

Case C-423/23

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:

10 July 2023

Referring court:

Tribunale Amministrativo Regionale per la Lombardia (Italy)

Date of the decision to refer:

7 July 2023

Applicant:

Secab Soc. coop.

Defendants:

Autorità di Regolazione per Energia Reti e Ambiente (ARERA)

Gestore dei servizi energetici (GSE) SpA

Subject matter of the main proceedings

Annulment of various acts and invoices issued by the defendants.

Subject matter and legal basis of the request

Pursuant to Article 267 TFEU, the Court is asked to clarify whether the Italian legislation setting a certain cap on the revenues that producers obtain from the sale of electricity, in particular as regards the renewable energy sector, is compatible with the relevant EU legislation.

Questions referred for a preliminary ruling

1. Do Article 5(4) of Directive (EU) 2019/944, recitals 3 and 12 of Directive (EU) 2018/2001, and recitals 27, 28, 29 and 39, Article 6(1) and Article 8(2) of Regulation (EU) 2022/1854 preclude a national rule which sets a cap on

- market revenue obtained from the sale of electricity in the manner provided for in Article 15 bis of Decree-Law No 4 of 27 January 2022, which does not guarantee that producers may retain 10% of their revenues above that cap?
2. Do Article 5(4) of Directive (EU) 2019/944, recitals 2, 3 and 12 of Directive (EU) 2018/2001, recitals 27, 28, 29 and 39, Article 6(1) and Article 8(2)(b) and (c) of Regulation (EU) 2022/1854 preclude a national rule which sets a cap on market revenues obtained from the sale of electricity in the manner provided for in Article 15 bis of Decree-Law No 4 of 27 January 2022, which does not preserve and incentivise investments in the renewable energy sector?
 3. Do recital 3 of Directive (EU) 2018/2001, and recitals 27 and 41, Article 7(1)(h), (i) and (j) and Article 8(1)(a) and (d) and (2) of Regulation (EU) 2022/1854 preclude a national rule which sets a cap on market revenues obtained from the sale of electricity in the manner provided for in Article 15 bis of Decree-Law No 4 of 27 January 2022, which does not provide for any specific cap on the revenues obtained from the sale of energy produced from hard coal, or a regulation differentiating between different sources of production?

Provisions of European Union law and case-law relied on

Directive (EU) 2019/944 of the European Parliament and of the Council of 5 June 2019 on common rules for the internal market for electricity and amending Directive 2012/27/EU, in particular Article 5.

Directive (EU) 2018/2001 of the European Parliament and of the Council of 11 December 2018 on the promotion of the use of energy from renewable sources, in particular recitals 2, 3, 12 and 29.

Council Regulation (EU) 2022/1854 of 6 October 2022 on an emergency intervention to address high energy prices, in particular recitals 1, 3, 6, 25, 27, 28, 29, 30, 32, 33, 34, 39, 40, 41 and 71 and Articles 6, 7 and 8.

Communication from the Commission to the European Parliament, the European Council, the Council, the European Economic and Social Committee and the Committee of the Regions REPowerEU: Joint European Action for more affordable, secure and sustainable energy, in particular 2.2.1., 2.2.2., Conclusions and Annex 2.

Judgments of the Court of 29 September 2016, *Essent Belgium*, C-492/14, EU:C:2016:732, and of 1 July 2014, *Ålands Vindkraft*, C-573/12, EU:C:2014:2037.

Provisions of national law relied on

Decreto-legge 27 gennaio 2022, n. 4 (Decree-Law No 4 of 27 January 2022); Article 15 bis

Paragraph 1 provides for the application, from 1 February 2022 until 31 December 2022, of a compensation mechanism on energy prices for electricity fed into the grid by different types of plant powered by renewable energy sources.

Paragraph 3 provides that the Gestore dei servizi energetici (GSE) SpA ('the GSE') is to calculate the difference between the reference price and the market price, and indicates how those prices are calculated.

Paragraph 4 provides that, if the difference referred to in paragraph 3 is positive, the GSE is to pay the corresponding amount to the producer and, if that difference is negative, the GSE is to make a balance adjustment or claim the corresponding amount from the producer (two-way compensation mechanism).

Decreto-legge 9 agosto 2022, n. 115 (Decree-Law No 115 of 9 August 2022); Article 11

Legge 29 dicembre 2022, n. 197 (Law No 197 of 29 December 2022); Article 1

Paragraph 30 provides for the application, from 1 December 2022 until 30 June 2023, of a cap on market revenues obtained from the production of electricity for electricity, fed into the grid from plants powered by renewable sources outside the scope of Article 15 bis and from plants powered by the non-renewable sources referred to in Article 7(1) of Regulation (EU) 2022/1854.

Paragraph 31 provides that the revenue cap is to apply to any market revenues of producers of electricity generated by the abovementioned plants and, where appropriate, of the intermediaries participating in wholesale electricity markets on behalf of those producers.

Paragraph 32 provides that the GSE is to calculate the difference between the reference price and the market price, and indicates how those prices are calculated.

Paragraph 33 provides that, if the difference referred to in paragraph 32 is negative, the GSE is to make a balance adjustment or claim the corresponding amount from the producer (one-way compensation mechanism).

Succinct presentation of the facts and procedure in the main proceedings

- 1 The applicant company produces electricity from plants powered by hydroelectric sources.

- 2 Pursuant to Article 15 bis of Decree-Law No 4 of 27 January 2022, the Autorità di Regolazione per Energia Reti e Ambiente (Regulatory Authority for Energy, Networks and Environment) ('the ARERA'), by its decisions of 2022 and 2023, included the applicant in the list of companies subject to that provision, and the GSE subsequently issued a series of invoices to the applicant. Those decisions, other related acts and those invoices are the subject of the action for annulment brought by the applicant before the referring court.
- 3 According to Article 15 bis, for the producers referred to therein, the consideration for the supply of energy, instead of being determined by the market, is determined authoritatively by the legislature, by setting a cap on revenue.
- 4 That article should have applied during the period from 1 February 2022 to 31 December 2022, but Article 11 of Decree-Law No 115 of 9 August 2022 extended the deadline until 30 June 2023.
- 5 On 8 October 2022, Regulation (EU) 2022/1854 on an emergency intervention to address high energy prices entered into force, which provided, in particular, for a higher revenue cap and a broader scope than those referred to in Article 15 bis.
- 6 Paragraphs 30 to 38 of Article 1 of Law No 197 of 29 December 2022, for their part, implemented, for the period between 1 December 2022 and 30 June 2023, Articles 6, 7, and 8 of Regulation (EU) 2022/1854, but excluded plants powered by renewable sources, which were already covered by Article 15 bis.
- 7 The revenue cap provided for in Article 15 bis therefore applied, during the period from 1 February 2022 to 30 June 2023, to producers of energy from renewable sources, notwithstanding the entry into force of Law No 197 of 29 December 2022, which instead applied to producers of energy from non-renewable sources, and from renewable sources not mentioned in Article 15 bis, during the period from 1 December 2022 to 30 June 2023.
- 8 Therefore, although it predates Regulation (EU) 2022/1854, Article 15 bis was in fact the national law which implemented the EU law with regard to energy produced by renewable sources.

The essential arguments of the parties in the main proceedings

- 9 The applicant submits that Article 15 bis of Decree-Law No 4 of 27 January 2022 is contrary to EU legislation.

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

- 10 From the end of 2021, electricity prices increased abnormally as a result of the exceptional increase in gas prices when used as fuel for producing electricity.

- 11 Article 15 bis, like Regulation (EU) 2022/1854, was enacted for the purpose of limiting, on a temporary basis, the extraordinary market revenues obtained by energy producers that, not using gas for production, have costs that are independent of gas price trends. To that end, Article 15 bis provides for a cap to be applied to such extraordinary revenues and for the corresponding amounts to be distributed to end customers.
- 12 The referring court is uncertain whether the specific arrangements used by the Italian legislature to determine the cap comply with the limits laid down by Regulation (EU) 2022/1854, and with EU energy legislation, as regards both its extent and the scope of the entities to which it applies.

ENTITIES

- 13 Although the reference price referred to in Article 15 bis (3)(a) is between EUR 56/MWh and EUR 58/MWh, and is therefore much lower than the price set by the European Union, which is EUR 180/MWh, according to ARERA it is fair since it corresponds to the arithmetic average of the prices in each market zone recorded from 1 January 2010 to 31 December 2020, adjusted for inflation.
- 14 The referring court notes that, according to recital 28 of Regulation (EU) 2022/1854, for the purpose of setting the market revenue cap, reference should have been made to the hours during which demand was at its highest, before Russia's war of aggression against Ukraine.
- 15 However, the method followed by the Italian legislature provided for an average of energy prices over several years, including 2020, which was affected by the anomalies caused by the COVID-19 pandemic, but excluding 2021, which, in addition to compensating for the exceptional nature of the previous year, saw the beginning of a new economic cycle of unprecedented price increases. The exclusion of 2021 from the basis for calculating the reference price led to the price being reduced by more than 10%.
- 16 The referring court therefore has doubts as to whether the market revenue cap referred to in Article 15 bis is proportionate and reasonable, given that it does not appear to guarantee that producers may retain 10% of their revenues above it, as required by recital 39 of Regulation (EU) 2022/1854.
- 17 The Italian measure also appears to be inadequate to protect investments made in the renewable energy sector and, above all, the ability to make such investments in the future, with a view to expanding the use of such sources, as expressly required by the relevant EU legislation.
- 18 According to the conclusions of the Communication from the Commission of 8 March 2022 entitled 'REPowerEU', the replacement of fossil sources with renewable sources is immediately necessary in order to increase Europe's energy independence; further, according to recital 2 of Directive (EU) 2018/2001, the promotion of energy from renewable sources is an important part of the package

of measures needed to comply with the European Union’s commitments under the 2015 Paris Agreement on Climate Change, including the binding target to cut emissions by at least 40% by 2030, expressly defined as being of ‘overarching importance for the Union’s energy and environmental policy’.

- 19 The lack of adequate investment in the renewable energy sector is one of the omissions in the fight against climate change on the part of the Member States, as established by several national courts (the ‘Urgenda Foundation’ case in the Netherlands, the ‘Affaire du siècle’ case in France, and ‘Neubauer’ case in Germany), with cases currently pending before the European Court of Human Rights (applications Nos 39371/20, 53600/20 and 34068/21).
- 20 Specifically, from a joint reading of recitals 28 and 29 of Regulation (EU) 2022/1854, it can be concluded that, in setting the cap, a reasonable margin must be left in relation to the price that investors could have expected, with the aim of not undermining the initial expectation of the profitability of the investments and not impairing those investments, which the Italian regulation does not seem to have taken into account.
- 21 In addition to directly limiting the financial capacity of undertakings producing energy from renewable sources to make investments, Article 15 bis is also intended to have indirect effects, undermining investor confidence in the growth of the sector, contrary to the principles stated by the Court of Justice, according to which it is necessary to ‘foster, from a long-term perspective, investment in new installations’ (see judgments of 29 September 2016, C-492/14, EU:C:2016:732, paragraph 110, and of 1 July 2014, C-573/12, EU:C:2014:2037, paragraph 103).

ENTITIES TO WHICH THE LEGISLATION IN QUESTION APPLIES

- 22 Article 15 bis concerns only energy producers using renewable sources.
- 23 While Regulation (EU) 2022/1854 also makes energy producers using lignite, crude petroleum and peat subject to the revenue cap, and deems it appropriate to set a specific cap for those using hard coal, Article 15 bis does not lay down any rules for those producers, which therefore received an unjustified advantage, especially between 1 February 2022 and 1 December 2022, where they were not subject to any revenue caps, thereby causing discrimination and distorting the functioning of the market.
- 24 In addition, while Article 8(1)(a) of Regulation (EU) 2022/1854 allows for the possibility of differentiating between different sources, Article 15 bis, on the other hand, provides for a cap on single market revenues for all the categories of producers from renewable sources referred to therein, despite the fact that the costs of generating energy are not the same for all categories of plant, a circumstance which, similarly, seems likely to give rise to discrimination and to distort the functioning of the market.

- 25 For example, in 2022, producers which used hydroelectric sources experienced a drop in their production by more than a third from historical levels due to the exceptional drought and high temperatures, while others were placed at an advantage, but were still subject to the same revenue cap.
- 26 The referring court therefore considers it necessary to refer the above questions for a preliminary ruling.

WORKING DOCUMENT