Case C-94/22

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:

9 February 2022

Referring court:

Tribunale Amministrativo Regionale per il Lazio (Italy)

Date of the decision to refer:

25 January 2022

Applicant:

Gruppo Mauro Saviola Srl

Defendants:

Ministero della Transizione Ecologica (formerly the Ministero dell'Ambiente e della Tutela del Territorio e del Mare)

Comitato nazionale per la gestione della direttiva 2003/87/CE e per il supporto nella gestione delle attività di progetto del protocollo di Kyoto

Other party:

Representation of the European Commission in Italy

Subject matter of the main proceedings

Action for annulment of the decision of the Comitato nazionale per la gestione della direttiva 2003/87/CE e per il supporto nella gestione delle attività di progetto del protocollo di Kyoto (Italian national committee for the management of Directive 2003/87/EC and for support in the management of project activities under the Kyoto Protocol; 'the ETS Committee') of 12 April 2021 not to allocate any free CO_2 emission allowances for the period 2021-2025 to an installation run by the applicant.

Subject matter and legal basis of the request

Article 267 TFEU.

Questions referred for a preliminary ruling

1. Is the decision taken by the Italian national committee for the management of Directive 2003/87/EC and for support in the management of project activities under the Kyoto Protocol, considering the adoption procedure and, in particular, the mechanism for dialogue with the European Commission provided for in Delegated Regulation (EU) 2019/331, concerning the inclusion of installations in the list for the allocation of CO_2 allowances, open to appeal before the General Court pursuant to the fourth paragraph of Article 263 TFEU, where the contested measure produces binding legal effects and directly affects the applicant as an economic operator?

2. In the alternative, can the private economic operator directly affected by the exclusion from the allocation of CO_2 allowances, on the basis of the joint investigation conducted by the European Commission and the Italian national committee for the management of Directive 2003/87/EC and for support in the management of project activities under the Kyoto Protocol, challenge the decision taken by the European Commission to reject the inclusion of the installation in the list pursuant to Article 14(4) of Delegated Regulation (EU) 2019/331 before the General Court pursuant to the fourth paragraph of Article 263 TFEU?

3. Does the concept of 'electricity generator' within the meaning of Article 3(u) of Directive 2003/87/EC, as was evident from the judgment of the Court of Justice (Fifth Chamber) of 20 June 2019 in Case C-682/17, *ExxonMobil Production Deutschland GmbH* v *Bundesrepublik Deutschland*, concerning the request for a preliminary ruling submitted to the Court of Justice pursuant to Article 267 TFEU by the Verwaltungsgericht Berlin (Administrative Court, Berlin, Germany) by decision of 28 November 2017, also cover situations in which the installation produces electricity entirely for its own consumption, feeding that electricity into the public grid intermittently only when the installations intended to receive the energy are temporarily shut down for operational reasons?

4. Is such an interpretation of the definition of 'electricity generator' compatible with the general principles of EU law on respect for competition between operators where incentives are granted, and with the principle of proportionality of the measure, where it does not provide an incentive for own consumption of electricity through the allocation of free CO_2 emission allowances for those installations that use it?

Provisions of European Union law and case-law relied on

TFEU; the fourth paragraph of Article 263.

Directive 2003/87/EC (the ETS Directive), as amended by Directive 2009/29/EU and, more recently, by Directive 2018/410/EU.

The ETS Directive regulates the European Union Emissions Trading Scheme (EU ETS), which is a key tool for combating climate change and for reducing greenhouse gas emissions cost-effectively. The system operates according to the principle of 'cap-and-trade': a cap is set on the total amount of certain greenhouse gases and this cap is reduced over time so that total emissions fall. Below this cap, undertakings buy or receive emission allowances, which they can trade with one another as needed. At the end of each year, companies must surrender enough allowances to cover their emissions if they want to avoid heavy fines. If an undertaking reduces its emissions, it can keep unused allowances to cover future needs or sell them to another undertaking. The ETS Directive stipulates that from 2013, electricity generators and installations that carry out carbon capture, transport and storage must purchase at auction allowances for all of their needs (allocation for consideration). By contrast, installations in the manufacturing sector are entitled to the free allocation of allowances, on the basis of their level of activity and benchmarks drawn up by the European Commission and valid at European level.

Commission Delegated Regulation (EU) 2019/331 of 19 December 2018, which, inter alia, sets out the information required with regard to installations falling within the scope of the directive, as well as the methods and procedures for Member States to send data to the Commission via their competent national authorities. (For Italy, it is the ETS Committee that determines the annual quantity of allowances to be allocated free of charge to eligible operators and that sends the Commission the list containing this information for each installation for which the free allocation of allowances is requested.) The Commission examines the data submitted and may request further documentation from the Member State.

Judgment of the Court of Justice of 20 June 2019 (Case C-682/17).

Judgment of the Court of Justice of 3 December 2019 (Case C-414/18).

Provisions of national law relied on

Decreto legislativo del 4 aprile 2006, n. 216 (Legislative Decree No 216 of 4 April 2006) and decreto legislativo del 13 marzo 2013, n. 30 (Legislative Decree No 30 of 13 March 2013), which, inter alia, identify the ETS Committee as the competent national authority for the implementation of the ETS system.

Decreto legislativo del 9 giugno 2020, n. 47 (Legislative Decree No 47 of 9 June 2020), which establishes, inter alia, that the ETS Committee is also responsible for

determining the annual quantity of allowances to be allocated free of charge in accordance with the rules of EU law.

Succinct presentation of the facts and procedure in the main proceedings

1 The applicant is a company operating in the field of eco-sustainable production, making chipboard panels from 100% recycled wood at various facilities, including one situated in the town of Sustinente. The production of those panels requires thermal energy, so three boilers with a total capacity of 17.4 MW and a 41.3 MW dryer were installed. The waste materials from the production process are used as fuel for the self-generation of electricity at the site.

2 Because it carries out combustion using fuels with a thermal rating of more than 20 MW, the Sustinente installation comes under the ETS system. It is one of the installations for which the ETS Directive provides for the partial free allocation of emission allowances, and always benefited from this until the decision which is the subject of the present application.

3 On 19 June 2019, the applicant sent the ETS Committee its application for the allocation of free allowances for three of its facilities, including the Sustinente installation. However, on 20 June 2019, the Court delivered its judgment in Case C-682/17 (‘the *Exxon* judgment’). This led the ETS Committee to review – erroneously, according to the applicant – the criteria for the allocation of free allowances and to reopen the investigation, in agreement with the Commission, on the grounds that the Sustinente installation, in the light of that judgment, came under the definition of ‘electricity generator’ within the meaning of the ETS Directive. On 12 November 2020, the ETS Committee informed the applicant of the outcome of the investigation carried out in agreement with the Commission. The ETS Committee confirmed that the Sustinente installation was categorised as an ‘electricity generator’ and, as such, was not eligible for free emission allowances.

4 Notwithstanding the observations to the contrary submitted by the applicant, on 12 April 2021, the ETS Committee updated the national allocation plan referred to in Article 11 of the ETS Directive and did not allocate any emission allowances to the Sustinente installation.

The essential arguments of the parties in the main proceedings

5 The **applicant**, to whom no free allowances have been allocated, first submits, on the substance, that there has been a misinterpretation of the *Exxon* judgment, in the light of which the installation in question has been considered an ‘electricity generator’ as defined in Article 3(u) of the ETS Directive and Article 3(bb) of Legislative Decree No 47/2020. According to that definition, 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, has the status of electricity generator. According to the applicant, the ETS Committee has incorrectly likened the Sustinente installation to the installation in the *Exxon* judgment ('the Exxon installation'). The ETS Committee failed to note that in the Exxon installation, unlike the Sustinente installation, the activity of manufacturing a product not covered by Annex I to the ETS Directive and the continuous feeding of the electricity produced into the public grid take place simultaneously. Conversely, the applicant requested the free CO_2 allowances solely for emissions from its production activities at the Sustinente installation, and not for emissions generated to supply the electricity generator through the recovery of wood waste. At the Sustinente installation, less energy was consumed than was produced in some years. Evidence of this is the fact that the applicant has to resort to buying additional electricity (exceeding both the amounts produced and sold) to complete its production cycle. Furthermore, the applicant points out that the installation in question cannot be likened to the Exxon installation since it does not continuously feed even minimal amounts of current into the public electricity network, and only occasionally sells its electricity. The applicant further submits that the interpretation supplied by the ETS Committee leads to the paradox whereby, owing to the mere fact of having decided to recover its own waste and use it to produce electricity for its own consumption, it is excluded from the benefits of the ETS system. By contrast, other installations – which do not use any eco-sustainability mechanism in relation to energy – are eligible for the benefits because they do not produce electricity. Lastly, the applicant complains that this application of the ETS Directive is in clear conflict with some of the general legal principles underpinning the single market. Specifically, it leads to a clear distortion of competition between operators in the same market, depending on whether they purchase energy from the grid (in which case they are entitled to the benefits), or produce it for their own consumption (in which case they are excluded). Yet such a distinction is not justified on the grounds of environmental protection, given that emissions that are harmful for the environment are exactly the same whether the energy is purchased or self-generated.

6 Second, as regards the possible inadmissibility of the action on the grounds of lack of jurisdiction, raised by the referring court of its own motion, the applicant submits that it is the ETS Committee (an interministerial body) that determines whether an installation is included in the list and that decides on the final allocation of free allowances to each of the installations included in that list. The ETS Committee acts as a body of the Ministero della Transizione Ecologica (Ministry of Ecological Transition). Since it is a national body and not an EU body, any measures it adopts have the same effect as an administrative act. Therefore, it is for the Member State – in this case the administrative court – to review their legality. The Court of Justice is precluded expressly from reviewing the legality of acts of Member State bodies, unless the measure is only formally adopted by a national body, but in reality is substantially the result of a decision at EU level. In this case, as stated in the judgment of the Court of Justice of 3 December 2019 in Case C-414/18, the private individual affected by that

measure may challenge it before the General Court, as with a measure adopted directly by the bodies of the Union.

7 **The Ministry of Ecological Transition (formerly the Ministero dell'Ambiente e della Tutela del Territorio e del Mare (Ministry of the Environment and Protection of Land and Sea))** contends that the action should be dismissed as unfounded.

8 First, the Ministry concluded that the starting point for understanding the substance of the Commission's decision was the judgment of the Court of Justice of 20 June 2019 in Case C-682/17. That judgment provided the interpretation of the concept of 'electricity generator' referred to in Article 3(u) of Directive 2003/87/EC. The judgment states that an installation which produces, within the framework of its activity of combustion of fuels in installations with a total rated thermal input exceeding 20 MW, referred to in Annex I to Directive 2003/87, electricity intended essentially to be used for its own needs, must be regarded as an 'electricity generator', within the meaning of Article 3(u) of the directive, where that installation, first, carries out simultaneously an activity which does not fall within the scope of ETS, and, second, continuously feeds, for consideration, even a small part of the electricity produced into the public electricity network, to which that installation must be permanently connected for technical reasons. The consequence of an installation's being classified as an electricity generator is that it loses the right to allocate free allowances for any sub-installation, except in certain cases expressly provided for in that directive. Therefore, an installation which can be categorised as an 'electricity generator' and to which none of the exceptions envisaged in the legislation apply is not entitled to any free allocation if it sells electricity to third parties, even if only marginally. The Ministry subsequently confirmed that the Court of Justice, referring to the Exxon installation, clarified that it is true that only a small part of that electricity produced is sold to third parties, since feeding it into the public electricity network is justified on technical grounds, in order to ensure continuity of electricity supply for the installation at issue in the event of an outage of the Claus-process facilities. However, it does not follow from the wording of Article 3(u) of Directive 2003/87 that, in order for an installation to be regarded as an 'electricity generator', the electricity which it produces should be used solely, or even mainly, to supply third parties. Therefore, irrespective of the fact that the electricity fed into the grid is residual compared with that intended for self-generation, the applicant has actually sold some of the electricity produced over the years, which means that the installation is defined as an electricity generator.

9 Second, as to jurisdiction, the Ministry considers that the exclusion of the applicant's installation from the national allocation plan referred to in Article 11 of Directive 2003/87/EC, and the consequent non-allocation of free allowances, are solely linked to the assessments carried out by the Commission. By law, the Commission retains the right to make a final decision which is binding on the Member States. Therefore, the consequences of not allocating allowances are not at the discretion of the ETS Committee. It follows that an appeal against the

measures taken by the ETS Committee, without an independent complaint against the Commission's assessments, must be considered inadmissible; any review of such assessments would not fall within the jurisdiction of the national court, but would have to be referred to the Court of Justice.

Succinct presentation of the reasoning in the request for a preliminary ruling

10 Given the importance of the interests involved and the complexity of the values at stake, the referring court considers it necessary to refer the above questions relating to the interpretation of EU law to the Court of Justice for a preliminary ruling.