Request for a preliminary ruling from the Verwaltungsgericht Berlin (Germany) lodged on 6 December 2017 — ExxonMobil Production Deutschland GmbH v Bundesrepublik Deutschland

(Case C-682/17)

(2018/C 112/15)

Language of the case: German

Referring court

Verwaltungsgericht Berlin

Parties to the main proceedings

Applicant: ExxonMobil Production Deutschland GmbH

Defendant: Bundesrepublik Deutschland

Questions referred

1. Is an installation which produces a product the production of which is not one of the activities referred to in Annex I to Directive 2003/87/EC ([1]) (such as, in this case, the production of sulphur) and which, at the same time, carries on the activity of 'combustion of fuels in installations with a total rated thermal input exceeding 20 MW' that is subject to the emission trading scheme pursuant to Annex I to Directive 2003/87/EC, an electricity generator within the meaning of Article 3(u) of Directive 2003/87/EU, in the case where a secondary facility within the same installation also produces electricity for that installation and a (small) proportion of that electricity is released for consideration to the public electricity network?

2. If the first question is answered in the affirmative:

   If an installation as described in Question 1 is an electricity generator within the meaning of Article 3(u) of Directive 2003/87/EC, is that installation eligible for an allocation for heat under Commission Decision 2011/278/EU ([2]) even in the case where the heat satisfies the conditions laid down in Article 3(c) of Decision 2011/278/EU but does not fall within any of the categories referred to in Article 10a(1), third subparagraph, (3) and (4) of Directive 2003/87/EC — heat from the combustion of waste gases for the production of electricity, district heating and high-efficiency cogeneration?

3. If, on the basis of the answers to the first two questions, the heat produced in the installation at issue is eligible for an allocation:

   Does the CO_2 released into the atmosphere as part of the conditioning of natural gas (in the form of sour gas) in the 'Claus process', whereby the CO_2 inherent in natural gas is separated from the gas mixture, constitute an emission which, for the purposes of the first sentence of Article 3(h) of Commission Decision 2011/278/EU, occurs as a result of the process referred to in Article 3(h)(v)?

   a) For the purposes of the first sentence of Article 3(h) of Commission Decision 2011/278/EU, can CO_2 emissions occur 'as a result of' a process in which the CO_2 inherent in the raw material is physically separated from the gas mixture and released into the atmosphere, even though that process as such does not give rise to additional carbon dioxide, or does that provision make it mandatory for the CO_2 released into the atmosphere to occur for the first time as a result of that process?

   b) Is a carbon-containing raw material 'used' within the meaning of Article 3(h)(v) of Commission Decision 2011/278/EU where, in the 'Claus process', the naturally-occurring gas is used to produce sulphur and, in the course of that procedure, the carbon dioxide inherent in the natural gas is released into the atmosphere, even though the carbon dioxide inherent in the natural gas is not part of the chemical reaction taking place in that process, or does the term 'use' make it mandatory for the carbon to be part of, or indeed essential to, the chemical reaction taking place?

4. If Question 3 is answered in the affirmative, on the basis of which benchmark is the allocation of free emissions allowances to be carried out in the case where an installation subject to the emission trading scheme satisfies both the defining conditions of a heat benchmark sub-installation and the defining conditions of a process emissions sub-installation? Does entitlement to an allocation on the basis of the heat benchmark take priority over entitlement to an allocation for process emissions or does entitlement to an allocation for process emissions take precedence over the heat benchmark and the fuel benchmark because the latter allocation is more specific to the case in question?

(1) 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) 2011/278/EU: Commission Decision of 27 April 2011 determining transitional Union-wide rules for harmonised free allocation of emission allowances pursuant to Article 10a of Directive 2003/87/EC of the European Parliament and of the Council (OJ 2011 L 130, p. 1).

Request for a preliminary ruling from the Fővárosi Törvényszék (Hungary) lodged on 8 December 2017 — Bayer Pharma AG v Richter Gedeon Vegyészeti Gyár Nyrt., Exeltis Magyarország Gyógyszerkereskedelmi Kft.

(Case C-688/17)

(2018/C 112/16)

Language of the case: Hungarian

Referring court

Fővárosi Törvényszék

Parties to the main proceedings

Applicant: Bayer Pharma AG

Defendants: Richter Gedeon Vegyészeti Gyár Nyrt., Exeltis Magyarország Gyógyszerkereskedelmi Kft.

Questions referred

1. Should the expression 'provide … appropriate compensation' referred to in Article 9(7) of Directive 2004/48/EC of the European Parliament and of the Council of 29 April 2004 on the enforcement of intellectual property rights (1), be interpreted to mean that Member States must establish the substantive rules of law on the liability of parties and the amount and method of compensation, by virtue of which the courts of the Member States can order applicants to compensate defendants for losses caused by measures which the court subsequently revoked or which subsequently lapsed due to an act or omission by the applicant, or in cases in which the court has subsequently found that there was no infringement or threat of infringement of an intellectual property right?

2. If the answer to the first question referred for a preliminary ruling is in the affirmative, does Article 9(7) of that Directive preclude opposition to the legislation of a Member State by virtue of which the rules to be applied to the compensation referred to in that provision of the Directive are the general rules of that Member State on civil liability and compensation according to which the court cannot oblige the applicant to provide compensation for losses caused by a provisional measure which was subsequently held to be unfounded due to the invalidity of the patent, and which were incurred as a result of the defendant's failure to act as would generally be expected in the circumstances in question, or losses for which the defendant is responsible for that same reason, provided that, when requesting the provisional measure, the applicant acted as would generally be expected in those circumstances?

(1) OJ L 157, 2004 p. 45.