with a production capacity exceeding 500 tonnes per day or in other furnaces with a production capacity exceeding 50 tonnes per day	Carbon dioxide
Production of lime or calcination of dolomite or magnesite in rotary kilns or in other furnaces with a production capacity exceeding 50 tonnes per day	Carbon dioxide
Manufacture of glass including glass fibre with a melting capacity exceeding 20 tonnes per day	Carbon dioxide
Manufacture of ceramic products by firing, in particular roofing tiles, bricks, refractory bricks, tiles, stoneware or porcelain, with a production capacity exceeding 75 tonnes per day	Carbon dioxide
Manufacture of mineral wool insulation material using glass, rock or slag with a melting capacity exceeding 20 tonnes per day	Carbon dioxide
Drying or calcination of gypsum or production of plaster boards and other gypsum products, where combustion units with a total rated thermal input exceeding 20 MW are operated	Carbon dioxide
Production of pulp from timber or other fibrous materials	Carbon dioxide
Production of paper or cardboard with a production capacity exceeding 20 tonnes per day	Carbon dioxide
Production of carbon black involving the carbonisation of organic substances such as oils, tars, cracker and distillation residues, where combustion units with a total rated thermal input exceeding 20 MW are operated	Carbon dioxide
Production of nitric acid	Carbon dioxide and nitrous oxide
Production of adipic acid	Carbon dioxide and nitrous oxide
Production of glyoxal and glyoxylic acid	Carbon dioxide and nitrous oxide
Production of ammonia	Carbon dioxide
Production of bulk organic chemicals by cracking, reforming, partial or full oxidation or by similar processes, with a production capacity exceeding 100 tonnes per day	Carbon dioxide

▼M4

Activities	Greenhouse gases
Production of hydrogen (H_2) and synthesis gas by reforming or partial oxidation with a production capacity exceeding 25 tonnes per day	Carbon dioxide
Production of soda ash (Na_2CO_3) and sodium bicarbonate ($NaHCO_3$)	Carbon dioxide
Capture of greenhouse gases from installations covered by this Directive for the purpose of transport and geological storage in a storage site permitted under Directive 2009/31/EC	Carbon dioxide
Transport of greenhouse gases by pipelines for geological storage in a storage site permitted under Directive 2009/31/EC	Carbon dioxide
Geological storage of greenhouse gases in a storage site permitted under Directive 2009/31/EC	Carbon dioxide
Aviation Flights which depart from or arrive in an aerodrome situated in the territory of a MemberState to which the Treaty applies. This activity shall not include: (a) flights performed exclusively for the transport, on official mission, of a reigning Monarch and his immediate family, Heads of State, Heads of Government and Government Ministers, of a country other than a Member State, where this is substantiated by an appropriate status indicator in the flight plan; (b) military flights performed by military aircraft and customs and police flights; (c) flights related to search and rescue, fire-fighting flights, humanitarian flights and emergency medical service flights authorised by the appropriate competent authority; (d) any flights performed exclusively under visual flight rules as defined in Annex 2 to the Chicago Convention; (e) flights terminating at the aerodrome from which the aircraft has taken off and during which no intermediate landing has been made; (f) training flights performed exclusively for the purpose of obtaining a licence, or a rating in the case of cockpit flight crew where this is substantiated by an appropriate remark in the flight plan provided that the flight does not serve for the transport of passengers and/or cargo or for the positioning or ferrying of the aircraft; (g) flights performed exclusively for the purpose of scientific research or for the purpose of checking, testing or certifying aircraft or equipment whether airborne or ground-based;	Carbon dioxide

▼M4

Activities	Greenhouse gases
(h) flights performed by aircraft with a certified maximum take-off mass of less than 5 700 kg;	
(i) flights performed in the framework of public service obligations imposed in accordance with Regulation (EEC) No 2408/92 on routes within outermost regions, as specified in Article 299(2) of the Treaty, or on routes where the capacity offered does not exceed 30 000 seats per year; and	
(j) flights which, but for this point, would fall within this activity, performed by a commercial air transport operator operating either: — fewer than 243 flights per period for three consecutive four-month periods, or — flights with total annual emissions lower than 10 000 tonnes per year. Flights performed exclusively for the transport, on official mission, of a reigning Monarch and his immediate family, Heads of State, Heads of Government and Government Ministers, of a MemberState may not be excluded under this point.	

▼B

ANNEX II

GREENHOUSE GASES REFERRED TO IN ARTICLES 3 AND 30

Carbon dioxide (CO_2)

Methane (CH_4)

Nitrous Oxide (N_2O)

Hydrofluorocarbons (HFCs)

Perfluorocarbons (PFCs)

Sulphur Hexafluoride (SF_6)

▼M4

ANNEX IIa

Increases in the percentage of allowances to be auctioned by Member States pursuant to Article 10(2)(a), for the purpose of Community solidarity and growth in order to reduce emissions and adapt to the effects of climate change

	Member State share
Belgium	10 %
Bulgaria	53 %
Czech Republic	31 %
Estonia	42 %
Greece	17 %
Spain	13 %
Italy	2 %
Cyprus	20 %
Latvia	56 %
Lithuania	46 %
Luxembourg	10 %
Hungary	28 %
Malta	23 %
Poland	39 %
Portugal	16 %
Romania	53 %
Slovenia	20 %
Slovakia	41 %
Sweden	10 %

▼**M4**

ANNEX IIb

DISTRIBUTION OF ALLOWANCES TO BE AUCTIONED BY MEMBER STATES PURSUANT TO ARTICLE 10(2)(c) REFLECTING EARLY EFFORTS OF SOME MEMBER STATES TO ACHIEVE 20 % REDUCTION OF GREENHOUSE GAS EMISSIONS

Member State	Distribution of the 2 % against the Kyoto base in percentages
Bulgaria	15 %
Czech Republic	4 %
Estonia	6 %
Hungary	5 %
Latvia	4 %
Lithuania	7 %
Poland	27 %
Romania	29 %
Slovakia	3 %

▼B

ANNEX IV

PRINCIPLES FOR MONITORING AND REPORTING REFERRED TO IN ARTICLE 14(1)

▼M2

PART A — Monitoring and reporting of emissions from stationary installations

▼B

Monitoring of carbon dioxide emissions

Emissions shall be monitored either by calculation or on the basis of measurement.

Calculation

Calculations of emissions shall be performed using the formula:

Activity data × Emission factor × Oxidation factor

Activity data (fuel used, production rate etc.) shall be monitored on the basis of supply data or measurement.

Accepted emission factors shall be used. Activity-specific emission factors are acceptable for all fuels. Default factors are acceptable for all fuels except non-commercial ones (waste fuels such as tyres and industrial process gases). Seam-specific defaults for coal, and EU-specific or producer country-specific defaults for natural gas shall be further elaborated. IPCC default values are acceptable for refinery products. The emission factor for biomass shall be zero.

If the emission factor does not take account of the fact that some of the carbon is not oxidised, then an additional oxidation factor shall be used. If activity-specific emission factors have been calculated and already take oxidation into account, then an oxidation factor need not be applied.

Default oxidation factors developed pursuant to Directive 96/61/EC shall be used, unless the operator can demonstrate that activity-specific factors are more accurate.

A separate calculation shall be made for each activity, installation and for each fuel.

Measurement

Measurement of emissions shall use standardised or accepted methods, and shall be corroborated by a supporting calculation of emissions.

Monitoring of emissions of other greenhouse gases

▼M3

Standardised or accepted methods shall be used, developed by the Commission in collaboration with all relevant stakeholders. Those measures, designed to amend non-essential elements of this Directive, by supplementing it, shall be adopted in accordance with the regulatory procedure with scrutiny referred to in Article 23(3).

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Reporting of emissions

Each operator shall include the following information in the report for an installation:

A. Data identifying the installation, including:

— Name of the installation;

— Its address, including postcode and country;

— Type and number of Annex I activities carried out in the installation;

— Address, telephone, fax and email details for a contact person; and

— Name of the owner of the installation, and of any parent company.

▼B

B. For each Annex I activity carried out on the site for which emissions are calculated:

— Activity data;

— Emission factors;

— Oxidation factors;

— Total emissions; and

— Uncertainty.

C. For each Annex I activity carried out on the site for which emissions are measured:

— Total emissions;

— Information on the reliability of measurement methods; and

— Uncertainty.

D. For emissions from combustion, the report shall also include the oxidation factor, unless oxidation has already been taken into account in the development of an activity-specific emission factor.

Member States shall take measures to coordinate reporting requirements with any existing reporting requirements in order to minimise the reporting burden on businesses.

▼M2

PART B — Monitoring and reporting of emissions from aviation activities

Monitoring of carbon dioxide emissions

Emissions shall be monitored by calculation. Emissions shall be calculated using the formula:

Fuel consumption × emission factor

Fuel consumption shall include fuel consumed by the auxiliary power unit. Actual fuel consumption for each flight shall be used wherever possible and shall be calculated using the formula:

Amount of fuel contained in aircraft tanks once fuel uplift for the flight is complete – amount of fuel contained in aircraft tanks once fuel uplift for subsequent flight is complete + fuel uplift for that subsequent flight.

If actual fuel consumption data are not available, a standardised tiered method shall be used to estimate fuel consumption data based on best available information.

Default IPCC emission factors, taken from the 2006 IPCC Inventory Guidelines or subsequent updates of these Guidelines, shall be used unless activity-specific emission factors identified by independent accredited laboratories using accepted analytical methods are more accurate. The emission factor for biomass shall be zero.

A separate calculation shall be made for each flight and for each fuel.

Reporting of emissions

Each aircraft operator shall include the following information in its report under Article 14(3):

A. Data identifying the aircraft operator, including:

— name of the aircraft operator,

— its administering Member State,

— its address, including postcode and country and, where different, its contact address in the administering Member State,

— the aircraft registration numbers and types of aircraft used in the period covered by the report to perform the aviation activities listed in Annex I for which it is the aircraft operator,

— the number and issuing authority of the air operator certificate and operating licence under which the aviation activities listed in Annex I for which it is the aircraft operator were performed,

▼M2

— address, telephone, fax and e-mail details for a contact person, and

— name of the aircraft owner.

B. For each type of fuel for which emissions are calculated:

— fuel consumption,

— emission factor,

— total aggregated emissions from all flights performed during the period covered by the report which fall within the aviation activities listed in Annex I for which it is the aircraft operator,

— aggregated emissions from:

— all flights performed during the period covered by the report which fall within the aviation activities listed in Annex I for which it is the aircraft operator and which departed from an aerodrome situated in the territory of a Member State and arrived at an aerodrome situated in the territory of the same Member State,

— all other flights performed during the period covered by the report which fall within the aviation activities listed in Annex I for which it is the aircraft operator,

— aggregated emissions from all flights performed during the period covered by the report which fall within the aviation activities listed in Annex I for which it is the aircraft operator and which:

— departed from each Member State, and

— arrived in each Member State from a third country,

— uncertainty.

Monitoring of tonne-kilometre data for the purpose of Articles 3e and 3f

For the purpose of applying for an allocation of allowances in accordance with Article 3e(1) or Article 3f(2), the amount of aviation activity shall be calculated in tonne-kilometres using the following formula:

tonne-kilometres = distance × payload

where:

‘distance’ means the great circle distance between the aerodrome of departure and the aerodrome of arrival plus an additional fixed factor of 95 km; and

‘payload’ means the total mass of freight, mail and passengers carried.

For the purposes of calculating the payload:

— the number of passengers shall be the number of persons on-board excluding crew members,

— an aircraft operator may choose to apply either the actual or standard mass for passengers and checked baggage contained in its mass and balance documentation for the relevant flights or a default value of 100 kg for each passenger and his checked baggage.

Reporting of tonne-kilometre data for the purpose of Articles 3e and 3f

Each aircraft operator shall include the following information in its application under Article 3e(1) or Article 3f(2):

A. Data identifying the aircraft operator, including:

— name of the aircraft operator,

— its administering Member State,

— its address, including postcode and country and, where different, its contact address in the administering Member State,

— the aircraft registration numbers and types of aircraft used during the year covered by the application to perform the aviation activities listed in Annex I for which it is the aircraft operator,

— the number and issuing authority of the air operator certificate and operating licence under which the aviation activities listed in Annex I for which it is the aircraft operator were performed,

▼M2

— address, telephone, fax and e-mail details for a contact person, and

— name of the aircraft owner.

B. Tonne-kilometre data:

— number of flights by aerodrome pair,

— number of passenger-kilometres by aerodrome pair,

— number of tonne-kilometres by aerodrome pair,

— chosen method for calculation of mass for passengers and checked baggage,

— total number of tonne-kilometres for all flights performed during the year to which the report relates falling within the aviation activities listed in Annex I for which it is the aircraft operator.

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ANNEX V

CRITERIA FOR VERIFICATION REFERRED TO IN ARTICLE 15

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PART A — Verification of emissions from stationary installations

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General Principles

1. Emissions from each activity listed in Annex I shall be subject to verification.

2. The verification process shall include consideration of the report pursuant to Article 14(3) and of monitoring during the preceding year. It shall address the reliability, credibility and accuracy of monitoring systems and the reported data and information relating to emissions, in particular:

   (a) the reported activity data and related measurements and calculations;

   (b) the choice and the employment of emission factors;

   (c) the calculations leading to the determination of the overall emissions; and

   (d) if measurement is used, the appropriateness of the choice and the employment of measuring methods.

3. Reported emissions may only be validated if reliable and credible data and information allow the emissions to be determined with a high degree of certainty. A high degree of certainty requires the operator to show that:

   (a) the reported data is free of inconsistencies;

   (b) the collection of the data has been carried out in accordance with the applicable scientific standards; and

   (c) the relevant records of the installation are complete and consistent.

4. The verifier shall be given access to all sites and information in relation to the subject of the verification.

5. The verifier shall take into account whether the installation is registered under the Community eco-management and audit scheme (EMAS).

Methodology

Strategic analysis

6. The verification shall be based on a strategic analysis of all the activities carried out in the installation. This requires the verifier to have an overview of all the activities and their significance for emissions.

Process analysis

7. The verification of the information submitted shall, where appropriate, be carried out on the site of the installation. The verifier shall use spot-checks to determine the reliability of the reported data and information.

Risk analysis

8. The verifier shall submit all the sources of emissions in the installation to an evaluation with regard to the reliability of the data of each source contributing to the overall emissions of the installation.

9. On the basis of this analysis the verifier shall explicitly identify those sources with a high risk of error and other aspects of the monitoring and reporting procedure which are likely to contribute to errors in the determination of the overall emissions. This especially involves the choice of the emission factors and the calculations necessary to determine the level of the emissions from individual sources. Particular attention shall be given to those sources with a high risk of error and the abovementioned aspects of the monitoring procedure.

10. The verifier shall take into consideration any effective risk control methods applied by the operator with a view to minimising the degree of uncertainty.

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Report

11. The verifier shall prepare a report on the validation process stating whether the report pursuant to Article 14(3) is satisfactory. This report shall specify all issues relevant to the work carried out. A statement that the report pursuant to Article 14(3) is satisfactory may be made if, in the opinion of the verifier, the total emissions are not materially misstated.

Minimum competency requirements for the verifier

12. The verifier shall be independent of the operator, carry out his activities in a sound and objective professional manner, and understand:

(a) the provisions of this Directive, as well as relevant standards and guidance adopted by the Commission pursuant to Article 14(1);

(b) the legislative, regulatory, and administrative requirements relevant to the activities being verified; and

(c) the generation of all information related to each source of emissions in the installation, in particular, relating to the collection, measurement, calculation and reporting of data.

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PART B — Verification of emissions from aviation activities

13. The general principles and methodology set out in this Annex shall apply to the verification of reports of emissions from flights falling within an aviation activity listed in Annex I.

For this purpose:

(a) in paragraph 3, the reference to operator shall be read as if it were a reference to an aircraft operator, and in point (c) of that paragraph the reference to installation shall be read as if it were a reference to the aircraft used to perform the aviation activities covered by the report;

(b) in paragraph 5, the reference to installation shall be read as if it were a reference to the aircraft operator;

(c) in paragraph 6 the reference to activities carried out in the installation shall be read as a reference to aviation activities covered by the report carried out by the aircraft operator;

(d) in paragraph 7 the reference to the site of the installation shall be read as if it were a reference to the sites used by the aircraft operator to perform the aviation activities covered by the report;

(e) in paragraphs 8 and 9 the references to sources of emissions in the installation shall be read as if they were a reference to the aircraft for which the aircraft operator is responsible; and

(f) in paragraphs 10 and 12 the references to operator shall be read as if they were a reference to an aircraft operator.

Additional provisions for the verification of aviation emission reports

14. The verifier shall in particular ascertain that:

(a) all flights falling within an aviation activity listed in Annex I have been taken into account. In this task the verifier shall be assisted by timetable data and other data on the aircraft operator's traffic including data from Eurocontrol requested by that operator;

(b) there is overall consistency between aggregated fuel consumption data and data on fuel purchased or otherwise supplied to the aircraft performing the aviation activity.

Additional provisions for the verification of tonne-kilometre data submitted for the purposes of Articles 3e and 3f

15. The general principles and methodology for verifying emissions reports under Article 14(3) as set out in this Annex shall, where applicable, also apply correspondingly to the verification of aviation tonne-kilometre data.

16. The verifier shall in particular ascertain that only flights actually performed and falling within an aviation activity listed in Annex I for which the aircraft operator is responsible have been taken into account in that operator's application under Articles 3e(1) and 3f(2). In this task the

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verifier shall be assisted by data on the aircraft operator's traffic including data from Eurocontrol requested by that operator. In addition, the verifier shall ascertain that the payload reported by the aircraft operator corresponds to records on payloads kept by that operator for safety purposes.

COMMISSION DECISION

of 5 September 2013

concerning national implementation measures for the transitional free allocation of greenhouse gas emission allowances in accordance with Article 11(3) of Directive 2003/87/EC of the European Parliament and of the Council

(notified under document C(2013) 5666)

(Text with EEA relevance)

(2013/448/EU)

THE EUROPEAN COMMISSION,

Having regard to the Treaty of the Functioning of the European Union,

Having regard 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 [1], and in particular Articles 10a and 11 thereof,

Whereas:

(1) Auctioning is the rule for the allocation of emission allowances from 2013 onwards to operators of installations within the scope of the emissions trading scheme of the Union (EU ETS). However, eligible operators will continue to receive free allowances between 2013 and 2020. The amount of allowances that each such operator receives is determined on the basis of Union-wide harmonised rules set out in Directive 2003/87/EC and Commission Decision 2011/278/EU [2].

(2) Member States were required to submit to the Commission by 30 September 2011 their National Implementation Measures (NIMs) comprising, among other mandatory information, a list of installations covered by Directive 2003/87/EC on their territory and the preliminary amount of free allowances to be allocated between 2013 and 2020 calculated on the basis of the Union-wide harmonised rules.

(3) Article 18 of the Act concerning the conditions of accession of the Republic of Croatia and the adjustments to the Treaty on European Union, the Treaty on the Functioning of the European Union and to the Treaty establishing the European Atomic Energy Community [3] provides for transitional measures applying in respect of Croatia and set out in Annex V to this Act. Pursuant to point 10 of that Annex V, Croatia is required to ensure that operators comply with Directive 2003/87/EC for the whole year 2013. Likewise, operators of eligible installations receive free allocation for the whole year 2013 to allow them full compliance with the EU ETS and its principle of annual monitoring, reporting and verification of emissions and surrender of emission allowances. Accordingly, Croatia submitted the NIMs to the Commission in accordance with Article 11(1) of Directive 2003/87/EC and Article 15(1) of Decision 2011/278/EU.

(4) To ensure data quality and comparability, the Commission provided an electronic template for the submission of the NIMs. All Member States submitted in this or in a similar format a list of installations, a table containing all relevant data per installation and a methodology report setting out the data collection process conducted by Member States' authorities.

(5) Given the wide range of information and data submitted, the Commission first analysed the completeness of all the NIMs. Where the Commission noted that submissions were incomplete, it requested additional information from the Member States concerned. In reply to those requests, the relevant authorities submitted additional relevant information in order to complete the submitted NIMs.

(6) The NIMs, including the preliminary total annual amounts of emission allowances to be allocated for free between 2013 and 2020, have then been evaluated against the criteria contained in Directive 2003/87/EC, notably Article 10a thereof, and in Decision 2011/278/EU, taking into account the Commission's guidance documents to Member States endorsed by the Climate Change Committee on 14 April 2011. Where applicable, account has been taken of the guidance on interpretation of Annex I to Directive 2003/87/EC.

[1] OJ L 275, 25.10.2003, p. 32.

[2] 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 L 130, 17.5.2011, p. 1).

[3] OJ L 112, 24.4.2012, p. 21.

(7) The Commission carried out an in-depth compliance assessment of the NIMs for each individual Member State. As part of that comprehensive assessment, the Commission analysed the consistency of the data itself and the consistency of the data with the harmonised allocation rules. First, the Commission examined the eligibility of installations for free allocation, the division of installations into subinstallations and their boundaries. The Commission then analysed the application of the correct benchmark values to the relevant subinstallations. Considering that for product-benchmark subinstallations Decision 2011/278/EU lays down, in principle, for each product one benchmark, the Commission paid particular attention to the application of the benchmark value to the final product produced in accordance with the product definition and the system boundaries set out in Annex I to Decision 2011/278/EU. Furthermore, given the significant impact on allocations, the Commission analysed in detail the calculation of the historical activity levels of installations, cases of significant capacity changes during the baseline period as well as cases of installations starting operation during the baseline period, the calculation of the preliminary number of emission allowances to be allocated free of charge taking into account the exchangeability of fuel and electricity, the carbon leakage status as well as heat exports to private households. Further statistical analyses and plausibility checks using indicators such as, for example, proposed allocation per historical activity level compared to benchmark values or historical activity level compared to production capacity helped in identifying additional potential irregularities in the application of the harmonised allocation rules.

(8) On the basis of the results of that assessment, the Commission carried out a detailed assessment of installations where potential irregularities in the application of the harmonised allocation rules were identified, seeking further clarification from the competent authorities of the Member State concerned.

(9) In the light of the results of that compliance assessment, the Commission considers the NIMs of Belgium, Bulgaria, Denmark, Estonia, Ireland, Greece, Spain, France, Croatia, Italy, Cyprus, Latvia, Lithuania, Luxembourg, Hungary, Malta, the Netherlands, Austria, Poland, Portugal, Romania, Slovenia, Slovakia, Finland, Sweden and the United Kingdom to be compatible with Directive 2003/87/EC and Decision 2011/278/EU. The installations included in the NIMs by these Member States have been found eligible for free allocation and no inconsistencies with regard to the preliminary total annual amounts of emission allowances allocated free of charge proposed by each of these Member States could be detected.

(10) But, in the light of the results of the assessment, the Commission finds that certain aspects of the NIMs submitted by the Czech Republic and Germany are incompatible with the criteria contained in Directive 2003/87/EC and in Decision 2011/278/EU, taking into account the Commission's guidance documents to Member States endorsed by the Climate Change Committee on 14 April 2011.

(11) The Commission notes that Germany has proposed that seven installations receive an increase in the level of free allocation of emission allowances because it considers this would avoid undue hardship. In accordance with Article 10a of Directive 2003/87/EC and Decision 2011/278/EU, the preliminary amounts of free allocation to be submitted as part of the NIMs are calculated on the basis of harmonised Union-wide rules. Decision 2011/278/EU does not provide for the adjustment which Germany would wish to make on the basis of Article 9(5) of the German Greenhouse Gas Emissions Trading Act — TEHG of 28 July 2011. Whereas until 2012, free allocation of emission allowances was organised nationally, for the period as of 2013 the legislator intentionally established fully-harmonised rules for free allocation to installations, so that all installations are treated in the same manner. Any unilateral change to the preliminary amounts of free allocation calculated by Member States on the basis of Decision 2011/278/EU would undermine this harmonised approach. Germany has not substantiated that the allocation for the installations in question calculated on the basis of Decision 2011/278/EU was manifestly inappropriate having regard to the objective of full harmonisation of allocations to be achieved. Assigning more free allowances to some installations would distort or threaten to distort competition and has cross-border effects given Union-wide trade in all sectors covered by Directive 2003/87/EC. In the light of the principle of equal treatment of installations under the EU ETS and of Member States, the Commission finds that it is therefore appropriate to object to the preliminary amounts of free allocation to certain installations contained in the German NIMs and listed in point A of Annex I.

(12) The Commission finds that the NIMs proposed by Germany also contravene Decision 2011/278/EU because the application of the product benchmark for hot metal in the cases listed in point B of Annex I to this Decision is inconsistent with the relevant rules. In this regard, the Commission observes that in the German NIMs, in cases of basic oxygen furnace (BOF) steelmaking processes and where hot metal from the blast furnace is

not refined to steel within the same installation, but exported for further processing, no free allocation of emission allowances is provided to the operator of the installation with the blast furnace for the production of the hot metal. Instead, the free allocation is provided to the installation where the steel refining takes place.

(13) The Commission notes that for the purposes of allocating emission allowances, product benchmarks have been laid down in Decision 2011/278/EU taking into account the product definitions and the complexity of the production processes that allow for verification of production data and a uniform application of the product benchmarks across the Union. For the application of the product benchmarks, installations are divided into sub-installations, a product benchmark sub-installation being defined as inputs, outputs and corresponding emissions relating to the production of a product for which a benchmark has been set in Annex I to Decision 2011/278/EU. Benchmarks are thus established for products and not for processes. Accordingly, a benchmark has been developed for hot metal, with the product defined as liquid iron saturated with carbon for further processing. The fact that the system boundaries for the hot metal benchmark set out in Annex I to Decision 2011/278/EU comprise the BOF cannot permit Member States to disregard that allocations should take place for the production of a given product. This consideration is corroborated by the fact that the benchmark values should cover all production-related direct emissions. However, it is the production of hot metal in the blast furnace that mainly causes emissions while the process of refining the hot metal to steel in the BOF converter is relatively low in emissions. Accordingly, the benchmark value would be much lower, if it also covered installations importing hot metal and refining it in the BOF converter to steel. Moreover, in the light of the overall scheme for allocation set up by Decision 2011/278/EU, in particular with regard to the rules on significant capacity changes, the allocation proposed by Germany cannot be regarded as consistent. The Commission therefore finds that due to the lack of a corresponding sub-installation that would allow for the determination of the allocation in accordance with Article 10 of Decision 2011/278/EU, installations importing hot metal for further processing cannot be regarded eligible for receiving free allocation on the basis of the hot metal benchmark for the amount of hot metal imported. The Commission therefore objects to the preliminary total annual amounts of free allocation proposed for the installations listed in point B of Annex I to this Decision.

(14) With regard to the application of the benchmark for hot metal in the NIMs as proposed by the Czech Republic, the Commission notes that the allocation to the installation listed under point C with the identifier CZ-existing-CZ-73-CZ-0134-11/M does not correspond to the value of the hot metal benchmark multiplied by the relevant product-related historical activity level as submitted in the NIMs and is therefore not in line with Article 10(2)(a) of Decision 2011/278/EU. The Commission therefore objects to the allocation to this installation unless this error is corrected. Furthermore, the Commission notes that the allocation to the installation listed under point C with the identifier CZ-existing-CZ-52-CZ-0102-05 takes account of processes that are covered by the system boundaries of the hot metal benchmark. The installation, however, does not produce, but imports hot metal. Due to the lack of production of hot metal in the installation with the identifier CZ-existing-CZ-52-CZ-0102-05, and thus a lack of a corresponding product benchmark sub-installation that would allow for the determination of the allocation in accordance with Article 10 of Decision 2011/278/EU, the proposed allocation is not consistent with the allocation rules and may give rise to double counting. The Commission therefore objects to the allocation to the installations listed in point C of Annex I to this Decision.

(15) The Commission notes that the installations referred to in point D of Annex I to this Decision receive an allocation on the basis of a process emissions sub-installation for the production of zinc in the blast furnace and related processes. In this regard, the Commission notes that the emissions covered by the process emissions sub-installation are already covered by the product benchmark sub-installation for hot metal on the basis of which one of the installations also receives an allocation and are thus double counted. The product benchmark sub-installation for hot metal clearly covers inputs, outputs and corresponding emissions relating to the production of hot metal in the blast furnace and all related processes as set out in Annex I to Decision 2011/278/EU, including slag treatment. The NIMs proposed by Germany therefore contravene Article 10(8) of Decision 2011/278/EU and the obligation to avoid double-counting of emissions because certain emissions are accounted for twice in the allocation to these installations. The Commission therefore objects to the allocation to these installations on the basis of a process emissions sub-installation for the production of zinc in the blast furnace and related processes.

(16) The Commission also notes that the list of installations set out in the German NIMs 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/EC, 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/EC. 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/EC. 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/EU.

(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/EC 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/EC 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.

(18) In accordance with Articles 9 and 9a of Directive 2003/87/EC, the Commission published by Decision 2010/634/EU [1] the absolute Union-wide quantity of allowances for the period from 2013 to 2020. In this regard, the quantity taken into account pursuant to Article 9 of Directive 2003/87/EC is based on the total quantities of allowances issued by the Member States in accordance with the Commission decisions on their National Allocation Plans for the period from 2008 to 2012. However, after the end of the trading period from 2008 to 2012, additional information and more accurate data has become available to the Commission in particular with regard to the quantity of allowances issued to new entrants from the Member States' New Entrant Reserves and on the use of allowances in Member States' set-asides for Joint Implementation projects established pursuant to Article 3 of Commission Decision 2006/780/EC [2]. Furthermore, with regard to the adjustment of the Union-wide quantity of allowances pursuant to Article 9a of Directive 2003/87/EC, and in particular paragraphs 1 and 4 thereof, account should be taken of the latest scientific data with regard to the global warming potential of greenhouse gases, Commission Decisions C(2011) 3798 and C(2012) 497 to accept the unilateral inclusion of additional greenhouse gases and activities by Italy and the United Kingdom pursuant to Article 24 of Directive 2003/87/EC as well as the exclusion of installations with low emissions from the EU ETS by Germany, Spain, France, Italy, the Netherlands, Slovenia and the United Kingdom, pursuant to Article 27 of Directive 2003/87/EC.

(19) In addition, the absolute Union-wide quantity of allowances should take account of the accession of Croatia to the European Union as well as the extension of the EU ETS to the EEA-EFTA States. Pursuant to point 8 of Annex III to the Act concerning the conditions of accession of the Republic of Croatia and the adjustments to the Treaty on European Union, the Treaty on the Functioning of the European Union and to the Treaty establishing the European Atomic Energy Community, the quantity taken into account pursuant to Article 9 of Directive 2003/87/EC is increased as a result of Croatia's accession by the quantity of allowances that Croatia shall auction pursuant to Article 10(1) of Directive 2003/87/EC. The incorporation into the European Economic Area (EEA) Agreement of Directive 2009/29/EC of the European Parliament and of the Council [3] and Decision 2011/278/EU as amended by Commission Decision 2011/745/EU [4] by Decision of the EEA Joint Committee No 152/2012 [5] implies an increase of the total quantity of allowances in the EU ETS as a whole under Articles 9 and 9a of Directive 2003/87/EC. It is therefore necessary to take account of the relevant figures provided by the EEA-EFTA States in Part A of the Appendix to that Directive in the EEA Agreement.

[1] Commission Decision 2010/634/EU of 22 October 2010 adjusting the Union-wide quantity of allowances to be issued under the Union Scheme for 2013 and repealing Decision 2010/384/EU (OJ L 279, 23.10.2010, p. 34).

[2] Commission Decision 2006/780/EC of 13 November 2006 on avoiding double counting of greenhouse gas emission reductions under the Community emissions trading scheme for project activities under the Kyoto Protocol pursuant to Directive 2003/87/EC of the European Parliament and of the Council (OJ L 316, 16.11.2006, p. 12).

[3] Directive 2009/29/EC of the European Parliament and of the Council of 23 April 2009 amending Directive 2003/87/EC so as to improve and extend greenhouse gas emission allowance trading scheme of the Community (OJ L 140, 5.6.2009, p. 63).

[4] Commission Decision 2011/745/EU of 11 November 2011 amending Decisions 2010/2/EU and 2011/278/EU as regards the sectors and subsectors which are deemed to be exposed to a significant risk of carbon leakage (OJ L 299, 17.11.2011, p. 9).

[5] Decision of the EEA Joint Committee No 152/2012 of 26 July 2012 amending Annex XX (Environment) to the EEA Agreement (OJ L 309, 8.11.2012, p. 38).

(20) Decision 2010/634/EU should therefore be amended accordingly.

(21) In 2014 and each subsequent year, the total quantity of allowances determined for 2013 on the basis of Articles 9 and 9a of Directive 2003/87/EC decreases by a linear factor of 1,74 % from 2010, amounting to 38 264 246 allowances.

(22) Article 10a(5) of Directive 2003/87/EC limits the maximum annual quantity of allowances that is the basis for calculating allocations free of charge to installations not covered by Article 10a(3) of Directive 2003/87/EC. This limit is composed of two elements referred to in points (a) and (b) of Article 10a(5) of Directive 2003/87/EC, each of which has been determined by the Commission on the basis of the quantities determined pursuant to Articles 9 and 9a of Directive 2003/87/EC, data publicly available in the Union registry and information provided by Member States, in particular with regard to the share of emissions from electricity generators and other installations not eligible for free allocation referred to in Article 10a(3) of Directive 2003/87/EC as well as verified emissions in the period from 2005 to 2007 from installations only included in the EU ETS from 2013 onwards, where available, taking into account the latest scientific data with regard to the global warming potential of greenhouse gases.

(23) The limit set by Article 10a(5) of Directive 2003/87/EC may not be exceeded, and this is ensured by the application of an annual cross-sectoral correction factor which, if necessary, reduces the number of free allowances in all installations eligible for free allocation in a uniform manner. Member States have to take this factor into account when deciding on the basis of preliminary allocations and this Decision on the final annual amounts of allocation to installations. Article 15(3) of Decision 2011/278/EU requires the Commission to determine the cross-sectoral correction factor, which is done through comparing the sum of the preliminary total annual amounts of free allocation submitted by Member States to the limit set by Article 10a(5) in the manner set out in Article 15(3) of Decision 2011/278/EU.

(24) Following the incorporation into the EEA Agreement of Directive 2009/29/EC by Decision of the EEA Joint Committee No 152/2012, the limit set by Article 10a(5) of Directive 2003/87/EC, the harmonised allocation rules and the cross-sectoral correction factor are to be applied within the EEA-EFTA countries. It is therefore necessary to take into account the preliminary annual amounts of emission allowances allocated free of charge over the period 2013 to 2020 fixed by the decisions of the EFTA Surveillance Authority of 10 July 2013 concerning the NIMs of Iceland, Liechtenstein and Norway.

(25) The limit set by Article 10a(5) of Directive 2003/87/EC is 809 315 756 allowances in 2013. In order to derive this limit, the Commission first collected from Member States and the EEA-EFTA countries information on whether installations qualify as an electricity generator or other installation covered by Article 10a(3) of Directive 2003/87/EC. The Commission then determined the share of emissions in the period from 2005 to 2007 from the installations not covered by that provision, but included in the EU ETS in the period from 2008 to 2012. The Commission then applied this share of 34,78289436 % to the quantity determined on the basis of Article 9 of Directive 2003/87/EC (1 976 784 044 allowances). To the result of this calculation, the Commission then added 121 733 050 allowances, based on the average annual verified emissions in the period from 2005 to 2007 of relevant installations taking into account the revised scope of the EU ETS as of 2013. In this respect, the Commission used information provided by Member States and the EEA-EFTA countries for the adjustment of the cap. Where annual verified emissions for the period 2005-2007 were not available, the Commission extrapolated, to the extent possible, the relevant emission figures from verified emissions in later years by applying the factor of 1,74 % in reverse direction. The Commission consulted and obtained confirmation from Member States' authorities on information and data used in this respect. The limit set by Article 10a(5) of Directive 2003/87/EC compared to the sum of the preliminary annual amounts of free allocation without application of the factors referred to in Annex VI to Decision 2011/278/EU gives the annual cross-sectoral correction factor as set out in Annex II to this Decision.

(26) Given the improved overview of the number of allowances that will be allocated free of charge that results from this Decision, the Commission is able to better estimate the amount of allowances to be auctioned in accordance with Article 10(1) of Directive 2003/87/EC. Taking into account the limit set by Article 10a(5) of Directive 2003/87/EC, the allocation in respect of heat production pursuant to Article 10a(4) set out in the table below and the size of the new entrants' reserve, the Commission estimates that the amount of allowances to be auctioned in the period from 2013 to 2020 is 8 176 193 157.

(27) The following table sets out the annual allocation in respect of heat production pursuant to Article 10a(4) of Directive 2003/87/EC:

Year	Free allocation under Article 10a(4) of Directive 2003/87/EC
2013	104 326 872
2014	93 819 860
2015	84 216 053
2016	75 513 746
2017	67 735 206
2018	60 673 411
2019	54 076 655
2020	47 798 754

(28) Member States should, on the basis of the NIMs, the cross-sectoral correction factor and the linear factor, proceed to the determination of the final annual amount of emission allowances allocated free of charge for each year over the period from 2013 to 2020. The final annual amount of free emission allowances should be determined by Member States in accordance with this Decision, Directive 2003/87/EC, Decision 2011/278/EU and with other relevant provisions of Union law. Likewise, the EEA EFTA States should proceed to the determination of the final annual amount of allowances allocated free of charge for each year from 2013 to 2020 in accordance with Article 10(9) of Decision 2011/278/EU to installations on their territory on the basis of their NIMs, the cross-sectoral correction factor and the linear factor.

(29) The Commission considers that the allocation of allowances free of charge to installations covered by the EU ETS on the basis of Union-wide harmonised rules does not confer a selective economic advantage to undertakings with the potential to distort competition and affect intra-Union trade. Member States are obliged under Union law to allocate allowances for free and cannot choose to auction the relevant quantities instead. Member States' decisions with regard to the allocation of allowances free of charge cannot therefore be considered as involving State aid in the sense of Articles 107 and 108 TFEU,

HAS ADOPTED THIS DECISION:

CHAPTER I

NATIONAL IMPLEMENTING MEASURES

Article 1

1. The inscription of the installations listed in Annex I to this Decision on the lists of installations covered by Directive 2003/87/EC submitted to the Commission pursuant to Article 11(1) of Directive 2003/87/EC 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 submitted for the installations in its territory included in the lists referred to in paragraph 1 and listed in point A of Annex I to this Decision before determining the final total annual amount for each year from 2013 to 2020 in accordance with Article 10(9) of Decision 2011/278/EU to the extent that the amendment consists of excluding any increase in allocation that is not provided for in that Decision.

No objections are raised should a Member State amend the preliminary total annual amounts of emission allowances allocated for free to installations in its territory included in the lists referred to in paragraph 1 and listed in point B of Annex I to this Decision before determining the final total annual amount for each year from 2013 to 2020 in accordance with Article 10(9) of Decision 2011/278/EU to the extent that the amendment consists of excluding any allocation on the basis of the hot metal benchmark to installations importing hot metal as defined in Annex I to Decision 2011/278/EU for further processing. Where this leads to an increase of the preliminary total annual amount of emission allowances in an installation producing and exporting hot metal to an installation listed in point B of Annex I to this Decision, no objections are raised should the Member State concerned amend the preliminary total annual amount of this installation producing and exporting hot metal accordingly.

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 C of Annex I to this Decision before determining the final total annual amount for each year from 2013 to 2020 in accordance with Article 10(9) of Decision 2011/278/EU to the extent that the amendment consists of bringing the allocation in line with Article 10(2)(a) of Decision 2011/278/EU and excluding any allocation for processes that are covered by the system boundaries of the product benchmark for hot metal as defined in Annex I to Decision 2011/278/EU to an installation not producing, but importing hot metal that would otherwise lead to double counting.

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 D of Annex I to this Decision before determining the final total annual amount for each year from 2013 to 2020 in accordance with Article 10(9) of Decision 2011/278/EU to the extent that the amendment consists of excluding any allocation on the

basis of a process emissions sub-installation for the production of zinc in the blast furnace and related processes. Where this leads to an increase of the preliminary allocation under the fuel or heat benchmark sub-installation in an installation with a blast furnace and listed in point D of Annex I to this Decision, no objections are raised should the Member State concerned amend the preliminary total annual amount of this installation accordingly.

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 Article 10(9) of Decision 2011/278/EU 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.

3. Any amendment referred to in paragraph 2 shall be notified to the Commission as soon as possible, and a Member State may not proceed to the determination of the final total annual amount for each year from 2013 to 2020 in accordance with Article 10(9) of Decision 2011/278/EU until acceptable amendments have been made.

Article 2

Without prejudice to Article 1, no objections are raised with regard to the lists of installations covered by Directive 2003/87/EC submitted by Member States pursuant to Article 11(1) of Directive 2003/87/EC and the corresponding preliminary total annual amounts of emission allowances allocated for free to these installations.

CHAPTER II

TOTAL QUANTITY OF ALLOWANCES

Article 3

Article 1 of Decision 2010/634/EU is replaced by the following:

"*Article 1*

On the basis of Articles 9 and 9a of Directive 2003/87/EC, the total quantity of allowances to be issued from 2013 onwards and annually decreased in a linear manner pursuant to Article 9 of Directive 2003/87/EC, is 2 084 301 856 allowances."

CHAPTER III

CROSS-SECTORAL CORRECTION FACTOR

Article 4

The uniform cross-sectoral correction factor referred to in Article 10a(5) of Directive 2003/87/EC and determined in accordance with Article 15(3) of Decision 2011/278/EU is set out in Annex II to this Decision.

Article 5

This Decision is addressed to the Member States.

Done at Brussels, 5 September 2013.

For the Commission

Connie HEDEGAARD

Member of the Commission

ANNEX I

POINT A

Installation Identifier as submitted in the NIMs
DE000000000000010
DE000000000000563
DE000000000000978
DE000000000001320
DE000000000001425
DE-new-14220-0045
DE-new-14310-1474

POINT B

Installation Identifier as submitted in the NIMs
DE000000000000044
DE000000000000053
DE000000000000056
DE000000000000059
DE000000000000069

POINT C

Installation identifier as submitted in the NIMs
CZ-existing-CZ-73-CZ-0134-11/M
CZ-existing-CZ-52-CZ-0102-05

POINT D

Installation Identifier as submitted in the NIMs
DE-new-14220-0045
DE000000000001320

POINT E

Installation Identifier as submitted in the NIMs
DE000000000000005
DE000000000000762

DE000000000001050
DE000000000001537
DE000000000002198

ANNEX II

Year	Cross-sectoral correction factor
2013	94,272151 %
2014	92,634731 %
2015	90,978052 %
2016	89,304105 %
2017	87,612124 %
2018	85,903685 %
2019	84,173950 %
2020	82,438204 %

Gesetz über den Handel mit Berechtigungen zur Emission von Treibhausgasen (Treibhausgas-Emissionshandelsgesetz - TEHG)

TEHG

Ausfertigungsdatum: 21.07.2011

Vollzitat:

"Treibhausgas-Emissionshandelsgesetz vom 21. Juli 2011 (BGBl. I S. 1475), das zuletzt durch Artikel 4 Absatz 27 des Gesetzes vom 18. Juli 2016 (BGBl. I S. 1666) geändert worden ist"

Stand: Zuletzt geändert durch Art. 4 Abs. 27 G v. 18.7.2016 I 1666
Mittelbare Änderung durch Art. 2 u. Art. 5 Abs. 9 G v. 18.7.2016 I 1666 ist berücksichtigt

*) Dieses Gesetz dient der Umsetzung der Richtlinie 2003/87/EG des Europäischen Parlaments und des Rates vom 13. Oktober 2003 über ein System für den Handel mit Treibhausgasemissionszertifikaten in der Gemeinschaft und zur Änderung der Richtlinie 96/61/EG des Rates (ABl. L 275 vom 25.10.2003, S. 32), die zuletzt durch die Richtlinie 2009/29/EG (ABl. L 140 vom 5.6.2009, S. 63) geändert worden ist, und der Richtlinie 2006/123/EG des Europäischen Parlaments und des Rates vom 12. Dezember 2006 über Dienstleistungen im Binnenmarkt (ABl. L 376 vom 27.12.2006, S. 36).

Fußnote

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(+++ Textnachweis ab: 28.7.2011 +++)
(+++ Zur Anwendung vgl. §§ 33, 34, 35 +++)
(+++ Amtlicher Hinweis des Normgebers auf EG-Recht:
     Umsetzung der
       EGRL  87/2003           (CELEX Nr: 32003L0087)
       EGRL 123/2006           (CELEX Nr: 32006L0123) +++)
```

Das G wurde als Art. 1 des G v. 21.7.2011 vom Bundestag beschlossen. Es ist gem. Art. 15 Abs. 2 Satz 1 dieses G am 28.7.2011 in Kraft getreten.

Inhaltsübersicht

Abschnitt 1
Allgemeine Vorschriften

§ 1 Zweck des Gesetzes

Zweck dieses Gesetzes ist es, für die in Anhang 1 Teil 2 genannten Tätigkeiten, durch die in besonderem Maße Treibhausgase emittiert werden, die Grundlagen für den Handel mit Berechtigungen zur Emission von Treibhausgasen in einem gemeinschaftsweiten Emissionshandelssystem zu schaffen, um damit durch eine kosteneffiziente Verringerung von Treibhausgasen zum weltweiten Klimaschutz beizutragen.

§ 2 Anwendungsbereich

(1) Dieses Gesetz gilt für die Emission der in Anhang 1 Teil 2 genannten Treibhausgase durch die dort genannten Tätigkeiten. Für die in Anhang 1 Teil 2 genannten Anlagen gilt dieses Gesetz auch dann, wenn sie Teile oder Nebeneinrichtungen einer Anlage sind, die nicht in Anhang 1 Teil 2 aufgeführt ist.

(2) Der Anwendungsbereich dieses Gesetzes erstreckt sich bei den in Anhang 1 Teil 2 Nummer 2 bis 31 genannten Anlagen auf alle

1. Anlagenteile und Verfahrensschritte, die zum Betrieb notwendig sind, und
2. Nebeneinrichtungen, die mit den Anlagenteilen und Verfahrensschritten nach Nummer 1 in einem räumlichen und betriebstechnischen Zusammenhang stehen und die für das Entstehen von den in Anhang 1 Teil 2 genannten Treibhausgasen von Bedeutung sein können.

Satz 1 gilt für Verbrennungseinheiten nach Anhang 1 Teil 2 Nummer 1 entsprechend.

(3) Die in Anhang 1 bestimmten Voraussetzungen liegen auch vor, wenn mehrere Anlagen derselben Art in einem engen räumlichen und betrieblichen Zusammenhang stehen und zusammen die nach Anhang 1 maßgeblichen Leistungsgrenzen oder Anlagengrößen erreichen oder überschreiten werden. Ein enger räumlicher und betrieblicher Zusammenhang ist gegeben, wenn die Anlagen

1. auf demselben Betriebsgelände liegen,
2. mit gemeinsamen Betriebseinrichtungen verbunden sind und
3. einem vergleichbaren technischen Zweck dienen.

(4) Bedürfen Anlagen nach Anhang 1 Teil 2 Nummer 2 bis 30 einer Genehmigung nach § 4 Absatz 1 Satz 3 des Bundes-Immissionsschutzgesetzes, so sind hinsichtlich der Abgrenzung der Anlagen nach den Absätzen 2 und 3 die Festlegungen in der immissionsschutzrechtlichen Genehmigung für die Anlage maßgeblich. Satz 1 gilt für Verbrennungseinheiten nach Anhang 1 Teil 2 Nummer 1 entsprechend. In den Fällen des Absatzes 1 Satz 2 gilt Satz 1 hinsichtlich der Festlegungen in der immissionsschutzrechtlichen Genehmigung zu den Anlagenteilen oder Nebeneinrichtungen entsprechend.

(5) Dieses Gesetz gilt nicht für:

1. Anlagen oder Anlagenteile, soweit sie der Forschung oder der Entwicklung oder Erprobung neuer Einsatzstoffe, Brennstoffe, Erzeugnisse oder Verfahren im Labor- oder Technikumsmaßstab dienen; hierunter fallen auch solche Anlagen im Labor- oder Technikumsmaßstab, in denen neue Erzeugnisse in der für die Erprobung ihrer Eigenschaften durch Dritte erforderlichen Menge vor der Markteinführung hergestellt werden, soweit die neuen Erzeugnisse noch weiter erforscht oder entwickelt werden,
2. Anlagen, die nach § 4 Absatz 1 Satz 3 des Bundes-Immissionsschutzgesetzes genehmigungsbedürftig sind und bei denen nach ihrer immissionsschutzrechtlichen Genehmigung außer für Zwecke der Zünd- und Stützfeuerung als Brennstoff nur Klärgas, Deponiegas, Biogas oder Biomasse im Sinne des Artikels 2 Absatz 2 Satz 2 Buchstabe a und e der Richtlinie 2009/28/EG des Europäischen Parlaments und des Rates vom 23. April 2009 zur Förderung der Nutzung von Energie aus erneuerbaren Quellen und zur Änderung und anschließenden Aufhebung der Richtlinien 2001/77/EG und 2003/30/EG (ABl. L 140 vom 5.6.2009, S. 16) in der jeweils geltenden Fassung eingesetzt werden darf und
3. Anlagen oder Verbrennungseinheiten nach Anhang 1 Teil 2 Nummer 1 bis 6 zur Verbrennung von gefährlichen Abfällen oder Siedlungsabfällen, die nach Nummer 8.1 oder Nummer 8.2 des Anhangs zur Verordnung über genehmigungsbedürftige Anlagen genehmigungsbedürftig sind.

(6) Bei Luftverkehrstätigkeiten erstreckt sich der Anwendungsbereich dieses Gesetzes auf alle Emissionen eines Luftfahrzeugs, die durch den Verbrauch von Treibstoffen entstehen. Zum Treibstoffverbrauch eines Luftfahrzeugs zählt auch der Treibstoffverbrauch von Hilfsmotoren. Dieses Gesetz gilt nur für Luftverkehrstätigkeiten, die von Luftfahrzeugbetreibern durchgeführt werden,

1. die eine gültige deutsche Betriebsgenehmigung im Sinne des Artikels 3 der Verordnung (EG) Nr. 1008/2008 des Europäischen Parlaments und des Rates vom 24. September 2008 über gemeinsame Vorschriften für die Durchführung von Luftverkehrsdiensten in der Gemeinschaft (ABl. L 293 vom 31.10.2008, S. 3) in der jeweils geltenden Fassung besitzen oder
2. die der Bundesrepublik Deutschland als zuständigem Verwaltungsmitgliedstaat zugewiesen sind nach der Verordnung (EG) Nr. 748/2009 der Kommission vom 5. August 2009 über die Liste der Luftfahrzeugbetreiber, die am oder nach dem 1. Januar 2006 einer Luftverkehrstätigkeit im Sinne von Anhang I der Richtlinie 2003/87/EG nachgekommen sind, mit Angabe des für die einzelnen Luftfahrzeugbetreiber zuständigen Verwaltungsmitgliedstaats (ABl. L 219 vom 22.8.2009, S. 1), die durch die Verordnung (EU) Nr. 82/2010 (ABl. L 25 vom 29.1.2010, S. 12) geändert worden ist, in der jeweils geltenden Fassung, und keine

gültige Betriebsgenehmigung eines anderen Vertragsstaats des Abkommens über den Europäischen Wirtschaftsraum besitzen.

Alle Luftverkehrstätigkeiten, die der Luftfahrzeugbetreiber ab Beginn des Kalenderjahres durchführt, in dem die Voraussetzungen nach Satz 3 erstmals erfüllt sind, fallen in den Anwendungsbereich dieses Gesetzes.

(7) Dieses Gesetz gilt auch für Aufgaben im Zusammenhang mit der Bewilligung von Beihilfen zur Kompensation indirekter CO_2-Kosten, soweit solche Beihilfen nach einer Förderrichtlinie nach Artikel 10a Absatz 6 der Richtlinie 2003/87/EG vorgesehen sind.

§ 3 Begriffsbestimmungen

Für dieses Gesetz gelten die folgenden Begriffsbestimmungen:

1. Anlage
   eine Betriebsstätte oder sonstige ortsfeste Einrichtung;
2. Anlagenbetreiber
   eine natürliche oder juristische Person oder Personengesellschaft, die die unmittelbare Entscheidungsgewalt über eine Anlage innehat, in der eine Tätigkeit nach Anhang 1 Teil 2 Nummer 1 bis 32 durchgeführt wird, und die dabei die wirtschaftlichen Risiken trägt; wer im Sinne des Bundes-Immissionsschutzgesetzes eine genehmigungsbedürftige Anlage betreibt, in der eine Tätigkeit nach Anhang 1 Teil 2 Nummer 1 bis 30 durchgeführt wird, ist Anlagenbetreiber nach Halbsatz 1;
3. Berechtigung
   die Befugnis zur Emission von einer Tonne Kohlendioxidäquivalent in einem bestimmten Zeitraum; eine Tonne Kohlendioxidäquivalent ist eine Tonne Kohlendioxid oder die Menge eines anderen Treibhausgases, die in ihrem Potenzial zur Erwärmung der Atmosphäre einer Tonne Kohlendioxid entspricht;
4. Betreiber
   ein Anlagenbetreiber oder Luftfahrzeugbetreiber;
5. Emission
   die Freisetzung von Treibhausgasen durch eine Tätigkeit nach Anhang 1 Teil 2; die Weiterleitung von Treibhausgasen steht nach Maßgabe der Monitoring-Verordnung der Freisetzung gleich;
6. Emissionsreduktionseinheit
   eine Einheit im Sinne des § 2 Nummer 20 des Projekt-Mechanismen-Gesetzes;
7. Luftfahrzeugbetreiber
   eine natürliche oder juristische Person oder Personengesellschaft, die die unmittelbare Entscheidungsgewalt über ein Luftfahrzeug zu dem Zeitpunkt innehat, zu dem mit diesem eine Luftverkehrstätigkeit durchgeführt wird, und die dabei die wirtschaftlichen Risiken der Luftverkehrstätigkeit trägt, oder, wenn die Identität dieser Person nicht bekannt ist oder vom Luftfahrzeugeigentümer nicht angegeben wird, der Eigentümer des Luftfahrzeugs;
8. Luftverkehrsberechtigung
   eine Berechtigung, die ausschließlich Luftfahrzeugbetreibern die Befugnis zur Emission von einer Tonne Kohlendioxidäquivalent in einem bestimmten Zeitraum verleiht;
9. Luftverkehrstätigkeit
   eine Tätigkeit nach Anhang 1 Teil 2 Nummer 33;
10. Monitoring-Verordnung
    die Verordnung der Europäischen Kommission nach Artikel 14 Absatz 1 der Richtlinie 2003/87/EG des Europäischen Parlaments und des Rates vom 13. Oktober 2003 über ein System für den Handel mit Treibhausgasemissionszertifikaten in der Gemeinschaft und zur Änderung der Richtlinie 96/61/EG des Rates (ABl. L 275 vom 25.10.2003, S. 32), die zuletzt durch die Richtlinie 2009/29/EG (ABl. L 140 vom 5.6.2009, S. 63) geändert worden ist, in der jeweils geltenden Fassung;
11. Produktionsleistung
    die tatsächlich und rechtlich maximal mögliche Produktionsmenge pro Jahr;
12. Tätigkeit
    eine in Anhang 1 Teil 2 genannte Tätigkeit;
13. Transportleistung
    das Produkt aus Flugstrecke und Nutzlast;
14. Treibhausgase

Kohlendioxid (CO_2), Methan (CH_4), Distickstoffoxid (N_2O), teilfluorierte Kohlenwasserstoffe (HFKW), perfluorierte Kohlenwasserstoffe (PFC) und Schwefelhexafluorid (SF_6);

15. Überwachungsplan
eine Darstellung der Methode, die ein Betreiber anwendet, um seine Emissionen zu ermitteln und darüber Bericht zu erstatten;

16. zertifizierte Emissionsreduktion
eine Einheit im Sinne des § 2 Nummer 21 des Projekt-Mechanismen-Gesetzes.

Abschnitt 2
Genehmigung und Überwachung von Emissionen

§ 4 Emissionsgenehmigung

(1) Der Anlagenbetreiber bedarf zur Freisetzung von Treibhausgasen durch eine Tätigkeit nach Anhang 1 Teil 2 Nummer 1 bis 32 einer Genehmigung. Die Genehmigung ist auf Antrag des Anlagenbetreibers von der zuständigen Behörde zu erteilen, wenn die zuständige Behörde auf der Grundlage der vorgelegten Antragsunterlagen die Angaben nach Absatz 3 feststellen kann.

(2) Der Antragsteller hat dem Genehmigungsantrag insbesondere folgende Angaben beizufügen:

1. Name und Anschrift des Anlagenbetreibers,
2. eine Beschreibung der Tätigkeit, des Standorts und der Art und des Umfangs der dort durchgeführten Verrichtungen und der verwendeten Technologien,
3. in den Fällen des § 2 Absatz 1 Satz 2 eine Beschreibung der räumlichen Abgrenzung der Anlagenteile, Verfahrensschritte und Nebeneinrichtungen nach § 2 Absatz 2,
4. die Quellen von Emissionen und
5. den Zeitpunkt, zu dem die Anlage in Betrieb genommen worden ist oder werden soll.

(3) Die Genehmigung enthält folgende Angaben:

1. Name und Anschrift des Anlagenbetreibers,
2. eine Beschreibung der Tätigkeit und des Standorts, an dem die Tätigkeit durchgeführt wird,
3. in den Fällen des § 2 Absatz 1 Satz 2 eine Beschreibung der räumlichen Abgrenzung der einbezogenen Anlagenteile, Verfahrensschritte und Nebeneinrichtungen nach § 2 Absatz 2 und
4. eine Auflistung der einbezogenen Quellen von Emissionen.

(4) Bei Anlagen, die vor dem 1. Januar 2013 nach den Vorschriften des Bundes-Immissionsschutzgesetzes genehmigt worden sind, ist die immissionsschutzrechtliche Genehmigung die Genehmigung nach Absatz 1. Der Anlagenbetreiber kann aber auch im Fall des Satzes 1 eine gesonderte Genehmigung nach Absatz 1 beantragen. In diesem Fall ist Satz 1 nur bis zur Erteilung der gesonderten Genehmigung anwendbar.

(5) Der Anlagenbetreiber ist verpflichtet, der zuständigen Behörde eine geplante Änderung der Tätigkeit in Bezug auf die Angaben nach Absatz 3 mindestens einen Monat vor ihrer Verwirklichung vollständig und richtig anzuzeigen, soweit diese Änderung Auswirkungen auf die Emissionen haben kann. Die zuständige Behörde ändert die Genehmigung entsprechend. Die zuständige Behörde überprüft unabhängig von Satz 2 mindestens alle fünf Jahre die Angaben nach Absatz 3 und ändert die Genehmigung im Bedarfsfall entsprechend. Für die genannten Änderungen der Genehmigung gilt Absatz 4 Satz 3 entsprechend.

(6) In den Verfahren zur Erteilung oder Änderung der Emissionsgenehmigung nach den Absätzen 1 und 5 ist der nach § 19 Absatz 1 Nummer 3 zuständigen Behörde Gelegenheit zur Stellungnahme in angemessener Frist zu geben.

Fußnote

(+++ § 4: Zur Anwendung vgl. § 34 Abs. 2 +++)

§ 5 Ermittlung von Emissionen und Emissionsbericht

(1) Der Betreiber hat die durch seine Tätigkeit in einem Kalenderjahr verursachten Emissionen nach Maßgabe des Anhangs 2 Teil 2 zu ermitteln und der zuständigen Behörde bis zum 31. März des Folgejahres über die Emissionen zu berichten.

(2) Die Angaben im Emissionsbericht nach Absatz 1 müssen von einer Prüfstelle nach § 21 verifiziert worden sein.

Fußnote

(+++ § 5: Zur Anwendung vgl. § 34 Abs. 2 u. § 35 Abs. 1 +++)

§ 6 Überwachungsplan

(1) Der Betreiber ist verpflichtet, bei der zuständigen Behörde für jede Handelsperiode einen Überwachungsplan für die Emissionsermittlung und Berichterstattung nach § 5 Absatz 1 einzureichen. Dabei hat er die in Anhang 2 Teil 1 Nummer 1 genannten Fristen einzuhalten.

(2) Der Überwachungsplan bedarf der Genehmigung. Die Genehmigung ist zu erteilen, wenn der Überwachungsplan den Vorgaben der Monitoring-Verordnung, der Rechtsverordnung nach § 28 Absatz 2 Nummer 1 und, soweit diese keine Regelungen treffen, des Anhangs 2 Teil 2 Satz 3 entspricht. Entspricht ein vorgelegter Überwachungsplan nicht diesen Vorgaben, ist der Betreiber verpflichtet, die festgestellten Mängel innerhalb einer von der zuständigen Behörde festzusetzenden Frist zu beseitigen und den geänderten Überwachungsplan vorzulegen. Im Verfahren zur Genehmigung des Überwachungsplans ist in den Fällen des § 19 Absatz 1 Nummer 1 der danach zuständigen Behörde Gelegenheit zur Stellungnahme zu geben. Die zuständige Behörde kann die Genehmigung mit Auflagen für die Überwachung von und Berichterstattung über Emissionen verbinden.

(3) Der Betreiber ist verpflichtet, den Überwachungsplan innerhalb einer Handelsperiode unverzüglich anzupassen, soweit sich folgende Änderungen bezüglich der Anforderungen an die Emissionsermittlung oder an ihre Berichterstattung ergeben:

1. Änderung der Vorgaben nach Absatz 2 Satz 2,
2. Änderung seiner Emissionsgenehmigung oder
3. sonstige Änderung seiner Tätigkeit.

Die zuständige Behörde kann nachträgliche Anordnungen treffen, um die Erfüllung der Pflicht nach Satz 1 sicherzustellen. Für den angepassten Überwachungsplan nach Satz 1 gelten Absatz 1 Satz 1 und Absatz 2 entsprechend.

Fußnote

(+++ § 6 Abs. 1 Satz 1: Zur Nichtanwendung vgl. § 35 Abs. 2 +++)

Abschnitt 3
Berechtigungen und Zuteilung

§ 7 Berechtigungen

(1) Der Betreiber hat jährlich bis zum 30. April an die zuständige Behörde eine Anzahl von Berechtigungen abzugeben, die den durch seine Tätigkeit im vorangegangenen Kalenderjahr verursachten Emissionen entspricht. Anlagenbetreiber können ihre Verpflichtung nach Satz 1 nicht durch die Abgabe von Luftverkehrsberechtigungen erfüllen.

(2) Die Berechtigungen gelten jeweils für eine der nachfolgend genannten Handelsperioden:

1. die Handelsperiode für Tätigkeiten nach Anhang 1 des Treibhausgas-Emissionshandelsgesetzes vom 8. Juli 2004 (BGBl. I S. 1578), das zuletzt durch Artikel 9 des Gesetzes vom 11. August 2010 (BGBl. I S. 1163) geändert worden ist, die am 1. Januar 2008 begonnen hat, endet am 31. Dezember 2012 (Handelsperiode 2008 bis 2012);
2. die erste Handelsperiode für Luftverkehrstätigkeiten, die am 1. Januar 2012 beginnt, endet am 31. Dezember 2012 (Handelsperiode 2012);
3. die Handelsperiode für alle Tätigkeiten, die am 1. Januar 2013 beginnt, endet am 31. Dezember 2020 (Handelsperiode 2013 bis 2020);

4. die sich an die Handelsperiode 2013 bis 2020 anschließenden Handelsperioden umfassen einen Zeitraum von jeweils acht Jahren.

Berechtigungen einer abgelaufenen Handelsperiode werden vier Monate nach Ende dieser Handelsperiode gelöscht und von der zuständigen Behörde durch Berechtigungen der laufenden Handelsperiode ersetzt. Der Inhaber von Berechtigungen kann jederzeit auf sie verzichten und ihre Löschung verlangen.

(3) Berechtigungen sind übertragbar. Die Übertragung von Berechtigungen erfolgt durch Einigung und Eintragung auf dem Konto des Erwerbers im Emissionshandelsregister nach § 17. Die Eintragung erfolgt auf Anweisung des Veräußerers an die kontoführende Stelle, Berechtigungen von seinem Konto auf das Konto des Erwerbers zu übertragen.

(4) Soweit für jemanden eine Berechtigung in das Emissionshandelsregister eingetragen ist, gilt der Inhalt des Registers als richtig. Dies gilt nicht für den Empfänger ausgegebener Berechtigungen, wenn ihm die Unrichtigkeit bei Ausgabe bekannt ist.

(5) Berechtigungen sind keine Finanzinstrumente im Sinne des § 1 Absatz 11 des Kreditwesengesetzes oder des § 2 Absatz 2b des Wertpapierhandelsgesetzes.

Fußnote

(+++ § 7: Zur Anwendung vgl. § 34 Abs. 2 u. § 35 Abs. 1 +++)

§ 8 Versteigerung von Berechtigungen

(1) Alle der Bundesrepublik Deutschland durch die Europäische Kommission nach der Richtlinie 2003/87/EG in der jeweils geltenden Fassung zur Versteigerung zugewiesenen Berechtigungen werden versteigert. Die Versteigerung erfolgt nach den Regeln der Verordnung (EU) Nr. 1031/2010 der Kommission vom 12. November 2010 über den zeitlichen und administrativen Ablauf sowie sonstige Aspekte der Versteigerung von Treibhausgasemissionszertifikaten gemäß der Richtlinie 2003/87/EG des Europäischen Parlaments und des Rates über ein System für den Handel mit Treibhausgasemissionszertifikaten in der Gemeinschaft (ABl. L 302 vom 18.11.2010, S. 1) in der jeweils geltenden Fassung.

(2) Das Bundesministerium für Umwelt, Naturschutz, Bau und Reaktorsicherheit beauftragt im Einvernehmen mit dem Bundesministerium der Finanzen und dem Bundesministerium für Wirtschaft und Energie eine geeignete Stelle mit der Durchführung der Versteigerung.

(3) Die Erlöse aus der Versteigerung der Berechtigungen nach Absatz 1 stehen dem Bund zu. Die Kosten, die dem Bund durch die Wahrnehmung der ihm im Rahmen des Emissionshandels zugewiesenen Aufgaben entstehen und nicht durch Gebühren nach § 22 gedeckt sind, werden aus den Erlösen nach Satz 1 gedeckt.

(4) Zur Gebotseinstellung auf eigene Rechnung oder im Namen der Kunden ihres Hauptgeschäftes bedürfen die in § 2a Absatz 1 Nummer 9 des Wertpapierhandelsgesetzes genannten Unternehmen einer Erlaubnis der Bundesanstalt für Finanzdienstleistungsaufsicht (Bundesanstalt). Für Berechtigungen, die nicht in Form eines Finanzinstruments gemäß Artikel 38 Absatz 3 der Verordnung (EG) Nr. 1287/2006 der Kommission vom 10. August 2006 zur Durchführung der Richtlinie 2004/39/EG des Europäischen Parlaments und des Rates betreffend die Aufzeichnungspflichten für Wertpapierfirmen, die Meldung von Geschäften, die Markttransparenz, die Zulassung von Finanzinstrumenten zum Handel und bestimmte Begriffe im Sinne dieser Richtlinie (ABl. L 241 vom 2.9.2006, S. 1) versteigert werden, bedürfen zur Gebotseinstellung im Namen der Kunden ihres Hauptgeschäftes auch

1. Institute im Sinne des § 1 Absatz 1b des Kreditwesengesetzes, denen eine Erlaubnis nach § 32 des Kreditwesengesetzes erteilt worden ist, und
2. nach § 53 Absatz 1 Satz 1 des Kreditwesengesetzes tätige Unternehmen, denen eine Erlaubnis nach § 32 des Kreditwesengesetzes erteilt worden ist,

einer Erlaubnis der Bundesanstalt. Die Erlaubnis wird erteilt, sofern das Unternehmen die Bedingungen des Artikels 59 Absatz 5 der Verordnung (EU) Nr. 1031/2010 erfüllt. Die Bundesanstalt kann die Erlaubnis außer nach den Vorschriften des Verwaltungsverfahrensgesetzes aufheben, wenn ihr Tatsachen bekannt werden, welche eine Erteilung der Erlaubnis nach Satz 3 ausschließen würden.

§ 9 Zuteilung von kostenlosen Berechtigungen an Anlagenbetreiber

(1) Anlagenbetreiber erhalten eine Zuteilung von kostenlosen Berechtigungen nach Maßgabe der Grundsätze des Artikels 10a Absatz 1 bis 5, 7 und 11 bis 20 der Richtlinie 2003/87/EG in der jeweils geltenden Fassung und des Beschlusses 2011/278/EU der Kommission vom 27. April 2011 zur Festlegung EU-weiter Übergangsvorschriften zur Harmonisierung der kostenlosen Zuteilung von Emissionszertifikaten gemäß Artikel 10a der Richtlinie 2003/87/EG (ABl. L 130 vom 17.5.2011, S. 1).

(2) Die Zuteilung setzt einen Antrag bei der zuständigen Behörde voraus. Der Antrag auf Zuteilung von kostenlosen Berechtigungen ist innerhalb einer Frist, die von der zuständigen Behörde mindestens drei Monate vor ihrem Ablauf im Bundesanzeiger bekannt gegeben wird, zu stellen. Die Bekanntgabe der Frist erfolgt frühestens nach Inkrafttreten der Rechtsverordnung über Zuteilungsregeln gemäß § 10. Bei verspätetem Antrag besteht kein Anspruch auf kostenlose Zuteilung. Dem Antrag sind die zur Prüfung des Anspruchs erforderlichen Unterlagen beizufügen. Soweit in der Verordnung nach § 10 nichts anderes bestimmt ist, müssen die tatsächlichen Angaben im Zuteilungsantrag von einer Prüfstelle nach § 21 verifiziert worden sein.

(3) Die zuständige Behörde berechnet die vorläufigen Zuteilungsmengen, veröffentlicht eine Liste aller unter den Anwendungsbereich dieses Gesetzes fallenden Anlagen und der vorläufigen Zuteilungsmengen im Bundesanzeiger und meldet die Liste der Europäischen Kommission. Bei der Berechnung der vorläufigen Zuteilungsmengen werden nur solche Angaben des Betreibers berücksichtigt, deren Richtigkeit ausreichend gesichert ist. Rechtsbehelfe im Hinblick auf die Meldung der Zuteilungsmengen können nur gleichzeitig mit den gegen die Zuteilungsentscheidung zulässigen Rechtsbehelfen geltend gemacht werden.

(4) Die zuständige Behörde entscheidet vor Beginn der Handelsperiode über die Zuteilung von kostenlosen Berechtigungen für eine Anlage an Anlagenbetreiber, die innerhalb der nach Absatz 2 Satz 2 bekannt gegebenen Frist einen Antrag gestellt haben. Im Übrigen gelten für das Zuteilungsverfahren die Vorschriften des Verwaltungsverfahrensgesetzes.

(5) Bedeutete eine Zuteilung nach den Zuteilungsregeln nach § 10 eine unzumutbare Härte für den Anlagenbetreiber und für ein mit diesem verbundenes Unternehmen, das mit seinem Kapital aus handels- oder gesellschaftsrechtlichem Rechtsgrund für die wirtschaftlichen Risiken des Anlagenbetriebes einstehen muss, teilt die zuständige Behörde auf Antrag des Betreibers zusätzliche Berechtigungen in der für einen Ausgleich angemessenen Menge zu, soweit die Europäische Kommission diese Zuteilung nicht nach Artikel 11 Absatz 3 der Richtlinie 2003/87/EG ablehnt.

(6) Die Zuteilungsentscheidung ist aufzuheben, soweit sie auf Grund eines Rechtsakts der Europäischen Union nachträglich geändert werden muss. Die §§ 48 und 49 des Verwaltungsverfahrensgesetzes bleiben im Übrigen unberührt.

Fußnote

(+++ § 9: Zur Anwendung vgl. § 34 Abs. 2 +++)

§ 10 Rechtsverordnung über Zuteilungsregeln

Die Bundesregierung wird ermächtigt, nach Maßgabe der Richtlinie 2003/87/EG in der jeweils geltenden Fassung und des Beschlusses 2011/278/EU der Kommission vom 27. April 2011 zur Festlegung EU-weiter Übergangsvorschriften zur Harmonisierung der kostenlosen Zuteilung von Emissionszertifikaten gemäß Artikel 10a der Richtlinie 2003/87/EG (ABl. L 130 vom 17.5.2011, S. 1) nach Anhörung der beteiligten Kreise die Einzelheiten der Zuteilung von kostenlosen Berechtigungen an Anlagenbetreiber durch Rechtsverordnung, die nicht der Zustimmung des Bundesrates bedarf, zu bestimmen. In dieser Rechtsverordnung kann die Bundesregierung insbesondere regeln:

1. die Produkte, für die die Berechtigungen kostenlos zugeteilt werden,
2. die Berechnung der Anzahl zuzuteilender Berechtigungen,
3. die Erhebung von Daten über die Emissionen und die Produktion von Anlagen und sonstiger für das Zuteilungsverfahren relevanter Daten,
4. die Bestimmung der Produktionsmenge oder sonstiger Größen, die zur Berechnung der Zuteilungsmenge erforderlich sind,
5. Emissionswerte je erzeugter Produkteinheit,

6. die Fälle, in denen von einer Zuteilung auf Grundlage von Emissionswerten je erzeugter Produkteinheit ausnahmsweise abgesehen wird oder in denen gesonderte Zuteilungsregeln bestehen, sowie die Methoden, die in diesen Fällen zur Anwendung kommen,
7. die Basisperiode, deren Daten für die Zuteilung von kostenlosen Berechtigungen maßgeblich sind, sowie Fälle, in denen von dieser Basisperiode abgewichen werden kann,
8. die Zuteilung für Neuanlagen und Kapazitätserweiterungen, einschließlich der Bestimmung der Kapazität und der Auslastung von Neuanlagen,
9. die Bestimmung der jährlich auszugebenden Mengen von kostenlosen Berechtigungen in der Zuteilungsentscheidung,
10. Festlegungen zu den Anteilen der Wärmeproduktion an den Emissionswerten nach Nummer 5,
11. die im Antrag nach § 9 Absatz 2 Satz 1
    a) erforderlichen Angaben und
    b) erforderlichen Unterlagen sowie die Art der beizubringenden Nachweise und
12. Anforderungen an die Verifizierung von Zuteilungsanträgen nach § 9 Absatz 2 Satz 5 sowie Ausnahmen von der Verifizierungspflicht.

Die Rechtsverordnung nach den Sätzen 1 und 2 bedarf der Zustimmung des Bundestages. Der Bundestag kann diese Zustimmung davon abhängig machen, ob Änderungswünsche übernommen werden. Übernimmt die Bundesregierung die Änderungen, ist eine erneute Beschlussfassung durch den Bundestag nicht erforderlich. Hat sich der Bundestag nach Ablauf von sechs Sitzungswochen seit Eingang der Rechtsverordnung nicht mit ihr befasst, gilt seine Zustimmung zu der unveränderten Rechtsverordnung als erteilt.

§ 11 Regelzuteilung von kostenlosen Berechtigungen an Luftfahrzeugbetreiber

(1) Luftfahrzeugbetreiber erhalten für eine Handelsperiode eine Anzahl von kostenlosen Luftverkehrsberechtigungen zugeteilt, die dem Produkt aus ihrer Transportleistung im Basisjahr in Tonnenkilometern und dem Richtwert entspricht, der in der Entscheidung der Europäischen Kommission nach Artikel 3e Absatz 3 Satz 1 Buchstabe e und Satz 2 der Richtlinie 2003/87/EG bestimmt wird.

(2) Das Basisjahr für die Transportleistung ist das Kalenderjahr, das 24 Monate vor Beginn der Handelsperiode endet, auf die sich die Zuteilung bezieht. Für die Handelsperiode 2012 und die Handelsperiode 2013 bis 2020 ist das Jahr 2010 das Basisjahr.

(3) Die Zuteilung für eine Handelsperiode setzt einen Antrag bei der zuständigen Behörde voraus, der spätestens 21 Monate vor Beginn der jeweiligen Handelsperiode gestellt werden muss. Bei einem verspäteten Antrag besteht kein Anspruch auf Zuteilung kostenloser Luftverkehrsberechtigungen mehr. Die Sätze 1 und 2 gelten nicht für die Handelsperiode 2012 und die Handelsperiode 2013 bis 2020.

(4) In dem Antrag muss der Antragsteller die nach den Anforderungen der Monitoring-Verordnung ermittelte Transportleistung angeben, die er im Basisjahr durch seine Luftverkehrstätigkeit erbracht hat. Hat der Luftfahrzeugbetreiber einen Bericht über Flugstrecke und Nutzlast nach § 5 Absatz 1 Satz 1 der Datenerhebungsverordnung 2020 abgegeben, so gilt dieser Bericht als Antrag auf Zuteilung für die Handelsperiode 2012 und die Handelsperiode 2013 bis 2020, sofern der Luftfahrzeugbetreiber dem nicht innerhalb eines Monats nach Inkrafttreten dieses Gesetzes widerspricht. Im Fall des Widerspruchs besteht kein Anspruch auf kostenlose Zuteilung nach Absatz 1. Die Angaben zur Transportleistung müssen von einer Prüfstelle nach § 21 verifiziert worden sein. Dies gilt nicht, soweit ein Bericht über Flugstrecke und Nutzlast bereits nach § 11 der Datenerhebungsverordnung 2020 geprüft worden ist.

(5) Die zuständige Behörde übermittelt die Anträge spätestens 18 Monate vor Beginn der Handelsperiode an die Europäische Kommission. Die zuständige Behörde überprüft die Angaben des Antragstellers zur Transportleistung und übermittelt nur solche Angaben an die Europäische Kommission, deren Richtigkeit zum Ablauf der Übermittlungsfrist ausreichend gesichert ist. Sofern die zuständige Behörde zur Prüfung des Antrags und der darin gemachten Angaben zusätzliche Angaben oder Nachweise benötigt, ist der Luftfahrzeugbetreiber verpflichtet, diese auf Verlangen der zuständigen Behörde innerhalb einer von dieser festzusetzenden Frist zu übermitteln.

(6) Die zuständige Behörde teilt die kostenlosen Berechtigungen innerhalb von drei Monaten zu, nachdem die Europäische Kommission den Richtwert gemäß Artikel 3e Absatz 3 der Richtlinie 2003/87/EG bekannt gegeben

hat. Die zuständige Behörde veröffentlicht eine Liste mit den Namen der Luftfahrzeugbetreiber und der Höhe der Zuteilungen im Bundesanzeiger.

§ 12 Zuteilung von kostenlosen Berechtigungen aus der Sonderreserve

(1) Luftfahrzeugbetreiber erhalten für eine Handelsperiode eine Zuteilung von kostenlosen Luftverkehrsberechtigungen aus der Sonderreserve, wenn

1. sie erstmals nach Ablauf des Basisjahres nach § 11 Absatz 2 eine Luftverkehrstätigkeit neu aufgenommen haben oder
2. die im Rahmen ihrer Luftverkehrstätigkeit erbrachte Transportleistung in Tonnenkilometern im Zeitraum zwischen dem Basisjahr und dem Ende des zweiten Kalenderjahres der laufenden Handelsperiode durchschnittlich um mehr als 18 Prozent jährlich angestiegen ist.

Weiterhin setzt eine Zuteilung nach Satz 1 voraus, dass der Luftfahrzeugbetreiber durch die neu aufgenommene Tätigkeit oder durch die angestiegene Transportleistung keine zuvor von einem anderen Unternehmen durchgeführte Tätigkeit ganz oder teilweise fortführt. Satz 1 gilt nicht für die Handelsperiode 2012.

(2) Im Fall der Neuaufnahme einer Tätigkeit entspricht die Anzahl der zuzuteilenden Luftverkehrsberechtigungen dem Produkt aus der im zweiten Kalenderjahr der Handelsperiode erbrachten Transportleistung und dem Richtwert, der in der Entscheidung der Europäischen Kommission nach Artikel 3f Absatz 5 der Richtlinie 2003/87/EG bestimmt wird.

(3) Im Fall der angestiegenen Transportleistung nach Absatz 1 Satz 1 Nummer 2 entspricht die Anzahl der zuzuteilenden Luftverkehrsberechtigungen dem Produkt aus dem Anstieg der Transportleistung in Tonnenkilometern, soweit der Anstieg den in Absatz 1 Satz 1 Nummer 2 genannten prozentualen Anstieg in Tonnenkilometern übersteigt, und dem Richtwert, der in der Entscheidung der Europäischen Kommission nach Artikel 3f Absatz 5 der Richtlinie 2003/87/EG bestimmt wird. Die Zuteilung nach Satz 1 beträgt höchstens 1 Million Luftverkehrsberechtigungen pro Luftfahrzeugbetreiber.

(4) Die zuständige Behörde teilt die kostenlosen Berechtigungen innerhalb von drei Monaten zu, nachdem die Europäische Kommission den Richtwert gemäß Artikel 3f Absatz 5 der Richtlinie 2003/87/EG bekannt gegeben hat. Sie weist dabei die Zuteilung für eine gesamte Handelsperiode und für die einzelnen verbleibenden vollen Jahre dieser Handelsperiode aus. Die zuständige Behörde veröffentlicht eine Liste mit den Namen der Luftfahrzeugbetreiber und der Höhe der Zuteilungen im Bundesanzeiger.

§ 13 Antrag auf Zuteilung aus der Sonderreserve

(1) Die Zuteilung aus der Sonderreserve setzt einen Antrag bei der zuständigen Behörde voraus, der spätestens bis zum 30. Juni des dritten Jahres der jeweils laufenden Handelsperiode gestellt werden muss. Bei einem verspäteten Antrag besteht kein Anspruch auf Zuteilung kostenloser Luftverkehrsberechtigungen mehr.

(2) Der Antragsteller hat in dem Antrag nach Absatz 1 das Vorliegen der in § 12 Absatz 1 aufgeführten Zuteilungsvoraussetzungen nachzuweisen. Ein Antrag nach § 12 Absatz 1 Satz 1 Nummer 2 muss insbesondere jeweils bezogen auf den Zeitraum zwischen dem Basisjahr und dem zweiten Kalenderjahr der laufenden Handelsperiode folgende Angaben enthalten:

1. den prozentualen Anstieg der Transportleistung des Antragstellers seit dem Basisjahr,
2. den absoluten Anstieg der Transportleistung des Antragstellers seit dem Basisjahr in Tonnenkilometern und
3. den Anteil des absoluten Anstiegs nach Nummer 2, der den in § 12 Absatz 1 Satz 1 Nummer 2 genannten prozentualen Anstieg in Tonnenkilometern überschreitet.

Die zuständige Behörde übermittelt die Anträge spätestens sechs Monate nach Ablauf der Frist nach Absatz 1 Satz 1 an die Europäische Kommission. § 11 Absatz 4 Satz 4 und Absatz 5 Satz 2 und 3 gelten entsprechend.

(3) In dem Antrag nach Absatz 1 Satz 1 ist die nach den Anforderungen der Monitoring-Verordnung ermittelte Transportleistung anzugeben, die der Antragsteller im zweiten Kalenderjahr der laufenden Handelsperiode durch seine Luftverkehrstätigkeit erbracht hat.

(4) Zur Ermittlung und Angabe der Transportleistung nach Absatz 3 hat der Luftfahrzeugbetreiber einen Tonnenkilometer-Überwachungsplan zu erstellen und bei der zuständigen Behörde innerhalb der in Anhang 2 Teil 1 Nummer 2 genannten Frist zur Genehmigung einzureichen.

(5) Die Genehmigung nach Absatz 4 ist zu erteilen, wenn der Überwachungsplan den Vorgaben der Monitoring-Verordnung entspricht. § 6 Absatz 2 Satz 3 und 5 gilt entsprechend.

§ 14 Ausgabe von Berechtigungen

(1) Die zuständige Behörde gibt die nach § 9 Absatz 4 zugeteilten Berechtigungen nach Maßgabe der Zuteilungsentscheidung bis zum 28. Februar eines Jahres, für das Berechtigungen abzugeben sind, aus.

(2) Abweichend von Absatz 1 werden für Anlagen, die nach Beginn der Handelsperiode in Betrieb genommen wurden, für das erste Betriebsjahr zugeteilte Berechtigungen unverzüglich nach der Zuteilungsentscheidung ausgegeben. Ergeht die Zuteilungsentscheidung vor dem 28. Februar eines Kalenderjahres, so werden Berechtigungen nach Satz 1 erstmals zum 28. Februar desselben Jahres ausgegeben.

(3) Bei der Regelzuteilung für Luftfahrzeugbetreiber nach § 11 gibt die zuständige Behörde die für eine Handelsperiode insgesamt zugeteilte Menge an Luftverkehrsberechtigungen in den Jahren der Handelsperiode jeweils bis zum 28. Februar in jährlich gleichen Teilmengen aus. Bei der Zuteilung aus der Sonderreserve nach § 12 gibt die zuständige Behörde die für eine Handelsperiode insgesamt zugeteilte Menge an Luftverkehrsberechtigungen in den auf die Zuteilungsentscheidung folgenden Kalenderjahren der Handelsperiode in jährlich gleichen Teilmengen aus.

Fußnote

(+++ § 14: Zur Anwendung vgl. § 34 Abs 2 +++)

§ 15 Durchsetzung von Rückgabeverpflichtungen

Soweit der Betreiber im Fall der Aufhebung der Zuteilungsentscheidung zur Rückgabe zu viel ausgegebener Berechtigungen verpflichtet ist, kann die zuständige Behörde diese Verpflichtung nach den Vorschriften des Verwaltungs-Vollstreckungsgesetzes durchsetzen. Die Höhe des Zwangsgeldes beträgt bis zu 500 000 Euro.

§ 16 Anerkennung von Berechtigungen und Emissionsgutschriften

(1) Berechtigungen, die von anderen Mitgliedstaaten der Europäischen Union in Anwendung der Richtlinie 2003/87/EG für die laufende Handelsperiode ausgegeben worden sind, stehen Berechtigungen gleich, die in der Bundesrepublik Deutschland ausgegeben worden sind.

(2) Die Vorschriften über Berechtigungen nach § 7 Absatz 3 bis 5 und § 17 gelten für Emissionsreduktionseinheiten, zertifizierte Emissionsreduktionen und Emissionsgutschriften, die in einer Rechtsverordnung nach § 28 Absatz 1 Nummer 3 anerkannt sind, entsprechend.

(3) Berechtigungen, die von Drittländern ausgegeben werden, mit denen Abkommen über die gegenseitige Anerkennung von Berechtigungen gemäß Artikel 25 Absatz 1 der Richtlinie 2003/87/EG geschlossen wurden, werden von der zuständigen Behörde nach Maßgabe der auf Grundlage von Artikel 25 Absatz 2 der Richtlinie 2003/87/EG erlassenen Vorschriften in Berechtigungen überführt.

§ 17 Emissionshandelsregister

Berechtigungen werden in einem Emissionshandelsregister nach der Verordnung gemäß Artikel 19 Absatz 3 der Richtlinie 2003/87/EG gehalten und übertragen.

§ 18 Umtausch von Emissionsgutschriften in Berechtigungen

(1) Auf Antrag des Betreibers tauscht die zuständige Behörde Emissionsreduktionseinheiten, zertifizierte Emissionsreduktionen oder andere Gutschriften für Emissionsminderungen nach Maßgabe der Absätze 2 und 3 in Berechtigungen für die Handelsperiode 2013 bis 2020 um.

(2) Der Umtausch ist in der Handelsperiode 2013 bis 2020 vorbehaltlich einer Erhöhung durch eine Rechtsverordnung nach § 28 Absatz 1 Nummer 3 auf folgende Höchstmengen beschränkt:

1. für eine Anlage, für die der Anlagenbetreiber in der Handelsperiode 2008 bis 2012 eine Zuteilung nach den §§ 6 bis 9 oder § 12 des Zuteilungsgesetzes 2012 erhalten hat, auf 22 Prozent dieser Zuteilungsmenge, soweit dieser Anteil nicht zur Erfüllung der Abgabepflicht für die Emissionen in der Handelsperiode 2008 bis 2012 genutzt wurde;

2. für eine Anlage, die nicht von Nummer 1 erfasst ist, auf eine Menge, die 4,5 Prozent der nach § 7 Absatz 1 für die Emissionen in der Handelsperiode 2013 bis 2020 insgesamt abzugebenden Menge an Berechtigungen entspricht;
3. für Luftfahrzeugbetreiber auf eine Menge, die 1,5 Prozent der vom jeweiligen Luftfahrzeugbetreiber nach § 7 Absatz 1 für die Emissionen in der Handelsperiode 2013 bis 2020 insgesamt abzugebenden Menge an Berechtigungen entspricht; diese Menge erhöht sich um eine Menge, die 15 Prozent der Menge an Berechtigungen entspricht, die der jeweilige Luftfahrzeugbetreiber für die Handelsperiode 2012 abzugeben hatte, soweit der Luftfahrzeugbetreiber diesen Anteil nicht zur Erfüllung dieser Abgabepflicht genutzt hat.

(3) Folgende Emissionsreduktionseinheiten oder zertifizierte Emissionsreduktionen sind vorbehaltlich einer Einschränkung durch eine Rechtsverordnung nach § 28 Absatz 1 Nummer 3 umtauschbar:

1. Emissionsreduktionseinheiten oder zertifizierte Emissionsreduktionen für Emissionsminderungen, die vor dem Jahr 2013 erbracht wurden;
2. zertifizierte Emissionsreduktionen aus Projekten, die vor dem Jahr 2013 von dem Exekutivrat im Sinne des § 2 Nummer 22 des Projekt-Mechanismen-Gesetzes registriert wurden.

Satz 1 gilt nur für Emissionsreduktionseinheiten und zertifizierte Emissionsreduktionen, die aus Projekttypen stammen, deren Gutschriften auch in der Handelsperiode 2008 bis 2012 genutzt werden durften.

Fußnote

(+++ § 18: Zur Anwendung vgl. § 33 Abs. 1 +++)

Abschnitt 4
Gemeinsame Vorschriften

§ 19 Zuständigkeiten

(1) Zuständige Behörde ist

1. für den Vollzug des § 4 bei genehmigungsbedürftigen Anlagen nach § 4 Absatz 1 Satz 3 des Bundes-Immissionsschutzgesetzes die nach Landesrecht für den Vollzug des § 4 zuständige Behörde,
2. für den Vollzug des § 31 Absatz 2 im Fall eines gewerblichen Luftfahrzeugbetreibers das Luftfahrt-Bundesamt,
3. im Übrigen das Umweltbundesamt.

(2) Ist für Streitigkeiten nach diesem Gesetz der Verwaltungsrechtsweg gegeben, ist für Klagen, die sich gegen eine Handlung oder Unterlassung des Umweltbundesamtes richten, das Verwaltungsgericht am Sitz der Deutschen Emissionshandelsstelle im Umweltbundesamt örtlich zuständig.

(3) Soweit die nach Absatz 1 Nummer 3 zuständige Behörde Aufgaben nach § 2 Absatz 7 wahrnimmt, unterliegt sie der gemeinsamen Fachaufsicht durch das Bundesministerium für Wirtschaft und Energie und das Bundesministerium für Umwelt, Naturschutz, Bau und Reaktorsicherheit.

§ 20 Überwachung

(1) Die nach § 19 jeweils zuständige Behörde hat die Durchführung dieses Gesetzes und der auf dieses Gesetz gestützten Rechtsverordnungen zu überwachen.

(2) Betreiber sowie Eigentümer und Besitzer von Luftfahrzeugen oder von Grundstücken, auf denen sich Luftfahrzeuge befinden oder auf denen Anlagen betrieben werden, sind verpflichtet, den Angehörigen der zuständigen Behörde und deren Beauftragten unverzüglich

1. den Zutritt zu den Anlagen, Luftfahrzeugen oder Grundstücken zu den Geschäftszeiten zu gestatten,
2. die Vornahme von Prüfungen einschließlich der Ermittlung von Emissionen zu den Geschäftszeiten zu gestatten sowie
3. auf Anforderung die Auskünfte zu erteilen und die Unterlagen vorzulegen, die zur Erfüllung ihrer Aufgaben erforderlich sind.

Im Rahmen der Pflichten nach Satz 1 haben die Betreiber Arbeitskräfte sowie Hilfsmittel bereitzustellen.

(3) Für die zur Auskunft verpflichtete Person gilt § 55 der Strafprozessordnung entsprechend.

§ 21 Prüfstellen

(1) Zur Prüfung von Emissionsberichten nach § 5 Absatz 2 und zur Prüfung von Zuteilungsanträgen nach § 9 Absatz 2 Satz 6, § 11 Absatz 4 Satz 4 und § 13 Absatz 2 Satz 4 sind berechtigt:

1. akkreditierte Prüfstellen nach der Verordnung (EU) Nr. 600/2012 der Kommission vom 21. Juni 2012 über die Prüfung von Treibhausgasemissionsberichten und Tonnenkilometerberichten sowie die Akkreditierung von Prüfstellen gemäß der Richtlinie 2003/87/EG des Europäischen Parlaments und des Rates (ABl. L 181 vom 12.7.2012, S. 1) in der jeweils geltenden Fassung,
2. zertifizierte Prüfstellen, die durch die auf Grundlage des § 28 Absatz 4 Satz 1 Nummer 1 beliehene Zulassungsstelle oder durch die entsprechende nationale Behörde eines anderen Mitgliedstaates nach Artikel 54 Absatz 2 der Verordnung (EU) Nr. 600/2012 zertifiziert sind.

(2) Die Prüfstelle hat die Prüfung von Emissionsberichten nach § 5 Absatz 2 sowie die Prüfung von Zuteilungsanträgen nach § 11 Absatz 4 Satz 4 und § 13 Absatz 2 Satz 4 nach den Vorgaben der Verordnung (EU) Nr. 600/2012 in der jeweils geltenden Fassung und der Rechtsverordnung nach § 28 Absatz 2 Nummer 1 durchzuführen. Die Prüfstelle hat Zuteilungsanträge von Anlagenbetreibern nach den Anforderungen der Rechtsverordnung nach § 10 zu prüfen.

(3) Die Prüfstelle nimmt die ihr nach Absatz 2 zugewiesenen Aufgaben nur im öffentlichen Interesse wahr.

§ 22 Gebühren für individuell zurechenbare öffentliche Leistungen von Bundesbehörden

(1) Für die Verwaltung eines Personen- oder Händlerkontos in dem Emissionshandelsregister erhebt die zuständige Behörde von dem Kontoinhaber eine Gebühr von 400 Euro pro Handelsperiode.

(2) Für Amtshandlungen der Zulassungsstelle nach § 28 Absatz 4 Satz 1 Nummer 1 werden Gebühren und Auslagen erhoben.

(3) Wird ein Widerspruch gegen Entscheidungen nach diesem Gesetz vollständig oder teilweise zurückgewiesen, mit Ausnahme des Widerspruchs gegen Entscheidungen nach § 4, beträgt die Gebühr entsprechend dem entstandenen Verwaltungsaufwand 50 bis 2 000 Euro. Dies gilt nicht, wenn der Widerspruch nur deshalb keinen Erfolg hat, weil die Verletzung einer Verfahrens- oder Formvorschrift nach § 45 des Verwaltungsverfahrensgesetzes unbeachtlich ist. Wird der Widerspruch nach Beginn der sachlichen Bearbeitung jedoch vor deren Beendigung zurückgenommen, ermäßigt sich die Gebühr um mindestens 25 Prozent.

(4) Die Befugnis der Länder zur Erhebung von Gebühren und Auslagen für Amtshandlungen nach § 4 bleibt unberührt.

Fußnote

(+++ § 22 Abs 1: Zur Anwendung vgl. § 33 Abs 3 +++)

§ 23 Elektronische Kommunikation

(1) Die zuständige Behörde kann für die in Satz 3 genannten Dokumente, für die Bekanntgabe von Entscheidungen und für die sonstige Kommunikation die Verwendung der Schriftform oder der elektronischen Form vorschreiben. Wird die elektronische Form vorgeschrieben, kann die zuständige Behörde eine bestimmte Verschlüsselung sowie die Eröffnung eines Zugangs für die Übermittlung elektronischer Dokumente vorschreiben. Die zuständige Behörde kann auch vorschreiben, dass Betreiber oder Prüfstellen zur Erstellung von Überwachungsplänen oder Berichten oder zur Stellung von Anträgen nur die auf ihrer Internetseite zur Verfügung gestellten elektronischen Formularvorlagen zu benutzen und die ausgefüllten Formularvorlagen in elektronischer Form sowie unter Verwendung einer qualifizierten Signatur nach dem Signaturgesetz vom 16. Mai 2001 (BGBl. I S. 876), das zuletzt durch Artikel 4 des Gesetzes vom 17. Juli 2009 (BGBl. I S. 2091) geändert worden ist, zu übermitteln haben. Wenn die Benutzung elektronischer Formatvorlagen vorgeschrieben ist, ist die Übermittlung zusätzlicher Dokumente als Ergänzung der Formatvorlagen unter Beachtung der Formvorschriften des Satzes 3 möglich. Soweit das Umweltbundesamt zuständige Behörde ist, werden Anordnungen nach den Sätzen 1 bis 3 im Bundesanzeiger bekannt gemacht; im Übrigen werden sie im amtlichen Veröffentlichungsblatt der zuständigen Behörde bekannt gemacht.

(2) Für Verfahren zur Bewilligung von Beihilfen im Sinne von § 2 Absatz 7 gilt Absatz 1 entsprechend.

§ 24 Einheitliche Anlage

Auf Antrag stellt die zuständige Behörde fest, dass das Betreiben mehrerer Anlagen im Sinne von Anhang 1 Teil 2 Nummer 7 sowie Nummer 8 bis 11, die von demselben Betreiber an demselben Standort in einem technischen Verbund betrieben werden, zur Anwendung der §§ 5 bis 7 und 9 als Betrieb einer einheitlichen Anlage gilt, wenn die erforderliche Genauigkeit bei der Ermittlung der Emissionen gewährleistet ist.

Fußnote

(+++ § 24: Zur Anwendung vgl. § 34 Abs. 2 +++)

§ 25 Änderung der Identität oder Rechtsform des Betreibers

(1) Ändert sich die Identität oder die Rechtsform eines Betreibers, so hat der neue Betreiber dies unverzüglich nach der Änderung der Behörde anzuzeigen, die für den Vollzug von § 6 Absatz 3 Satz 1 zuständig ist, und bei immissionsschutzrechtlich genehmigten Anlagen der Behörde, die für den Vollzug von § 4 Absatz 5 Satz 1 zuständig ist. Der neue Betreiber übernimmt die noch nicht erfüllten Pflichten des ursprünglichen Betreibers nach den §§ 5 und 7.

(2) Ein Wechsel des Betreibers im Verlauf der Handelsperiode lässt die Zuteilungsentscheidung unberührt. Noch nicht ausgegebene Berechtigungen werden ab dem Nachweis des Betreiberwechsels an den neuen Betreiber ausgegeben, soweit er die Tätigkeit übernommen hat. Im Falle der Aufteilung einer Anlage teilt die zuständige Behörde die in der ursprünglichen Zuteilungsentscheidung ausgewiesene Zuteilungsmenge auf die aus der Aufteilung hervorgehenden Anlagen in dem Verhältnis auf, in dem sie die Tätigkeit der Anlage übernommen haben.

§ 26 Ausschluss der aufschiebenden Wirkung

Widerspruch und Anfechtungsklage gegen Zuteilungsentscheidungen oder Entscheidungen nach § 29 Satz 1 oder § 31 Absatz 2 Satz 1 haben keine aufschiebende Wirkung.

§ 27 Befreiung für Kleinemittenten

(1) Die zuständige Behörde befreit den Betreiber einer Anlage für die Handelsperiode 2013 bis 2020 von der Pflicht nach § 7 Absatz 1, sofern

1. die Anlage in den Jahren 2008 bis 2010 jeweils weniger als 25 000 Tonnen Kohlendioxidäquivalent emittiert hat und
2. die Europäische Kommission keine Einwände nach Artikel 27 Absatz 2 der Richtlinie 2003/87/EG gegen die Befreiung erhebt.

Bei Anlagen der in Anhang 1 Teil 2 Nummer 2 bis 6 genannten Tätigkeiten ist eine Befreiung nach Satz 1 ausgeschlossen, sofern die Feuerungswärmeleistung der Anlage 35 Megawatt oder mehr beträgt; dies gilt für die Gesamtfeuerungswärmeleistung von Verbrennungseinheiten nach Anhang 1 Teil 2 Nummer 1 in einer Anlage entsprechend. Für die Dauer der Befreiung besteht kein Anspruch auf eine Zuteilung von kostenlosen Berechtigungen nach § 9 Absatz 1.

(2) Die Befreiung nach Absatz 1 setzt einen Antrag des Betreibers bei der zuständigen Behörde voraus, der nur zusammen mit dem Antrag nach § 9 Absatz 2 gestellt werden kann. Er ist für die Handelsperiode 2013 bis 2020 mit der Auswahl einer der beiden Maßnahmen nach Satz 3 zu verbinden. Als Ausgleich für die Pflichtenbefreiung nach Absatz 1 unterliegt der Betreiber für die Handelsperiode 2013 bis 2020 einer der nachfolgenden gleichwertigen Maßnahmen:

1. Zahlung eines Ausgleichsbetrages für ersparte Kosten des Erwerbs von Emissionsberechtigungen für die Berichtsjahre der Handelsperiode 2013 bis 2020 nach Maßgabe des Absatzes 3;
2. Selbstverpflichtung zu spezifischen Emissionsminderungen der Anlage in der Handelsperiode 2013 bis 2020 nach Maßgabe des Absatzes 4.

(3) Der nach Absatz 2 Satz 3 Nummer 1 letztendlich zu zahlende Ausgleichsbetrag ergibt sich aus der berechneten Zahlungsverpflichtung, vermindert um einen Betrag, der sich aus der Anwendung eines

Kürzungsfaktors auf die Ausgleichszahlung ergibt. Der Kürzungsfaktor entspricht dem Verhältnis der erreichten Reduzierung des spezifischen Emissionswertes in Prozentpunkten zu 1,74 Prozentpunkten. Die Zahlungsverpflichtung ist das Produkt aus der anzusetzenden Menge an Emissionsberechtigungen, die dem Zukaufbedarf für das jeweilige Berichtsjahr der Handelsperiode 2013 bis 2020 entspricht, und dem durchschnittlichen, volumengewichteten Zuschlagspreis der Versteigerungen nach § 8 im Berichtsjahr oder dem Kalenderjahr vor dem Berichtsjahr, je nachdem, welcher der beiden Zuschlagspreise der geringere ist; für das Berichtsjahr 2013 ist nur der Zuschlagspreis dieses Berichtsjahres maßgeblich. Der Zukaufbedarf einer Anlage entspricht der Differenz zwischen der Emissionsmenge des Vorjahres und der sich aus den Berechnungsvorschriften der Rechtsverordnung nach § 10 ergebenden Menge an Berechtigungen. Die Einnahmen aus der Ausgleichszahlung stehen dem Bund zu und fließen in das Sondervermögen „Energie- und Klimafonds“.

(4) Gegenstand der Selbstverpflichtung zu spezifischen Emissionsminderungen der Anlage nach Absatz 2 Nummer 2 ist die Reduzierung des anlagenspezifischen Emissionswertes pro Produkteinheit gegenüber dem Emissionswert der Basisperiode um jährlich 1,74 Prozent. Für die Berechnung der erforderlichen, spezifischen Emissionsminderung sind die Vorgaben des Anhangs 5 Teil 1 maßgeblich. Der Betreiber ist verpflichtet, der zuständigen Behörde jeweils bis zum 31. März eines Jahres die Produktionsmenge des Vorjahres zu berichten. Erfüllt ein Betreiber die Verpflichtung nach Satz 1 in drei aufeinanderfolgenden Berichtsjahren der Handelsperiode 2013 bis 2020 nicht, so unterliegt er für jedes dieser Berichtsjahre der Ausgleichszahlung nach Absatz 2 Nummer 1 bis zum Beginn des Berichtsjahres, in dem die Verpflichtung wieder erfüllt wird. Der Betreiber unterliegt der Ausgleichszahlung auch, wenn er seine Verpflichtung nach Satz 1 im Berichtsjahr 2020 oder in den beiden Berichtsjahren 2019 und 2020 nicht erfüllt. Für die Berechnung der Ausgleichszahlung in den Fällen der Sätze 4 und 5 sind die Vorgaben des Anhangs 5 Teil 2 maßgeblich.

(5) Für Anlagen, die in den Jahren 2008 bis 2010 oder in den drei Kalenderjahren vor dem Berichtsjahr jeweils weniger als 20 000 Tonnen Kohlendioxidäquivalent emittiert haben, gilt die Pflicht zur Emissionsermittlung und Berichterstattung nach § 5 mit der Maßgabe, dass ein vereinfachter Emissionsbericht jeweils einen Zeitraum von zwei Berichtsjahren umfasst. Sofern sich bei diesen Anlagen aus dem Emissionsbericht Gesamtemissionen in einem Berichtsjahr von mehr als 20 000 Tonnen Kohlendioxidäquivalent ergeben, kann die zuständige Behörde die Vorlage jährlicher Emissionsberichte anordnen.

(6) Die Befreiung erlischt, wenn die Anlage in einem Jahr der Handelsperiode 2013 bis 2020 25 000 Tonnen Kohlendioxidäquivalent oder mehr emittiert. In diesem Fall unterliegt der Betreiber ab dem Jahr der Überschreitung der Emissionsgrenze bis zum Jahr 2020 der Pflicht nach § 7 Absatz 1 und erhält eine Zuteilung gemäß § 9.

§ 28 Verordnungsermächtigungen

(1) Die Bundesregierung wird ermächtigt, durch Rechtsverordnung, die nicht der Zustimmung des Bundesrates bedarf,

1. die Kohlendioxidäquivalente im Sinne des § 3 Absatz 1 Nummer 3 für die einzelnen Treibhausgase nach Maßgabe internationaler Standards zu bestimmen;
2. Einzelheiten für die Versteigerung nach § 8 vorzusehen; dabei kann die Bundesregierung insbesondere Vorschriften erlassen über die Zulassung von Stellen, die Versteigerungen durchführen, über die Aufsicht über diese Stellen sowie über die Zulassung von weiteren Bietern;
3. Einzelheiten zum Umtausch von Emissionsreduktionseinheiten, zertifizierten Emissionsreduktionen oder anderen Emissionsgutschriften in Berechtigungen nach § 18 und weitere Formen der Nutzung dieser Gutschriften zu regeln; dabei kann die Bundesregierung insbesondere
   a) vorsehen, dass nach den Vorgaben von Maßnahmen der Europäischen Kommission nach Artikel 11a Absatz 8 Unterabsatz 4 bis 6 der Richtlinie 2003/87/EG zusätzliche Mengen von Gutschriften in Berechtigungen umgetauscht werden können, die von den in § 18 Absatz 2 genannten Werten abweichen,
   b) Anforderungen an das Umtauschverfahren sowie Antragsfristen festlegen,
   c) Umtausch und Nutzung für weitere Arten von Gutschriften für Emissionsminderungen zur Umsetzung von Artikel 11a Absatz 4 bis 6 der Richtlinie 2003/87/EG zulassen und
   d) Projekttypen festlegen, deren Gutschriften durch Maßnahmen nach Artikel 11a Absatz 9 der Richtlinie 2003/87/EG in der Handelsperiode 2013 bis 2020 einer Verwendungsbeschränkung unterliegen, sowie den Zeitpunkt, ab dem die Verwendungsbeschränkung beginnt;

4. Einzelheiten zur Anwendung des § 24 für Anlagen, die von demselben Betreiber am gleichen Standort in einem technischen Verbund betrieben werden, zu regeln; dies umfasst insbesondere Regelungen, dass
   a) der Antrag nach § 24 auch zulässig ist für einheitliche Anlagen aus Anlagen nach Anhang 1 Teil 2 Nummer 1 bis 6 und anderen Anlagen nach Anhang 1 Teil 2,
   b) bei Anlagen nach Anhang 1 Teil 2 Nummer 8 bis 11 die Produktionsmengen der in den einbezogenen Anlagen hergestellten Produkte anzugeben sind,
   c) Anlagen nach Anhang 1 Teil 2 Nummer 7 mit sonstigen in Anhang 1 Teil 2 aufgeführten Anlagen als einheitliche Anlage gelten;
5. Einzelheiten zur Ausgestaltung der Pflichtenfreistellung nach § 27 zu regeln, insbesondere Bestimmungen zu erlassen über
   a) Angaben im Befreiungsantrag nach § 27 Absatz 2,
   b) Anforderungen an den vereinfachten Emissionsbericht nach § 27 Absatz 5 Satz 1 sowie zusätzliche Erleichterungen bei der Berichterstattung nach § 5 für Anlagen, die in den Jahren 2008 bis 2010 oder in den drei Kalenderjahren vor dem Berichtsjahr jeweils weniger als 5 000 Tonnen Kohlendioxidäquivalent emittiert haben,
   c) Anforderungen an den Nachweis des anlagenspezifischen Emissionswertes,
   d) die Berücksichtigung der gekoppelten Produktion von Strom und Wärme sowie die Berücksichtigung mehrerer Einzelelemente der Zuteilung bei der Berechnung der spezifischen Emissionsminderung,
   e) Anforderungen an die gemeinsame Nachweisführung nach Anhang 5 Teil 1 Nummer 1 Buchstabe b und
   f) gesonderte Fristen für die Erfüllung der Pflichten nach den §§ 5 und 7 in Fällen des § 27 Absatz 6.

(2) Das Bundesministerium für Umwelt, Naturschutz, Bau und Reaktorsicherheit wird ermächtigt, durch Rechtsverordnung, die nicht der Zustimmung des Bundesrates bedarf, zu regeln:

1. Einzelheiten zur Ermittlung von und Berichterstattung über Emissionen nach § 5 Absatz 1, zur Verifizierung der Angaben in Emissionsberichten nach § 5 Absatz 2 und zur Verifizierung der Angaben zur Transportleistung in Anträgen nach § 11 Absatz 4 Satz 4 und § 13 Absatz 2 Satz 4, soweit diese Sachverhalte nicht den Vollzug des § 4 betreffen und nicht in der Monitoring-Verordnung oder in der Verordnung (EU) Nr. 600/2012 in ihrer jeweils geltenden Fassung abschließend geregelt sind;
2. im Einvernehmen mit dem Bundesministerium für Wirtschaft und Energie Einzelheiten zur Überführung von Berechtigungen, die von Drittländern ausgegeben werden, nach § 16 Absatz 3 und
3. Einzelheiten zur Einrichtung und Führung eines Emissionshandelsregisters nach § 17, insbesondere die in der Verordnung nach Artikel 19 Absatz 3 der Richtlinie 2003/87/EG aufgeführten Sachverhalte zur ergänzenden Regelung durch die Mitgliedstaaten.

(3) Das Bundesministerium für Umwelt, Naturschutz, Bau und Reaktorsicherheit wird ermächtigt, durch Rechtsverordnung, die nicht der Zustimmung des Bundesrates bedarf, eine juristische Person des Privatrechts mit der Wahrnehmung aller oder eines Teils der Aufgaben des Umweltbundesamtes nach diesem Gesetz und den hierfür erforderlichen hoheitlichen Befugnissen zu beleihen, wenn diese Gewähr dafür bietet, dass die übertragenen Aufgaben ordnungsgemäß und zentral für das Bundesgebiet erfüllt werden. Dies gilt nicht für Befugnisse nach § 20 Absatz 2 Nummer 1 und 2 und Abschnitt 5 dieses Gesetzes sowie für Maßnahmen nach dem Verwaltungs-Vollstreckungsgesetz. Eine juristische Person bietet Gewähr im Sinne des Satzes 1, wenn

1. diejenigen, die die Geschäftsführung oder die Vertretung der juristischen Person wahrnehmen, zuverlässig und fachlich geeignet sind,
2. die juristische Person über die zur Erfüllung ihrer Aufgaben notwendige Ausstattung und Organisation verfügt und ein ausreichendes Anfangskapital hat und
3. eine wirtschaftliche oder organisatorische Nähe zu Personen ausgeschlossen ist, die dem Anwendungsbereich dieses Gesetzes unterfallen.

Die Beliehene untersteht der Aufsicht des Umweltbundesamtes.

(4) Das Bundesministerium für Umwelt, Naturschutz, Bau und Reaktorsicherheit wird ermächtigt, durch Rechtsverordnung, die nicht der Zustimmung des Bundesrates bedarf,

1. eine juristische Person mit den Aufgaben und Befugnissen einer Zulassungsstelle für Prüfstellen zu beleihen;

2. Anforderungen an die Zulassungsstelle und den Informationsaustausch mit der zuständigen Behörde nach § 19 Absatz 1 Nummer 3 sowie mit den für den Emissionshandel zuständigen Behörden anderer Mitgliedstaaten zu regeln;
3. Einzelheiten zum Zertifizierungsverfahren, insbesondere zu Anforderungen an die zu zertifizierenden Prüfstellen nach § 21 und zu deren Aufgaben und Pflichten, sowie zur Aufsicht über die Prüfstellen zu regeln;
4. die Erhebung von Gebühren und Auslagen für Amtshandlungen der Zulassungsstelle zu regeln.

Die Beleihung nach Satz 1 Nummer 1 ist nur zulässig, wenn die zu beleihende juristische Person die Gewähr für die ordnungsgemäße Erfüllung der Aufgaben der Zulassungsstelle im Einklang mit den Anforderungen der Verordnung (EU) Nr. 600/2012 in ihrer jeweils geltenden Fassung bietet; die Beliehene untersteht der Aufsicht des Bundesministeriums für Umwelt, Naturschutz, Bau und Reaktorsicherheit.

Abschnitt 5
Sanktionen

§ 29 Durchsetzung der Berichtspflicht

Kommt ein Betreiber seiner Berichtspflicht nach § 5 Absatz 1 nicht nach, so verfügt die zuständige Behörde die Sperrung seines Kontos. Die Sperrung ist unverzüglich aufzuheben, sobald der Betreiber der zuständigen Behörde einen den Anforderungen nach § 5 entsprechenden Bericht vorlegt oder eine Schätzung der Emissionen nach § 30 Absatz 2 Satz 1 erfolgt.

§ 30 Durchsetzung der Abgabepflicht

(1) Kommt ein Betreiber seiner Pflicht nach § 7 Absatz 1 nicht nach, so setzt die zuständige Behörde für jede emittierte Tonne Kohlendioxidäquivalent, für die der Betreiber keine Berechtigungen abgegeben hat, eine Zahlungspflicht von 100 Euro fest. Die Zahlungspflicht erhöht sich entsprechend dem Anstieg des Europäischen Verbraucherpreisindex für das Berichtsjahr gegenüber dem Bezugsjahr 2012; diese Jahresindizes werden vom Statistischen Amt der Europäischen Union (Eurostat) veröffentlicht. Die Festsetzung einer Zahlungspflicht nach Satz 1 ist nur innerhalb eines Jahres ab dem Pflichtenverstoß zulässig. Von der Festsetzung einer Zahlungspflicht kann abgesehen werden, wenn der Betreiber seiner Pflicht nach § 7 Absatz 1 auf Grund höherer Gewalt nicht nachkommen konnte.

(2) Soweit ein Betreiber nicht ordnungsgemäß über die durch seine Tätigkeit verursachten Emissionen berichtet hat, schätzt die zuständige Behörde die durch die Tätigkeit verursachten Emissionen entsprechend den Vorgaben des Anhangs 2 Teil 2. Die Schätzung ist Basis für die Verpflichtung nach § 7 Absatz 1. Die Schätzung unterbleibt, wenn der Betreiber im Rahmen der Anhörung zum Festsetzungsbescheid nach Absatz 1 seiner Berichtspflicht ordnungsgemäß nachkommt.

(3) Der Betreiber bleibt verpflichtet, die fehlenden Berechtigungen bis zum 31. Januar des Folgejahres abzugeben; sind die Emissionen nach Absatz 2 geschätzt worden, so sind die Berechtigungen nach Maßgabe der erfolgten Schätzung abzugeben. Gibt der Betreiber die fehlenden Berechtigungen nicht bis zum 31. Januar des Folgejahres ab, so werden Berechtigungen, auf deren Zuteilung oder Ausgabe der Betreiber einen Anspruch hat, auf seine Verpflichtung nach Satz 1 angerechnet.

(4) Die Namen der Betreiber, die gegen ihre Verpflichtung nach § 7 Absatz 1 verstoßen, werden im Bundesanzeiger veröffentlicht. Die Veröffentlichung setzt einen bestandskräftigen Zahlungsbescheid voraus.

§ 31 Betriebsuntersagung gegen Luftfahrzeugbetreiber

(1) Erfüllt ein Luftfahrzeugbetreiber seine Pflichten aus diesem Gesetz nicht und konnte die Einhaltung der Vorschriften nicht durch andere Durchsetzungsmaßnahmen gewährleistet werden, so kann die zuständige Behörde die Europäische Kommission ersuchen, eine Betriebsuntersagung für den betreffenden Luftfahrzeugbetreiber zu beschließen. Die zuständige Behörde hat dabei eine Empfehlung für den Geltungsbereich der Betriebsuntersagung und für Auflagen, die zu erfüllen sind, abzugeben. Die zuständige Behörde hat bei dem Ersuchen im Fall eines gewerblichen Luftfahrzeugbetreibers Einvernehmen mit dem Luftfahrt-Bundesamt herzustellen.

(2) Hat die Europäische Kommission gemäß Artikel 16 Absatz 10 der Richtlinie 2003/87/EG die Verhängung einer Betriebsuntersagung gegen einen Luftfahrzeugbetreiber beschlossen, so ergreift im Fall eines gewerblichen Luftfahrzeugbetreibers das Luftfahrt-Bundesamt und im Fall eines nichtgewerblichen Luftfahrzeugbetreibers

das Umweltbundesamt die zur Durchsetzung dieses Beschlusses erforderlichen Maßnahmen. Dazu können sie insbesondere

1. ein Startverbot verhängen,
2. ein Einflugverbot verhängen und
3. die Erlaubnis nach § 2 Absatz 7 des Luftverkehrsgesetzes oder die Betriebsgenehmigung nach § 20 Absatz 4 oder § 21a des Luftverkehrsgesetzes, soweit vorhanden, widerrufen.

§ 32 Bußgeldvorschriften

(1) Ordnungswidrig handelt, wer

1. entgegen § 5 Absatz 1 in Verbindung mit Anhang 2 Teil 2 Satz 1 der Behörde nicht richtig berichtet,
2. einer Rechtsverordnung nach § 10 Satz 3 Nummer 11 Buchstabe a oder einer vollziehbaren Anordnung auf Grund einer solchen Rechtsverordnung zuwiderhandelt, soweit die Rechtsverordnung für einen bestimmten Tatbestand auf diese Bußgeldvorschrift verweist,
3. entgegen § 11 Absatz 4 Satz 1 eine Angabe nicht richtig macht oder
4. entgegen § 11 Absatz 5 Satz 3, auch in Verbindung mit § 13 Absatz 2 Satz 4, eine Angabe oder einen Nachweis nicht richtig übermittelt.

(2) Ordnungswidrig handelt, wer eine in Absatz 1 bezeichnete Handlung fahrlässig begeht.

(3) Ordnungswidrig handelt, wer vorsätzlich oder fahrlässig

1. ohne Genehmigung nach § 4 Absatz 1 Satz 1 Treibhausgase freisetzt,
2. entgegen § 4 Absatz 2 eine Angabe nicht richtig oder nicht vollständig beifügt,
3. entgegen § 4 Absatz 5 Satz 1 oder § 25 Absatz 1 Satz 1 eine Anzeige nicht, nicht richtig, nicht vollständig oder nicht rechtzeitig erstattet,
4. entgegen § 6 Absatz 1 einen Überwachungsplan nicht oder nicht rechtzeitig einreicht,
5. einer vollziehbaren Anordnung nach § 6 Absatz 3 Satz 2 zuwiderhandelt,
6. einer Rechtsverordnung nach § 10 Satz 3 Nummer 3 oder Nummer 11 Buchstabe b oder einer vollziehbaren Anordnung auf Grund einer solchen Rechtsverordnung zuwiderhandelt, soweit die Rechtsverordnung für einen bestimmten Tatbestand auf diese Bußgeldvorschrift verweist, oder
7. entgegen § 20 Absatz 2 eine dort genannte Handlung nicht gestattet, eine Auskunft nicht, nicht richtig, nicht vollständig oder nicht rechtzeitig erteilt, eine Unterlage nicht, nicht richtig oder nicht rechtzeitig vorlegt oder eine Arbeitskraft oder ein Hilfsmittel nicht oder nicht rechtzeitig bereitstellt.

(4) Die Ordnungswidrigkeit kann in den Fällen des Absatzes 1 mit einer Geldbuße bis zu fünfhunderttausend Euro und in den Fällen der Absätze 2 und 3 mit einer Geldbuße bis zu fünfzigtausend Euro geahndet werden.

(5) Die zuständige Behörde soll in den Fällen des Absatzes 1 Nummer 1 von einer Ahndung absehen, wenn der Betreiber infolge des nicht richtigen Berichts gegen die Abgabepflicht nach § 7 Absatz 1 Satz 1 verstößt und wegen dieser Handlung eine Zahlungspflicht nach § 30 Absatz 1 Satz 1 festgesetzt wird.

Abschnitt 6
Übergangsregelungen

§ 33 Allgemeine Übergangsregelung

(1) § 18 findet ab dem 1. Januar 2013 Anwendung.

(2) § 13 Absatz 2, § 19 Absatz 1 Nummer 4 und § 27 des Treibhausgas-Emissionshandelsgesetzes vom 8. Juli 2004 (BGBl. I S. 1578), das zuletzt durch Artikel 9 des Gesetzes vom 11. August 2010 (BGBl. I S. 1163) geändert worden ist, gelten für Rechte und Pflichten, die sich auf Emissionen aus der Handelsperiode 2008 bis 2012 beziehen, fort.

(3) § 22 Absatz 1 gilt für die Erhebung von Gebühren für die Verwaltung von Konten ab der Handelsperiode 2013 bis 2020. § 22 Absatz 1 des Treibhausgas-Emissionshandelsgesetzes vom 8. Juli 2004 (BGBl. I S. 1578),

das zuletzt durch Artikel 9 des Gesetzes vom 11. August 2010 (BGBl. I S. 1163) geändert worden ist, gilt für Gebührentatbestände, die bis Ende des Jahres 2012 erfüllt sind.

(4) Abweichend von § 9 Absatz 2 Satz 6 und § 21 können Anlagenbetreiber vor dem 1. Januar 2014 bei der zuständigen Behörde Zuteilungsanträge für Neuanlagen und Kapazitätserweiterungen auch mit einer Verifizierung durch eine sachverständige Stelle einreichen, soweit diese sachverständige Stelle nach § 21 des Treibhausgas-Emissionshandelsgesetzes in seiner bis zum 19. Juli 2013 geltenden Fassung bekannt gegeben wurde.

§ 34 Übergangsregelung für Anlagenbetreiber

(1) Für die Freisetzung von Treibhausgasen durch Tätigkeiten im Sinne des Anhangs 1 des Treibhausgas-Emissionshandelsgesetzes vom 8. Juli 2004 (BGBl. I S. 1578), das zuletzt durch Artikel 9 des Gesetzes vom 11. August 2010 (BGBl. I S. 1163) geändert worden ist, sind in Bezug auf die Handelsperiode 2008 bis 2012 die §§ 1 bis 25 des Treibhausgas-Emissionshandelsgesetzes vom 8. Juli 2004 (BGBl. I S. 1578), das zuletzt durch Artikel 9 des Gesetzes vom 11. August 2010 (BGBl. I S. 1163) geändert worden ist, weiter anzuwenden. Dies gilt auch, wenn die Anlage, in der die Tätigkeit ausgeübt wird, erst zwischen dem 28. Juli 2011 und dem 31. Dezember 2012 in Betrieb genommen wird.

(2) Auf Anlagenbetreiber sind die Pflichten nach den §§ 4, 5 sowie 7 erst ab dem 1. Januar 2013 anzuwenden; soweit sich diese Vorschriften auf Emissionen beziehen, sind sie für Treibhausgase, die ab diesem Datum freigesetzt werden, anzuwenden. Die §§ 9 und 14 sind erst auf die Zuteilung und die Ausgabe von Berechtigungen, die für die Handelsperiode 2013 bis 2020 sowie für nachfolgende Handelsperioden gelten, anzuwenden. § 24 ist auf die Feststellung einheitlicher Anlagen ab der Handelsperiode 2013 bis 2020 anzuwenden. Die zuständige Behörde kann Feststellungen nach § 25 des Treibhausgas-Emissionshandelsgesetzes vom 8. Juli 2004 (BGBl. I S. 1578), das zuletzt durch Artikel 9 des Gesetzes vom 11. August 2010 (BGBl. I S. 1163) geändert worden ist, mit Wirkung ab der Handelsperiode 2013 bis 2020 widerrufen, sofern diese Feststellungen nach § 24 oder der Rechtsverordnung nach § 28 Absatz 1 Nummer 4 nicht getroffen werden durften.

§ 35 Übergangsregelung für Luftfahrzeugbetreiber

(1) Für Luftfahrzeugbetreiber sind die Pflichten nach den §§ 5 und 7 auf Emissionen anzuwenden, die ab dem 1. Januar 2012 freigesetzt werden.

(2) Die Pflicht nach § 6 Absatz 1 Satz 1 gilt in der Handelsperiode 2012 nicht für Luftfahrzeugbetreiber, die bereits über einen genehmigten Überwachungsplan für ihre Emissionsberichterstattung nach § 27 Absatz 4 des Treibhausgas-Emissionshandelsgesetzes vom 8. Juli 2004 (BGBl. I S. 1578), das zuletzt durch Artikel 9 des Gesetzes vom 11. August 2010 (BGBl. I S. 1163) geändert worden ist, verfügen. Reicht ein Luftfahrzeugbetreiber einen Überwachungsplan für die Handelsperiode 2012 ein, so sind für die Genehmigung abweichend von Absatz 2 Satz 2 nicht die Vorgaben der Monitoring-Verordnung, sondern die Vorgaben der Entscheidung 2007/589/EG der Kommission vom 18. Juli 2007 zur Festlegung von Leitlinien für die Überwachung und Berichterstattung betreffend Treibhausgasemissionen im Sinne der Richtlinie 2003/87/EG des Europäischen Parlaments und des Rates (Monitoring-Leitlinien) (ABl. L 229 vom 31.8.2007, S. 1), die zuletzt durch den Beschluss 2010/345/EU (ABl. L 155 vom 22.6.2010, S. 34) geändert worden ist, maßgeblich.

(3) Luftfahrzeugbetreiber können die Abgabepflicht nach § 7 Absatz 1 Satz 1 in der Handelsperiode 2012 durch Abgabe von Emissionsreduktionseinheiten oder zertifizierten Emissionsreduktionen bis zu einem Anteil von höchstens 15 Prozent der Menge der abzugebenden Berechtigungen erfüllen. § 6 Absatz 1c des Treibhausgas-Emissionshandelsgesetzes vom 8. Juli 2004 (BGBl. I S. 1578), das zuletzt durch Artikel 9 des Gesetzes vom 11. August 2010 (BGBl. I S. 1163) geändert worden ist, gilt entsprechend.

(4) Ist ein Luftfahrzeugbetreiber nach § 2 Absatz 6 Satz 2 Nummer 2 der Bundesrepublik Deutschland als zuständigem Verwaltungsmitgliedstaat zugewiesen nach der Verordnung (EG) Nr. 748/2009 (ABl. L 219 vom 22.8.2009, S. 1), die durch die Verordnung (EU) Nr. 82/2010 (ABl. L 25 vom 29.1.2010, S. 12) geändert worden ist, und wird dieser Luftfahrzeugbetreiber durch eine neue Fassung der Verordnung einem anderen Verwaltungsmitgliedstaat zugewiesen, so bleibt dieses Gesetz auf ihn hinsichtlich des Zuteilungsverfahrens nach § 11 mit Ausnahme der Zuteilungsentscheidung nach § 11 Absatz 6 anwendbar.

Anhang 1 (zu § 1, § 2 Absatz 1 bis 3 Satz 1, Absatz 4 Satz 1, Absatz 5 Nummer 3, § 3 Absatz 1 Nummer 2, 5, 9 und 12, § 4 Absatz 1 Satz 1, § 7 Absatz 2 Satz 1 Nummer 1,

§ 24, § 27 Absatz 1 Satz 2 und § 28 Absatz 1 Nummer 4)
Einbezogene Tätigkeiten und Treibhausgase

(Fundstelle: BGBl. I 2011, 1488 - 1491)

Teil 1
Grundsätze

1. Zur Berechnung der Gesamtfeuerungswärmeleistung einer in Teil 2 Nummer 2 bis 6, 11, 13, 19 und 22 genannten Anlage oder der Gesamtfeuerungswärmeleistung der Verbrennungseinheiten einer Anlage nach Teil 2 Nummer 1 werden die Feuerungswärmeleistungen aller technischen Einheiten addiert, die Bestandteil der Anlage sind und in denen Brennstoffe verbrannt werden. Bei diesen Einheiten handelt es sich insbesondere um alle Arten von Heizkesseln, Turbinen, Erhitzern, Industrieöfen, Verbrennungsöfen, Kalzinierungsöfen, Brennöfen, sonstigen Öfen, Trocknern, Motoren, Brennstoffzellen, Fackeln und thermischen oder katalytischen Nachbrennern. Einheiten mit einer Feuerungswärmeleistung von weniger als 3 Megawatt (MW), Notfackeln zur Anlagenentlastung bei Betriebsstörungen, Notstromaggregate und Einheiten, die ausschließlich Biomasse nutzen, werden bei dieser Berechnung nicht berücksichtigt. Ist der Schwellenwert für die Gesamtfeuerungswärmeleistung überschritten, sind alle Einheiten erfasst, in denen Brennstoffe verbrannt werden.
2. Für die Zuordnung einer Anlage, die sowohl einer Tätigkeit mit einem als Produktionsleistung angegebenen Schwellenwert als auch einer Tätigkeit mit einem als Gesamtfeuerungswärmeleistung angegebenen Schwellenwert zugeordnet werden kann, gilt Folgendes:
   a) Wenn die Anlage sowohl den Schwellenwert der Produktionsleistung als auch den Schwellenwert der Gesamtfeuerungswärmeleistung erreicht oder überschreitet, so ist die Anlage derjenigen Tätigkeit zuzuordnen, für die der Schwellenwert als Produktionsleistung angegeben ist.
   b) Wenn die Anlage entweder nur den Schwellenwert der Gesamtfeuerungswärmeleistung oder nur den Schwellenwert der Produktionsleistung erreicht oder überschreitet, ist sie derjenigen Tätigkeit zuzuordnen, deren Schwellenwert sie erreicht.

Teil 2
Tätigkeiten

Nr.	Tätigkeiten	Treib-hausgas
1	Verbrennungseinheiten zur Verbrennung von Brennstoffen mit einer Gesamtfeuerungswärmeleistung von insgesamt 20 MW oder mehr in einer Anlage, soweit nicht von einer der nachfolgenden Nummern erfasst	CO_2
2	Anlagen zur Erzeugung von Strom, Dampf, Warmwasser, Prozesswärme oder erhitztem Abgas durch den Einsatz von Brennstoffen in einer Verbrennungseinrichtung (wie Kraftwerk, Heizkraftwerk, Heizwerk, Gasturbinenanlage, Verbrennungsmotoranlage, sonstige Feuerungsanlage), einschließlich zugehöriger Dampfkessel, mit einer Feuerungswärmeleistung von 50 MW oder mehr	CO_2
3	Anlagen zur Erzeugung von Strom, Dampf, Warmwasser, Prozesswärme oder erhitztem Abgas durch den Einsatz von Kohle, Koks, einschließlich Petrolkoks, Kohlebriketts, Torfbriketts, Brenntorf, naturbelassenem Holz, emulgiertem Naturbitumen, Heizölen, gasförmigen Brennstoffen (insbesondere Koksofengas, Grubengas, Stahlgas, Raffineriegas, Synthesegas, Erdölgas aus der Tertiärförderung von Erdöl, Klärgas, Biogas), Methanol, Ethanol, naturbelassenen Pflanzenölen, Pflanzenölmethylestern, naturbelassenem Erdgas, Flüssiggas, Gasen der öffentlichen Gasversorgung oder Wasserstoff mit einer Feuerungswärmeleistung von mehr als 20 MW bis weniger als 50 MW in einer Verbrennungseinrichtung (wie Kraftwerk, Heizkraftwerk, Heizwerk, Gasturbinenanlage, Verbrennungsmotoranlage, sonstige Feuerungsanlage), einschließlich zugehöriger Dampfkessel	CO_2
4	Anlagen zur Erzeugung von Strom, Dampf, Warmwasser, Prozesswärme oder erhitztem Abgas durch den Einsatz anderer als in Nummer 3 genannter fester oder flüssiger Brennstoffe in einer Verbrennungseinrichtung (wie Kraftwerk, Heizkraftwerk, Heizwerk, Gasturbinenanlage, Verbrennungsmotoranlage, sonstige Feuerungsanlage), einschließlich zugehöriger Dampfkessel, mit einer Feuerungswärmeleistung von mehr als 20 MW bis weniger als 50 MW	CO_2
5	Verbrennungsmotoranlagen zum Antrieb von Arbeitsmaschinen für den Einsatz von Heizöl EL, Dieselkraftstoff, Methanol, Ethanol, naturbelassenen Pflanzenölen, Pflanzenölmethylestern oder gasförmigen Brennstoffen (insbesondere Koksofengas, Grubengas, Stahlgas, Raffineriegas, Synthesegas, Erdölgas aus der Tertiärförderung von Erdöl, Klärgas, Biogas, naturbelassenem Erdgas, Flüssiggas, Gasen der öffentlichen Gasversorgung, Wasserstoff) mit einer Feuerungswärmeleistung von 20 MW oder mehr	CO_2
6	Gasturbinenanlagen zum Antrieb von Arbeitsmaschinen für den Einsatz von Heizöl EL, Dieselkraftstoff, Methanol, Ethanol, naturbelassenen Pflanzenölen, Pflanzenölmethylestern oder gasförmigen Brennstoffen (insbesondere Koksofengas, Grubengas, Stahlgas, Raffineriegas, Synthesegas, Erdölgas aus der Tertiärförderung von Erdöl, Klärgas, Biogas, naturbelassenem Erdgas, Flüssiggas, Gasen der öffentlichen Gasversorgung, Wasserstoff) mit einer Feuerungswärmeleistung von mehr als 20 MW	CO_2

Nr.	Tätigkeiten	Treib-hausgas
7	Anlagen zur Destillation oder Raffination oder sonstigen Weiterverarbeitung von Erdöl oder Erdölerzeugnissen in Mineralöl- oder Schmierstoffraffinerien	CO_2
8	Anlagen zur Trockendestillation von Steinkohle oder Braunkohle (Kokereien)	CO_2
9	Anlagen zum Rösten, Schmelzen, Sintern oder Pelletieren von Metallerzen	CO_2
10	Anlagen zur Herstellung oder zum Erschmelzen von Roheisen oder Stahl einschließlich Stranggießen, auch soweit Konzentrate oder sekundäre Rohstoffe eingesetzt werden, mit einer Schmelzleistung von 2,5 Tonnen oder mehr je Stunde, auch soweit in integrierten Hüttenwerken betrieben	CO_2
11	Anlagen zur Herstellung oder Verarbeitung von Eisenmetallen (einschließlich Eisenlegierung) bei Betrieb von Verbrennungseinheiten mit einer Gesamtfeuerungswärmeleistung von 20 MW oder mehr, soweit nicht von Nummer 10 erfasst; die Verarbeitung umfasst insbesondere Walzwerke, Öfen zum Wiederaufheizen, Glühöfen, Schmiedewerke, Gießereien, Beschichtungs- und Beizanlagen	CO_2
12	Anlagen zur Herstellung von Primäraluminium	CO_2, PFC
13	Anlagen zum Schmelzen, zum Legieren oder zur Raffination von Nichteisenmetallen bei Betrieb von Verbrennungseinheiten mit einer Gesamtfeuerungswärmeleistung (einschließlich der als Reduktionsmittel verwendeten Brennstoffe) von 20 MW oder mehr	CO_2
14	Anlagen zur Herstellung von Zementklinker mit einer Produktionsleistung von mehr als 500 Tonnen je Tag in Drehrohröfen oder mehr als 50 Tonnen je Tag in anderen Öfen	CO_2
15	Anlagen zum Brennen von Kalkstein, Magnesit oder Dolomit mit einer Produktionsleistung von mehr als 50 Tonnen Branntkalk, gebranntem Magnesit oder gebranntem Dolomit je Tag	CO_2
16	Anlagen zur Herstellung von Glas, auch soweit es aus Altglas hergestellt wird, einschließlich Anlagen zur Herstellung von Glasfasern, mit einer Schmelzleistung von mehr als 20 Tonnen je Tag	CO_2
17	Anlagen zum Brennen keramischer Erzeugnisse mit einer Produktionsleistung von mehr als 75 Tonnen je Tag	CO_2
18	Anlagen zum Schmelzen mineralischer Stoffe, einschließlich Anlagen zur Herstellung von Mineralfasern, mit einer Schmelzleistung von mehr als 20 Tonnen je Tag	CO_2
19	Anlagen zum Trocknen oder Brennen von Gips oder zur Herstellung von Gipskartonplatten und sonstigen Gipserzeugnissen bei Betrieb von Verbrennungseinheiten mit einer Gesamtfeuerungswärmeleistung von 20 MW oder mehr	CO_2
20	Anlagen zur Gewinnung von Zellstoff aus Holz, Stroh oder ähnlichen Faserstoffen	CO_2
21	Anlagen zur Herstellung von Papier, Karton oder Pappe mit einer Produktionsleistung von mehr als 20 Tonnen je Tag	CO_2
22	Anlagen zur Herstellung von Industrieruß bei Betrieb von Verbrennungseinheiten mit einer Gesamtfeuerungswärmeleistung von 20 MW oder mehr	CO_2
23	Anlagen zur Herstellung von Salpetersäure	CO_2, N_2O
24	Anlagen zur Herstellung von Adipinsäure	CO_2, N_2O
25	Anlagen zur Herstellung von Glyoxal oder Glyoxylsäure	CO_2, N_2O
26	Anlagen zur Herstellung von Ammoniak	CO_2
27	Anlagen zur Herstellung organischer Grundchemikalien (Alkene und chlorierte Alkene; Alkine; Aromaten und alkylierte Aromaten; Phenole, Alkohole; Aldehyde, Ketone; Carbonsäuren, Dicarbonsäuren, Carbonsäureanhydride und Dimethylterephthalat; Epoxide; Vinylacetat, Acrylnitril; Caprolactam und Melamin) mit einer Produktionsleistung von über 100 Tonnen je Tag	CO_2
28	Anlagen zur Herstellung von Wasserstoff oder Synthesegas durch Reformieren, partielle Oxidation, Wassergas-Shiftreaktion oder ähnliche Verfahren mit einer Produktionsleistung von mehr als 25 Tonnen je Tag	CO_2
29	Anlagen zur Herstellung von Natriumkarbonat und Natriumhydrogenkarbonat	CO_2
30	Anlagen zur Abscheidung von Treibhausgasen aus Anlagen nach den Nummern 1 bis 29 zum Zwecke der Beförderung und geologischen Speicherung in einer in Übereinstimmung mit der Richtlinie 2009/31/EG des Europäischen Parlaments und des Rates vom 23. April 2009 über die geologische Speicherung von Kohlendioxid und zur Änderung der Richtlinie 85/337/EWG des Rates sowie der Richtlinien 2000/60/EG, 2001/80/EG, 2004/35/EG, 2006/12/EG und 2008/1/EG des Europäischen Parlaments und des Rates sowie der Verordnung (EG) Nr. 1013/2006 (ABl. L 140 vom 5.6.2009, S. 114) zugelassenen Speicherstätte	CO_2
31	Rohrleitungsanlagen zur Beförderung von Treibhausgasen zum Zwecke der geologischen Speicherung in einer in Übereinstimmung mit der Richtlinie 2009/31/EG zugelassenen Speicherstätte	CO_2
32	Speicherstätte zur geologischen Speicherung von Treibhausgasen, die in Übereinstimmung mit der Richtlinie 2009/31/EG zugelassen ist	CO_2
33	Flüge, die von einem Flugplatz abgehen oder auf einem Flugplatz enden, der sich in einem Hoheitsgebiet eines Vertragsstaats des Abkommens über den Europäischen Wirtschaftsraum befindet, bei Mitgliedstaaten der Europäischen Union jedoch nur, soweit der Vertrag über die Europäische Union in dem Gebiet Anwendung findet. Nicht unter diese Tätigkeit fallen:	CO_2

Nr.	Tätigkeiten	Treib-hausgas
	a) Flüge, die ausschließlich durchgeführt werden, um aa) regierende Monarchinnen und Monarchen und ihre unmittelbaren Familienangehörigen, bb) Staatschefinnen und Staatschefs, Regierungschefinnen und Regierungschefs und zur Regierung gehörende Ministerinnen und Minister eines Nichtmitgliedstaats des Abkommens über den Europäischen Wirtschaftsraum in offizieller Mission zu befördern, soweit dies durch einen entsprechenden Statusindikator im Flugplan vermerkt ist; b) Militärflüge in Militärluftfahrzeugen sowie Zoll- und Polizeiflüge; c) Flüge im Zusammenhang mit Such- und Rettungseinsätzen, Löschflüge, Flüge im humanitären Einsatz sowie Ambulanzflüge in medizinischen Notfällen, soweit eine Genehmigung der jeweils zuständigen Behörde vorliegt; d) Flüge, die ausschließlich nach Sichtflugregeln im Sinne der §§ 28 und 31 bis 34 der Luftverkehrs-Ordnung durchgeführt werden; e) Flüge, bei denen das Luftfahrzeug ohne Zwischenlandung wieder zum Ausgangsflugplatz zurückkehrt; f) Übungsflüge, die ausschließlich zum Erwerb eines Pilotenscheins oder einer Berechtigung für die Cockpit-Besatzung durchgeführt werden, sofern dies im Flugplan vermerkt ist; diese Flüge dürfen nicht zur Beförderung von Fluggästen oder Fracht oder zur Positionierung oder Überführung von Luftfahrzeugen dienen; g) Flüge, die ausschließlich der wissenschaftlichen Forschung oder der Kontrolle, Erprobung oder Zulassung von Luftfahrzeugen oder Ausrüstung dienen, unabhängig davon, ob es sich um Bord- oder Bodenausrüstung handelt; h) Flüge von Luftfahrzeugen mit einer höchstzulässigen Startmasse von weniger als 5 700 Kilogramm; i) Flüge im Rahmen von gemeinwirtschaftlichen Verpflichtungen nach Maßgabe des Artikels 16 der Verordnung (EG) Nr. 1008/2008 auf Routen innerhalb von Gebieten in äußerster Randlage im Sinne des Artikels 349 des Vertrags über die Arbeitsweise in der Europäischen Union oder auf Routen mit einer angebotenen Kapazität von höchstens 30 000 Sitzplätzen pro Jahr sowie j) Flüge, die nicht bereits von den Buchstaben a bis i erfasst sind und von einem Luftfahrzeugbetreiber durchgeführt werden, der gegen Entgelt Linien- oder Bedarfsflugverkehrsleistungen für die Öffentlichkeit erbringt, bei denen er Fluggäste, Fracht oder Post befördert (gewerblicher Luftfahrzeugbetreiber), sofern aa) dieser Luftfahrzeugbetreiber innerhalb eines Kalenderjahres jeweils weniger als 243 solcher Flüge in den Zeiträumen Januar bis April, Mai bis August und September bis Dezember durchführt oder bb) die jährlichen Gesamtemissionen solcher Flüge dieses Luftfahrzeugbetreibers weniger als 10 000 Tonnen betragen; diese Ausnahme gilt nicht für Flüge, die ausschließlich zur Beförderung von regierenden Monarchinnen und Monarchen und ihren unmittelbaren Familienangehörigen sowie von Staatschefinnen und Staatschefs, Regierungschefinnen und Regierungschefs und zur Regierung gehörenden Ministerinnen und Ministern eines Mitgliedstaats des Abkommens über den Europäischen Wirtschaftsraum in Ausübung ihres Amtes durchgeführt werden.	

Anhang 2 (zu § 5 Absatz 1, § 6 Absatz 1 Satz 2, Absatz 2 Satz 2, § 13 Absatz 4, § 30 Absatz 2 Satz 1 und § 32 Absatz 1 Nummer 1) Anforderungen an die Vorlage und Genehmigung von Überwachungsplänen nach den §§ 6 und 13 sowie an die Ermittlung von Emissionen und die Berichterstattung nach § 5

(Fundstelle: BGBl. I 2011, 1492)

Teil 1
Fristen für die Vorlage eines Überwachungsplans

1. Für die Einreichung eines Überwachungsplans nach § 6 Absatz 1 Satz 1 gelten folgende Fristen:
   a) Für Betreiber von Anlagen, die spätestens zehn Monate vor Beginn einer Handelsperiode in Betrieb genommen wurden, endet die Frist fünf Monate vor Beginn der Handelsperiode;
   b) Betreiber von Anlagen, die später als zehn Monate vor Beginn einer Handelsperiode in Betrieb genommen wurden, müssen den Überwachungsplan vor Inbetriebnahme der Anlage vorlegen;
   c) Luftfahrzeugbetreiber, die ihre Tätigkeit bis zum 28. Juli 2011 aufgenommen haben, müssen unverzüglich nach dem 28. Juli 2011 einen Überwachungsplan über die Emissionsberichterstattung für die Jahre 2010 bis 2012 vorlegen;

d) Luftfahrzeugbetreiber, die ihre Tätigkeit nach dem unter Buchstabe c genannten Zeitpunkt aufnehmen, müssen unverzüglich nach diesem Zeitpunkt einen Überwachungsplan über die Emissionsberichterstattung für die Jahre 2010 bis 2012, soweit diese noch nicht abgelaufen sind, vorlegen;

e) Luftfahrzeugbetreiber, die ihre Tätigkeit bis zum 31. August 2012 aufnehmen, müssen bis zum 30. September 2012 einen Überwachungsplan über die Emissionsberichterstattung für die Handelsperiode 2013 bis 2020 vorlegen;

f) Luftfahrzeugbetreiber, die ihre Tätigkeit nach den unter Buchstabe e genannten Zeitpunkten aufnehmen, müssen unverzüglich nach diesem Zeitpunkt einen Überwachungsplan über die Emissionsberichterstattung für die Handelsperiode 2013 bis 2020, soweit diese noch nicht abgelaufen ist, vorlegen.

2. Luftfahrzeugbetreiber müssen den Überwachungsplan zur Ermittlung und Berichterstattung der Transportleistung für das zweite Kalenderjahr der laufenden Handelsperiode nach § 13 Absatz 4 spätestens drei Monate vor Beginn des zweiten Kalenderjahres der laufenden Handelsperiode vorlegen.

Teil 2
Anforderungen an die Ermittlung von Emissionen und die Emissionsberichterstattung

Ein Betreiber hat seine Emissionen nach seinem genehmigten Überwachungsplan zu ermitteln. Soweit dieser Überwachungsplan keine Regelungen trifft, hat er die Emissionen nach der Monitoring-Verordnung und der Rechtsverordnung nach § 28 Absatz 2 Nummer 1 zu ermitteln und darüber zu berichten. Soweit diese keine Regelungen treffen, sind die folgenden Regelungen zu beachten:

1. Bei Oxidationsprozessen ist ein Oxidationsfaktor von 1 zugrunde zu legen; eine unvollständige Verbrennung bleibt auch bei der Bestimmung des Emissionsfaktors unberücksichtigt.
2. Die CO_2-Emissionen von Anlagen im Sinne des Anhangs 1 Teil 2 Nummer 8 bis 10 sind über die Bilanzierung und Saldierung der Kohlenstoffgehalte der CO_2-relevanten Inputs und Outputs zu erfassen, soweit diese Anlagen nach § 24 als einheitliche Anlage gelten; Verbundkraftwerke am Standort von Anlagen zur Eisen- und Stahlerzeugung dürfen nicht gemeinsam mit den übrigen Anlagen bilanziert werden.

Abweichend von Satz 2 haben Luftfahrzeugbetreiber die Emissionen des Jahres 2012 nach der Entscheidung 2007/589/EG der Kommission zu ermitteln.

Anhang 3 (weggefallen)

Anhang 4 (weggefallen)

**Anhang 5 (zu § 27 Absatz 4 und § 28 Absatz 1 Nummer 5 Buchstabe e)
Berechnung der spezifischen Emissionsminderung sowie des Ausgleichsbetrages bei Nichterfüllung der Selbstverpflichtung nach § 27 Absatz 4**

(Fundstelle: BGBl. I 2011, 1496 - 1497)

Teil 1
Berechnung der spezifischen Emissionsminderung nach § 27 Absatz 4

1. Anlagenspezifischer Emissionswert für die Berechnung der spezifischen Emissions

a) Der anlagenspezifische Emissionswert für den Ausgangswert der Berechnung der spezifischen Emissionsminderung ist der Quotient aus der Emissionsmenge und der Produktionsmenge der betreffenden Anlage in der für die Zuteilung nach § 9 maßgeblichen Basisperiode; für die Berechnung des Emissionswertes sind die im Zuteilungsverfahren verwendeten Daten maßgeblich. Die jährliche erforderliche Minderung des spezifischen Emissionswertes der Anlage um 1,74 Prozent beginnt erstmals 2010.

b) Der Nachweis der erforderlichen Minderung des anlagenspezifischen Emissionswertes kann auch gemeinsam für mehrere Anlagen geführt werden, die der Verpflichtung nach § 27 Absatz 2 Nummer 2 unterliegen, sofern in den Befreiungsanträgen alle Anlagen benannt sind, für die ein gemeinsamer Nachweis geführt wird. In diesen Fällen werden die nach Buchstabe a ermittelten Minderungsbeiträge der einzelnen Anlagen nach Formel 7 entsprechend dem Anteil der Emissionsmenge jeder einzelnen Anlage an den Gesamtemissionen aller in den gemeinsamen Nachweis einbezogenen Anlagen in der für die Zuteilung nach § 9 maßgeblichen Basisperiode gewichtet.

2. Berechnungsformeln

a) Berechnungsformeln für Einzelanlagen-Nachweis

Formel 1	(Erfüllung der Minderungspflicht):	E-Mind-Ist(n) ≥ E-Mind-Soll(n)
Formel 2	(Notwendiger Minderungsprozentsatz):	E-Mind-Soll(n) = 1,74 x (n – 2009)
Formel 3	(Erreichter Minderungsprozentsatz):	E-Mind-Ist(n) = 100 – (E(n) x 100) / EBas)

b) Berechnungsformeln für gemeinsamen Nachweis

Formel 4	(Erfüllung der Minderungspflicht):	EPool-Ist(n) ≥ EPool-Soll(n)
Formel 5	(Notwendiger Minderungsprozentsatz):	EPool-Soll(n) = 1,74 x (n – 2009)
Formel 6	(Erreichter Minderungsprozentsatz der Einzelanlage):	EPool-Ist-Sg(a, n) = 100 – (E(a, n) x 100) / (EBas(a))
Formel 7	(Gewichtung der Minderungsbeiträge bei gemeinsamem Nachweis):	$\text{EPool-Ist(n)} = \sum_{a} \text{EPool-Ist-Sg(a, n)} \times \text{W(a)}$

Erläuterung der Abkürzungen:

Formeln 1 bis 3:

n	Index des Berichtsjahres in der Handelsperiode 2013 – 2020
EMind-Ist(n)	Erreichte Minderung des anlagenspezifischen Emissionswertes für das Berichtsjahr n in Prozent
EMind-Soll(n)	Erforderliche Minderung des anlagenspezifischen Emissionswertes für das Berichtsjahr n in Prozent
E(n)	Im Berichtsjahr n erreichter anlagenspezifischer Emissionswert in t CO_2Äq pro Produkteinheit
EBas	In der für die Zuteilungsentscheidung nach § 9 maßgeblichen Basisperiode erreichter anlagenspezifischer Emissionswert in t CO_2Äq

Formeln 4 bis 7:

a	Index der Anlagen bei gemeinsamem Nachweis
n	Index des Berichtsjahres in der Handelsperiode 2013 – 2020
EPool-Ist(n)	Erreichte Minderung des Emissionswertes aller in den gemeinsamen Nachweis einbezogenen Anlagen für das Berichtsjahr n in Prozent
EPool-Soll(n)	Erforderliche Minderung des Emissionswertes für das Berichtsjahr n in Prozent
EPool-Ist-Sg(a, n)	Erreichte Minderung des spezifischen Emissionswertes der Anlage a für das Berichtsjahr n in Prozent
E(a, n)	Im Berichtsjahr n erreichter anlagenspezifischer Emissionswert in t CO_2Äq pro Produkteinheit
EBas(a)	In der für die Zuteilungsentscheidung nach § 9 maßgeblichen Basisperiode erreichter anlagenspezifischer Emissionswert in t CO_2Äq
W(a)	Gewichtungsfaktor des Minderungsbeitrags einer Anlage a entsprechend Nummer 1 Buchstabe b in Prozent

Teil 2
Berechnung des Ausgleichsbetrages bei Nichterfüllung der Selbstverpflichtung nach § 27 Absatz 4 Satz 4 und 5

Sofern im Fall des § 27 Absatz 4 Satz 4 in einem Zeitraum von jeweils drei aufeinanderfolgenden Berichtsjahren die Pflicht nach § 27 Absatz 4 Satz 1 nicht erfüllt wurde, ergibt sich der Ausgleichsbetrag aus der berechneten Zahlungsverpflichtung vermindert um einen Betrag, der sich aus der Anwendung eines Kürzungsfaktors auf die berechnete Zahlungsverpflichtung ergibt. Der Kürzungsfaktor entspricht dem Verhältnis der im

Dreijahreszeitraum erreichten Reduzierung des spezifischen Emissionswertes in Prozentpunkten zu 5,22 Prozentpunkten. Der Betrag der Zahlungsverpflichtung berechnet sich nach § 27 Absatz 3. Für die in § 27 Absatz 4 Satz 5 geregelten Fälle gelten die Sätze 2 bis 4 entsprechend, wobei die maßgeblichen Werte an die verkürzten Zeiträume anzupassen sind.

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Strategic and efficient brief writing before the General Court of the European Union: Practical suggestions regarding the application and the reply in competition law cases

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Strategic and efficient brief writing before the General Court of the European Union: Practical suggestions regarding the application and the reply in competition law cases

Abstract

Given the complexity of litigating EU competition law cases and the considerable financial stakes involved, it is surprising to find almost no legal literature discussing efficient brief drafting techniques in direct actions brought before the General Court of the European Union in this field. This contrasts with the plethora of doctrine and court guidelines addressing the art or science of legal writing before the Federal and State Appellate or Supreme Courts in the United States. This article seeks to bridge that gap by making some practical suggestions regarding the submission of the application and the reply in annulment actions brought before the General Court against Commission decisions in the sphere of EU competition law. In four sections respectively entitled "drafting suggestions", "structuring suggestions", "substantive suggestions" and "procedural suggestions", this article will provide tips concerning drafting techniques, the structuring of the application and the reply, the main substantive rules and principles that applicants should bear in mind when drafting their pleadings and the main procedural tools available to enhance the chances of obtaining the annulment of the contested decision.

S'inspirant de l'abondante littérature juridique portant sur la rédaction de mémoires dans le cadre de recours introduits devant les juridictions américaines, le présent article émet des suggestions sur la manière de rédiger la requête et la réplique dans les affaires de concurrence portées devant le Tribunal de l'Union européenne. Ces suggestions, qui prennent en compte les spécificités et le fonctionnement de cette juridiction, concernent plus particulièrement la technique rédactionnelle, la structure et la substance de ces mémoires ainsi que les outils procéduraux auxquels les requérants peuvent utilement faire appel dans le cadre de leur recours.

Introduction

1. As observed by an experienced American litigator,[1] it is more than likely that, when reviewing a brief, "*the last thing that any judge wants is fifty or more pages of disorganized, repetitive, vituperative and unsupported argument*". There is every reason to believe that this assertion also applies on the other side of the Atlantic to briefs lodged before the General Court of the European Union (hereinafter "General Court").

2. Given the complexity of litigating EU competition law cases and the considerable financial stakes involved,[2] it is surprising that almost no legal literature discusses strategic and efficient brief drafting techniques in the actions brought before the General Court. This contrasts with the plethora of doctrine and court guidelines addressing the art or science of legal writing before the Federal and State Appellate or Supreme Courts in the United States.[3]

3. This article seeks to bridge that gap by making a number of practical suggestions regarding the submission of the application and the reply in annulment actions brought before the General Court against Commission decisions in the EU competition law field.[4] In particular, "Drafting Suggestions" (I.) makes some observations regarding the requirements for lodging an action for annulment of a Commission decision. It also discusses a number of drafting techniques in light of the General Court's specificities and needs. "Structuring Suggestions" (II.) addresses the various sections that may compose the application and the reply and the order in which these sections may be organised. "Substantive Suggestions" (III.) discusses a number of important EU substantive rules and principles that applicants should bear in mind when challenging a Commission decision. "Procedural Suggestions" (IV.) deals with some of the main procedural tools that applicants may use to obtain the annulment of the contested decision.

* The views expressed in this article are strictly personal and do not bind the institution for whom the co-authors work.

1 See D. F. Broder, Persuasive Brief Writing in Antitrust Cases: How to Win the Paper War, ABA Section of *Litigation. Journal*, May 2008, p. 2 available at: http://www.klgates.com/files/tempFiles/e020acf4-8eeb-485d-bf0d-d7d94e7a78ac/Broder_ABA_Brief_Writing.pdf. All websites referred to in this article were last accessed on 1 September 2012.

2 According to the statistics made available by the Directorate General Competition of the European Commission (hereinafter "Commission") on its website, the total amount of fines imposed on undertakings that were punished in the past five years for their participation in a cartel infringement (Article 101 TFEU infringements only) exceeds 7,6 billion euros. These statistics issued on 27 June 2012 are available at: http://ec.europa.eu/competition/cartels/statistics/statistics.pdf.

3 See, e.g., R. A. Posner, Effective *Appellate Brief Writing, Appellate Practice Journal*, Spring 2010, available at: http://apps.americanbar.org/litigation/litigationnews/trial_skills/appellate-brief-writing-posner.html; S. Walbolt and D. Matthew Allen, The Ten Commandments of Writing An effective Appellate Brief, Carlton Fields Publications, February 2007, p. 7, available at: http://www.carltonfields.com/ten-commandments-of-writing-an-effective-appellate-brief/; M. Painter, *Legal Writing* 201: 30 Suggestions to improve readability, or How to write for judges, not like judges, available at: http://www.plainlanguagenetwork.org/ legal/legalwriting.pdf; D. F. Broder, footnote 1 *supra* ; and S. E. Ricks and J. L. Istvan, Effective Brief Writing despite High Volume Practice: Ten Misconceptions that Result in Bad Briefs, *University of Toledo Law Review*, vol. 38, number 4 (2007), p. 1123.

4 Written pleadings that must be lodged by separate acts (i.e. applications for expedited procedure, for interim measures, for confidential treatment, for legal aid etc) are not examined in this article.

I. Drafting suggestions

4. Strategic and efficient brief writing implies that applicants must not only satisfy the legal requirements of the court before which they bring an action but that they should also adapt their pleadings to the specificities and needs of that court.[5] As the well-known antitrust expert and US Court of Appeals Judge Richard Posner[6] opined, the best piece of advice that may be given to brief writers is that they "*put themselves in the judge's shoes*" as it will "*enable them to write a brief that will communicate their position effectively*". Some other American practitioners[7] also suggest that brief writers should ask themselves: "*Could the* [C]*ourt take the arguments laid out in [their] brief and make them* [its] *opinion?*" In our view, both these opinions are applicable to any court in the world and the General Court is therefore no exception.[8]

5. The written phase of the proceedings before the General Court is of critical importance in convincing the judges of a chamber[9] to find in favour of applicants for two main reasons.

6. *First*, pleas in law and evidence that have not been put forward in the application may not normally be raised at a later stage of the proceedings.[10] Furthermore, the General Court may decide not to authorize parties to submit a second round of pleadings after the submission of the application and the defence.[11]

7. *Second*, judges of a chamber will make their own provisional opinion on a case before the oral hearing takes place.[12] Oral hearings before the General Court are convened after judges had the opportunity to exchange their views during a preliminary meeting (internally referred to as the "*conférence de chambre*"). During that meeting, both the report for the hearing and the preliminary report prepared by the reporting judge (hereinafter "Judge-Rapporteur") are discussed.

5 See S. E. Ricks and J. L. Istvan, footnote 3 *supra*, p. 1123. According to these authors, "*an effective brief meets the needs of the reader*".

6 See R. A. Posner, footnote 3 *supra*.

7 See S. Walbolt and D. Matthew Allen, footnote 3 *supra*, p. 7.

8 Pleadings that are adapted to the needs of their readers are more likely to be convincing and be dealt with more swiftly than those which are not.

9 Articles 10 and 14 of the Rules of Procedure. While chambers in competition law cases are normally composed of 3 judges, chambers of 5, 13 (Grand Chamber) and 27 (Plenary) judges may also deal with a case depending on its legal difficulty, its importance or special circumstances. In practice, Grand Chambers are rare and Plenaries never deal with cases. See sub-section IV.3. below for further developments on requests that may be lodged by applicants with a view to having their case heard by an enlarged chamber.

10 Pursuant to Article 48(2) of the Rules of Procedure, no new plea in law may be introduced in the course of proceedings unless it is based on matters of law and fact which come to light in the course of the procedure. Pursuant to Article 48(1) an Article 66(2) of the Rules of Procedure, new evidence may only come at the stage of the reply if (i) the applicant puts forward (valid) reasons for the delay in offering it; or (ii) the evidence is submitted in rebuttal of arguments made by the Commission in its reply; or (iii) the evidence comes as an amplification of evidence that was previously submitted.

11 See Articles 47(1) and 52(1)(d) of the Rules of Procedure. It is, however, exceptional in competition law cases that parties are not authorised to lodge a reply and a rejoinder.

12 This should not however be interpreted as meaning that the opinion of judges will not evolve or even change after hearing the oral arguments of the parties and the answers to their questions.

8. The report for the hearing summarises the main facts and legal arguments of the parties.[13] The preliminary report discusses in detail the substance of the case.[14] It contains indications as to how the Judge-Rapporteur proposes to solve the dispute (at that stage of the proceedings and without prejudice to the debates during the hearing).[15] Other members of the chamber (hereinafter "Judge-Assessors") indicate whether, at that stage of the proceedings, they tend to concur (or not), and for what reasons, with the solution and the reasoning proposed by the Judge-Rapporteur.

9. In light of the importance of the written pleadings, applicants may be well advised to comply with the "ABCD"[16] legal writing rule. Pursuant to that "rule", pleadings should be (A)ccurate, (B)rief, (C)lear, and (D)ocumented. This section examines what each of these four sub-rules involves in light of the General Court.

1. Accuracy

10. Pleadings before the General Court must satisfy all the requirements provided for by the TFEU, the Protocol on the Statute of the Court of Justice of the European Union (hereinafter "Statute of the Court of Justice"),[17] the Rules of Procedure of the General Court (hereinafter "Rules of Procedure")[18], the Instructions to the Registrar of the General Court (hereinafter "Instructions to the Registrar")[19] and the Practice Directions to Parties (hereinafter "Practice Directions").[20]

11. In that regard, it is worthwhile stressing that applicants must, on the one hand, lodge their application in due time and, on the other hand, provide all mandatory information and documentation.

1.1. What is the deadline within which to lodge an application with the General Court?

12. Pursuant to Article 263 TFEU, applicants have two months to lodge an action for annulment against an EU act. Unless unforeseeable circumstances or *force majeure* are

13 Under point 129 of the Practice Directions, the report for the hearing is confined to "*setting out the pleas in law and a succinct summary of the parties' arguments*".

14 Pursuant to Article 52(2) of the Rules of Procedure, the preliminary report must contain recommendations as to whether some measures of organisation of procedure or measures of inquiry should be adopted and whether the case should be referred to an enlarged chamber. See, for a discussion on this issue, sub-section IV.3. below.

15 In cases in which, at that stage of the proceedings, the file does not contain all the information or documentation necessary to solve the dispute, the General Court may address measures of organization of the procedure to the parties in that respect. See, for a discussion on these measures, sub-section IV.1. below.

16 This rule is directly inspired by the "ABC'S" legal writing rule which stands for (A)ccuracy, (B)revity, (C)larity and (S)implicity, put forward by D. F. Broder, footnote 1 *supra*, p. 3.

17 OJ 2010 C 83, p. 10.

18 The last modifications of the Rules of Procedure were published in OJ 2011 L 162, p. 18.

19 The last modifications of the Instructions to the Registrar were published in OJ 2012 L 68, p. 20.

20 The last modifications of the Practice Directions were published in OJ 2012 L 68, p. 23.

established,[21] actions which are not lodged within the two-month deadline are inadmissible.[22] The rules to be followed in determining the day on which that deadline starts running and the day on which it expires are set out both in Article 263 TFEU and in Articles 101 and 102 of the Rules of Procedure.

13. The day on which the deadline starts running. When seeking to determine the day on which the deadline for lodging an action for annulment starts running, applicants must comply with three rules.

14. *First*, they must identify the event that triggers the deadline. Pursuant to Article 263 TFEU, that event is, as the case may be:

→ the publication of the EU act in the Official Journal of the European Union (hereinafter "OJ");[23]

→ the notification of the EU act to the applicant; or

→ in the absence of publication in the OJ or notification to the applicant, the day on which the EU act came to the knowledge of the applicant.

15. In competition law cases, one of three scenarii may arise.

16. When the applicant is one of the addressees of the contested decision, the event that triggers the deadline is the notification of that decision. The notification is the communication of the decision by the Commission so that its addressees may take cognisance of it.[24]

17. When the applicant is not one of the addressees of the contested decision and that decision is not published in the OJ, the event that triggers the deadline is the knowledge of that decision. Applicants are considered to have knowledge of the decision from the day they obtained a copy of that decision.[25] In that respect, it must be emphasized that third parties learning of the existence of a decision of the Commission they wish to challenge (for example, through a press article or a press release of the Commission) should always request a copy of that decision within a reasonable period of time.[26]

18. When the applicant is not one of the addressees of the contested decision and that decision is published in the OJ, the event that triggers the deadline is the publication in the OJ. When the applicant had knowledge of the challenged decision before it was published in the OJ, the General Court held, in a number of cases,[27] that the criterion of the day on which a decision came to the knowledge of an applicant is subsidiary to the criteria of publication of that decision. This means that the event that triggers the deadline is the publication of the decision even when the applicant acquired knowledge of that decision beforehand. However, arguably, that case law could be interpreted as retaining the publication of the contested decision in the OJ as the triggering event only if such a publication allowed the applicant to have access to the main elements necessary for bringing an action for annulment.[28] Hence, if the contested decision is published in the OJ but the applicant acquired knowledge of it before its publication, it is advisable to consider that the event that triggers the deadline is the knowledge of that decision (i.e. the communication, upon request, of a copy of that decision).

19. *Second*, where the triggering event is the notification of the EU act or knowledge thereof, the two-month deadline starts running from the day following that triggering event.[29] It is to be noted that the deadline starts running from that day even if it is a Saturday, a Sunday or an official holiday. For instance, if a decision is published in the OJ on Monday 30 April 2012, the deadline will start running on Tuesday 1 May 2012, regardless of the fact that 1 May is a public holiday in the calendar of the Court of Justice.[30]

20. *Third*, where the triggering event is the publication in the OJ, the two-month deadline starts running at the end of the fourteenth day that follows the day of publication.[31] In practice, the fourteen-day period must be computed from the day that follows the day of publication in the OJ and comprises both working days and Saturdays, Sundays and official holidays. For instance, if an EU act was published in the OJ on Tuesday 21 February 2012, the fourteen-day period expired on Tuesday 6 March 2012 (February 2012 counted 29 days). Applicants must be aware that if the EU act is not published in the OJ but in another media, for instance, on the internet, the fourteen-day period is not applicable.[32]

21. The day on which the deadline expires. That day is determined by applying successively the following three rules.

22. *First*, pursuant to Article 101(1)(b) of the Rules of Procedure, the two-month period ends with the day of the month which falls on the same date as the day during which the event or action from which the period is to be calculated occurred.

23. Practically speaking, this implies that, when the triggering event is the notification of the decision or its knowledge, the two-month deadline expires on the same date as the day of the notification or the acquisition of the knowledge of the decision

21 Article 45(2) of the Statute of the Court. Unforeseeable circumstances or *force majeure* are concepts that are strictly interpreted by the General Court as they are exceptions to the two-month deadline rule.

22 Inadmissibility in that regard may be raised by the General Court of its own motion.

23 This normally applies to legal entities that were not involved in the administrative procedure before the Commission and that were not notified of the contested decision.

24 See Case T-48/04, *Qualcomm v. Commission* [2009] ECR II-2029, § 46.

25 See, e.g., Case C-309/95, *Commission v. Council* [1998] ECR I-655, § 18.

26 Ibid.

27 See, e.g., with regard to mergers, *Qualcomm v. Commission*, footnote 24 *supra*, § 55. See also Case T-110/97, *Kneissl v. Commission* [1999] ECR II-2881, § 41.

28 See *Qualcomm v. Commission*, footnote 24 *supra*, § 53.

29 Article 101(1)(a) of the Rules of Procedure.

30 See, for the list of official holidays of the EU Courts, Decision on official holidays (2003 L 172, p. 12).

31 Articles 101(1)(a) and 102(1) of the Rules of Procedure.

32 See Case T-268/10, *PPG and SNF v. ECHA*, order of 21 September 2011, not yet reported, § 35.

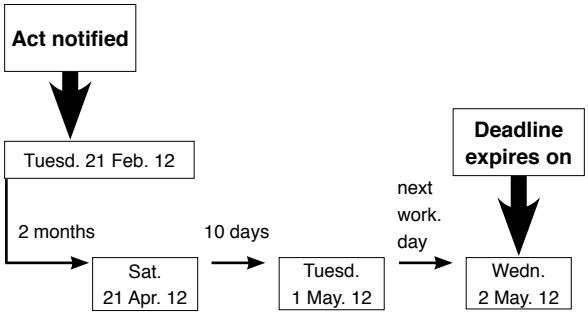
two months later. For example, if a Commission decision was notified to the applicant on Tuesday 21 February 2012, the two-month deadline expires on Saturday 21 April 2012. In other words, for practical purposes, when determining the day on which the two-months deadline expires, one may ignore the rule set out in paragraph 19 above, pursuant to which the two-month deadline starts running from the day following the notification or the acquisition of the knowledge of the existence of the decision.

24. When the triggering event is the publication in the OJ, the two-month deadline expires on the same date as the fourteenth day that follows the day of publication two months later. For instance, if a Commission decision was published on Tuesday 21 February 2012, the fourteen-day period expired on Tuesday 6 March 2012 to which two months must be added, which means Sunday 6 May 2012.

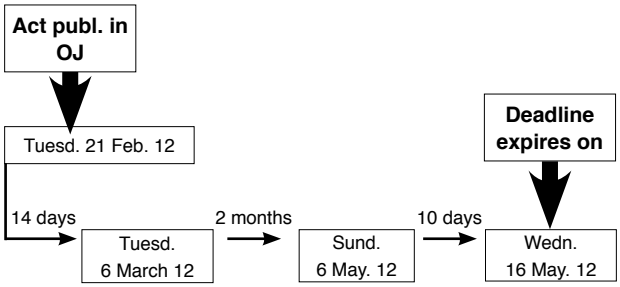
25. *Second*, pursuant to Article 102(2) of the Rules of Procedure, ten days must be added on account of distance to the two-month deadline. For example, if a Commission decision was notified to the applicant on Tuesday 21 February 2012, the two-month deadline expired on Saturday 21 April 2012 to which ten days on account of distance had to be added, which means Tuesday 1 May 2012.

26. *Third*, pursuant to Article 101(2) of the Rules of Procedure, if the two months and ten days period – or, as the case may be, the fourteen days plus two-months plus ten days period – would otherwise end on a Saturday, Sunday or official holiday, it must be extended until the end of the first following working day. This rule applies only at the end of the deadline, i.e. for a decision, at the end of the two months plus ten days period. In the example mentioned in the previous paragraph, this implies that because Tuesday 1 May 2012 is an official holiday[33], the deadline would expire on the following working day, namely Wednesday 2 May 2012.

27. Those rules are illustrated by the following flowchart.



33 See footnote 30 *supra*.



28. The consequence of the use of technical means of communication on the two-month deadline. In addition to the possibility of lodging applications (and written pleadings in general) by post or hand-delivery, applicants may choose to lodge them either by fax[34] or e-mail[35] or, since 21 November 2011, through the Court of Justice's IT application called "e-curia"[36]. When making use of those technical means of communication, applications must bear in mind two principles.

29. *First*, when applicants lodge their application by fax or e-mail, they must provide the registry with originals and certified copies of these originals by post or hand-delivery within ten days from the receipt by the General Court of that fax or e-mail.[37] There should be no difference whatsoever, even of a minor nature, between the pleading that was lodged by fax or e-mail and the original.[38] For instance, in cases where the signature of the applicant's lawyer is slightly different from the one on the original, this normally leads the General Court to disregard the fax or e-mail and consider the application lodged on the day the registry received the original.[39]

30. *Second*, where pleadings are submitted by means of e-curia, they are considered as lodged when applicants' representatives validate their submission electronically.[40] It is the time applicable in Luxembourg which is taken into consideration to determine at what time the pleadings were submitted.[41] Furthermore, when pleadings are lodged by means of e-curia, applicants do not have to provide any originals by post or by hand delivery.[42]

34 The fax number of the General Court is: +352 43 03 21 00.

35 The e-mail address of the General Court is: GeneralCourt.registry@curia.europa.eu.

36 The e-curia application is accessible at: https://curia.europa.eu/e-Curia. See, in that respect, the Decision of the General Court on the lodging and service of procedural documents by means of e-curia (OJ 2011 C 289, p. 9) (hereinafter "General Court Decision on e-curia"). Although the latter Decision entered into force on 2 October 2011, the e-curia application has been accessible since 21 November 2011 only. See, for some useful explanations on the functioning of e-curia, the document "e-Curia: Conditions of use applicable to parties'representatives" available at: http://curia.europa.eu/jcms/upload/docs/application/pdf/2011-10/en08602.pdf and the document "e-Curia: Conditions of use applicable to assistants" available at: http://curia.europa.eu/jcms/upload/ docs/application/pdf/2011-10/en08603.pdf.

37 See Point 6 of the Practice Directions. In practice, this means that applications are admissible when they are lodged by fax or e-mail on the day on which the two-month deadline expires only if the registry receives the originals within ten days.

38 See Point 7 of the Practice Directions.

39 Ibid.

40 Article 5 of the General Court Decision on e-curia.

41 As indicated in the documents mentioned in footnote 36 *supra*, lawyers may only lodge pleadings with e-curia after they have opened an e-curia account. The application form for the opening of such an account for both the representatives of the applicant and their assistants are available on the e-curia website and they must be sent by post to one of the registries of the three EU Courts.

42 See Point 1 of the Practice Directions. However, it should be highlighted that, under Point 2 of the Practice Directions, annexes which by their nature cannot be lodged by e-curia, must be identified in the schedule of annexes lodged on e-curia and must reach the registry of the General Court within 10 days.

1.2. What information and documentation must applicants provide?

31. The rules which identify the information and documentation that applicants must provide when lodging their application and their reply evolve on a regular basis. At the time of writing this article, discussions regarding an extensive reform of the Rules of Procedure are on-going and could lead to the adoption of new rules in 2013. In light of this, it is imperative that applicants check that their application is consistent with the requirements in the latest version of the official texts mentioned in paragraph 10 above.[43] Three suggestions should nonetheless be made in that regard.

32. *First*, the General Court has made available on the website of the Court of Justice checklists regarding the information and documentation that applicants must provide. Even though these checklists expressly mention that they cannot be considered as binding, they allow applicants to make sure that they have not forgotten to provide all necessary information and documentation. In that regard, it must be recalled that the failure to provide the requested information or documentation may, at best, result in a request from the registry to regularise the submission made within a set period of time[44] or, at worst, lead the General Court to declare the action inadmissible.[45]

33. *Second*, the possibility to lodge applications electronically through the e-curia (rather than by hand-delivery, post, fax or e-mails), should be given full consideration and taken advantage of. As indicated in paragraph 30 above, it discharges applicants of the burden of submitting originals by hand-delivery and/or post as well as five copies or more of these originals.[46]

34. *Third*, pursuant to Article 19(2) of the Instructions to the Registrar, the registry must provide lawyers, who so request, information on its practice. It should be highlighted however that the registry will not normally answer questions lawyers may have regarding the specificities of a case. For instance, it may respond to questions on the rules applicable to the computation of the two-month deadline within which an action must be brought but it is unlikely to take a position on what is the ultimate day on which a given application should be lodged to be admissible.

2. Brevity

35. Brevity in competition law cases is achieved where an application addresses exclusively the factual and legal elements which are necessary for the General Court to support the reasons put forward by applicants to obtain the annulment of the contested decision or a reduction in the fine imposed. As observed elsewhere, it is often the case that "*attorneys have the inclination to want to include everything*".[47] This "*dilutes the effectiveness of the important facts*"[48] and pleas in law.[49]

2.1. Why is brevity important before the General Court?

36. Brevity is paramount for swift treatment of a case. The General Court is a busy Court.[50] The number of cases lodged before the General Court is continuously increasing[51] while the number of judges and their cabinets remain steady.[52] Over the past five years, it has taken several important internal measures to increase output.[53] Despite the increased number of judgments issued by the General Court,[54] the number of pending cases[55] and the average time taken to resolve competition law cases are not diminishing.[56] The submission of short briefs is therefore highly recommended to obtain a judgment within the shortest timeframe.

37. Pursuant to the Practice Directions,[57] an application lodged before the General Court in a competition law case should be limited to 50 pages and the reply to 25 pages.[58] These may only be exceeded in cases involving particularly complex legal or factual issues.[59] Three general considerations may be put forward on this point.

43 The consolidated versions of all these rules are available on the website of the Court of Justice at: http://curia.europa.eu/jcms/jcms/Jo2_7040.

44 Article 44(6) of the Rules of Procedure and Article 7(1) of the Instructions to the Registrar. Points 62 to 64 of the Practice Directions list various types of irregularities.

45 See Article 44(6) of the Rules of Procedure.

46 See Point 1 of the Practice Directions. However, it should be highlighted that, under Point 2 of the Practice Directions, annexes which by their nature cannot be lodged by e-curia, must be identified in the schedule of annexes lodged on e-curia and must reach the registry within 10 days.

47 D. W. McOrmick, Writing Effective Appellate Briefs, p. 3, available at: www.okbar.org/cle/AMTracks07/NutsBolts/McCormick.pdf.

48 Ibid.

49 Drafting short and structured pleadings which exclusively address the issues that are important to solve the dispute requires a lot of work.

50 See, e.g. for a recent discussion on the challenges that the General Court faces, including with regard to its backlog, F. Dehousse, The reform of the EU Courts; The need of a management approach, *Egmont Paper* 53 (December 2011), p. 7, available at: http://www.egmontinstitute.be/ paperegm/ep53.pdf.

51 According to the statistics of the General Court in 2007, 522 actions were lodged before the General Court. This number rose to 722 in 2011. These statistics are available at: http://curia.europa.eu/jcms/upload/docs/application/pdf/201203/ra2011_statistiques_tribunal_final_fr.pdf.

52 The General Court is composed of 27 judges who are assisted by three référendaires (legal secretaries) and two assistants. There will be 28 judges after Croatia joins the EU in July 2013. The proposal of the Court of Justice in 2011 that 12 additional judges be appointed has not so far found a consensus in the Council of the European Union.

53 See, e.g., M. Jaeger, The View from the Bench, *Mlex Magazine* (Issue 6, July-September 2011), pp. 9-13. See also M. Jaeger, The Court of First Instance and Competition Law Litigation, pp. 1-16, in H. Kanninen, N. Korjus and A. Rosas (eds), *EU Competition Law in Context: Essays in Honour of Virpi Tiili*, Hart, 2009, pp. 10-16.

54 In 2007, the General Court closed 397 cases. In 2011, it closed 714 cases. These statistics are available at: http://curia.europa.eu/jcms/upload/docs/application/pdf/201203/ra2011_statistiques_tribunal_final_fr.pdf.

55 In 2007, there were 1154 pending cases before the General Court. In 2011, there were 1308 pending cases before that Court.

56 In 2007, the average length of proceedings in competition law cases was a bit less than 43 months. In 2011, the average length of proceedings in competition law cases was a bit less than 51 months. These statistics are available at: http://curia.europa.eu/jcms/upload/docs/application/pdf/2012-03/ra2011_statistiques_tribunal_final_fr.pdf.

57 Point 15 of the Practice Directions.

58 Pursuant to Point 12(c) and Footnotes 1 to 3 of the Practice Directions, pleadings should be submitted on A4 format paper and applicants are asked to use characters of a current type and of a legible font (such as Times New Roman Fonts 12 for the main text and 10 in footnotes) with sufficient line spacing (such as 2.5 line spacing) and margins (such as margins of 2.5 cm). When pleadings are submitted by e-mail, only a scanned copy (with a resolution of 300 dpi and in PDF) of the originals will be accepted by the registry.

59 Point 16 of the Practice Directions.

38. *First*, lawyers who lodge written pleadings that exceed the authorised limits will normally be requested to shorten them.[60] This inevitably delays the procedure as the registry will not serve the application on the Commission until the irregularitie have been resolved[61].

39. *Second*, because the vast majority of competition law cases show at least one element (and, most often, several elements) of legal or factual complexity, it is likely that it is only in cases where applicants identify very specific circumstances that pleadings which exceed the authorised limits might be considered admissible. Brief drafters may explain in detail these specific circumstances upfront in a separate letter addressed to the General Court. In any event, they would be well advised to spend more time on editing and shortening their pleadings rather than debating on the legality of the limitations imposed by the Practice Directions. Whether longer pleadings are eventually deemed admissible is of no influence on the fact that a brief is not "*more persuasive by virtue of its length*".[62]

40. *Third*, the shorter the brief, the quicker it is translated by the lawyer-linguists working with the Court of Justice and the quicker the Judge-Rapporteur will be in a position to draft the report for the hearing. Because all pleadings introduced in one of the 22 EU languages other than French will have to be translated into French, which is the sole internal working language of the Court of Justice and of the General Court for historical and practical reasons,[63] the General Court's internal clock for dealing with a case does not normally start ticking before these translations are available.

2.2. How may pleadings be kept brief?

41. As observed elsewhere,[64] the best writing style for a brief is one "*that promotes brevity, clarity and simplicity*". Applying the "Short List"[65] legal writing rule helps to achieve this result. This rule states that applicants should use "*Short sections, Short paragraphs, Short sentences, and Short words*".[66] While suggestions addressing the sections composing the pleadings are discussed in Section III below with other issues regarding the structure of the application and of the reply, the other three elements of the "Short List" rule are further developed in the following three paragraphs.

42. *First*, paragraphs may be considered short where they do not exceed six to eight short sentences. It is advisable that each paragraph deals with no more than one legal or factual proposition. It is also important that each paragraph starts with one sentence indicating clearly what the applicant will address in substance in that paragraph. The logical link between each paragraph may be usefully highlighted by transition words such as however, furthermore, in addition or first, second, third.

43. *Second*, sentences should ideally support one thought only. For that reason, applicants should seek to draft as far as possible sentences that are no longer than two or three lines. This applies to all EU languages, whether it is common or not in the language of the case to use run-on sentences.

44. *Third*, using short words should not be taken literally but rather as indicating that applicants ought to use a simple and precise wording. This means using plain language instead of "legalese". Furthermore, it is often the case that adjectives or adverbs are unnecessary or legally imprecise. For instance, an error in law does not need to be "clear", "obvious" or even "outrageous" to lead to the annulment of the contested decision.[67] Moreover, applicants will avoid all misunderstandings and facilitate the General Court's reading if they seek to mirror the wording used by the General Court in its judgments as far as possible. In that regard, it may be noted, by way of example, that the General Court normally refers to applicants by their status in the proceedings (i.e. the "applicant"), not by their name unless there are several applicants in the same action whose individual situations need to be specified.

45. Conversely, the EU institutions are always referred to by their names (i.e. the "Commission"), not by their status. Another example is that the decision under appeal is always referred to (after its references have been indicated) as the "contested decision" or the "Decision". Finally, there is no room for words such as "*probably*", or "*it seems*" in a brief as they cast doubt on the reliability of the statements made by the brief writer.

3. Clarity

46. A clear brief is one that allows its readers (i.e. lawyer-linguists and then judges, *référendaires* and *lecteurs d'arrêts*[68]) to grasp the issues at stake after a first reading. As rightly observed elsewhere,[69] it is sensible that "*judges will not always have the time, the inclination or the patience to figure out what a disorganized brief's arguments are or should have been*".

3.1. Why is clarity important before the General Court?

47. Unless a legal proposal is clearly drafted, the defendant cannot respond to it and the General Court cannot take a position on it. Applicants should also bear in mind at all times that the General Court is both an international and a generalist court. These two features have direct consequences on brief drafting.

60 See Points 65 and 66 of the Practice Directions.

61 See Point 7(1) of the Instructions to the Registrar and Point 67 of the Practice Directions.

62 D. F. Broder, footnote 1 *supra*, p. 3.

63 See, e.g., A. Lacresse and A. de Moncuit, To Keep French or not to Keep French, Is that the Question?, *Mlex Magazine* (Issue 9, April-June 2012), p. 57.

64 D. F. Broder, footnote 1 *supra*, p. 2.

65 D. W. McCormick, footnote 47 *supra*, p. 4, quoting D. R. Cohen, Writing Winning Briefs, nº 7 at 47, 26-*Summer Litigation Magazine* 46 (2000).

66 Ibid.

67 It is true, however, that, when used sparingly by brief drafters, adjectives or adverbs may prove useful in emphasising the gravity of some of the violations they raise.

68 *Lecteurs d'arrêts* ("case-readers") are *référendaires* who are members of the cabinet of the President of the General Court. They have access to the file in competition law cases and may make drafting suggestions to the chamber in charge of a case regarding an advanced version of the draft judgment. The chamber may always decide to accept or reject the suggestions proposed by the *lecteurs d'arrêts*.

69 S. E. Ricks and J. L. Istvan, footnote 3 *supra*, p. 114.

48. *First*, the General Court is composed of 27 judges proposed by each of the EU Member States. They are appointed by the Council of the EU[70] after a panel gives its opinion on their suitability.[71] It is worthwhile stressing that the diversity of the legal and cultural backgrounds of the General Court judges should not be underestimated.[72] For instance, what may seem obvious to a lawyer trained in common law is not necessarily so obvious to a lawyer trained in civil law and vice-versa. Furthermore, because all incoming pleadings are translated into French, it is critical that briefs in their original language are clear and precise. It should not come as a surprise that an unclear brief will not get any clearer once translated.

49. *Second*, the General Court is a generalist court. Over the past five years (2007-2011), competition law cases represented only 10% of the total number of cases the General Court dealt with.[73] These cases are allocated by the President of the General Court to one of the currently existing eight chambers[74] according to rotas.[75] None of these eight chambers exclusively deal with competition law cases. However, in practice, it appears that all of them comprise one or several judges with some specific competition law experience. Furthermore, in most, if not all cabinets, one or more of the three *référendaires* have specific competition law expertise on which judges may rely.

3.2. How can clarity be best achieved?

50. One essential factor (and legal requirement)[76] for submitting clear pleadings is that both their pages and paragraphs are numbered. Three suggestions may be added here.

51. *First*, it is highly advisable to define all economic, technical, and state of the art terms and concepts used in the written pleading. As further discussed in Section IV.1. below, these definitions should be made in the pleadings and supporting documentation should be attached in the annex.

52. *Second*, several good writing practices foster clarity. They include using the same wording as the one provided for by the relevant legislative act or case law when explaining how a legal test is met. Using the same consistent wording throughout the pleadings to refer to the same facts also increases clarity. Moreover, brief drafters ought to seek to limit the use of acronyms to those commonly used (i.e. "SO" standing for "Statement of Objections") or in situations where an acronym is useful to avoid the unnecessary repetition of long expressions (i.e. "MOP" standing for "Measures of Organisation of the Procedure"). In all cases, acronyms should only be used once they have been defined in the pleading.

53. Appropriate terms should be used to refer to legal provisions. For instance, Treaties, Directives and Regulations comprise "recitals" and "articles". So called "atypical acts" of the European Commission such as the Leniency Notice[77] or the Fining Guidelines[78] comprise "points". Decisions of the Commission comprise "recitals" and "articles". Statements of Objections comprise "paragraphs". Judgments of the EU Courts contain "paragraphs".

54. To avoid confusion, applicants who make cross-references in the text of their pleadings should indicate the precise paragraphs to which they refer. Likewise, references to specific legal provisions should be precise. In particular, applicants should always identify the legal instrument they rely on, whether in full or by using a shortened definition once they have defined it (e.g. the "Fining Guidelines"[79]).

55. It is also important to note that the use of the passive voice and double negatives in the same sentence is often a source of imprecision and may lead to misunderstanding. Emotional language should be avoided. In that respect, sentences that end with exclamation and question marks are most often a sign that brief writers rely on feelings rather than on legal and factual demonstration. Moreover, applicants should bear in mind that the use of offensive or uncivil language in general and to refer to the Commission's actions or personnel in particular never serves their cause.

56. The use of Latin expressions should be limited to those expressions commonly used by the EU Courts and/or by a majority of Member States (e.g. *ne bis in idem*). Latin expressions that are not commonly used ought to be translated in the language of the case to ensure proper understanding.

57. Finally, it should be pointed out in this context that the use of italics and characters in bold as well as underlining important elements of the pleadings facilitates the identification of the main legal proposals. These tools also facilitate the reading of the pleadings when used sparingly and consistently.

70 Article 48 of the Statute of the Court of Justice.

71 Article 255TFEU. This panel is composed of various legal personalities and renders a non binding opinion. Its first report issued on 17 February 2011 explains the criteria taken into consideration when assessing a candidate. This report is available on the website of the Council of the European Union at: http://register.consilium.europa.eu/pdf/fr/11/st06/st06509. fr11.pdf.

72 A case involving specific national legal aspects will not necessarily be dealt with by a chamber composed of the judge of that nationality.

73 From 2007 until 2011, 3077 actions were brought before the General Court, out of which 293 were competition law cases. These statistics are available at: http://curia.europa.eu/jcms/upload/docs/application/pdf/201203/ra2011_statistiques_tribunal_final_fr.pdf.

74 Article 13(1) of the Rules of Procedure. Pursuant to Article 13(2) of the Rules of Procedure, the President of the chamber proposes to the President of the General Court the name of the Judge-Rapporteur who will handle the case.

75 See the Criteria for assigning cases to Chambers (OJ 2011 C 232, p. 3). There are three rotas, the first one for competition, state aid and trade protection measures, the second one for intellectual property cases and the third one for all other cases. The President of the General Court may derogate from the rotas on the ground that cases are related or with a view to ensuring an even spread of the workload. Applicants cannot therefore foresee which chamber will be in charge of a case. Furthermore, it may also be added in that regard that applicants are informed of which chamber and Judge-Rapporteur are in charge of their case after the written procedure is over, when they receive the report for the hearing, typically three weeks before the hearing (see Point 130 of the Practice Directions).

76 Points 12(d) and 6 of the Practice Directions.

77 Commission Notice on immunity from fines and reduction of fines in cartel cases (OJ 2006 C 298, p. 17).

78 Guidelines on the method of setting fines imposed pursuant to Article 23(2)(a) of Regulation N 1/2003 (OJ 2006 C 210, p. 2).

79 Ibid.

58. *Third*, before applicants submit their application a fresh pair of eyes should proofread and edit the brief. This could be done by brief drafters themselves after a "cooling-off" period or, ideally, by another lawyer. While it is very difficult, if not impossible, to submit flawless pleadings, the editing and proofreading exercise can prove very useful in substantially reducing the number of unfinished sentences, incorrect citations and unsupported assertions as well as grammatical or typographic errors. An excessive number of such errors may affect the clarity of the pleadings.

4. Documentation

59. Briefs must be legally and factually documented. In addition to the mandatory documents that applicants must provide for their application to be admissible, submitting a documented brief implies providing appropriate documentation in support of an assertion and making useful and correct references and quotes.

4.1. What annexes must be provided and how?

60. Both formal and substantive considerations must be made with regard to documenting a brief.

61. Formal considerations. *First*, it should be remembered that all documents annexed to a pleading, whether they are mandatory or in support of an argument, should be paginated in the top right hand corner consecutively with the pleading to which they are annexed.[80] They should also be lettered and numbered in a logic manner (i.e. Annex A.1, A.2. etc. for those attached to the application and annexes C.1., C.2., etc. for those attached to the reply).[81]

62. Where an annex comprises one or several sub-annexes, this should be reflected in the letter and number used to avoid confusion with other annexes. For instance, if annex A.10 in the application comprises two annexes, they may be identified as annex A.10.1 and A.10.2.,[82] annexes may be more easily manipulated if they are separated by dividers such as white pages indicating the letter and the number of the annex that follows. Brief writers must be aware in that respect of the fact that it is not unusual for the binders they have prepared containing plastic or cardboard dividers to reach their final addressee (i.e. judges, *référendaires* and *lecteurs d'arrêts*) without those dividers (due to the scanning of these documents by the registry), which renders the search through annexes very burdensome.

63. *Second*, a schedule of annexes must be provided with the application.[83] This schedule must indicate (i) the letter and number of each annex; (ii) a short description of the document in question allowing its identification such as, for a letter, the date, the author and the addressee of that letter; (iii) the page reference and the paragraph number in the pleading where the document is mentioned, and (iv) its relevance.[84] Though not legally mandatory, a table identifying each item makes the brief easier to read.

64. *Third*, each annex must necessarily be referred to in the text of the pleading.[85] This reference must state the relevant annex letter and number and indicate the pleading with which the annex has been lodged.

65. *Four*, documents provided in an annex must be in the language of the case.[86] When documents submitted are not in the language of the case, they must be accompanied by a translation into that language.[87] In the case of lengthy documents, translations may be confined to extracts. The General Court may, of its own motion or at the request of another party, call for a fuller or complete translation.[88]

66. *Five*, unless one of the judges in the chamber specifically requests so, annexes are not automatically translated into French.[89] For that reason, it may be advisable to quote directly in the pleading, for example in a footnote, the most relevant parts of the annex.

67. Substantive considerations. It is important to insist on the fact that, on the one hand, it is only if applicants provide relevant documentation to substantiate their assertion that the General Court may find in their favour.[90] On the other hand, only those documents which are necessary to prove or illustrate the content of a pleading may and should be submitted as annexes.[91] Three considerations should be born in mind in that regard.

68. *First*, attachments that are not relevant to the dispute may either be not put on the file or declared inadmissible.[92] In all cases, they unnecessarily delay the handling of the case and may give the impression that the application is not factually founded.

69. S*econd*, the information that should be provided in an annex should be clearly differentiated from that which must appear in the pleading itself. Errors of this regard may result in the inadmissibility of the argument raised by applicants in an annex instead of the main pleadings.[93]

80 Point 59 of the Practice Directions.

81 Point 58(a) of the Practice Directions.

82 Point 60 of the Practice Directions.

83 Point 58 of the Practice Directions.

84 Point 58(b) and (c) of he Practice Directions.

85 Point 57 of the Practice Directions.

86 Article 35(3)(1) of the Rules of Procedure and Article 7(5) of the Instructions to the Registrar.

87 Article 35(3)(3) of the Rules of Procedure.

88 Ibid.

89 As indicated in paragraph 40 above, French is the sole internal working language of the General Court.

90 However, should the applicant and the Commission fail to provide relevant documentation, the General Court may order one of them to provide it in the framework of the measures of organisation of the procedure that it may address to the parties. See, for a discussion on the use of these measures, sub-section IV.1. below.

91 Point 57 of the Practice Directions.

92 Article 7(3) and (6) of the Instructions to the Registrar.

93 See paragraph 152 below for a discussion on this issue.

70. *Third*, all relevant documentation supporting the elements of fact and law put forward by applicants should be annexed. It is worthwhile specifying in that regard that applicants do not have to provide in annex a copy of the EU legislation on which they rely. However, they must provide a copy of both EU or non-EU Member States' legislation that they refer to in their pleadings. Furthermore, in cases where applicants refer in their pleadings to information accessible on a website, a print-out of this information should be provided in the annexes.

4.2. What are correct and useful references and quotes?

71. Both references and quotes must be correct and precise as it is neither for the defendant nor for the chamber to search for what applicants seek to demonstrate. Five suggestions may be made on that point.

72. *First*, mirroring the rules applied by the General Court in its judgments where referring to legal instruments or case law allows applicants to make sure that the General Court will understand and take into consideration all the references they make.[94] Examples for most, if not all, references may be found in the General Court's case law by using the search engine available on the Court of Justice's website.[95]

73. *Second*, references to case law as well as annexes may be made at the end of each relevant paragraph or in a footnote. References placed in footnotes take less space and do not hamper the reading of the pleading.

74. *Third*, with regard to the citation of case law, where the case law is particularly clear and applies directly to their situation, applicants may want to quote it verbatim. However, where the case law on which applicants wish to rely does not apply to their situation in an obvious way, it is advisable to explain the substance of the quote before making a reference to that case law.

75. *Four*, block quoting case law or doctrine (i.e. quoting more than three consecutive paragraphs of a judgment or of an article) allows neither the General Court nor the defendant to understand what precise legal propositions applicants wish to put forward in their pleadings. Applicants would therefore be better advised to reformulate their legal proposition in their own words and then make a reference to the case law or the doctrine that supports that proposition.

76. *Five*, relying on "settled case law" implies referring to at least two or more cases standing for the same legal proposition. In principle, there is no need to quote more than two or three cases of the General Court and of the Court of Justice to establish settled case law, in particular if the judgments that are cited refer to some older case law. Brief writers should not put on an equal footing judgments of EU Courts and opinions of Advocate Generals as the latter have no binding effect. While these opinions are very helpful in the interpretation of the rules that the General Court must apply, brief writers should refer to them as supporting their legal proposition, not as binding case law.

II. Structuring suggestions

77. Section II addresses the structure of the application and the reply. It identifies the various mandatory and optional sections that these pleadings should contain and how they may be organized. This is without prejudice to the right of the General Court, as mentioned in paragraph 6 above, not to allow a reply and the faculty of applicants to decide not to lodge such a reply. This faculty should not be disregarded as it contributes to a swift treament of the case.

78. It must be emphasized from the outset that each section in both the application and the reply should start with a heading indicating its content and should be numbered. This is crucial to helping the judges understand the structure of the pleadings.

79. As indicated in paragraph 37 above, the application should not exceed 50 pages and the reply 25 pages. Those pleadings must indicate (i) the subject-matter of the action (i.e. that it is an action for annulment brought under Article 263 TFEU), (ii) the pleas in law on which the application is based and (iii) the forms of order sought.[96]

1. The structure of the application

1.1. What should the structure of an application achieve?

80. An effective structure for the application is one which achieves two goals. First, it sets out a clear and logic demonstration that applicants' requests are factually and legally founded. Second, it mirrors as far as possible the structure normally used by the General Court in its judgments.

1.2. How should the application be structured?

81. While many structures may be envisaged, the structure comprising the majority, if not all, of the nine sections mentioned below fulfil both the legal requirements and the specific needs of the General Court.

82. The first two pages. Both the Rules of Procedure[97] and the Practice Directions[98] provide for the information that must appear on the first two pages of the application. It must be emphasized that visual clarity matters as it may give a first impression on the quality of the application.

94 Under Point 133 of the Practice Directions, when citing a judgment of the General Court, representatives are requested to refer to it by the usual name of the case and the case number and specify the relevant paragraph(s).

95 The Court of Justice's website is accessible at: http://curia.europa.eu/jcms/jcms/j_6/.

96 Article 44(1) of the Rules of Procedure and Point 22 of the Practice Directions.

97 See Article 44 (1) and (2) of the Rules of Procedure.

98 See Points 9(a) to 9(c) and 19(a) to (d) of the Practice Directions.

83. The table of contents. Applicants do not have to provide a table of contents in their pleadings. However, such a table proves very useful for the General Court, as it provides a general view of how the application is constructed and what pleas in law are put forward. It may either be placed at the very beginning of the pleading or at the end.

84. The preliminary statement. No rule requires applicants to provide a preliminary statement in their pleadings. However, a short preliminary statement (i.e. that should not exceed six or seven short paragraphs) may fruitfully serve two purposes.

85. *First*, the preliminary statement may be used to sum up what the contested decision is about, why it should be overturned or why the fine should be reduced. It may be compared to an executive summary that allows the General Court to understand the main features of a case. Accordingly, it is advisable to prepare that statement once the application is completed as it should reflect and explain the logics underlying the pleadi

86. *Second*, a preliminary statement may also prove useful to draw the attention to the specificities or the complexity of the case and to the specific procedural requests that applicants may have.

87. Regarding the specificities or the complexity of the case, the preliminary statement may indicate whether applicants consider that certain issues are addressed for the first time in that case or whether it requires that some questions of principle be answered. This allows Judge-Rapporteurs to identify upfront how this case may be best handled given their workload. [99]

88. Regarding specific procedural requests that applicants may have (such as, for instance, asking the General Court to transfer the case to an enlarged chamber or to adopt measures of organisation of the procedure[100]), they may be mentioned in a few sentences. They may be further developed either in the framework of the parts of the application dealing with the pleas in law or repeated in the final part of the application if they are not directly linked to a specific plea in law (e.g. in cases of requests that an enlarged chamber deal with the case).

89. The forms of order sought. While the substantive questions raised by the forms of order are addressed in Section IV.1. below, it must be recalled that, under Point 22 of the Practice Directions, the "precise wording" of the forms of order sought must be set forth either at the beginning or at the end of the application and be "identified as such". Applicants should therefore explicitly request the General Court to decide on each head of claim that they list in bullet points. In that regard, the section "Forms of order sought" in the General Court judgments may serve as a model.

90. It is useful to note that setting out the forms of order at the beginning of the application allows brief writers to indicate upfront what is requested from the General Court. This allows the General Court to review easily whether all the pleas in law that are then raised in the application support these forms of order.

91. The background to the dispute. Pursuant to Point 21 of the Practice Directions, applicants must provide a brief account of the facts giving rise to the dispute. In this part of the application, applicants would be well advised to address exclusively the factual, procedural and legal elements that are necessary to understand, in general terms, the pleas in law that are raised. This is without prejudice to the fact that, if necessary, these factual, procedural and legal elements may be addressed in further detail in the context of each of the pleas in law they relate to more specifically. The section "background to the dispute" in the judgments of the General Court may serve as a model.

92. Admissibility of the action. On the one hand, in cases where there is no doubt about the admissibility of the action (e.g., when the case is lodged against a final decision of the Commission imposing a fine on the applicant), applicants may either decide not to address the issue or address it in a few lines to indicate in particular the event and the day on which, in their opinion, the two-month deadline started running.[101]

93. On the other hand, in cases where there is no settled case law as to whether the contested decision is an act that can be challenged[102] (e.g. a decision informing an applicant that it may not benefit from conditional immunity), or that EU Courts have already decided against the admissibility of an action in a similar situation (e.g. an action brought against the Statement of Objections), applicants have the choice between addressing the admissibility issue upfront in their application or waiting to see if the Commission raises an inadmissibility plea in its defence or by separate act[103] and respond to it in their reply.[104] In both these situations, applicants would be well advised to develop in detail the reasons why they consider both as a matter of principle and in the case at hand, that the action should be admitted. Indeed, unless they manage to pass the admissibility hurdle, their pleas in law will not be examined. [105]

99 This also allows Judge-Rapporteurs to determine rapidly whether dealing with the case in an enlarged chamber would be appropriate.

100 The substantive issues raised by these procedural requests are discussed in Section IV below.

101 This allows the registry to determine with no delay whether the action was lodged within due time.

102 An analysis of the requirements for an act to be challengeable or for an applicant other than an addressee of the contested decision to have standing goes beyond the scope of this article. For an exhaustive and updated analysis of these requirements, see, e.g., F. Mariatte and D. Ritleng, *Contentieux de l'Union européenne*, Wolters Kluwer France, 2011, pp. 45-189.

103 Pursuant to Article 114 of the Rules of Procedure, the Commission may apply for a decision on admissibility by lodging a separate document. In cases where the Commission raises an inadmissibility plea under that Article, applicants are then given the opportunity to respond to this request in writing. The General Court may either decide to declare the action inadmissible in an order or reserve its decision for the final judgment.

104 The General Court may raise the admissibility issue of its own motion at all stages of the proceedings and ask the parties to provide their observations in that regard in the context of its measures of organisation of the procedure.

105 In such cases, the inadmissibility and substantive issues should be given equal consideration.

94. The pleas in law. Point 21 of the Practice Directions provides in essence that applicants should comply with three requirements regarding the pleas in law they raise. Additional suggestions may be made in relation to these three requirements.

95. *First*, each plea in law should be given a heading.[106] While this is not explicitly provided by Point 21 of the Practice Directions, it is advisable for applicants to number the headings and to clearly indicate, in those headings, what the purpose of each plea is. In that regard, applicants may easily find examples in the case law of the General Court. For instance, pleas in law may be entitled as follows: First Plea in Law alleging Errors of Law and Fact in relation to a finding of a Cartel Infringement; Second Plea in Law alleging Errors of Appraisal in the Calculation of the Fine; Third Plea in Law alleging Breach of the Rights of Defence; etc.

96. In cases where applicants wish to raise several breaches under the same plea in law, they should create sub-headings referred to as "limbs". For instance, applicants may raise a plea in law entitled "First Plea, alleging Procedural Errors". Under this heading, they may create two sub-headings entitled "First Limb of the First Plea alleging Breach of the Rights of Defence" and "Second Limb of the First Plea alleging Breach of the Right to an Impartial Tribunal" to address the two main breaches they wish to raise.

97. It is evident that short headings and sub-headings foster clarity and may help applicants to keep their argumentation within the limits of that plea in law.

98. *Second*, pursuant to Point 21 of the Practice Directions, each plea should be preceded by a summary statement of the relevant plea. This formal requirement may be met by indicating, (i) the number of pleas in law that are raised and (ii) by describing each one of them in one sentence.[107]

99. *Third*, legal arguments should be set forth and grouped by reference to the particular pleas in law to which they relate.[108] Important additional observations should be made on this point.

100. For reasons of clarity, pleas in law may all be structured in a similar way. The legal writing "CRAC rule"[109] suggests a simple, clear and logic structure which may serve as a guide to brief writers. Pursuant to that "rule", pleas in law should indicate first the "Conclusion", then the "Rule", followed by the "Analysis" and finally reiterate the "Conclusion". This structure mirrors the one most often used by the General Court in its judgments.

101. According to the "CRAC rule", the "Conclusion" should be set out immediately after the heading of a plea in law (or, if applicable, the sub-heading of each limb of that plea in law). This conclusion ought to indicate in very clear terms the legal proposal put forward in the framework of that plea in law (e.g. "*the Commission breached its duty of reasoning and the principle of sound administration because it did not address in the contested decision the arguments raised by the applicant during the administrative procedure*").

102. The "Rule" applicable to the case should then be indicated. In that context, if need be, applicants may first recall the standard of legal review that they believe the General Court should apply to their claim and then enunciate the rule that was, in their opinion, violated. In cases where applicants consider that one action of the Commission breached several rules, they should enunciate each one. In the example mentioned in the previous paragraph, the applicant should clearly enunciate the rules establishing the duty of reasoning and the principle of sound administration.

103. In the "Analysis", applicants should explain in detail how, in the contested decision, the Commission infringed each one of the rules they refer to. In cases where applicants raised a similar argument in the course of the administrative procedure (for example in their response to the statement of objections) and the Commission addressed that argument in the contested decision, applicants should put forward the reasons why they believe that the Commission's argumentation is erroneous.

104. Finally, as the direct consequence of their demonstration, applicants should reiterate their "Conclusion".

105. Pleas in law should be raised in a structured order. Five suggestions may be made in that regard. The first is that the strongest pleas in law should always come first. If the first pleas in law are sufficient to lead to an annulment of the contested decision, the chamber may decide to find in favour of the applicants without examining the remaining pleas. This allows applicants to obtain a judgment in a shorter timeframe.

106. Furthermore, pleas in law seeking the "full" annulment of the contested decision should be dealt with separately and before those seeking exclusively the annulment or the reduction of the fine.

107. Moreover, pleas in law relating to procedural errors should also be raised separately from those relating to substantive errors. In that regard, it is advisable that pleas in law raising procedural errors should only be invoked after substantive pleas and in case the General Court were to decide not to annul the contested decision on the basis of those substantive pleas. This is so because, in substance, the Commission may re-adopt a decision annulled by the General Court after correcting the procedural errors that lead to its annulment.[110] As rightly observed by an experienced EU litigator[111], "*success on procedural grounds alone can be short-lived*".

106 Point 21 of the Practice Directions.

107 The paragraph in which the General Court normally lists in its judgments the various pleas in law put forward by applicants before examining each of them may be used as a model.

108 Point 21 of the Practice Directions.

109 See, e.g., S. E. Ricks and J. L. Istvan, footnote 3 *supra*, pp. 1115 and 1116.

110 See Case T-301/01 *Alitalia v. Commission* [2008] ECR II-1753, § 99 and the case law cited therein.

111 G. Berrisch, Twelve Principles for Successful Litigation against Administrative Acts of the EU, Covington Report (November 2008), available at: http://www.cov.com/files/Publication/226cf3d6-f7d7-4167-ad98956e42e0ee7e/Presentation/PublicationAttachment/7738a94c-e1fc-406a-bc4e9cff2dd25644/Twelve%20Principles%20For%20Successful% 20Litigation%20Against%20Administrative%20Acts.pdf.

108. In addition, in all cases, applicants ought to focus their pleadings on their strongest pleas rather than raising a considerable number of pleas.

109. Finally, should applicants raise pleas in law that were dismissed on numerous occasions by the EU Courts, they will be well advised to explain in detail the reasons why they believe that the specific circumstances of the case should lead to a different conclusion. In other words, applicants should never (wilfully) ignore unfavourable case law but should confront it and distinguish their case from it.

110. Specific procedural requests. Specific procedural requests that have been mentioned in the preliminary statement and have not been reiterated in the context of the pleas in law may be further developed in this part of the application.[112]

111. The schedule of annexes. The schedule of annexes must comply with the requirements mentioned in paragraph 63 above.

2. The structure of the reply

2.1. What should the structure of a reply achieve?

112. As indicated in paragraph 37 above, the reply should not exceed 25 pages. Except for the part in the application regarding the background to the dispute described in paragraph 91 above, the structure of the reply should mirror as far as possible that of the application. This ensures continuity between the written pleadings and facilitates their reading.

2.2. How should the reply be structured?

113. The first two pages. Just as for the application, the Rules of Procedure and the Practice Directions provide the information that must appear at the beginning of the reply.[113]

114. The table of contents. Even though the reply contains a more limited number of pages, it is advisable that a table of contents be included in the reply. As in the application, it may be placed either at the beginning or the end of the pleading.

115. The preliminary statement. While a preliminary statement in the reply is neither requested nor necessarily useful, applicants may wish to insert one to explain in brief and general terms why they believe that the arguments made by the Commission in its defence do not invalidate those made in their application.

116. The forms of order sought. Applicants should indicate in their reply, whether they confirm the forms of order sought in their application or whether they wish to abandon some of the forms of order raised in their application or adapt them.

117. Admissibility of the action. In cases where the Commission argues in its defence that the action is inadmissible, applicants should address this issue before dealing with the pleas in law.

118. The pleas in law. Applicants should exclusively seek in that part of their reply to rebut the arguments made by the Commission in its defence. In that regard, applicants should take into account six important considerations.

119. *First*, the very purpose of the reply is to explain for what factual or legal reasons the arguments made by the Commission in its defence are either unfounded or ineffective. Accordingly, the reply should not repeat arguments put forward in the application but it should explain why the arguments raised by the Commission in its defence do not invalidate them. As mentioned in paragraph 6 above and further explained in paragraph 151 below, applicants may not raise new pleas in law or arguments in their reply unless specific circumstances that they must expressly set out are met.

120. Furthermore, applicants may be well advised to indicate that they wish to maintain the pleas in law they put forward in the application but with regard to which they do not deem it necessary to make further developments in the reply. By so doing, they make sure that their pleas in law may not be considered as having been abandoned.

121. *Second*, applicants should answer the Commission's arguments in the context of the structure of the pleas in law that they raised in their application. This facilitates the understanding of the pleadings. Applicants may proceed by recalling first the essence of the plea in law that they raised in their application and then respond to each argument raised by the Commission to invalidate their pleas.[114]

122. *Third*, applicants should not necessarily answer the arguments made by the Commission in the order in which it raised them but rather in an order that highlights the reasons why they should be dismissed. No argument raised by the Commission should be ignored unless it is irrelevant to solving the dispute. In such a case, it is sufficient for the applicant to explain the reasons why the Commission erred.

123. *Four*, applicants should make sure they take into consideration all the latest legal developments relevant to their case such as the judgments from the EU Courts that have been delivered since they submitted their application.

124. *Five*, if the Commission does not answer in its defence certain pleas in law or arguments put forward by the applicants in their application, they should be identified in their reply. This will give the Commission a chance to clarify whether it objects or not to that plea in law or that argument in its rejoinder.

112 The substantive issues raised by these procedural requests are discussed in Section 4 below.

113 See footnotes 97 and 98 *supra*.

114 It should be pointed out that it is common practise for the Commission to summarize in its pleadings the arguments raised by the applicant before responding to them.

125. *Six*, in all cases, applicants would be well advised in their reply to refer explicitly to the paragraphs of the defence in which the Commission raised its arguments in response to those they put forward in their application. This allows the General Court to identify quickly whether any arguments of the Commission have been left aside.

126. Specific procedural requests. In cases where applicants make some specific procedural requests in their application, they should indicate whether they wish to maintain them at that stage of the proceedings.

127. The schedule of annexes. As for the application, the schedule of annexes in the reply must comply with the requirements mentioned in paragraph 63 above.

III. Substantive Suggestions

128. This section discusses the main rules and principles governing the exercise by the General Court of its judicial review. The basic framework for that judicial review is set out in the EU Treaties, in particular Article 19 TEU and Articles 261 and 263 TFEU. It comprises of rules and principles concerning both the admissibility and the substance of the cases to be handled by the General Court. That framework was fleshed out by the case law.

129. As the General Court has to abide by those rules and principles, disregarding them when drafting written pleadings will inevitably lead to a dismissal of the action, the form of order, the plea or the argument invoked in violation of those rules and principles as being inadmissible, unfounded or irrelevant. Accordingly, the substance of the briefs is, in part, determined by those rules and principles.

130. The present section aims, in particular, at outlining those rules and principles that are most commonly ignored by litigants. To that end, the following issues will in turn be handled: (1.) admissibility; (2.) control of legality, and (3.) burden of proof.

1. Admissibility issues

131. It follows from the Statute of the Court of Justice[115] as well as the Rules of Procedure[116] that applicants must clearly state what they request from the General Court. This means that the application must contain an indication of the subject-matter of the proceedings, a statement of the grounds relied on (the pleas in law) and the forms of relief (or forms of order) sought by the applicants.

132. However, applicants must be aware of what they may and may not request from the General Court, in the forms of order and the pleas in law. Ignorant of what they may not request, forms of order, pleas or arguments, as the case may be, are destined to be dismissed as inadmissible.

115 Article 21 of the Statute of the Court of Justice.

116 Article 44(1)(c) of the Rules of Procedure.

1.1. What forms of order may or may not be sought?

133. While paragraphs 135 and 136 below identify the forms of order that applicants may seek, paragraphs 137 to 149 below examine those that are doomed to be declared inadmissible should they be included in the written pleadings.

1.1.1. Forms of order that may be sought

134. In competition law applications, the forms of order ought to contain at least the following two heads of claim.

135. *First*, applicants should request the General Court either to annul the Commission decision or to both annul that decision and to amend the level of the fine imposed in that decision in equity. In that respect, it must be emphasized that the General Court was entrusted, in substance, with two main competences. Pursuant to Article 263 TFEU, it was entrusted with the power to annul Commission decisions that it found to be illegal. Pursuant to Article 261 TFEU, read in combination with Article 31 of Council Regulation (EC) No 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Articles [101 and 102 TFEU] (OJ 2003 L 1, p. 1), it was accorded unlimited jurisdiction with regard to fines, which implies that it is allowed to vary the penalty imposed by the Commission in equity (i.e. reduce or increase or, as the case may be, uphold it),[117] regardless of whether the Commission decision has been found to be unlawful.

136. *Second*, applicants should request the General Court to order the Commission to bear their costs.[118] It is only if applicants apply for costs that the General Court may order the Commission to pay them.[119]

1.1.2. Forms of order that may not be sought

137. Requesting the annulment of the decision without clarifying the exact scope of the annulment sought. When a Commission decision has more than one addressee, the applicants must clearly state, in the forms of order, that they seek the annulment of that decision insofar as they are concerned. With regard to competition decisions in which the Commission imposes fines on the addressees, the applicants must make it clear whether they seek the annulment of that decision (i) insofar as the Commission both found that they took part in an infringement[120] and imposed a fine on them[121] or (ii) solely insofar as the Commission imposed a fine on them.

117 See, e.g., Case T-220/00, *Cheil Jedang Corporation v. Commission* [2003] ECR II-2473, § 100 or Joined Cases T-217/03 and T-245/03, *FNCBV and Others v. Commission* [2006] ECR II-4987, § 357-361. With regard to unlimited jurisdiction, see, e.g. for a discussion on the most recent case law, G. Muguet-Poullennec, D. Domenicucci and F. Hoseinian, Sanctions prévues par le règlement n° 1/2003 et droit à une protection juridictionnelle effective : les leçons des arrêts KME et Chalkor de la CJUE, RLC 2012/32, no 2112. See, also, G. Muguet-Poullennec and D. Domenicucci, Amende infligée par un autorité de concurrence et droit à une protection juridictionnelle effective : les enseignements de l'arrêt Menarini de la CEDH, RLC 2012/30, n° 1988.

118 Article 87(2) of the Rules of Procedure.

119 Ibid.

120 For instance, in Article 101 TFEU cases, the finding of an infringement is normally mentioned in Article 1 of a sanction decision adopted pursuant to Articles 101 or 102 TFEU.

121 For instance, in Article 101 TFEU cases, the fine imposed on each company is normally mentioned in Article 2 of a sanction decision.

138. Should applicants merely request the annulment of the contested decision without further explanation, the General Court may ask them to clarify the exact scope of the annulment they request. It may also dismiss the action as inadmissible with regard to those parts of the decision which do not concern them. This follows from the case law pursuant to which, if an addressee of a decision decides to bring an action for annulment, the matter to be adjudicated by the EU judicature relates only to those aspects of the decision which concern that addressee.[122] This is particularly true in cartel cases since Commission decisions are regarded by the EU judge as a bundle of individual decisions making a finding or findings of infringement against each of the undertakings to which they are addressed and, where appropriate, imposing a fine[123].

139. Requesting that the contested decision be reformed in disregard of certain principles. Applicants wishing the General Court to make use of its unlimited jurisdiction pursuant to Article 261 TFEU must bear in mind three basic principles.

140. *First*, it is advisable for brief writers to indicate explicitly in the forms of order that they request the General Court to reduce the fine pursuant to Article 261 TFEU. While the absence of an express reference to that article does not prevent the General Court from examining such a request pursuant to that provision, such an explicit reference leaves no room for doubt as to the extent of the review requested by applicants.[124]

141. *Second*, such a form of order should be duly supported by one or several pleas or arguments explaining why the amount of the fine ought to be amended in equity. This means that the request that the fine be reduced pursuant to Article 261 TFEU must be supported by arguments other than those raised by the applicants in the framework of the request for annulment of the contested decision.

142. *Third*, applicants may not request the General Court to make use of its unlimited jurisdiction without also requesting it to annul the Commission decision on the basis of Article 263 TFEU. In that regard, the EU judicature made it clear that the EU Treaties do not recognise the action under the General Court's unlimited jurisdiction as an autonomous remedy.[125] Although the General Court has recently seemed prone to hold cases in which the annulment of the contested decision had not expressly been sought admissible,[126] it remains advisable for brief drafters to include, within their pleadings, a form of order pertaining to the annulment of the contested decision besides the form of order whereby they request the General Court to resort to its unlimited jurisdiction. Furthermore, it is advisable for brief drafters to expressly state that the request pursuant to Article 261 TFEU should only be examined by the General Court if it has decided to dismiss the request pursuant to Article 263 TFEU.

143. Requesting costs incurred during the administrative procedure. Only costs that have been incurred for the purposes of the procedure before the General Court may be applied for.[127] Accordingly, requests to recover costs incurred during the administrative procedure before the Commission will be dismissed as inadmissible.[128]

144. Injunctive relief, declaratory and amending orders. *First*, the General Court does not have jurisdiction to grant injunctive relief in direct actions[129] and brief drafters must therefore refrain from asking it to issue directions or instructions to the Commission. Claims that a direction be issued to that institution will inevitably be dismissed as inadmissible by the General Court. The rationale for such a dismissal is that, pursuant to Article 266 TFEU, it is for the institution whose act has been declared void to take the necessary measures to comply with a judgment given in annulment proceedings (i.e. both its operative part and the grounds which led to that operative part).[130]

145. *Second*, the General Court does not have jurisdiction to make declaratory orders whereby it substitutes itself for the Commission.[131] For example, it is not within its powers to declare that a behaviour is compatible with Articles 101 or 102 TFEU. It may only come to the conclusion that the decision it is reviewing, declaring that behaviour incompatible with those provisions, must be annulled. There is therefore no point in requesting the General Court to declare the applicant's behaviour compatible with these articles.

146. *Third*, because the General Court may not assume the role assigned to the Commission, except in the framework of the unlimited jurisdiction it may exercise pursuant to Article 261 TFEU with regard to fines, it may not amend a decision made by the Commission.[132] Accordingly, requests to that end, that do not relate to a fine imposed by the Commission, will be dismissed as inadmissible.

147. Requesting the benefit of the ruling made in another case. In principle, applicants in one case may not request the benefit of the judgment pronounced by the General Court in another case. This is so because of the relative effect of

122 See, e.g., Case C-310/97 P, *Commission v. AssiDomän Kraft Products and Others* [1999] ECR I-5363, § 53, and Case T-456/05 and T-457/05, *Gütermann and Zwicky v. Commission* [2010] ECR II-1443, § 112.

123 See, e.g., Commission v. AssiDomän Kraft Products and Others, footnote 122 supra, § 63.

124 See, in that respect, Opinion of Advocate General Sharpston in Case C-272/09 P, *KME Germany and Others v. Commission*, judgment of 8 December 2011, not yet reported, § 77 and 78.

125 Case T-252/03, *FNICGV v. Commission* [2004] ECR II-3795, § 22. See also F. Arbault and E. Sakkers, Cartels, pp. 745-1128, in J. Faull and A. Nikpay (eds), *The EC Law of Competition*, OUP, 2007, p. 1114.

126 See Case T-127/04, *KME Germany and Others v. Commission* [2009] ECR II-1167.

127 Article 91(b) of the Rules of Procedure.

128 See, e.g., Case T-140/04, *Ehcon v. Commission* [2005] ECR II-3287, § 100.

129 See, e.g., Case T-102/92, *Viho v. Commission* [1995] ECR II-17, § 28. See also C. Bellamy, Views from the European Courts, The Court of First Instance of the European Communities, pp. 45-55, in Practitioners' Handbook of EC law, Trenton Publishing, 1998, p. 50.

130 See, e.g., Case T-273/09, *Associazione "Giùlemanidallajuve" v. Commission*, order of 19 March 2012, not reported, § 20. See, also, Cases 194 to 206/83, *Asteris v. Commission* [1985] ECR 2815, § 27.

131 See, e.g., Case T-57/91, *Naloo v. Commission* [1996] ECR II-1019, § 90-93.

132 See, e.g., Case T-155/04, *SELEX Sistemi Integrati v. Commission* [2006] ECR II-4797, § 28.

judicial proceedings. The consequences attached to that effect by the General Court in principle preclude an application brought by an undertaking which is an addressee of a decision from affecting the situation of the other addressees of the decision.[133]

148. However, this principle is now being reconsidered in cartel cases in which the Commission held a parent company, forming a single economic unit with its subsidiary, liable for the infringements committed by that subsidiary although it had not itself taken part in the infringements. In those cases, the General Court has recently seemed prone to grant the benefit of the ruling it made in the case lodged by the subsidiary to the parent company, in the framework of the separate case it had lodged.[134]

149. Because this question is now being reviewed by the Court of Justice,[135] it is advisable for brief drafters, until the latter court has expressed its opinion, to abstain, in cases lodged by parent companies, from merely requesting, in a form of order, the benefit of the judgment pronounced by the General Court in the case lodged by their subsidiary. As of today, to be entirely certain that the General Court will not dismiss that form of order as inadmissible, it is safer to fully reproduce, in cases lodged by parent companies, the arguments made by their subsidiaries in their own challenges.

1.2. What pleas in law and arguments may and may not be invoked?

1.2.1. Pleas in law and arguments that may be invoked

150. Pleas in law must set out with sufficient clarity the facts and reasoning on which they are based[136] and must support one of the forms of order set forth in the application.

151. Furthermore, as mentioned in paragraph 6 above, pleas in law that have not been put forward in the application may not normally be raised at a later stage of the proceedings. New pleas in law may only be raised in the reply if they are based on matters of law and fact which have come to light in the course of the procedure.

1.2.2. Pleas in law and arguments that may not be invoked

152. Pleading by reference to annexes or documentation. Pursuant to the case law, pleading by reference is considered to be inadmissible, as this would jeopardise legal certainty and sound administration of justice.[137] This means that brief drafters may not, in their pleas in law or arguments, direct the General Court to look at annexes or other documents to find out about the particulars of their argumentation. In other words, it is necessary that the basic matters of fact and law relied on in the pleading appear coherently and intelligibly in the text itself. Specific points in that pleading may be supported and supplemented by references to documents annexed to it. However, a general reference to other documents, including those annexed, cannot compensate for the lack of essential elements in the text of the pleading itself. The General Court made it clear, in that respect, that it is not for it to seek and identify in the annexes the pleas in law and arguments on which it may consider the action to be based, since the annexes have a purely evidential and instrumental function.[138]

153. Pleading by reference to pleas raised in another case. For the same reasons as those set out in the previous paragraph (i.e. legal certainty and sound administration of justice), a reference to one or more pleas in law made in other cases, even if connected to the case at hand, is generally considered to be inadmissible. Accordingly, brief drafters may not direct the General Court to look at another case to find out about the particulars of the argumentation of the applicant.[139]

154. Contesting facts that were previously acknowledged. For the sake of completeness, it must be underlined that, in the past, pursuant to the case law, in proceedings concerning Articles 101 and 102 TFEU, where an undertaking had explicitly admitted during the administrative procedure the substantive truth of the facts which the Commission had alleged against it in the statement of objections, the facts were thereafter regarded as established and the undertaking was estopped from disputing them during the procedure before the General Court.[140] This case law has now been overturned and the Court of Justice has made it clear that, although an undertaking's express or implicit acknowledgement of matters of fact or of law during the administrative procedure before the Commission may constitute additional evidence when determining whether an action is well founded, it cannot restrict the actual exercise of a natural or legal person's right to bring proceedings before the General Court under Article 263(4) TFEU.[141] In other words, applicants may raise pleas and arguments with a view to contesting matters of facts and law that they had acknowledged in the framework of the administrative procedure.

2. Control of legality issues

155. To obtain the annulment of the decision against which a challenge has been brought before the General Court, applicants must demonstrate its illegality. To that end, they must conform with three basic principles when drafting their written pleadings. First, they must take heed of the nature of the judicial review exercised by the General Court.

133 See *Commission v. AssiDomän Kraft Products and Others*, footnote 122 *supra*.

134 See Case T-382/06, *Tomkins v. Commission*, judgment of 24 March 2011, not yet reported, § 38-46.

135 See Case C-286/11 P, *Commission v. Tomkins*, pending. Note that Advocate General Mengozzi, whose opinion was delivered on 19 July 2012, appears to have accepted the principle pursuant to which the General Court may grant the parent company the benefit of the ruling it made in the case lodged by the subsidiary, provided that it does so in the context of its unlimited jurisdiction.

136 See, e.g., Case T-85/92, *De Hoe v. Commission* [1993] ECR II-523, § 21.

137 See, e.g., Case T-144/04, *TF1 v. Commission* [2008] ECR II-761, § 29.

138 Ibid.

139 See Case T-376/06, *Legris Industries v. Commission*, judgment of 24 March 2011, not yet reported, § 32 and 33.

140 See, e.g, Joined Cases T-236/01, T-239/01, T-244/01 to T-246/01, T-251/01 and T-252/01, *Tokai Carbon v. Commission* [2004] ECR II-1181, § 108.

141 Case C-407/08 P, *Knauf Gips v. Commission* [2010] ECR I-6375, § 90.

Second, they must make sure they rely on grounds of review over which the General Court was granted jurisdiction and apply the appropriate legal test, as developed by that court in relation with each single ground of review. Third, they must demonstrate that the infringement they allege justifies the annulment of the contested decision.

2.1. What is the nature of the judicial review exercised by the General Court?

2.1.1. Nature of the judicial review

156. In the EU, the competition enforcement system is essentially based on judicial review of administrative acts.[142] The Commission enjoys very wide investigative and decision-making powers and the control exercised by the General Court over those acts is limited to a review of their legality pursuant to Article 263 TFEU.[143] Except with regard to fines under Article 261 TFEU, the General Court may not conduct a *de novo* review of the case brought before it with a view to amending the Commission decision. Hence, the General Court does not verify whether the decision under review is appropriate or adequate in view of the particular circumstances of the case but makes sure that the decision is lawful in view of the information the Commission possessed at the time it was adopted.[144]

157. Written pleadings must be drafted so as to take account of the nature of the judicial review exercised by the General Court in competition law cases. In that respect, a few traps must be avoided by brief drafters.

2.1.2. Impact on the substance of the written pleadings

158. Arguments concerning elements not contained in the contested decision and information pre- or post-dating it. As the review carried out by the General Court is limited to the legality of the contested decision (except with regard to fines), applicants must strictly base their argumentation on the content of the contested decision. Hence, brief drafters must target the defects affecting both the operative part and the recitals of the contested decision, whether those defects concern the substance of that decision or its more formal aspects, such as whether it contains a proper statement of reasons with regard to the essential elements that led the Commission to adopt that decision or whether it contains contradictions or logical problems.

159. Furthermore, generally speaking, the legality of an EU measure must be assessed by the General Court on the basis of the elements of fact and of law existing at the time the measure was adopted.[145] This implies that applicants may not rely on information that was not available to the Commission when it made the assessments contained in the contested decision or on matters that were not known to it during the administrative procedure.[146] Furthermore, applicants are barred from referring to elements post-dating the adoption of the EU measure.[147]

160. It must also be stressed that, even when requesting the General Court to make use of its unlimited jurisdiction pursuant to Article 261 TFEU, brief drafters ought to pay attention to the arguments they raise. By virtue of its unlimited jurisdiction, the General Court may take into consideration additional information which was not mentioned in the contested decision when assessing the amount of the fine in the light of the objections raised by applicants. The EU judicature ruled in the past that that possibility must, in principle, be limited to taking into account information pre-dating the contested decision and which the Commission could have known at the time it adopted that decision.[148] However, in more recent case law,[149] the General Court has taken into consideration facts that were contemporaneous to the adoption of the contested decision, but that the applicant did not communicate to the Commission, to reduce the amount of the fine imposed in the contested decision.

161. Arguments concerning the appropriateness of the contested decision. Because the review carried out by the General Court is a legality review, all arguments concerning the reasonableness, appropriateness and adequacy of the contested decision are in vain, except with regard to fines. If applicants nonetheless wish to raise such arguments, they should be kept to a bare minimum and only considered as background information for the judges handling the case. Failure to do so would result in wasting space that could be more effectively used in the pleading.

2.2. What are the grounds of review and the applicable legal tests?

2.2.1. Grounds of review and legal tests

162. The grounds of review under Article 263 TFEU. With the exception of fines under Article 261 TFEU[150], the General Court was granted jurisdiction over four exhaustively enumerated grounds of review pursuant to Article 263 TFEU: (i) lack of competence, (ii) infringement of an essential procedural requirement, (iii) infringement of the Treaties or of any rule of law relating to their application,

142 See M. Jaeger, The Court of First Instance and Competition Law Litigation, footnote 53 *supra*, p. 7.

143 D. Edward, Views from the European Courts, The Court of First Instance of the European Communities, The Court of Justice of the European Communities – Advocacy before the Court of Justice: Hints for the uninitiated, pp. 27-45, in *Practitioners' Handbook of EC law*, footnote 129 *supra*, p. 29.

144 See, e.g., Case T-322/01, *Roquette Frères v. Commission* [2006] ECR II-3137, § 325.

145 See, e.g., *Roquette Frères v. Commission*, footnote 144 *supra*, § 325.

146 See, e.g., Case T-369/06, *Holland Malt v. Commission* [2009] ECR II-3313, § 119.

147 See, e.g., Case T-329/01, *Archer Daniels Midland v. Commission* [2006] ECR II-3255, § 377.

148 See, e.g., *Roquette Frères v. Commission*, footnote 146 *supra*, § 327.

149 See, e.g., Case T-217/06, *Arkema and Others v. Commission*, judgment of 7 June 2011, not yet reported, § 274. See also, in the same vein, Case T-343/06, *Shell Petroleum and Others v. Commission*, judgment of 27 September 2012, not yet reported, § 118 and 119.

150 Pursuant to Article 261 TFEU, the General Court was entrusted with unlimited jurisdiction to review fines, which implies that it may be asked to amend the level of the fine in equity. Accordingly, when relying on Article 261 TFEU, applicants may raise any factual element, including arguments pertaining to the reasonableness of the fines imposed on them.

or (iv) misuse of powers. Because those grounds of review, as laid down in Article 263 TFEU, are open-textured, they were further elaborated upon by the EU judicature itself.[151]

163. *First*, incompetence covers mainly cases in which an institution took a decision which it did not have power to take. Incompetence, like misuse of powers, is more rarely invoked by applicants than the two other grounds of review. In the competition law field, it was for example invoked and upheld by the General Court in relation with a decision adopted by a Commissioner after his mandate had expired.[152]

164. *Second*, the breach of an essential procedural requirement covers a number of different infringements. The infringements most relevant to competition law challenges before the General Court are: violation of the rights of defence and failure to state reasons.

165. *Third*, infringement of the Treaties and any rule of law relating to their application covers two different types of wrongdoings. On the one hand, it covers any violation of a superior rule of EU law, i.e. international law provisions (provisions of international agreements to which the EU is a party or international customary law), Treaty provisions, secondary legislation, general principles of EU law (e.g. principle of proportionality, principle of equal treatment, principle of protection of legitimate expectations, principle of reasonable time in administrative procedure, principle ne bis in idem), the Charter of Fundamental Rights of the European Union[153] and all valid binding acts of EU institutions or bodies[154] (e.g. guidelines and notices). A review of the compliance with a superior rule of EU law may involve the verification of the material correctness of the facts relied on by the EU institution as well as the correctness of the legal qualification applied to those facts.[155] On the other hand, it covers errors of law, which comprise mainly of errors in the interpretation of a legal rule and errors in the choice of the legal basis of an EU act.

166. *Fourth*, misuse of powers covers cases in which an institution used its powers for a purpose other than that for which they were conferred.[156] Such a ground is seldom invoked in Articles 101 and 102 TFEU challenges brought before the General Court and to date has never been upheld.

167. The legal tests applicable to those grounds of review. Not only must brief drafters be well aware of the grounds of review they may rely on, they must also have a very good knowledge of the legal tests developed by the EU judicature in relation with each of those grounds. Failure to demonstrate that the relevant test is met, in a specific case brought before the General Court, will lead that institution to dismiss the plea relating to the particular ground of review as unfounded.

168. It is not the aim of this article to describe in detail the legal tests to be met in relation with each single ground of review. However, the following sub-section will outline some errors that are commonly made by applicants with regard to the legal tests applicable to some grounds of review. The most frequent errors concern the second and third grounds of review under Article 263 TFEU, i.e. infringement of a superior rule of law and infringement of an essential procedural requirement.

2.2.2. Impact on the substance of the written pleadings

169. Error versus manifest error of assessment. When verifying the existence of an infringement of the Treaties and any rule of law relating to their application, the General Court applies a differential legal test. The General Court sanctions the existence of an error when it controls the interpretation of the law, the choice of the legal basis, the material correctness of facts, and the correctness of the legal qualification applied to those facts. However, generally speaking, when the Commission benefits from a margin of discretion, the General Court only verifies the existence of a manifest error of appraisal.[157]

170. More precisely, with regard to Articles 101 and 102 TFEU cases, the General Court undertakes a comprehensive review, i.e. checks the existence of any error, of the question whether or not the conditions for the application of Articles 101 and 102 TFEU are met.[158] Nonetheless, where such a finding involves complex economic or technical appraisals, the General Court recognises that the Commission has a certain discretion and only verifies whether there has been a manifest error of appraisal.[159]

171. When drafting their written pleadings, applicants must therefore identify and comply with the applicable legal test. Should the part of the Commission decision they contest concern complex economic or technical appraisals, they must make sure that they demonstrate that the Commission manifestly went beyond the limits of its margin of assessment.[160] In principle, this means that when the Commission's assessment may be considered plausible, the plea will be dismissed as unfounded.[161]

151 See P. Craig, EU Administrative Law, OUP, 2006, p. 266.

152 See Joined Cases T-80/89, T-81/89, T-83/89, T-87/89, T-88/89, T-90/89, T-93/89, T-95/89, T-97/89, T-99/89, T-100/89, T-101/89, T-103/89, T-105/89, T-107/89 and T-112/89, *BASF and Others v. Commission* [1995] ECR II-729, § 103-107.

153 Charter of Fundamental Rights of the European Union, proclaimed on 7 December 2000 in Nice (OJ 2000 C 364, p. 1).

154 See K. Lenaerts, D. Arts and I. Maselis, *Procedural Law of the European Union*, Sweet & Maxwell, 2006, p. 306.

155 See, e.g., F. Mariatte and D. Ritleng, footnote 102 *supra*, p. 202.

156 See, e.g., Case T-190/06, *Total and Elf Aquitaine v. Commission*, judgment of 14 July 2011, not yet reported, § 238.

157 The EU judge held, however, that, even when the Commission benefits from a margin of discretion, the General Court must establish whether the evidence relied on is factually accurate, reliable and consistent but also whether that evidence contains all the information which must be taken into account in order to assess a complex situation and whether it is capable of substantiating the conclusions drawn from it. See, e.g., Case C-12/03 P, *Commission v. Tetra Laval* [2005] ECR I-987, § 39. See, with regard to the debate as to the nature of the control limited to the existence of a manifest error of assessment, M. Jaeger, The Standard of Review in Competition Cases Involving Complex Economic Assessment : Towards the Marginalisation of the Marginal Review?, *Journal of European Competition Law & Practice*, 2011, Vol. 2, N° 4, p. 302 and M. Siragusa and G. Faella, Trends and Problems of the Antitrust of the Future, Speech delivered in Treviso, 17-18 May 2012.

158 See, e.g., Case T-446/05, *Amann & Söhne and Cousin Filterie v. Commission* [2010] ECR II-1255, § 131.

159 See, e.g., Case T-111/08, *MasterCard and Others. v. Commission*, judgment of 24 May 2012, not yet reported, § 82.

160 See, e.g., Case T-151/07, *Kone and Others v. Commission*, judgment of 13 July 2011, not yet reported, § 103.

161 See, in the State aids field, Case T-380/94, *AUIFASS and AKT v. Commission* [1996] ECR II-2169, § 59.

172. Procedural irregularities. When claiming the infringement of an essential procedural requirement, brief drafters often refer to the existence of procedural irregularities committed by the Commission in the course of the administrative procedure. It is, however, sometimes forgotten that it is only where the irregularity committed by the Commission was capable of actually compromising the rights of defence of the undertaking involved in the administrative procedure that such an irregularity could lead to the annulment of the Commission decision.[162] More precisely, the applicant must produce concrete evidence to establish that the irregularity in question adversely affected the efficiency of its defence during the administrative procedure and that the content of the Commission decision could have been influenced by a more efficient defence.[163]

173. The same holds true when applicants invoke certain general principles of law such as, for example, the principle of reasonable time in administrative procedure. In respect of that principle, the General Court considers that breaching it can only lead to the annulment of the decision provided that it has affected the ability of the undertakings concerned to defend themselves and, therefore, has adversely affected their rights of defence.[164] This is, however, without prejudice to the reduction of the fine that the General Court may decide to grant, pursuant to Article 261 TFEU, in cases where the administrative procedure was excessively long[165].

174. Failure to state reasons versus incorrect statement of reasons. Failure to state reasons comprises both complete lack of reasoning and insufficient reasoning.[166] Lack or insufficient reasoning and incorrect statement of reasons are autonomous concepts. Nonetheless, when invoking lack or insufficient reasoning, brief drafters often raise arguments pertaining to the correctness of the statement of reasons rather than its absence or its insufficiency. In such a situation, the General Court recalls that the obligation to provide a statement of reasons is an essential procedural requirement that is distinct from the question of whether the reasons given are correct, which goes to the substantive legality of the contested measure.[167] Hence, the plea in law is dismissed by the General Court as unfounded.

175. Furthermore, brief drafters ought to be particularly careful when raising the existence of contradictions in the contested decision. Such contradictions may either lead to the conclusion that that decision is incomprehensible, in which case it is vitiated by insufficient reasoning, or that it is incorrect, in which case it is vitiated by an error of assessment. In any event, it is only if the contradiction has an influence on the validity of the reasoning on which the contested decision is based that it may lead to an annulment.

2.3. Does the infringement justify the annulment of the contested decision?

2.3.1. What must applicants do?

176. For the General Court to annul the contested decision, applicants should not forget that it is not sufficient to demonstrate the existence of illegality on the part of the Commission. Applicants must also demonstrate that such illegality justifies the annulment of the contested decision. The General Court judgments show that applicants frequently disregard this rule. The following section will outline the mistakes most frequently made by applicants in that respect.

2.3.2. What must applicants avoid doing?

177. Pleas in law and arguments directed at grounds relied on by the Commission for the sake of completeness. Brief drafters must refrain from raising pleas concerning grounds that the Commission included in the contested decision for the sake of completeness only if they do not also challenge the "decisive" grounds it relied on in reaching that decision. In that respect, the General Court rules that pleas directed against grounds of a Commission decision included purely for the sake of completeness must be rejected outright since they cannot lead to the decision being annulled.[168]

178. Pleas in law and arguments directed at one of the pillars of reasoning on which the operative part of a Commission decision is based. Brief drafters must also make sure that, where the operative part of a Commission decision is based on several pillars of reasoning, each of which would *per se* be sufficient to justify that operative part, they do not limit themselves to raising pleas in law and arguments directed at only one of those pillars of reasoning. In such a case, an error or other illegality which affects only the contested pillar of reasoning cannot be sufficient to justify annulment of the decision at issue because that error could not have had a decisive effect on the operative part adopted by the Commission. In principle, the decision will be annulled only if each of those pillars is vitiated by illegality.[169]

3. Burden of proof issues

179. When drafting written pleadings, applicants must also take account of three important considerations that relate to the burden of proof. First, they must be aware of who must demonstrate what. Second, they must not forget what law they may rely on. Third, they must bear in mind the facts that they are allowed to invoke.

162 See, e.g., Case T-299/08, *Elf Aquitaine v. Commission*, judgment of 17 May 2011, not yet reported, § 147.

163 See, e.g., Case T-99/04, *AC-Treuhand v. Commission* [2008] ECR II-1501, § 59 or Case C-51/92 P, *Hercules Chemicals v. Commission* [1999] ECR I-4235, § 78 and 81.

164 See, e.g., Case T-461/07, *Visa Europe and Visa International Service v. Commission*, judgment of 14 April 2011, not yet reported, § 232.

165 See Case T 214/06, Imperial Chemical Industries v. Commission, judgment of 5 June 2012, not yet reported, § 294-296.

166 The difference between a lack of reasoning and insufficient reasoning may be explained in the simple following terms. There is a lack of reasoning where the Commission does not provide any reasoning at all in the contested decision. There is an insufficient reasoning where the reasoning provided by the Commission is insufficient to support its finding.

167 See, e.g., Case T-112/05, *Akzo Nobel and Others v. Commission* [2007] ECR II-5049, § 94.

168 See, e.g., Case T-50/00, *Dalmine v. Commission* [2004] ECR II-2395, § 146.

169 See, e.g., *SELEX Sistemi Integrati v. Commission*, footnote 130 *supra*, § 47.

3.1. Who must demonstrate what?

180. To obtain annulment of a Commission decision, litigants must be aware of the rules relating to the burden of proof so that they may adjust their pleadings accordingly. In a direct action, the onus of proof lies with the party seeking relief.[170] Accordingly, before the General Court, applicants must prove that the Commission decision is unlawful.

181. However, to determine the precise extent of their burden, applicants must also be well aware of the rules governing the burden of proof in the context of the administrative procedure. Generally speaking, it is for the Commission to demonstrate an Article 101 or 102 TFEU infringement.[171] The evidential burden may nonetheless shift with regard to certain issues. For example, in cartel cases, when the Commission relies on the 100 % ownership of a subsidiary by a parent company to hold the latter responsible for the infringements committed by the former on the basis of the presumption that the parent company does in fact exercise a decisive influence over the conduct of its subsidiary, it will be for the parent company to rebut that presumption by demonstrating that its subsidiary acts independently on the market.[172]

182. Depending on the party on which the burden of proof lay during the administrative procedure, the substance of the written pleadings will vary.[173] If the onus of proof was on the Commission, applicants will need to demonstrate that the Commission did not properly discharge its evidential burden.[174] If the burden of proof was on the applicants, they will have to demonstrate that the Commission erred in concluding that they did not manage to discharge their evidential burden.[175]

3.2. What law may be relied on?

183. As mentioned in paragraph 165 above, the General Court controls the legality of the decisions brought before it in view of international law provisions by which the EU is bound, Treaty provisions, secondary legislation, general principles of EU law, the Charter of Fundamental Rights and all valid binding acts of EU institutions or bodies. The General Court does not control the compliance of EU acts with national laws of the EU Member States or of third States.

184. Nevertheless, brief drafters often refer to general principles of national law or to national legal rules, claiming that they were breached by the Commission. Such a reference is vain and should be considered as wasting valuable space that could be put to better use.

185. This does not mean however that a reference to a national legal principle or rule may not prove a useful guide for the General Court to interpret EU law provided two conditions are met. *First*, applicants must clearly explain the legal provisions or principles that they are referring to, as those provisions and principles may be clear to the brief drafters but not so clear for those who have undertaken their legal studies in another jurisdiction.[176] *Second*, they must also explain why those provisions and principles are relevant, by analogy, to the case at issue. In the past, when those two conditions were met, the General Court took account of provisions of EU Member States laws or third States laws to interpret EU law.[177]

186. A reference to the laws of Member States could also be relevant when applicants wish to raise a human rights argument pursuant to Article 6(3) TEU, insofar as that article provides that "*fundamental rights* (…) *as they result from the constitutional traditions common to the Member States* (…) *shall constitute general principles of the Union's law*". However, *first*, applicants should verify that the principle they wish to invoke does not already exist in EU law, namely in the Charter of Fundamental Rights of the European Union or as a general principle of EU law developed by the EU judicature in its case law. *Second*, they should not overlook the fact that it is not enough to refer to a principle existing in one Member State but should refer to a principle resulting from the constitutional traditions common to several Member States.

3.3. What facts may be relied on?

187. Applicants, when drafting their pleadings, must remember that certain facts may not be relied on.

188. ***Nemo auditur.*** First, pursuant to the *nemo auditur propriam turpitudinem allegans* ("*no one shall be heard to invoke his own turpitude*") principle, a party cannot rely on its own wrongful conduct.[178] It cannot rely either on the unlawful conduct of a person authorised to act on its behalf in order to evade its own liability as a result of actions performed by that person.[179]

170 The Hon. Mr. Justice Richards and M. Beloff QC, View from the Bar, pp. 11-26, in *Practitioners' Handbook of EC law*, footnote 129 *supra*, p. 15.

171 See Article 2 of Council Regulation (EC) nº 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Articles [101 and 102 TFEU]. See also K. Lenaerts, Réflexions sur la preuve et sur la procédure en droit communautaire de la concurrence, pp. 475-507, in C. Baudenbacher, C. Gulmann, K. Lenaerts, E. Coulon and E. Barbier de la Serre (eds), *Liber Amicorum in honour of Bo Vesterdorf*, Bruylant, 2007, pp. 482 and 484.

172 See, e.g., Case C-97/08 P, *Akzo Nobel and others v. Commission* [2009] ECR I-8237, § 60 and 61. Another example of a case where the burden of proof does not lie on the Commission relates to the demonstration that the conditions of Article 101(3) TFEU are met. Furthermore, in the context of an infringement of Article 102 TFEU, it is arguably for the undertaking accused of being in a dominant position to show that its actions have an objective justification and that its actions are proportionate to its legitimate self-interest. See, with regard to the latter statement, M. M. Collins, The Burden and Standard of Proof in Competition Litigation and Problems of Judicial Evaluation, in *ERA Forum*, vol. 5, number 1 (2004), 66-83, p. 68.

173 See G. Berrisch, footnote 111 *supra*, pp. 3 and 4.

174 Case T-342/99, *Airtours v. Commission* [2002] ECR II-2585, in particular § 294, is a perfect example of a case where the General Court upheld such an argument and concluded that the decision was not based on cogent evidence.

175 See, e.g., Joined Cases T-141/07, T-142/07, T-145/07 and T-146/07, *General Technic-Otis v. Commission*, judgment of 13 July 2011, not yet reported, § 80-90.

176 D. Vaughan and M. Gray, Litigating in Luxembourg and the Role of the Advocate at the Court of Justice, pp. 48-69, in A. Arnull, P. Eeckhout and T. Tridimas, eds, *Continuity and Change in EU Law*, Essays in Honour of Sir Francis Jacobs, OUP, 2008, p. 58.

177 See, e.g., Case T-86/95, *Compagnie générale maritime and Others v. Commission* [2002] ECR II-1011, § 271, in which the General Court took account of provisions of United States law.

178 See Case C-453/99, *Courage and Crehan* [2001] ECR I-6297, § 31.

179 See Case T-141/01 R, *Entorn v. Commission* [2001] ECR II-3123, § 121.

189. Error that benefited others. Brief drafters often invoke, in particular in cartel cases, the principle of equal treatment so as to claim the benefit of a more favourable treatment unlawfully granted to another undertaking involved in the same administrative procedure. However, such an argument is destined to fail insofar as the principle of equal treatment must be reconciled with the principle of legality, according to which a person may not rely, in support of his claim, on an unlawful act committed in favour of a third party.[180]

IV. Procedural suggestions

190. To convince the General Court that a Commission decision ought to be annulled, brief drafters may usefully resort to a number of procedural tools, that applicants may invoke in their application or their reply.[181] These are (i) requests for measures of organisation of the procedure, (ii) requests for measures of inquiry, in particular requests to summon witnesses or call upon an expert, and (iii) requests for a referral to an enlarged chamber.

1. Requests for measures of organisation of the procedure (MOP)

191. Pursuant to Article 64(3) of the Rules of Procedure, MOP may consist of: putting questions to the parties; inviting the parties to make written or oral submissions on certain aspects of the proceedings; asking the parties or third parties for information or particulars; asking for documents or any papers relating to the case to be produced; summoning the parties' agents or the parties in person to meetings. Pursuant to Article 64(4) of the Rules of Procedure, parties to a dispute may, at any stage of the procedure, propose the adoption or modification of MOP. However, in practice, the General Court held that, when a request for MOP is lodged at a later stage of the procedure than that of the application, applicants must explain the reasons why that request could not have been made earlier.[182]

192. The present sub-section aims at outlining why a request for MOP may be considered to be a useful tool, in what cases it should be lodged and in what form.

1.1. Why request the adoption of MOP?

193. The current president of the General Court, Marc Jaeger, described the usefulness of MOP in competition law cases as follows: "[MOP], *such as written questions to the parties, requests for information or documents, informal meetings etc., allow the chamber hearing the case to obtain all necessary elements of fact and all the parties' arguments before the hearing stage, so that the hearing can truly be an opportunity to get to the bottom of the crucial issues at stake* (…)". He further added: "*considering the fact-intensive nature of competition cases, which generally require in-depth economic analysis, the* [MOP] *have been developed through the years to ensure that the preliminary report, and consequently the report for the hearing, is as detailed as possible so as to allow all of the judges in the chamber to master from the earliest stages of a procedure all of the facts at stake and the crucial legal issues that need answering, and, on that basis, to make the hearing as meaningful and informative as possible*".[183]

194. Accordingly, MOP are an essential tool for the judges deciding a case to have an informed and fruitful discussion with the parties at the hearing and to decide the case with the full knowledge of its particulars. One should not forget that they may also be a useful tool for parties to obtain more information when they lack elements to properly ensure their defence.

1.2. In what cases should a request for MOP be lodged?

195. When deciding whether to lodge a request for MOP, parties should bear in mind two sets of considerations.

196. *First*, judges will only adopt MOP if they think not only that they are relevant to the dispute at hand but also that they are necessary for them to reach a solution on that dispute. Briefs drafters must not forget, in that respect, that, in practice, MOP are generally adopted by the chamber in charge of the case during the *conférence de chambre* in the course of which the preliminary report and the report for the hearing are discussed. Their adoption is proposed by the Judge-Rapporteur in the preliminary report. As explained in paragraph 7 above, the preliminary report contains a full analysis of the case the General Court has to handle. Hence, at that point of the procedure, judges have a very good view of what additional information and/or documentation they need to be provided with to make a decision on the case. That is why the criterion generally applied by judges to decide whether a measure ought to be adopted is its necessity to solve the dispute brought before it. Accordingly, there is no point in lodging a request for MOP concerning issues that are not essential to the outcome of the dispute.

197. *Second*, brief drafters must bear in mind that the adoption of MOP will lengthen the procedure by a few weeks.

1.3. Content of the request for MOP

198. Requests for MOP must respect two rules. *First*, brief drafters must not only identify the type of measure they would like the General Court to adopt, e.g. production of documents or question to be put to the other party, they must also be precise in their request. For example, parties should avoid requests in which they ask the General Court to order the production of all the documents relevant to their situation. Such a request is too vague. The request must identify more precisely the type of documents they would like the other party to provide.

180 See, e.g., Case T-23/99, *LR AF 1998 v. Commission* [2002] ECR II-1705, § 367.

181 Only those procedural tools that must be invoked in the application or the reply (as opposed to those that must be lodged by separate act) are addressed in this section.

182 See *Entorn v. Commisssion* , footnote 179 *supra*, § 130-137.

183 See M. Jaeger, The Court of First Instance and Competition Law Litigation, footnote 53 *supra*, p. 11.

199. *Second*, although requests for adoption of MOP rarely contain developments as to why those measures are necessary to the outcome of that dispute, it is advisable for brief drafters to remember to explain exactly why the measures they request are necessary to solve the dispute. It must be emphasized that not only must the Judge-Rapporteur be convinced that MOP are essential to the outcome of the case but also she or he must be given solid arguments to convince her or his colleagues in the chamber that the requested measures are necessary to the outcome of the dispute as, pursuant to Article 64(5) of the Rules of Procedure, MOP are adopted by the chamber in charge of the case.

2. Requests for measures of inquiry (MOI)

200. Article 65 of the Rules of Procedure concerns MOI. They may consist of: the personal appearance of the parties, a request for information and production of documents, oral testimony, the commissioning of an expert's report, and an inspection of the place or thing in question. Contrary to MOP, which are communicated to the parties by ordinary mail and do not have a binding character, MOI are prescribed by order of the General Court served on the parties and are binding.

201. The present sub-section will focus on requests for information and production of documents and requests to summon witnesses or call upon an expert, which are the main MOI which applicants may ask for.

2.1. Requests for information and production of documents

202. In practice, requests for information and production of documents may be addressed to the parties in the form of either an MOP or an MOI. Nonetheless, at the stage of the application, brief drafters wishing to obtain information or documents should opt for a request for a MOP for two main reasons. *First*, a MOP is non-binding in character and should therefore be resorted to in the first place. It must be emphasized, in that respect, that it is the practice of the General Court to adopt MOI only after the parties have refused to comply with MOP. *Second*, Article 65 of the Rules of Procedure does not expressly set out the possibility for parties to a dispute to request the adoption of MOI contrary to Article 64(4) of the Rules of Procedure with regard to MOP.

2.2. Requests to summon witnesses or call upon an expert

203. Pursuant to Article 68(1) of the Rules of Procedure, parties to a dispute may request the General Court to summon a witness. Furthermore, by virtue of Article 70 of the Rules of Procedure, the General Court may order that an independent expert's report be obtained.

204. The present sub-section aims at outlining why a request for oral testimony or expert's report may be considered as a useful tool, in what cases it should be lodged and in what form.

2.2.1. Why request oral testimony or expert's report?

205. Where very technical and complex issues are at stake, as may be the case in competition law cases brought before the General Court, judges may need assistance to get a better grasp of those issues. In that respect, expert reports, whether provided by the parties or commissioned by the General Court, may prove useful in detecting errors.[184]

206. It should not be underestimated that calling upon an independent expert might not always prove opportune. For instance, such an appointment might not be necessary in cases in which parties provide their own expert reports. In such cases, the General Court relies on those reports to make its opinion. In contrast, independent expert's reports may prove useful insofar as neutral experts have no incentive to be partisan.[185]

207. The interest of resorting to witness' testimony is self evident. Witnesses may be able to testify about certain factual assertions made in the case brought before the General Court.

2.2.2. In what cases should a request for oral testimony or expert's report be lodged?

208. *First*, when considering the possibility of requesting oral testimony or expert's report, brief drafters must bear in mind that such a request is granted only very exceptionally,[186] even in the competition law field when very delicate issues are at stake.[187]

209. *Second*, they must also take account of the fact that the General Court applies a strict standard of proof with regard to such requests, especially as far as requests for expert's report are concerned. In practice, the General Court demands that the requested report be relevant and necessary for the purpose of the ruling[188] or of decisive interest in the case at issue[189]. Generally speaking, the General Court does

184 See E. Barbier de la Serre and A-L. Sibony, Expert Evidence before the EC Courts, *CMLRev.* 45: 941-985, 2008, p. 969.

185 See E. Barbier de la Serre and A-L. Sibony, footnote 184 *supra*, pp. 971 and 972.

186 See E. Barbier de la Serre and A-L. Sibony, footnote 184 *supra*, p. 949. See, however, Case T-439/07, *Coats Holdings v. Commission*, judgment of 27 June 2012, not yet reported, § 176.

187 Barbier de la Serre and Sibony mention two cartel cases as the only two competition law cases in which expert reports were commissioned (the so-called *Dyestuff case*, i.e. Case 48/69, *ICI v. Commission* [1972] ECR 619, 647; Case 49/69, *BASF v. Commission* [1972] ECR 713, 726; Case 51/69, *Bayer v. Commission* [1972] ECR 745, 766; Case 52/69, *Geigy v. Commission* [1972] ECR 787, 819; Case 53/69, *Sandoz v. Commission* [1972] ECR 845; Case 54/69, *Francolor v. Commission* [1972] ECR 851, 868; Case 55/69, *Cassella v. Commission* [1972] ECR 887, 907; and Case 57/69, *ACNA v. Commission* [1972] ECR 933, 944; and the so-called Woodpulp case, i.e. Joined Cases C-89, 104, 114, 116, 117 & 125-129/85, *Ahlstrom and Others v. Commission* [1993] ECR I-1445, § 333). Barbier de la Serre and Sibony counted only 25 cases on 1 January 2008 for all fields of law. See E. Barbier de la Serre and A-L. Sibony, footnote 184 *supra*, p. 949.

188 See Case T-138/98, *ACAV and Others v. Council* [2000] ECR II-341, § 72.

189 See, e.g., Case C-106/90 R, *Emerald Meats v. Commission* [1990] ECR I-3377, § 29.

not order the appointment of an independent expert if the evidence before it is not deficient in some respect or if the requesting party has not provided *prima facie* evidence in favour of their argument.[190]

210. As Barbier de la Serre and Sibony concluded, the General Court "will not commission an experts' report when (i) the facts that one party offers to prove by means of an expert report have no bearing on the legal issue at bar or on the legality of the contested decision; (ii) they consider themselves sufficiently informed; (iii) it does not appear that the findings which an expert could reach could be of any 'decisive interest' in solving the dispute in the main action; or, more generally, (iv) an examination of the party's pleas has disclosed no factor warranting the commissioning of an expert's report. Conversely, an expert's report may be commissioned '[i]n view of the contradictory information given by the Commission and the applicants' or because "*both parties' arguments contain*[ed] *particulars of an extremely technical nature*"".[191]

211. It may therefore be burdensome for parties to draft a proper request for oral testimony or expert's report while the prospect of getting a positive answer from the General Court is rather thin. Accordingly, it is advisable for brief drafters to include such a request only in very complex and important cases, for which they think they meet the conditions outlined in the previous paragraphs.

2.2.3. Content of the request for oral testimony or expert's report

212. Pursuant to Article 68(1) of the Rules of Procedure, an application by a party for the examination of a witness shall state precisely about what facts and for what reasons the witness should be examined.[192]

213. Pursuant to Article 70(1) of those rules, the order appointing the expert must define their task. Accordingly, brief drafters requesting the commissioning of an expert's report would be well advised to set out why an expert is needed, in what respect it may be helpful to the judges sitting on the case and what its tasks should be. Furthermore, in view of what was stated in sub-section IV.2 (2.2.2.), brief drafters must make sure that they clearly state the reasons their request is relevant and necessary for the purpose of the ruling and why it is of decisive interest in the case at issue.3. Requests for a referral to an enlarged chamber

214. Pursuant to Articles 14(1) and 51(1) of the Rules of Procedure, where the legal difficulty or the importance of the case or special circumstances so justify, parties may request the General Court to refer the case from a three-judge chamber to a chamber composed of a greater number of judges. The decision to refer the case to an enlarged composition is made by the General Court in plenary session.

215. When considering such a possibility, brief drafters must balance its advantages and disadvantages. Its obvious advantage is that the case at issue benefits from the views of a greater number of judges. Its main disadvantage is that, in an enlarged composition, judges will have more problems reaching a consensus, or even a majority, and that, as a result, having a case tried by such a composition may take more time than having it tried by a three-judge chamber.

216. As regards the content of the request, applicants must bear in mind that, pursuant to Article 51(1) of the Rules of Procedure, it is for the chamber in charge of the case, which in practice means the Judge-Rapporteur, or for the President of the General Court to propose to the General Court sitting in plenary session that the case be referred to an enlarged composition. It is therefore crucial that brief drafters put forward solid arguments to convince the plenary.

Conclusion

217. The drafting, structuring, substantive and procedural suggestions discussed in this article do not prejudge the fundamental right of applicants to raise the legal arguments they deem relevant to best defend their interests. Neither do they bear any influence on the merits of a case. However, given the General Court's specificities and functioning, these suggestions should facilitate swift and optimal treatment of a case brought by an applicant in the competition law field. ■

190 See E. Barbier de la Serre and A.-L. Sibony, footnote 184 *supra*, p. 950.

191 See E. Barbier de la Serre and A.-L. Sibony, footnote 184 *supra*, pp. 950 and 951.

192 See also, e.g., Case T-9/99, *HFB and Others v. Commission* [2002] ECR II-487, § 34-38.

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Litigating European Union Law

Proceedings before the European Court of Justice

ERA – 17 September 2020

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The content of this publication represents the views of the author only and is her sole responsibility. The European Commission does not accept any responsibility for use that may be made of the information it contains.

Roleplay: facts

- Since 1987, the civil servants working for the EU in delegations (third countries) have enjoyed an annual leave corresponding to 42 days per year whereas the civil servants working in the EU have always enjoyed a basic right of 24 days per year.
- In 2014, the EU legislature (EP and Council) amended the EU regulation laying down the staff regulations of officials working for the EU. One of the amended provision is about the duration of the annual paid leave which has been **reduced from 42 days per year to 24 days per year**.
- The members of staff serving in delegation however kept other specific advantages such as a special allowance for living conditions and supplementary sickness insurance cover. They may also request an additional special rest leave of up to 15 days.
- Two appeals were brought before the General Court (first instance) to challenge the legality of the reduction of the annual leave's length.

Proceedings in the first instance

- First case: application for annulment (art. 263 TFEU) brought by a civil servant seeking the annulment of the Regulation.

  ➔The appeal was dismissed as **inadmissible** and the applicant brought an appeal against this judgment before the Court of Justice (case ERA-1/20 P)

- Second case: application for annulment brought by a civil servant (art. 270 TFEU) seeking the annulment of the decision of the administration applying this new provision to him.

  ➔ The General Court ruled that the appeal was admissible and **annulled** the challenged decision on the ground that the reduction of the annual paid leave duration infringed upon the fundamental right to an annual paid leave enshrined in Article 31(2) of the Charter (case ERA-2/20 P).

Legal framework

- Article 263(4) TFEU: "*Any natural or legal person may, under the conditions laid down in the first and second paragraphs, institute proceedings against an act addressed to that person or which is of direct and individual concern to them, and against a regulatory act which is of direct concern to them and does not entail implementing measures*."
- Article 27 of the Charter: "*Workers or their representatives must, at the appropriate levels, be guaranteed information and consultation in good time in the cases and under the conditions provided for by Union law and national laws and practices.*"
- Article 31(2) of the Charter: "*Every worker has the right to (…) an annual period of paid leave*."

Legal framework

- Directive 2003/88 concerning certain aspects of the organization of working time
  - Article 7(1): "*Member States shall take the measures necessary to ensure that every worker is entitled to paid annual leave of **at least four weeks** in accordance with the conditions for entitlement to, and granting of, such leave laid down by national legislation and/or practice*"
- Regulation 1023/2013 laying down the staff regulations
  - Recital (27): "*It is appropriate to modernise working conditions for staff employed in third countries and to render them more cost-effective whilst generating cost savings. (…)*"
  - Article 1(70)(a): "*An official shall, per calendar year, be entitled to annual leave of two working days for each month of service.*"

First instance decisions

- Case ERA-1/20 P:
  - The applicant is not individually concerned by the challenged regulation
- Case ERA-2/20 P:
  - The General Court found that the significant reduction in the length of the annual leave of officials and members of staff serving in third countries could not be regarded as consistent with the principle of promoting the improvement of the living and working conditions of the persons concerned
  - The General Court considered that the challenged reduction was not justified by a legitimate reason compatible with the nature of the annual leave
  - The General Court found that the EU legislature had not ascertained whether the challenged provision constituted a proportionate interference with the right to annual leave

Legal questions to be addressed during the hearing

- First case
  - Discuss the admissibility of an application for annulment of this EU regulation in light of the conditions set in Article 263(4) TFEU, as interpreted by the CJEU
- Second case
  - Discuss:
    - Has the right to annual leave been affected?
    - Is it justified by a legitimate reason?
    - Is it a proportionate interference with the right to annual leave?

Organisation of the hearing

1. Introductory pleadings by the main parties
2. Questions by the judges and the advocate general (if any)
3. Replies of the main parties
4. Final pleadings by the main parties
5. The Court deliberates after hearing the opinion of its Advocate General

Debriefing of the hearing

ERA-1/20 P

What condition(s) does Ms **AB**'s application for annulement must comply with in order to be admissible?

ERA-1/20 P

- Admissibility of an action against acts of general nature adopted by the EU legislature
- **Cumulative** conditions set out in Article 263(4) TFEU
  - Direct concern: that condition requires, first, that the contested EU measure must directly affect the legal situation of the individual and, second, it must leave no discretion to its addressees who are entrusted with the task of implementing it, such implementation being purely automatic and resulting from EU rules without the application of other intermediate rules
  - Individual concern: the persons other than those to whom a decision is addressed may claim to be individually concerned only if that decision affects them by reason of certain attributes which are peculiar to them or by reason of circumstances in which they are differentiated from all other persons and by virtue of these factors distinguises them individually just as in the case of the person concerned

ERA-1/20 P

Is Ms **AB** directly and individually concerned by the challenged regulation?

ERA-1/20 P

- Cumulative conditions, if one is not fulfilled, the Court will not examine the other
- Direct concern
  - The length of the annual leave is set by the EU legislature and the administration does not have any discretion with respect to its implementation
- Individual concern
  - Civil servants do not have an individual right to participate in the EU legislative process as they are represented by trade unions and staff committees (article 27 of the Charter)
  - Ms **AB** is one of around 3,000 members of staff posted in delegation, she cannot be considered as an sufficiently identifiable addressee of the challenged regulation

ERA-1/20 P

- Relevant case-law:
  - Arcelor/Parliament and Council, T-16/04, §106: « (…) first, the possibility of determining, at the time of adoption of the contested measure, more or less precisely the number, or even the identity, of the persons to whom a measure applies by no means implies that it must be regarded as being of individual concern to those persons as it is established that that application **takes effect by virtue of an objective legal or factual situation defined by the measure in question**. Second, the fact that certain operators are more affected economically by a measure of general application than others is not sufficient to distinguish them individually from all other operators, since the application of that measure **takes effect by virtue of an objectively determined situation** (…) »

ERA-1/20 P

- Furthermore, Ms **AB**'s right to an effective judicial protection is adequately protected by the possibility she has to bring proceedings against her employer for applying the contested provision (application for annulment + plea of illegality)

ERA-2/20 P

- Judgment of the Court in case C-119/19 P delivered on 8 Sept 2020
- Position of the institutions:
  - The Charter does not impose any obligation on the legislator to promote the improvement of the living and working conditions of workers (§95)
  - The issue is not whether the reduction in the number of days of annual leave is consistent with this principle but whether it affects substance of the civil servants' right to annual leave, their health or their safety (§101)
  - The amended provision cannot be held incompatible with the Charter as the new length of the annual leave is superior to the minimum prescribed in the EU directive (§102)
- Position of the civil servant:
  - The EU legislature did not pursue the objective of improving the living and working conditions of the officials and contract staff posted in delegation (§104)
  - The right to an annual leave would be breached if the EU legislature could significantly reduce the length of the annual paid leave without demonstrating that it actually struck a balance between the interests involved (budgetary issues *vs* protection of health and safety of the workers) (§105)

ERA-2/20 P

- Decision of the Court:
  - The amended provision does not affect the right to an annual leave because:
    - The Court clarified the scope of Article 31(2) of the Charter which is held to only impose on the EU legislature an obligation to provide for period of annual leave for every worker
    - This provision is given concrete expression in secondary law which prescribes the minimum requirements that must be met concerning the duration of the annual leave (minimum 20 days)
    - By setting a period of paid annual leave that is greater than the minimum of four weeks required in Article 7(1) of Directive 2003/88, the challenged provision is necessarily capable of ensuring that the dual purpose of the right to annual leave is fulfilled, that is to say, in accordance with the case-law of the Court, to enable the worker to rest from carrying out the work he or she is required to do and to enjoy a period of relaxation and leisure.

ERA-2/20 P

- Food for thoughts
  - *Effet utile* of Article 31(2) of the Charter?
  - Secondary law dictactes the content of primary law
  - The Court leaves wide discretionary powers to EU and national legislatures provided that they meet the minimum requirements laid down in secondary law: what if the EU legislature had expressly indicated that the reduction was intended to lower the living and working conditions of staff in delegation?
  - Comp. with case *TSN*, C-609/17 and C-610/17 where the Court held that where a Member State goes further than the minimum prescribed by the EU directive, it does not implement the Charter which is therefore not applicable

Questions?

ROLEPLAY : LITIGATING EUROPEAN UNION LAW
16-17 September 2020, ERA

Facts

1. Since 1987, the civil servants of the European Union posted in delegations (third countries) have enjoyed an annual paid leave of 42 days per year whereas those working on the territory of the Member States benefit from 24 days per year.

   Back then, a longer period of annual paid leave was justified by the living and working conditions experienced by civil servants working in third countries, which were deemed more difficult and less favourable than in Brussels.

2. In 2014, the European Union legislator (European Parliament and Council of the EU) has amended the regulation laying down the Staff Regulations for officials working for the EU institutions.

   One of the amendments brought to the Staff Regulations concern the length of the annual leave days of civil servants working in delegations, which has been reduced from 42 days per year to 24 days per year.

   As expressed in the recitals of the regulation, the intent of the legislator was to render working conditions for staff employed in third countries "*more cost-effective whilst generating cost savings*".

   Furthermore, an annual leave of 42 days per year was no longer deemed necessary in view of the development of transport and technologies (i.e. Skype, Zoom) which allow officials serving in delegation to return home more easily and be in contact with their families at all time.

3. Two cases were brought by civil servants posted in delegation before the General Court about the legality of this new provision.

4. The first appeal concerns an application brought by Ms AB who sought the annulment of this Regulation. Her application was rejected as inadmissible by the General Court because Ms AB is not individually concerned by the challenged regulation.

   Ms AB lodged an appeal against that ruling before the Court of justice (**case ERA-1/20 P**).

5. The second case concerns an application brought by Mr CS who sought the annulment of the decision of the European Commission's Director General of Human Resources applying this new provision to his situation. Mr CS argued that the reduction of his annual paid leave infringes upon the fundamental right to an annual period of paid leave enshrined in Article 31(2) of the Charter of Fundamental Rights of the EU.

   The General Court ruled that his appeal was admissible and annulled the challenged decision on the ground that the amended provision was illegal. In particular, the General Court held that such a reduction was incompatible with the principle according to which a period of annual paid leave must be designed to improve the living and working conditions of workers.

   The European Commission and the Council of the European Union lodged an appeal against that ruling before the Court of justice (**case ERA-2/20 P**).

Legal framework

6. Article 31(2) of the Charter of Fundamental Rights states: "*Every worker has the right to (…) an annual period of paid leave*".

7. Article 263(4) of the TFEU states: "*Any natural or legal person may, under the conditions laid down in the first and second paragraphs, institute proceedings against an act addressed to that person or which is of direct and individual concern to them, and against a regulatory act which is of direct concern to them and does not entail implementing measures*".

8. Article 7(1) of Directive 2003/88 concerning certain aspects of the organization of working time states: "*Member States shall take the measures necessary to ensure that every worker is entitled to paid annual leave of at least four weeks in accordance with the conditions for entitlement to, and granting of, such leave laid down by national legislation and/or practice*".

9. Recital (27) of Regulation 1023/2013 laying down the staff regulations states: "*It is appropriate to modernise working conditions for staff employed in third countries and to render them more cost-effective whilst generating cost savings*".

10. Article 1(70)(a) of Regulation 1023/2013 laying down the staff regulations states: "*An official shall, per calendar year, be entitled to annual leave of two working days for each month of service*".

Organisation of the hearing

11. On appeal, the Court decided to join these cases for the purpose of the hearing. The hearing is held before a chamber composed of **5 judges**. An **Advocate General** has also been designated to give his/her opinion on the case before a final ruling is delivered.

    In case ERA-1/20 P, the parties are:

    - Ms **AB**, official of the European Union serving in delegation, represented by 2 lawyers, appellant,

    - The **European Parliament**, represented by 4 agents of its Legal Service, respondent,

    - The **Council of the European Union**, represented by 4 agents of its Legal Service, respondent,

    - The **European Commission**, represented by 4 agents of its Legal Service, intervener supporting the EP and the Council,

    In case ERA-2/20 P, the parties are:

    - The **European Commission**, represented by 4 agents of its Legal Service, appellant,

    - The **Council of the European Union**, represented by 4 agents of its Legal Service, appellant,

    - The **European Parliament**, represented by 4 agents of its Legal Service, intervener supporting the Commission and the Council,

- Mr **CS**, official of the European Union serving in delegation, represented by 2 lawyers, respondent.

Main arguments of the parties and forms of order sought by the parties before the Court of Justice

12. In case ERA-1/20 P, Ms **AB** argues that the General Court misinterpreted the conditions set out in Article 263(4) TFEU, in particular the criteria of "individual concern". She claims that, as a civil servant working in delegation, she is individually targeted by the regulation.

13. Ms **AB** claims that the Court should:

- set aside the judgment under appeal,
- annul the contested regulation,
- order the defending institutions to pay the costs.

The **defending institutions** contend that the Court should:

- dismiss the appeal; and
- order the appellant to pay the costs.

14. In case ERA-2/20 P, the **appellants** argue that the General Court erred in law in ruling that the legislator had violated the civil servants' fundamental right to an annual leave as the substance of this right was not affected. Even if it was the case, the reduction of the length of their annual leave is legitimate and proportionate.

The **appellants** claim that the Court should:

- set aside the judgment under appeal,
- dismiss the application for annulment,
- order Mr CS to pay the costs.

Mr **CS** contends that the Court should:

- dismiss the appeal; and
- order the appellants to pay the costs.

Roleplay

15. The hearing starts with the introductory pleadings.

The Court has asked the counsels of the parties to focus their pleadings on (i) the admissibility of the application in case ERA-1/20 P in view of the conditions laid down in Article 263(4) TFEU and (ii) the legality of the reduction of the duration of the annual paid leave in light of the aim of the right to an annual paid leave and the justifications provided by the legislator.

After the introductory pleadings, the members of the Court and the Advocate General may have questions that the parties will have to reply to.

Before the Court deliberates and issues its ruling, the parties will be given a short time for closing statements.

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