

## JUDGMENT OF THE COURT (Second Chamber)

26 February 2015 (\*)

(Reference for a preliminary ruling — Protection of the ozone layer — Scheme for greenhouse gas emission allowance trading within the European Union — Method of allocating allowances — Allocation of allowances free of charge — Application of gift tax to such an allocation)

In Case C-43/14,

REQUEST for a preliminary ruling under Article 267 TFEU from the Nejvyšší správní soud (Supreme Administrative Court of the Czech Republic), made by decision of 18 December 2013, received at the Court on 27 January 2014, in the proceedings

**ŠKO-Energo s. r. o.**

v

**Odvolací finanční ředitelství,**

THE COURT (Second Chamber),

composed of R. Silva de Lapuerta, President of the Chamber, K. Lenaerts, Vice-President of the Court, acting as a Judge of the Second Chamber, J.-C. Bonichot (Rapporteur), A. Arabadjiev and J.L. da Cruz Vilaça, Judges,

Advocate General: J. Kokott,

Registrar: M. Aleksejev, Administrator,

having regard to the written procedure and further to the hearing on 19 November 2014,

after considering the observations submitted on behalf of:

- ŠKO-Energo s.r.o., by T. Zatloukal, adviser,
- Odvolací finanční ředitelství, by D. Jeroušek and E. Nedorostková, acting as Agents,
- the Czech Government, by M. Smolek and J. Vláčil, acting as Agents,
- the European Commission, by E. Kružíková, P. Němečková and K. Mifsud-Bonnici, acting as Agents,

after hearing the Opinion of the Advocate General at the sitting on 11 December 2014,

gives the following

### Judgment

- 1 This request for a preliminary ruling concerns the interpretation of Article 10 of 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 (OJ 2003 L 275, p. 32).

- 2 The request has been made in proceedings between ŠKO-Energo s. r. o. ('ŠKO-Energo') and Odvolací finanční ředitelství (Tax Appeal Board), concerning the payment of a tax on the allocation of greenhouse gas emission allowances for the years 2011 and 2012.

### Legal context

#### *EU law*

- 3 According to recital 5 of Directive 2003/87, the directive aims to contribute to fulfilling the commitments of the European Community and its Member States to reduce anthropogenic greenhouse gas emissions effectively, in accordance with Council Decision 2002/358/EC of 25 April 2002 concerning the approval, on behalf of the European Community, of the Kyoto Protocol to the United Nations Framework Convention on Climate Change and the joint fulfilment of commitments thereunder (OJ 2002 L 130, p. 1), through an efficient European market in greenhouse gas emission allowances, with the least possible diminution of economic development and employment.

- 4 Recital 7 of Directive 2003/87 states:

'Community provisions relating to allocation of allowances by the Member States are necessary to contribute to preserving the integrity of the internal market and to avoid distortions of competition.'

- 5 Article 1 of Directive 2003/87 ('Subject matter') provides:

'This Directive establishes a scheme for greenhouse gas emission allowance trading within the Community ... in order to promote reductions of greenhouse gas emissions in a cost-effective and economically efficient manner.'

- 6 Article 10 of Directive 2003/87 ('Method of allocation') provides:

'For the three-year period beginning 1 January 2005 Member States shall allocate at least 95% of the allowances free of charge. For the five-year period beginning 1 January 2008, Member States shall allocate at least 90% of the allowances free of charge.'

#### *Czech law*

- 7 Law No 357/1992 on inheritance tax, gift tax and tax on transfers of immovable property was amended by Law No 402/2010 ('Law No 357/1992'), which for the first time imposed gift tax upon the acquisition free of charge of emission allowances in 2011 and 2012.

- 8 Paragraph 6(8) of Law No 357/1992 provides:

'Gift tax shall be charged on the acquisition free of charge of greenhouse gas emission allowances in 2011 and 2012 for the production of electricity in an installation which on or after 1 January 2005 produced electricity for sale to third parties and in which no activity to which greenhouse gas emission allowance trading relates is carried out other than the combustion of fuels ... by an electricity producer.'

- 9 Paragraph 7a of that law, entitled 'Basis of assessment of allowances acquired free of charge', provides:

'(1) In the case of allowances acquired free of charge, the basis of assessment to gift tax shall be the average market value of the greenhouse gas emission allowance on 28 February of the relevant calendar year multiplied by the number of allowances acquired free of charge for the production of electricity for the relevant calendar year.

(2) The average market value of a greenhouse gas emission allowance on 28 February of the relevant calendar year shall be ascertained by the Ministry of the Environment by a method enabling distance access.'

- 10 Paragraph 14a of that law, entitled ‘Rate of gift tax in the case of allowances acquired free of charge’, provides:

‘The rate of gift tax in the case of allowances acquired free of charge shall be 32%.’

- 11 Paragraph 20(1) and (15) of Law No 357/1992 reads as follows:

‘(1) The following shall be free from inheritance tax and gift tax: the acquisition of property free of charge

- (a) by the Czech Republic or another Member State of the European Union, Norway or Iceland (‘another European State’), as well as the transfer of property free of charge by the Czech Republic, with the exception of allowances acquired free of charge, and the acquisition of property from another European State ...

...

(15) The following shall be free from gift tax: the acquisition of a number of allowances acquired free of charge which corresponds to the proportion of the quantity of electricity produced from cogeneration of electricity and heat to the total quantity of electricity produced in 2005 and 2006.’

### **The dispute in the main proceedings and the question referred for a preliminary ruling**

- 12 ŠKO-Energo acquired free of charge, for 2011 and 2012, greenhouse gas emission allowances for the production of electricity for which the Finanční ředitelství (Tax Office) is claiming CZK 20 473 152 in gift tax.
- 13 ŠKO-Energo lodged an objection to the assessment with the Finančního úřad but it was unsuccessful. It then brought the matter before the Krajský soud v Praze (Prague Regional Court) claiming that this tax infringed Article 10 of Directive 2003/87.
- 14 The Krajský soud granted its application.
- 15 Hearing an appeal, the Nejvyšší správní soud expressed doubts as to whether this tax was compatible with EU law, particularly Article 10 of Directive 2003/87, which provides that at least 90% of emission allowances are to be allocated free of charge during the period 2008-2012.
- 16 In those circumstances, the Nejvyšší správní soud decided to stay proceedings and refer the following question to the Court for a preliminary ruling:

‘Must Article 10 of [Directive 2003/87] be interpreted as preventing the application of provisions of national law which make the allocation free of charge of emission allowances in the relevant period subject to gift tax?’

### **The question referred for a preliminary ruling**

- 17 By its question, the referring court asks, in essence, whether Article 10 of Directive 2003/87 must be interpreted as precluding the imposition of gift tax such as that at issue in the main proceedings since that article requires Member States to allocate at least 90% of greenhouse gas emission allowances free of charge for the period 2008-2012.
- 18 As is apparent from its wording — according to which, during the period at issue, Member States are to allocate at least 90% of the emission allowances free of charge — Article 10 of Directive 2003/87 precludes charges imposed in respect of the allocation of allowances themselves (judgment in *Iberdrola and Others*, C-566/11, C-567/11, C-580/11, C-591/11, C-620/11 and C-640/11, EU:C:2013:660, paragraph 27).

- 19 However, the Court stated that neither Article 10 of Directive 2003/87 nor any other provision of the directive concerns the use of those emission allowances or expressly restricts the right of Member States to adopt measures which may affect the economic implications of using such allowances (judgment in *Iberdrola and Others*, EU:C:2013:660, paragraph 28).
- 20 Consequently, Member States are free, as a rule, to adopt economic policy measures, such as price controls on the markets for certain essential goods or resources, determining the manner in which the value of the emission allowances allocated free of charge to producers is to be passed on to consumers (judgment in *Iberdrola and Others*, EU:C:2013:660, paragraph 29).
- 21 Nevertheless, the adoption of such measures must not neutralise the principle that emission allowances are allocated free of charge; nor may it undermine the objectives pursued by Directive 2003/87 (judgment in *Iberdrola and Others*, EU:C:2013:660, paragraph 30).
- 22 In this regard, the allocation 'free of charge' under Article 10 of Directive 2003/87 precludes not only the direct fixing of a price for the allocation of emission allowances but also the subsequent levying of a charge in respect of their allocation (judgment in *Iberdrola and Others*, EU:C:2013:660, paragraph 31).
- 23 In the present case, it is apparent from the documents before the Court that the gift tax at issue in the main proceedings is levied at a rate of 32% on greenhouse gas emission allowances acquired free of charge for electricity production obtained by the combustion of fuels, with the exception of cogeneration.
- 24 Thus a measure such as that at issue in the main proceedings, which applies only to the allocation of emission allowances and not to their use, and in a specific sector, and during a limited period corresponding in part to that during which the EU legislature has temporarily established the principle that allowances should be allocated almost entirely free of charge, constitutes a charge in respect of the allocation free of charge of greenhouse gas emission allowances which is incompatible with the requirement laid down by Directive 2003/87 that allowances should be allocated free of charge.
- 25 Furthermore, such a measure, which, as indicated in the decision to refer, was intended to obtain additional revenue for operators of photovoltaic power stations, pursues objectives different from those of Directive 2003/87. Consequently, it cannot be regarded as a more stringent protective measure for the purposes of Article 193 TFEU (see, by analogy, the judgments in *Deponiezweckverband Eiterköpfe*, C-6/03, EU:C:2005:222, paragraphs 49 and 52, and *Azienda Agro-Zootecnica Franchini and Eolica di Altamura*, C-2/10, EU:C:2011:502, paragraph 50).
- 26 However, the Czech Government has argued that Article 10 of Directive 2003/87 does not preclude a gift tax such as that at issue in the main proceedings, since this tax, in practice, is levied on less than 10% of the total value of the greenhouse gas emission allowances allocated by that Member State.
- 27 In this context, it should, however, be noted that the second sentence of that article lays down, for the period concerned, the principle that at least 90% of the allowances should be allocated free of charge, and does not refer to their value.
- 28 It should also be observed that the interpretation advocated by the Czech Government would be contrary to the objective of Article 10 of Directive 2003/87 of temporarily reducing the economic impact of the introduction by the European Union of a greenhouse gas emission allowances market by preventing a loss of competitiveness in certain production sectors covered by that directive (judgment in *Iberdrola and Others*, EU:C:2013:660, paragraph 39). With a view to compliance with the principle of equality, such an objective implies that the limitation to 10% of the number of allowances which may be allocated for consideration should be assessed from the point of view of operators in each of the sectors concerned and not in relation to all the allowances allocated by the Member State.
- 29 It is for the referring court to determine, in the light of those considerations, whether the gift tax at issue in the main proceedings may be regarded as complying with the ceiling of 10% applicable to the allocation of emission allowances for consideration laid down in Article 10 of Directive 2003/87.
- 30 Accordingly, the answer to the question referred is that Article 10 of Directive 2003/87 must be

interpreted as precluding the imposition of a gift tax such as that at issue in the main proceedings if it does not respect the 10% ceiling on the allocation of emission allowances for consideration laid down in that article, which is a matter for the referring court to determine.

### **Costs**

- 31 Since these proceedings are, for the parties to the main proceedings, a step in the action pending before the national court, the decision on costs is a matter for that court. Costs incurred in submitting observations to the Court, other than the costs of those parties, are not recoverable.

On those grounds, the Court (Second Chamber) hereby rules:

**Article 10 of 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 must be interpreted as precluding the imposition of a gift tax such as that at issue in the main proceedings if it does not respect the 10% ceiling on the allocation of emission allowances for consideration laid down in that article, which is a matter for the referring court to determine.**

[Signatures]

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\* Language of the case: Czech.