Case C-705/19

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

Date lodged:

23 September 2019

Referring court:

Consiglio di Stato (Italy)

Date of the decision to refer:

14 March 2019

Appellant:

Axpo Trading Ag

Respondent:

Gestore dei Servizi Energetici — GSE s.p.a.

Subject matter of the action in the main proceedings

Appeal before the Consiglio di Stato (Council of State, Italy) against the judgment of the Tribunale Amministrativo Regionale per il Lazio (Regional Administrative Court, Lazio, Italy) which dismissed the action of the appellant company contesting measures taken by the respondent, with which it had criticised the appellant for failing to purchase green certificates for energy imported into Italy in 2012 and 2014 and had requested it to purchase them within 30 days.

Subject matter and legal basis of the reference

Compatibility of decreto legislativo n. 28/2011 (Legislative Decree No 28/2011) with Articles 18, 28, 30, 34, 107, 108 and 110 TFEU, Articles 6 and 13 of the EEC-Switzerland Free Trade Agreement, Directive 2009/28/EC and the case-law of the Court of Justice.

Question referred for a preliminary ruling

Do the following provisions:

- Article 18 TFEU, in so far as it prohibits any discrimination on grounds of nationality within the scope of application of the Treaties;

- Articles 28 and 30 TFEU and Article 6 of the EEC-Switzerland Free Trade Agreement, in so far as they provide for the abolition of customs duties on imports and measures having equivalent effect;

- Article 110 TFEU, in so far as it prohibits taxation on imports in excess of those imposed directly or indirectly on similar domestic products;

- Article 34 TFEU and Article 13 of the EEC-Switzerland Free Trade Agreement, in so far as they prohibit the adoption of measures having equivalent effect to quantitative restrictions on imports;

- Articles 107 and 108 TFEU, in so far as they prohibit the implementation of a State aid measure not notified to the Commission and incompatible with the internal market; and

- Directive 2009/28/EC, in so far as it seeks to promote intra-Community trade in green electricity, thus promoting, moreover, the production capacity of individual Member States,

preclude national legislation such as the one described above, which imposes on importers of green electricity a financial burden that does not apply to domestic producers of the same product?

Provisions of EU law relied on

Articles 18, 28, 30, 34, 107, 108 and 110 TFEU.

EEC-Switzerland Free Trade Agreement, and in particular Articles 6 and 13 thereof.

Directive 2009/28/EC of the European Parliament and of the Council of 23 April 2009 on the promotion of the use of energy from renewable sources (‘Directive 2009/28’).

Provisions of national law cited

Decreto legislativo del 16 marzo 1999, n. 79 — Attuazione della direttiva 96/92/CE recante norme comuni per il mercato interno dell’energia elettrica (Legislative Decree No 79 of 16 March 1999 — Implementation of Directive 96/92/EC concerning common rules for the internal market in electricity)

('Legislative Decree No 79/1999'), in force until 1 January 2016. In particular, Article 11 thereof required entities feeding electricity produced from non-renewable energy sources into the grid to feed a predetermined share of green energy into the national electricity system in the following year or, alternatively, to purchase green certificates for the equivalent value from other producers.

Decreto legislativo del 3 marzo 2011, n. 28 — Attuazione della direttiva 2009/28/CE sulla promozione dell'uso dell'energia da fonti rinnovabili (Legislative Decree No 28 of 3 March 2011 — Implementation of Directive 2009/28/EC on the promotion of the use of energy from renewable sources) ('Legislative Decree No 28/2011'). In particular, Article 25(11) thereof repealed, with effect from 1 January 2012, Article 20(3) of decreto legislativo del 2003, n. 387 (Legislative Decree No 387/2003), pursuant to which entities importing electricity from EU Member States, subject to the obligation laid down in the abovementioned Article 11 of Legislative Decree No 79/1999, could apply to the network operator for an exemption from said obligation in relation to the share of imported electricity produced from renewable sources. Furthermore, Article 25(2) provides that from 1 January 2012, imported electricity is not subject to the abovementioned obligation only if it contributes to the achievement of the national targets laid down in that legislative decree.

Outline of the facts and the main proceedings

1 The appellant, Axpo Trading Ag, is a Swiss company which imports into Italy energy produced in France and Switzerland from renewable sources ('clean' or 'green' energy). The appellant brought an action before the Regional Administrative Court for Lazio against measures taken by the respondent, Gestore dei Servizi Energetici — GSE, with which it had criticised the appellant for failing to purchase green certificates for energy imported into Italy in 2012 and 2014 and had requested it to purchase them within 30 days.

2 By its judgment of 18 September 2017, the Regional Administrative Court for Lazio dismissed the action, citing, in particular, the ruling of the Court of Justice in Case C-573/12, in which Swedish legislation similar to the legislation at issue here was found to be proportionate and to comply with EU law since it fulfilled the underlying environmental protection objective.

3 The appellant brought an appeal before the referring court against the abovementioned judgment, seeking to have the Italian legislation in question disapplied.

4 The European Commission, which received two complaints concerning the matter under consideration, submitted written and oral observations in the main proceedings.

The main arguments of the parties to the main proceedings

5 The appellant submits that, whereas Italian legislation prior to 2011 — and specifically Article 20(3) of Legislative Decree No 387/2003 — exempted electricity importers who could demonstrate the renewable nature of the relevant energy source from the obligation to purchase green certificates, that possibility ceased to exist under Legislative Decree No 28/2011.

6 Article 25(11) of Legislative Decree No 28/2011 repealed Article 20(3) of Legislative Decree No 387/2003 with effect from 1 January 2012. The appellant claims that this resulted in an obligation also for importers of energy produced abroad from renewable sources to purchase green certificates, which, according to the appellant, is contrary to EU law.

7 Furthermore, Article 25(2) of Legislative Decree No 28/2011 provides that electricity imported from 1 January 2012 is not subject to the obligation in question only if it contributes to the national targets laid down in that legislative decree.

8 The appellant submits that, first, the abovementioned legislative framework constitutes State aid to the benefit of green energy producers operating in Italy that was not previously notified to the Commission, in breach of Articles 107 and 108 TFEU; secondly, it imposes a tax having equivalent effect to a customs duty, to the detriment of importers into Italy of green energy produced in other Member States, in breach of Articles 28, 30 and 110 TFEU; thirdly, it constitutes a measure equivalent to a quantitative restriction on imports and on the free movement of green energy produced in other Member States, in breach of Articles 34 and 36 TFEU and of Article 13 of the EEC-Switzerland Free Trade Agreement.

9 The appellant further submits that the matter was brought to the attention of the European Commission by means of two complaints, to which the Commission had allegedly replied that duly notified support schemes of other Member States were classified as State aid and that it was considering initiating infringement proceedings against Italy with regard to the current green energy support scheme, particularly with regard to the taxation of the A3 component in electricity bills.

10 In its written observations, the Commission argued that in the judgment of the Court of Justice in Case C-573/12, cited by the court of first instance, the Court of Justice had ruled exclusively with regard to whether the provisions of Swedish law related to measures having equivalent effect to a quantitative restriction on imports. It also argued that the national court could only rule out the existence of State aid, but not indicate whether State aid was justified, since the assessment of the compatibility of State aid with the single market is the sole prerogative of the Commission.

Succinct presentation of the reasons for the reference for a preliminary ruling

11 The referring court notes that Directive 2009/28 focuses on national targets for the production and use of green energy. That approach, whereby the individual targets for each Member State are set on the basis of the specific characteristics of each national situation, is illustrated in particular in recitals 15 and 25 of the abovementioned directive.

12 National support schemes and measures of cooperation between Member States, governed by Article 3(3) of the directive in question, are the means by which Member States can achieve their goals of increasing the production and consumption of green energy. In particular, measures of cooperation between Member States are optional, as confirmed by Article 3 of Directive 2009/28.

13 The referring court states that Legislative Decree No 28/2011, which implements Directive 2009/28, provided for the system of green certificates to be phased out and replaced from 2016 by feed-in premium (FIP) tariffs. It also notes that Article 25(11) of the legislative decree eliminated the possibility of green energy produced abroad counting towards the national quota; a possibility that, under the previous rules, created an exemption from the obligation to purchase a pro-rata quantity of green certificates.

14 Regarding the alleged State aid nature of the rules in question, the referring court notes that in the present case there is no transfer of State resources to producers of green energy operating in Italy. Even if it is assumed that State aid exists also where purchase obligations are imposed on operators in the sector or a financial burden is imposed on consumers, the fact that Directive 2009/28 focuses on national targets for the production and use of green energy, requiring each Member State to achieve an ever-increasing share of green energy, and the entirely optional nature of the measures of cooperation between Member States, taken together, might suggest that the adoption by Member States of measures aimed solely at assisting domestic producers of green energy comply with the directive in question. The increase in national consumption of green energy is undoubtedly facilitated by the increase in domestic production of green energy (see judgment of 29 September 2016, *Essent Belgium NV*, C-492/14, paragraphs 105 to 110). To that effect, by facilitating the domestic production of clean energy, each Member State is promoting the environmental health of its territory, as intended by EU legislation (see judgment of 1 July 2014, *Ålands Vindkraft AB*, C-573/12, paragraphs 53, 54, 94, 95 and 130).

15 Moreover, by definition, the national support schemes covered by Directive 2009/28 provide for special treatment in favour of domestic producers of green energy and therefore do not derogate from the reference system established by that directive, but rather allow for its effective implementation. The reference system provided for in the directive in question is therefore openly and deliberately

selective in itself, since it is aimed at encouraging the production of green energy rather than energy from non-renewable sources.

16 The referring court observes that the Italian Republic was therefore not obliged to notify the Commission in advance of the rules contained in Legislative Decree No 28/2011, since these did not constitute State aid. Furthermore, the rules in question do not constitute a tax having equivalent effect to a customs duty to the detriment of importers into Italy of green energy produced in other Member States or a measure equivalent to a quantitative restriction on imports and on the free movement of green energy.

17 The obligation for importers of energy produced abroad to purchase green certificates is therefore functional to the overall design of the support scheme established in Italy, which in turn complies with Articles 18 and 110(1) TFEU, since it reserves the same treatment for all operators in the electricity sector, Italian or otherwise, who feed into the grid electricity which is not produced from Italian renewable sources.

18 The judgment of the Court in Case C-213/96, cited by the appellant in support of its arguments, concerns taxation, whereas the present case concerns facilitating measures, and in any event was delivered before Directive 2009/28 entered into force. Likewise, the abovementioned judgment in Case C-492/14, which relates to the question of the permissibility of national legislation providing for energy distribution that is selectively free of charge, applies the previous EU legislation.

19 Since the question at issue is decisive for the settlement of the dispute and there is a specific request from the appellant, the referring court, which is the court of last instance, submits the reference for a preliminary ruling to the Court of Justice.