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Commentary on European Court of Justice judgement of 19 January 2017 in case C-460/15 Schaefer Kalk GmbH & Co. KG v Bundesrepublik Deutschland

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Abstract
The aim of this article is to discuss the following judgement of the European Court of Justice in case C-460/15 Schaefer Kalk GmbH & Co. KG v Bundesrepublik Deutschland concerning the EU Emissions Trading Scheme (EU ETS):
'The second sentence of Article 49(1) of Commission Regulation (EU) No 601/2012 of 21 June 2012 on the monitoring and reporting of greenhouse gas emissions pursuant to Directive 2003/87/EC of the European Parliament and of the Council and point 10(B) of Annex IV to that regulation are invalid in so far as they systematically include the carbon dioxide (CO_2) transferred to another installation for the production of precipitated calcium carbonate in the emissions of the lime combustion installation, regardless of whether or not that CO_2 is released into the atmosphere.'
[operative part of the judgment].

1. INTRODUCTION

The commented judgement concerns the EU Emissions Trading Scheme (EU ETS). The EU ETS is the first large greenhouse gas emissions trading scheme in the world and remains the biggest. It covers approximately 11,000 power stations and manufacturing plants in the 28 EU Member States plus Iceland, Liechtenstein and Norway, as well as aviation activities in these countries.
The EU ETS was introduced in 2005. The system evolved as a result of amendments 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 (Directive 2003/87/EC).[1] The EU ETS, which induces Member States to reduce greenhouse gas emissions covered by the system, is regarded as a key tool to reduce greenhouse gas emissions, including specifically carbon dioxide (CO_2), in a cost-effective manner.[2]

In total, around 45% of total EU greenhouse gas emissions are regulated by the EU ETS. Initially, the EU ETS was based on a cap-and trade system. The system worked by putting a limit on overall emissions from covered installations (installations included in the EU ETS),[3] which was reduced each year and resulted in an overall reduction of emissions. Within this limit, companies could buy and sell emission allowances as needed.[4] This model of operation was altered quite significantly because of changes in the relevant EU legislation. A good example is the Market Stability Reserve (MSR) introduced by Decision (EU) 2015/1814 of the European Parliament and of the Council of 6 October 2015 concerning the establishment and operation of a market stability reserve for the Union greenhouse gas emission trading scheme and amending Directive 2003/87/EC.[5]

1 OJ L 275 25.10.2003, p. 32, as amended.
2 C. d'Oultremont, *The EU's Emissions Trading Scheme: Achievements, Key Lessons, and Future Prospects*, Egmont Paper No. 40, December 2010, p. 8.
3 To put it simply, an installation is a stationary technical equipment or set of technologically interrelated stationary technical equipments that produces emissions or has major impact on the emissions.
4 From 2013 to 2020 runs the third phase of the EU ETS.
5 Decision (EU) 2015/1814 of the European Parliament and of the Council of 6 October 2015 concerning the establishment and operation of a market stability reserve for the Union greenhouse gas

These changes cause that the fundamental objective of the EU ETS – achieving the desired CO_2 emissions targets – evolves towards pushing up the price of allowances. This is achieved by an additional reduction of allowances put on the market that is not linked with emission targets. As a result, the EU ETS moves away from the cap-and-trade principle and loses its purely market dimension. It becomes a tool for triggering technological changes in the economy.

In the EU ETS, each actor is obliged to surrender allowances for reported emissions every year. Severe penalties for failing to surrender sufficient EU ETS allowances in time to cover annual reportable emissions are provided for in the EU law. If a company reduces its emissions, it can keep the spare allowances to cover its future needs or else sell them to another company that is short of allowances.[6]

More precisely, it should be pointed out that the EU ETS covers certain sectors and greenhouse gases and focuses on gas emissions that can be measured, described and verified with a high degree of accuracy[7].

It should be noted that unless exceptions are expressly provided for in relevant EU legislation, for actors undertaking activities in sectors covered by EU ETS, participation in the EU ETS is mandatory.

For the efficient functioning of the EU ETS established by Directive 2003/87/EC, the complete, transparent and accurate monitoring of greenhouse gas emissions in accordance with Commission Regulation (EU) No 601/2012 of 21 June 2012 on the monitoring and reporting of greenhouse gas emissions pursuant to Directive 2003/87/EC of the European Parliament and of the Council (Regulation No 601/2012)[8] is of key importance.

Reporting of greenhouse gas emissions pursuant to Directive 2003/87/EC of the European Parliament and of the Council and Commission Regulation No 601/2012 is the subject of the judgement. More precisely, the commented ruling concerns reporting of greenhouse gas emissions, in the case of CO_2 that is generated in an installation for the calcination of lime and transferred to another installation for the production of precipitated calcium carbonate (PCC), not being emitted into the atmosphere. The question is whether in accordance with Directive 2003/87/EC, carbon dioxide generated in an installation for the calcination of lime and transferred to an installation for producing PCC can be regarded as 'emissions' for the purposes of the emissions trading system and whether it results in the obligation to surrender allowances by the operator of the installation for the calcination of lime.

2. THE FACTUAL AND LEGAL BACKGROUND

The commented ruling was given by the Court (First Chamber) on 19 January 2017 following a request for a preliminary ruling[9] under Article 267 Treaty on the Functioning of the European Union (TFEU)[10] from the Verwaltungsgericht Berlin (Administrative Court, Berlin, Germany). This request for a preliminary ruling concerns the validity of Article 49(1) of Commission Regulation (EU) No 601/2012 of 21 June 2012 on the monitoring and reporting of greenhouse gas emissions pursuant to Directive 2003/87/EC of the European Parliament and of the Council (OJ 2012 L 181, p. 30) and point 10 of Annex IV thereto. The request was made in proceedings between Schaefer Kalk GmbH & Co. KG ('Schaefer Kalk')[11] and the Bundesrepublik Deutschland (Federal Republic of Germany) concerning the refusal to allow that company to subtract the carbon dioxide (CO_2) generated in an installation for the calcination of lime transferred to a PCC installation from the emissions subject to the monitoring obligation.

According to Article 49(1) of Regulation No 601/2012, the operator shall subtract from the emissions of the installation any amount of CO_2 originating from fossil carbon in activities covered by Annex I to Directive 2003/87/EC, which is not emitted from the installation but transferred out of the installation to any of the (a) capture installation for the purpose of transport and long-term geological storage in a storage site permitted under Directive 2009/31/EC; (b) transport network with the purpose of long-term geological storage in a storage site permitted under Directive 2009/31/EC; (c) storage site permitted under Directive 2009/31/EC for the purpose of long-term geological storage. Pursuant to the second sentence of this paragraph, for any other transfer of CO_2 out of the installation, no subtraction of CO_2 from the installation's emissions shall be allowed. Article 49 of

emission trading scheme and amending Directive 2003/87/EC (OJ L 264, 9.10.2015, p. 1–5, as amended). The establishment of the MSR that should start operating in January 2019 changed the system designed in 2003, where the price of allowances was governed by the law of supply and demand. The aim of the reserve is to regulate the price of allowances by decreasing the overall number of allowances. Each year, a number of allowances equal to 12% of the total number of allowances in circulation will be deducted from the volume of allowances. The objective of the EU ETS – achieving the desired CO_2 emissions targets – evolves towards triggering technological changes in the sectors covered by the EU ETS and through technological changes, also towards changes in Member States' energy mix.

6 House of Lords, European Union Committee, *The Revision of the EU's Emissions Trading System*: Report with Evidence; 33rd Report of Session 2007-2008, HL Paper 197, p. 10.

7 These are as follows:
(a) carbon dioxide (CO_2) from
power and heat generation,
energy-intensive industry sectors including oil refineries, steel works and production of iron, aluminium, metals, cement, lime, glass, ceramics, pulp, paper, cardboard, acids and bulk organic chemicals,
commercial aviation,
(b) nitrous oxide (N_2O) from production of nitric, adipic and glyoxylic acids and glyoxal,
(c) perfluorocarbons (PFCs) from aluminium production.

8 OJ L 181, 12.7.2012, p. 30–104, as amended.

9 The preliminary ruling is directly binding on the referring court and all other courts hearing the same case. In practice, it also has a very high status as a precedent for subsequent cases of a like nature.

10 OJ C 326, 26.10.2012, as amended.

11 Schaefer Kalk operates an installation for the calcination of lime in Hahnstätten (Germany), whose operation is subject to the scheme for greenhouse gas emission allowance trading.

Regulation No 601/2012, therefore, generally concerns CO_2 originating from fossil carbon in activities covered by Annex I to Directive 2003/87/EC not only those produced by an installation for the calcination of lime. Point 10 of Annex IV to Regulation No 601/2012 (also questioned) states: 'where CO_2 is used in the plant or transferred to another plant for the production of PCC (precipitated calcium carbonate), that amount of CO_2 shall be considered as emitted by the installation producing the CO_2'.

Turning to the more detailed clarification of the factual background, it should be explained that, in connection with the procedure for the approval of a monitoring plan of its installation initiated before the Deutsche Emissionshandelsstelle im Umweltbundesamt (German Emissions Trading Authority at the Federal Environment Agency, 'the DEHSt'), Schaefer Kalk applied for authorisation to subtract from the amount of greenhouse gas emissions referred to in the emissions report the CO_2 transferred for the production of PCC to an installation not subject to the EU ETS. It considers that the CO_2 thereby transferred is chemically bound in the PCC and that it is not being emitted into the atmosphere, it should not be regarded as 'emissions' as defined in Article 3(b) of Directive 2003/87. The DEHSt having approved the monitoring plan without addressing the issue of subtracting transferred CO_2, Schaefer Kalk brought a complaint in that regard, which was rejected on 29 August 2013. The DEHSt took the view that such subtraction was not possible under Article 49 of Regulation No 601/2012 and Annex IV thereto, from which it appeared that only the CO_2 transferred to one of the long-term geological storage installations listed in that Article may be subtracted from the emissions of an installation subject to the monitoring and reporting obligation. By its action brought before the Verwaltungsgericht Berlin (Administrative Court, Berlin, Germany) on 10 September 2013, Schaefer Kalk reiterated its claim. It relied on the illegality of the second sentence of Article 49(1) of Regulation No 601/2012 and of point 10(B) of Annex IV thereto. It submitted that those provisions, which subject CO_2 bound in PCC and transferred for the production of that substance to mandatory participation in the EU ETS, were not covered by the powers granted under Article 14(1) of Directive 2003/87.

3. DECISION OF THE COURT AND THE REASONING THE COURT. OPINION OF ADVOCATE GENERAL

As a preliminary point, the Court clarified that under the second sentence of Article 49(1) of Regulation No 601/2012 and of point 10(B) of Annex IV thereto, the CO_2 produced by an installation for the calcination of lime and transferred, as in the case in the main proceedings, to another installation for the production of PCC[12] is regarded as having been emitted by the first installation.

The Court noted that, by its questions, the referring court asks the Court to rule on the validity of those provisions in so far as by systematically including the CO_2 transferred for the production of PCC in the emissions of a lime combustion installation, regardless of whether or not that CO_2 is released into the atmosphere, those provisions go beyond the definition of emissions as provided for in Article 3(b) of Directive 2003/87.

The Court subsequently clarified that Regulation No 601/2012 was adopted on the basis of Article 14(1) of Directive 2003/87, according to which the Commission is to adopt a regulation, inter alia, for the monitoring and reporting of emissions, that measure being designed to amend non-essential elements of the directive by supplementing it. Consequently, an assessment, in the present case, of the validity of the provisions at issue from that regulation requires determination whether the Commission, by adopting those provisions, did not exceed the limits as provided for in Directive 2003/87.

The Court found it necessary to analyse the notion of 'emissions' under Directive 2003/87. According to Article 3(b) of Directive 2003/87, 'emissions' are, for the purposes of that directive, defined as the release of greenhouse gases into the atmosphere from sources in an installation. It follows from the wording of that provision that for there to be an emission within the meaning of that provision, a greenhouse gas must be released into the atmosphere.

The Court pointed out that indeed Article 12(3a) of Directive 2003/87[13] provides that, subject to certain conditions, emissions that have been captured and transported for their permanent geological storage to a facility for which a permit is in force in accordance with Directive 2009/31 are not subject to the allowance surrender obligations. Nevertheless, and contrary to the submissions of the Commission, 'that does not mean that the EU legislature considered that operators are exempt from the obligation to surrender only in the sole instance of permanent geological storage. In contrast to the last paragraph of Article 49(1) of Regulation No 601/2012, which provides that for any other transfer of CO_2 no subtraction of CO_2 from the installation's emissions is to be allowed, Article 12(3a) of Directive 2003/87 contains no similar rule'.[14] The Court observed that the latter provision, which refers only to a particular situation and is intended to encourage the storage of greenhouse gases, was not intended to, and did not, amend the definition of 'emissions' within the meaning of Article 3 of Directive 2003/87, or even, by implication,

12 Then the produced CO_2 transforms chemical into a new, stable chemical in which it is bound.

13 Article 12(3a) of Directive 2003/87: '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'.

14 The Court found that Article 12(3a) of Directive 2003/87, which refers only to a particular situation and is intended to encourage the storage of greenhouse gases, was not intended to, and did not, amend the definition of 'emissions' within the meaning of Article 3 of Directive 2003/87 or even, by implication, the scope of that directive as established in Article 2(1) thereof.

the scope of that directive as established in Article 2(1) thereof.

Consequently, the Court considered that 'for the purposes of determining whether the CO_2 resulting from the activity of lime production by an installation such as that at issue in the main proceedings falls within the scope of Directive 2003/87, under Article 2(1) thereof, and Annexes I and II thereto, it is necessary to ascertain whether such lime production leads to the release of CO_2 into the atmosphere'.[15]

The Court pointed out that Article 49(1) of Regulation No 601/2012 and point 10(B) of Annex IV to that regulation lead to the CO_2 transferred in such circumstances being regarded as falling under the definition of 'emissions' within the meaning of Article 3(b) of Directive 2003/87, despite not always being released into the atmosphere. The Court noted that by the second sentence of Article 49(1) of Regulation No 601/2012 and point 10(B) of Annex IV to that regulation, the Commission, therefore, broadened the scope of that definition.

The Court indicated that those provisions create an irrebuttable presumption that all the CO_2 transferred has been released into the atmosphere. It follows from that presumption that the operators concerned may not, in any circumstances, subtract the amount of CO_2 transferred for the production of PCC from the aggregate emissions of their installations for the production of lime, despite the fact that that CO_2 may not always be released into the atmosphere. In the Court's opinion, such an impossibility means that the allowances must be surrendered for all of the CO_2 transferred for the production of PCC and may no longer be sold as excess, thus calling into question the allowance trading scheme in circumstances, nevertheless, consonant with the ultimate objective of Directive 2003/87, which seeks to protect the environment by means of a reduction greenhouse gas emissions.[16]

The Court accordingly concluded that in adopting the second sentence of Article 49(1) of Regulation No 601/2012 and point 10(B) of Annex IV to that regulation, the Commission had, therefore, amended an essential element of Directive 2003/87.[17]

Moreover, the Court found that 'the second sentence of Article 49(1) of Regulation No 601/2012 and point 10(B) of Annex IV to that regulation ensure that the CO_2 transferred to an installation, such as that where the PCC is produced, whether or not released into the atmosphere, is always regarded as an emission into the atmosphere'. The Court considered that 'such a presumption, in addition to prejudicing the coherency of the scheme put in place as regards the objective of Directive 2003/87, goes beyond what is necessary for attaining that objective'.

On the basis of the above observations, the Court came to the conclusion that the Commission, having altered an essential element of Directive 2003/87 when it adopted the second sentence of Article 49(1) of Regulation No 601/2012 and point 10(B) of Annex IV to that regulation, overstepped the limits laid down in Article 14(1) of that directive.

Consequently, the answer to the questions referred was that 'the second sentence of Article 49(1) of Regulation No 601/2012 and point 10(B) of Annex IV to that regulation are invalid in so far as they systematically include the CO_2 transferred to another installation for the production of PCC in the emissions of the lime combustion installation, regardless of whether or not that CO_2 is released into the atmosphere'.

The reasoning presented above is logical and coherent. Therefore, it merits the authors' approval. The most important and persuasive element of this reasoning is in the opinion of the authors, the Court's observation that according to Article 3(b) of Directive 2003/87, 'emissions' are, for the purposes of that directive, defined as the release of greenhouse gases into the atmosphere from sources in an installation. It follows from the very wording of that provision that for there to be an emission within the meaning of that provision, a greenhouse gas must be released into the atmosphere. Conversely, transfer of CO_2 generated in an installation for the calcination of lime to another plant for the production of PCC that does not lead to the release of CO_2 into the atmosphere cannot be regarded as an emission.

Advocate General Eleanor Sharpston, in her opinion delivered on 10 November 2016, stated that the key issue in the case at hand is the meaning of 'emissions' as defined in Article 3(b) of Directive 2003/87. In her view, in first place, it has to be established whether carbon dioxide transferred to an installation for producing PCC can be regarded as 'emissions' for the purposes of the emissions trading system.

Following the analysis of the provisions, Advocate General Eleanor Sharpston, pointed out the wording of Article 3(b) of Directive 2003/87, makes it clear that there can be no 'emissions' unless greenhouse gases are released 'into the atmosphere', that is to say, into the layer of gases surrounding the earth. Consistent with the Directive's objective to reduce emissions in order to avoid dangerous climate change,[18] the mere production of greenhouse gases, therefore, does not result in 'emissions' when those gases are not released into the atmosphere. Annex IV to Directive 2003/87, which sets out the general principles for monitoring and reporting, does not point to a different conclusion: it requires the operator to include in the installation's report the 'total emissions' calculated or measured for each activity covered by the allowance trading scheme.[19]

The Advocate General also indicated that the economic logic of the allowance trading scheme consists of ensuring that the reduction of greenhouse gas emissions required to achieve a predetermined environmental outcome takes

15 Point 37 of the judgement.

16 In this context of aims of Directive 2003/87 reference was be made to the of 16 December 2008, *Arcelor Atlantique et Lorraine and Others*, C-127/07, EU:C:2008:728, paragraph 31.

17 Point 42 of the judgement.

18 Article 1, second subparagraph of Directive 2003/87

19 Annex IV, Part A, 'Reporting of emissions', points B and C.

place at the lowest cost. By permitting the allowances that have been allocated to be sold, the scheme is intended to encourage a participant to emit quantities of greenhouse gases that are less than the allowances originally allocated to him, in order to sell the surplus to another participant who has emitted more than his allowance.[20] That can essentially be achieved in two ways: either by reducing greenhouse gases produced (typically, by using more efficient production methods) or by avoiding the release of greenhouse gases into the atmosphere (e.g. by transforming those gases into a product in which they are chemically bound). The logic of the system is undermined in the case where greenhouse emission, that was not released into the atmosphere ('avoided' emissions) results in the obligation to surrender allowances. As a result, the operator of an installation does not benefit from the efforts made to cut greenhouse emissions.

4. CONCLUSIONS FROM THE RULING AND ITS IMPACT ON THE POLISH LEGAL ORDER

As far as legal effects of the judgement are concerned, it should be noted that in Poland, the Act of 12 June 2015 on the greenhouse gas emissions trading scheme[21] sets out the basis for the functioning of the greenhouse gas emissions trading scheme. Under this act (Article 3 point 4), emissions are 'greenhouse gases emitted into the air as a result of human activity connected with operation of an installation or performed aircraft operation'. The notion of 'emissions' under Polish law is consistent with the relevant EU legislation (Article 3(b) of Directive 2003/87).

As the Polish legislator pointed out, this act implements provisions of the Commission Regulation (EU) No 601/2012 of 21 June 2012 on the monitoring and reporting of greenhouse gas emissions pursuant to Directive 2003/87/EC of the European Parliament and of the Council. This regulation lays down rules on the content of the monitoring plan and the methodology of emissions monitoring regarding the covered installations and aircraft operations.

In line with the requirements arising from Regulation No 601/2012, in the Act of 12 June 2015 on the greenhouse gas emissions trading scheme, the procedure of approval of monitoring plans for EU ETS emissions was set out. The requirements for the monitoring plan result from the Regulation No 601/2012 (see Chapter 12 of the Act 'Monitoring and accounting of emissions from installations and aircraft operations'; Articles 74–97).

Pursuant to Article 80 paragraph 1 of the Act on the greenhouse gas emissions trading scheme, 'Every year, aircraft operator or operator of an installation is obliged to monitor emissions respectively in accordance with the monitoring plan for aircraft operations or simplified monitoring plan for aircraft operations or monitoring plan for emissions approved by the competent authority'. In accordance with Article 80 paragraph 2 of the Act, 'aircraft operator or operator of an installation draws up an emissions report'.[22]

In view of the above, it should be concluded that the fact that the Court considered, that, 'The second sentence of Article 49(1) of Commission Regulation (EU) No 601/2012 of 21 June 2012 on the monitoring and reporting of greenhouse gas emissions pursuant to Directive 2003/87/EC of the European Parliament and of the Council and point 10(B) of Annex IV to that regulation are invalid in so far as they systematically include the carbon dioxide (CO_2) transferred to another installation for the production of precipitated calcium carbonate in the emissions of the lime combustion installation, regardless of whether or not that CO_2 is released into the atmosphere', shall not have the effect of amending the relevant national law, because the Act of 12 June 2015 on the greenhouse gas emissions trading scheme only refers to Regulation 601/2012 without repeating its provisions (Article 83, Article 86 of the Act on the greenhouse gas emissions trading scheme).

Examining the impact of the judgement on the application of national law, there is no doubt that it follows from the judgement that in case of CO_2 that is generated in an installation for the calcination of lime and transferred to another installation for the production of PCC, the operator has the right to subtract the carbon dioxide (CO_2) generated in an installation for the calcination of lime transferred to a PCC installation from the emissions subject to the monitoring obligation. The practical exercise of this right may be difficult in some way, because Commission Regulation No 601/2012 on the monitoring and reporting of greenhouse gas emissions pursuant to Directive 2003/87/EC of the European Parliament and of the Council does not envisage methodology of emissions monitoring regarding the transfer of produced CO_2 into a

20 Judgment of 16 December 2008, *Arcelor Atlantique et Lorraine and Others*, C-127/07, EU:C:2008:728, paragraph 32. See also the judgment of 7 April 2016, *Holcim (Romania) v Commission*, C-556/14 P, not published, EU:C:2016:207, paragraphs 64 and 65.

21 Journal of Laws of 2017, item 568, as amended.

22 Further provisions of the Act introduce an obligation to draw up emissions reports and verify them by independent verifier (verification report) and by the national administrator – The National Centre for Emissions Management. Pursuant to Article 83 of the Act, 'Commission Regulation (EU) No 601/2012 specifies the method of monitoring emissions from installations and aircraft operations and the method of monitoring tonne-kilometres from the performed aircraft operations'. In accordance with Article 86 paragraph 1 of the Act, 'operator of an installation or aircraft operator is obliged to submit to the National Centre for Emissions Management emissions report referred to in Article 80 paragraph 3, drawn up for the previous accounting period and verification report referred to in Article 84 paragraph 1 by 31 March each year'. Pursuant to Article 86 paragraph 5 of the Act, 'the National Centre for Emissions Management carries out an assessment of the emissions report in terms of completeness of data, the correctness of conducted calculations and the compliance of the set out findings with the provisions of Regulation Commission Regulation (EU) No 601/2012 and with the approved appropriate monitoring plan for aircraft operations or the simplified monitoring plan for aircraft operations or monitoring plan for emissions bearing in mind the verification report referred to in Article 84 paragraph 1'.

new, stable chemical in which it is bound (CO_2 not emitted into the atmosphere). Therefore, it is suggested to amend Regulation No 601/2012 (to detail the provisions of Regulation No 601/2012) in order to enable operators to exercise their right to subtract from the emissions subject to the monitoring obligation the carbon dioxide (CO_2) generated in an installation for the calcination of lime transferred to a PCC) installation. A secondary problem is an appropriate update of the electronic template for the submission of the monitoring plan and annual report by the Commission.

However, the question arises as to whether the effect of the judgement is that in each case of transfer of CO_2 produced in an installation to another installation without releasing it into the atmosphere, the operator shall subtract the amount of CO_2 transferred from the aggregate emissions of the former installation. As the Court on this occasion did not give its view directly on this issue, rightly[23] limiting its analysis to the present case, in the opinion of the authors, this question should be answered in the negative. According to the authors, the effect of this judgement is limited to the transfer of carbon dioxide (CO_2) to another installation for the production of PCC.[24]

This, however, does not change the fact that a similar problem may occur in the case of other EU ETS installations. For instance, a similar legal regulation exists in point 14(B) sentence 5 of Annex IV of Regulation No 601/2012 that concerns the pulp and paper production.[25] On this basis, it can be assumed that national courts will request preliminary rulings under Article 267 TFEU on the validity of these similar legal regulations during domestic litigations.

23 The preliminary ruling of the European Court of Justice shall not go beyond the issue referred to it.

24 It should be emphasised that the European Court of Justice alone has the power to reject illegal provisions of the EU law. The national courts and authorities must, therefore, apply and comply with the EU law until it is declared invalid by the European Court of Justice – K.D. Borchardt, *The ABC of European Union Law, Publications Office of the European Union*, Luxembourg 2010, p. 110.

25 Point 14(B) sentence 5 of Annex IV of Regulation No 601/2012: 'where CO_2 is used in the plant or transferred to another plant for the production of PCC (precipitated calcium carbonate), that amount of CO_2 shall be considered as emitted by the installation producing the CO_2'.