Case C-414/23

Request for a preliminary ruling

Date lodged:

6 July 2023

Referring court:

Helsingin hallinto-oikeus (Finland)

Date of the decision to refer:

30 June 2023

Applicant:

Metsä Fibre Oy

HELSINGIN HALLINTO-OIKEUS INTERIM ORDER 3431/2023

30 June 2023

[…]

Subject matter Request to the Court of Justice of the European Union for a preliminary ruling under Article 267 of the Treaty on the Functioning of the European Union

Applicant Metsä Fibre Oy

Contested decision

Energiavirasto, 26 April 2022, reference 2407/330/2020

Subject matter of the dispute and relevant facts

(1) In the case pending before the Helsingin hallinto-oikeus (Administrative Court, Helsinki), an action brought by Metsä Fibre Oy requires judgment regarding the lawfulness of a decision issued by the Energiavirasto (Energy Agency).

(2) In the contested decision, the Energy Agency assessed the total quantities of CO_2 emissions for the years 2013 to 2017 from the bioproducts mill Metsä Fibre Äänekoski (‘the installation’) belonging to Metsä Fibre Oy, because the annual

emissions for the years in question as set out in the annex were not fully in compliance 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 ('the Commission Monitoring Regulation'). In the view of the Energy Agency, the total quantities of emissions declared in the reports on emissions of greenhouse gases for the years 2013 to 2017 were rendered incorrect by the judgment of the Court of Justice of 19 January 2017, *Schaefer Kalk* (C-460/15, EU:C:2017:29).

(3) In the *Schaefer Kalk* judgment, the Court had explained that the provisions of the Commission Monitoring Regulation under which the CO_2 used or transferred for the production of precipitated calcium carbonate (PCC) was considered emitted by the installation regardless of whether or not it was released into the atmosphere, which were in force from 2013 to 2018, were invalid. The judgment was to be applied retroactively from the date of entry into force of the Commission Monitoring Regulation on 1 January 2013, with the result that the emissions reporting for Metsä Fibre Oy's Äänekoski installation in the years 2013 to 2017 was not compliant with the regulation in that the CO_2 transferred for the production of PCC had been counted as part of the emissions of the installation. The Commission Monitoring Regulation was amended in that respect in line with the *Schaefer Kalk* judgment, with effect from 1 January 2019, with a new Article 49(1)(b).

(4) In the contested decision, the Energy Agency had made a conservative estimate, in accordance with Article 70 of the Commission Monitoring Regulation, of the emissions of the Äänekoski installation in the years 2013 to 2017, thereby revising downwards the emissions quantities declared by Metsä Fibre Oy. According to a table contained in the decision, the number of emissions allowances surrendered in excess to the Union Registry amounted to 115 312 in total. Under the decision, Metsä Fibre Oy was able to have those excessive allowances offset against the surrender of allowances for 2021 emissions, to be undertaken by 30 April 2022. This left the compliance status of the Äänekoski installation's compliance account positive by the amount of the correction. At the same time, the Energy Agency, by its decision, corrected the total emissions quantities declared for the installation for the years 2013 to 2017 in the electronic emissions trading system FINETS and in the Union Registry.

(5) According to the contested Energy Agency decision, the timeframes specified in Article 70 of Commission Regulation (EU) No 389/2013 of 2 May 2013 establishing a Union Registry pursuant to Directive 2003/87/EC of the European Parliament and of the Council, Decisions No 280/2004/EC and No 406/2009/EC of the European Parliament and of the Council and repealing Commission Regulations (EU) No 920/2010 and No 1193/2011 ('the Commission Registry Regulation') for the reversal of erroneously entered registry transactions prevent the allowances which were surrendered in excess from being returned to the account of Metsä Fibre Oy's Äänekoski installation and the regulation does not account for the scenario of a surrender of allowances having been based on

invalid provisions. According to the decision, the Commission Registry Regulation also does not provide for the option of transferring the positive compliance status of the compliance account to the account of another of Metsä Fibre Oy's installations.

Summary of the essential arguments of the parties

(6) In the action it brought before the hallinto-oikeus (Administrative Court), Metsä Fibre Oy argued that the Äänekoski installation was almost CO_2 neutral nowadays thanks to extensive investment by the company, with the result that the company could not, in practice, make use of the positive compliance status of the compliance account for that installation in future surrenders of emission allowances.

(7) Metsä Fibre Oy contends that the court should set aside the Energy Agency decision in so far as it determines that the company can have the allowances which had been surrendered in excess offset against the surrender of emissions allowances for 2021. Metsä Fibre Oy considers that the type of remedy provided by the Energy Agency decision cannot be regarded as an effective and appropriate way to put the company into the legal and financial position in which it would have been if the invalid provisions of the Commission Monitoring Regulation had not existed and the company had not surrendered excessive allowances on the basis of them. According to Metsä Fibre Oy, the surrender of allowances to the Union Registry must be reversed so that the company receives the erroneously surrendered allowances back into the account of the Äänekoski installation and can use them as it sees fit.

(8) In its observations submitted to the hallinto-oikeus (Administrative Court), the Energy Agency argued that it had been unable to decide the matter in any other way within the rules relating to the Union Registry. The observations stated that the quantities of emissions from Metsä Fibre Oy's Äänekoski installation had decreased considerably since 2018. The Energy Agency argued that, in practice, the possibility of using the positive compliance status of the compliance account entirely for the installation's future emissions therefore remained theoretical. According to the observations, at the current annual rate of emissions – less than 20 tonnes of CO_2 a year – it would take an estimated six to seven thousand years to use up the positive compliance status of the compliance account amounting to 115 312 allowances.

Provisions of national law

(9) Under Paragraph 46(1) of the Päästökauppalaki (Law on emissions trading) [8.4.2011/311], the emissions trading authority acts as the registry office responsible for the national functions of the registry referred to in Article 19 of the Emission Trading Directive, to ensure that exact accounts are kept of the annual recording, holding, transfer and cancellation of emissions allowances. In accordance with subparagraph (3) of the same Paragraph, the Commission

Registry Regulation is followed in matters relating to the establishment, management and functions of the registry.

(10) Under Paragraph 48 of the Law on emissions trading, the entry in the registry of the annual recording of allowances, the holding, transfer and cancellation of allowances and project units, the right of public access to the information contained in the registry, and the confidentiality of the information are governed by the Commission's Registry Regulation.

Relevant EU legislation and case-law

(11) The *Schaefer Kalk* judgment of the Court of Justice, as regards the parts relevant to the present dispute, was referenced in paragraph (3) above.

(12) Under Article 70(1) of the Commission Monitoring Regulation, the competent authority shall make a conservative estimate of the emissions of an installation or aircraft operator in any of the following situations:

(b) the verified annual emission report referred to in Article 67(1) is not in compliance with this Regulation.

(13) Under recital (8) of the Commission Registry Regulation, as allowances and Kyoto units exist only in dematerialised form and are fungible, the title to an allowance or Kyoto unit should be established by their existence in the account of the Union Registry in which they are held. Moreover, to reduce the risks associated with the reversal of transactions entered in a registry, and the consequent disruption to the system and to the market that such reversal may cause, it is necessary to ensure that allowances and Kyoto units are fully fungible. In particular, transactions cannot be reversed, revoked or unwound, other than as defined by the rules of the registry, after a moment set out by those rules. Nothing in this Regulation should prevent an account holder or a third party from exercising any right or claim resulting from the underlying transaction that they may have in law to recovery or restitution in respect of a transaction that has entered a system, such as in case of fraud or technical error, as long as this does not lead to the reversal, revocation or unwinding of the transaction. Furthermore, the acquisition of an allowance or Kyoto unit in good faith should be protected.

(14) Under Article 35(6) of the Commission Registry Regulation, the competent authority may instruct the national administrator to correct the annual verified emissions for an installation to ensure compliance with Articles 14 and 15 of Directive 2003/87/EC, by entering the corrected verified or estimated emissions for that installation for a given year in the Union Registry.

(15) Under Article 40(1) of the Commission Registry Regulation, an allowance or Kyoto unit shall be a fungible, dematerialised instrument that is tradable on the market. Under paragraph 2, the dematerialized nature of allowances and Kyoto units shall imply that the record of the Union Registry shall constitute prima facie and sufficient evidence of title over an allowance or Kyoto unit, and of any other

matter which is by this Regulation directed or authorised to be recorded in the Union Registry. Under paragraph 3, the fungibility of allowances and Kyoto units shall imply that any recovery or restitution obligations that may arise under national law in respect of an allowance or Kyoto unit shall only apply to the allowance or Kyoto unit in kind. Subject to Article 70 and the reconciliation process provided for in Article 103, a transaction shall become final and irrevocable upon its finalisation pursuant to Article 104. Without prejudice to any provision of or remedy under national law that may result in a requirement or order to execute a new transaction in the Union Registry, no law, regulation, rule or practice on the setting aside of contracts or transactions shall lead to the unwinding in the registry of a transaction that has become final and irrevocable under this Regulation. An account holder or a third party shall not be prevented from exercising any right or claim resulting from the underlying transaction that they may have in law, including to recovery, restitution or damages, in respect of a transaction that has become final in the Union Registry, for instance in case of fraud or technical error, as long as this does not lead to the reversal, revocation or unwinding of the transaction in the Union Registry.

(16) Under Article 70(1) of the Commission Registry Regulation, if an account holder or a national administrator acting on behalf of the account holder unintentionally or erroneously initiated one of the transactions referred to in paragraph 2, the account holder may propose to the administrator of its account to carry out a reversal of the completed transaction in a written request. The request shall be posted within five working days of the finalisation of the process. The request shall contain a statement indicating that the transaction was initiated erroneously or unintentionally.

Under paragraph 2(a), account holders may propose the reversal of, inter alia, the surrender of allowances. Under paragraph 3, if the administrator of the account establishes that the request fulfils the conditions under paragraph 1 and agrees with the request, it may propose the reversal of the transaction in the Union Registry. Under paragraph 6(a), the central administrator shall ensure that the Union Registry accepts the proposal for reversal made pursuant to paragraph 1, provided that a transaction surrendering allowances to be reversed was not completed more than 30 working days prior to the account administrator's proposal in accordance with paragraph 3.

(17) Under Article 33(1) of Commission Delegated Regulation (EU) 2019/1122 of 12 March 2019 supplementing Directive 2003/87/EC of the European Parliament and of the Council as regards the functioning of the Union Registry, which is relevant to the trading period 2021-2030, the central administrator shall ensure that on 1 May of each year, the Union Registry indicates the compliance status figure for the preceding year for every installation and aircraft operator with an operator or aircraft operator holding account that is not in a closed status by calculating the sum of all allowances surrendered for the current period less the sum of all verified emissions in the current period up to and including the preceding year, plus a correction factor. Under paragraph 2 of the same Article,

for the trading periods 2008-2012 and 2013-2020, the correction factor referred to in paragraph 1 shall be zero if the compliance status figure of the last year of the previous period was greater than zero, but shall remain the same as the compliance status figure of the last year of the previous period if this figure is less than or equal to zero. For the trading periods starting on 1 January 2021, the correction factor referred to in paragraph 1 shall be the same as the compliance status figure of the last year of the previous period.

(18) Under Article 17(1) of the Charter of Fundamental Rights of the European Union, everyone has the right to own, use, dispose of and bequeath his or her lawfully acquired possessions. No one may be deprived of his or her possessions, except in the public interest and in the cases and under the conditions provided for by law, subject to fair compensation being paid in good time for their loss. The use of property may be regulated by law in so far as is necessary for the general interest.

The need to obtain a preliminary ruling

(19) The views of Metsä Fibre Oy and the Energy Agency do not differ on the reasons for correcting the emissions quantities or on the corrected emissions quantities. In the present dispute, therefore, the only question to be examined before the hallinto-oikeus (Administrative Court) as a result of the action brought by Metsä Fibre Oy is whether the Energy Agency decision as to the manner of offsetting the emissions allowances surrendered in excess to the Union Registry is lawful, in particular when it is taken into account that the surrender of excessive allowances resulted from the application of provisions in the Commission Monitoring Regulation which were later found, in the *Schaefer Kalk* judgment, to be invalid.

(20) While dealing with the matter, the Energy Agency was in contact with the Commission, which was of the opinion that the conditions for reversing the surrender of allowances were not satisfied, because the timeframes specified in Article 70 of the Commission Registry Regulation had been exceeded.

(21) Both Metsä Fibre Oy and the Energy Agency proposed to the hallinto-oikeus (Administrative Court) that a request be made to the Court of Justice of the European Union for a preliminary ruling under Article 267 of the Treaty on the Functioning of the European Union.

(22) It is common ground in the dispute that the timeframes specified in Article 70 of the Commission Registry Regulation for the reversal of a transaction have passed, making the surrender of allowances to the Union Registry final and irrevocable on the basis of Article 40 of the regulation. The Energy Agency has therefore returned the allowances to the compliance account of Metsä Fibre Oy's Äänekoski installation in the form of a positive compliance status. The hallinto-oikeus (Administrative Court) is unaware of any other way provided for in the regulation or in another piece of EU legislation to take account of the situation

which has arisen for Metsä Fibre Oy from the *Schaefer Kalk* judgment. It is moreover common ground that, under the prevailing circumstances, Metsä Fibre Oy cannot in practice use the allowances granted by the Energy Agency decision, because it has considerably reduced the CO_2 emissions of the Äänekoski installation.

(23) The question of law at issue in the present dispute therefore hinges primarily on whether the Commission Registry Regulation is in certain respects invalid in the present circumstances as, even after the point when the Commission Monitoring Regulation was amended in light of the *Schaefer Kalk* judgment, it still does not take into account the situation currently at issue of Metsä Fibre Oy's Äänekoski installation and does not permit effective implementation of the judgment in relation to the company.

(24) The national courts have no jurisdiction themselves to declare that acts of Community institutions are invalid (judgment of 22 October 1987, *Foto-Frost*, C-314/85, EU:C:1987:452, paragraph 20). Where a court against whose decisions there is a judicial remedy under national law considers that one or more arguments for invalidity, put forward by the parties or, as the case may be, raised by it of its own motion, are well founded, it is incumbent upon it to stay proceedings and to make a reference to the Court for a preliminary ruling on the act's validity (judgment of 10 January 2006, *Air Transport*, C-344/04, EU:C:2006:10, paragraph 30).

(25) In the action brought by Metsä Fibre Oy before the hallinto-oikeus (Administrative Court), the Energy Agency decision is considered to infringe primary EU law, in particular because a situation where, in the circumstances described, the company in effect derives no benefit from the return of the allowances infringes the right to property guaranteed in Article 17 of the Charter of Fundamental Rights of the European Union, the principle of equality and the economic logic of emissions trading. The action contends that Articles 40 and 70 of the Commission Registry Regulation, in view of the aspects set out, are invalid in the present situation, Metsä Fibre Oy is in effect left without legal protection and the legal rule articulated by the *Schaefer Kalk* judgment is not implemented.

(26) The assessment presented at that stage by the hallinto-oikeus (Administrative Court) is that the aspects submitted by Metsä Fibre Oy referring to the invalidity of the rules are to be considered significant in that there is a reasonable assumption that those rules infringed primary legislation. In that situation, it is necessary to stay the proceedings before the court or tribunal against whose decision there is a judicial remedy under national law and to request, in preliminary ruling proceedings, that the Court of Justice assess the effectiveness of the rules.

(27) Metsä Fibre Oy and the Energy Agency were given the opportunity to submit their observations on the questions referred for a preliminary ruling.

Hallinto-oikeus (Administrative Court) interim order for reference to the Court of Justice of the European Union for a preliminary ruling

(28) The hallinto-oikeus (Administrative Court) has decided to stay the proceedings and to request a preliminary ruling from the Court of Justice under Article 267 of the Treaty on the Functioning of the European Union. A preliminary ruling is necessary for the resolution of the dispute pending before the hallinto-oikeus (Administrative Court).

Questions referred for a preliminary ruling

1 Are the provisions of Articles 70 and 40 of the Commission Registry Regulation regarding the timeframes for reversal of transactions and the final and irrevocable nature of transactions invalid when the right to property under Article 17 of the Charter of Fundamental Rights of the European Union and the other rights protected in the Charter of Fundamental Right are taken into account, in as much as the provisions at issue prevent the retransfer of the allowances to Metsä Fibre Oy in a situation where the surrender of excessive allowances to the Union Registry was based on the application of the provisions which were found in the *Schaefer Kalk* judgment to be invalid, and the company cannot use the positive compliance status of the compliance account because of the current low level of emissions from the Äänekoski installation?

2 If Question 1 is answered in the negative, are the provisions of Articles 70 and 40 of the Commission Registry Regulation at all applicable in a situation where the surrender of excessive allowances to the Union Registry was based on application of the provisions which were found in the *Schaefer Kalk* judgment to be invalid and not on a transaction unintentionally or erroneously initiated by an account holder or a national administrator acting on behalf of the account holder?

3 If Question 1 is answered in the negative and Question 2 is answered in the affirmative, is there any other way made possible by EU law to put Metsä Fibre Oy in the position, with respect to use of the allowances, in which it would have been if the provisions which were found in the *Schaefer Kalk* judgment to be invalid had not existed and the company had not surrendered excessive allowances on the basis of them?

(29) Once it has received a preliminary ruling from the Court of Justice on the questions set out above, the hallinto-oikeus (Administrative Court) will give a final decision in the case.

Appeal

Under Paragraph 108 of the Oikeudenkäynnistä hallintoasioissa annettu laki (Rules of procedure of the administrative courts), that order is not open to separate appeal.

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