Case C-617/19

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:

14 August 2019

Referring court:

Tribunale Amministrativo Regionale per il Lazio (Italy)

Date of the decision to refer:

13 March 2019

Applicant:

Granarolo S.p.A.

Defendants:

Ministero dell'Ambiente e della Tutela del Territorio e del Mare and Others

Intervening party:

E.On Connecting Energies S.r.l.

Subject matter of the main proceedings

Action brought by Granarolo S.p.A. before the Tribunale amministrativo regionale del Lazio (Regional Administrative Court, Lazio, Italy) seeking annulment, following suspension, of Decision No 0007368 of 6 June 2018 of the Comitato nazionale per la gestione della direttiva 2003/87/CE e per il supporto delle attività di progetto del Protocollo di Kyoto (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'), which rejected (i) the request to update the monitoring plan in relation to greenhouse gas emissions permit No 1703, issued to Granarolo S.p.A. for its facility at Pasturago di Vernate ('ETS permit No 1703') and (ii) the related request to re-determine the permitted emissions.

Subject matter and legal basis of the request

The interpretation of Article 3(e) of Directive 2003/87/EC as amended by Directive 2009/29/EC and in particular the concepts 'installation' and 'technical connection' contained within that provision, as well as the interpretation of the rule of aggregation of sources provided for in Annex I to that directive.

Article 267 of the Treaty on the Functioning of the European Union (TFEU).

Questions referred for a preliminary ruling

1. Must Article 3(e) 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, as amended by Directive 2009/29/EC of the European Parliament and of the Council of 23 April 2009, be interpreted as including within the concept of 'installation' a situation such as that at issue, in which a co-generator built by the applicant on its industrial site to supply energy for its production facility was subsequently transferred, by a transfer of part of the business, to another company, a specialist in the energy sector, by a contract which provided, on the one hand, for (i) the installation co-generating electricity and heat to be transferred to the transferee as well as the certificates, documents, declarations of conformity, licences, concessions, authorisations and permits required for the operation of that installation and for the carrying out of activities, and for (ii) a surface right to be created in the transferee's favour over an area of the site adequate and functional for the management and maintenance of the installation, in addition to rights of easement over the construction used for co-generation and an exclusive right over the surrounding area, and, on the other hand, for the transferee to supply the transferor for 12 years with energy produced by the installation, at prices set out in the contract?

2. In particular, may a connection between a co-generator and a production facility, such that that production facility, which belongs to another party and which despite having a privileged relationship with the co-generator for the purposes of supplying energy (connected by means of: an electricity distribution system; a specific supply contract with the energy company that is the transferee of the installation; a commitment for that transferee to supply a minimum amount of energy to the production facility or reimburse a sum equal to the difference between the cost of supplying energy on the market and the prices set out in the contract; a discount on the sale prices of the energy as from 10 years and 6 months after the start-date of the contract; an option for the transferor to repurchase the co-generator from the transferee at any time; and a requirement for authorisation to be given by the transferor in order for works to be carried out on the co-generator installation), is able to continue its own activity even in the event that the supply of energy is interrupted or the co-generator malfunctions or ceases its

activity, be included within the concept of 'technical connection' referred to in Article 3(e) of Directive 2003/87/EC?

3. Lastly, in the event of an actual transfer of an energy-production installation by the party who constructed it — which is also the owner of an industrial plant on the same site — to a different company which is a specialist in the field of energy, for reasons of efficiency, does the possibility of delinking the relevant emissions from the holder of the industrial plant's ETS permit, following the transfer, and the possible effect that those emissions will 'evade' the ETS system due to the fact that the energy-production installation, considered alone, does not exceed the threshold for qualification as a 'small emitter'[,] represent an infringement of the rule of aggregation of sources provided for in Annex I to Directive 2003/87/EC, or, on the contrary, is it merely a lawful consequence of the organisational choices of the operators, not prohibited by the ETS system?

Provisions of EU law relied on

Directive 2003/87/EC as amended by Directive 2009/29/EC and by Directive 2018/410/EU. In particular: Article 3(1)(e), concerning the definition of 'installation', and (f); Article 4 relating to the obligation to obtain a permit in order to carry out any activity listed in Annex I to Directive 2003/87/EC; Article 6; and Article 7 on the updating of the monitoring plan in the event of any changes to installations.

The European Commission's 'Guidance on Interpretation of Annex I of the EU ETS Directive (excl. aviation activities)' of 18 March 2010.

Guidance document No 6 'Cross-boundary Heat Flows' of 14 April 2011.

Provisions of national law relied on

Legislative Decree No 30/2013 implementing Directive 2003/87/EC. In particular, Article 3(1)(t), concerning the concept of 'operator', and (v), which defines 'installation' as 'a stationary technical unit where one or more activities listed in Annex I are carried out and any other directly associated activities which have a technical connection with the activities carried out on the same site and which could have an effect on emissions and pollution'; Article 13, according to which 'no installation may undertake any activity listed in Annex I resulting in emissions of greenhouse gases specified in the same annex in relation to that activity unless its operator holds a permit … issued by the Committee under Article 15'; Article 15; Article 16, which requires the monitoring plan to be updated where there are changes to the identity of the operator or the nature and functioning of the installation; Article 38 concerning the 'small emitters' scheme for the purposes of the monitoring and control of CO_2 emissions; Annex I, under which the activity of 'combustion of fuels in installations with a total rated thermal input

exceeding 20 MW' is included among the activities subject to a permit and to greenhouse gas emission monitoring measures.

Decision No 16/2013 of the ETS Committee laying down the 'Rules governing small installations excluded from the greenhouse gas emission allowance trading scheme of the Community in accordance with Article 38 of Legislative Decree No 30/2013', in particular Articles 4 and 5.

Succinct presentation of the facts and procedure

1 Directive 2003/87/EC forms the basis of the EU emissions trading system ('the ETS'), which seeks to combat climate change and reduce greenhouse gas emissions in an economically efficient manner. The ETS applies, inter alia, to carbon dioxide (CO_2) deriving from the production of electricity and heat as well as from energy-intensive industrial sectors, although Member States have the option of excluding from the ETS small installations (so-called 'small emitters') which emit less than 25 000 of CO_2 equivalent per year.

2 In Italy, Directive 2003/87/EC was implemented by means of decreto legislativo n. 216/2006 (Legislative Decree No 216/2006) and subsequently by decreto legislativo n. 30/2013 (Legislative Decree No 30/2013). The competent Italian authority for implementing the ETS is the ETS Committee, an inter-ministerial body chaired by the Ministero dell'Ambiente (Ministry of Environment).

3 By Decision No 16/2013, the ETS Committee set up a National Scheme for Small Emitters, which provides simpler rules for small emitters compared with the normal ETS. Those rules include: the obligation to report emissions before 30 April of the year following the reference year; the obligation to pay the State, or refund, European Union Allowances (EUA) in the event that the permitted emissions are exceeded; the obligation to report extensions of the installation in order to redefine the permitted emissions; and, lastly, the obligation to notify suspension of activity in the event such suspension is expected to last for more than 10 consecutive months.

4 Granarolo S.p.A. is a company operating in the fresh milk food sector and it produces and distributes milk and dairy products. It has production facilities across Italy.

5 In Pasturago di Vernate, Granarolo S.p.A. has a production facility with a thermal power facility producing the heat necessary for its processing operations. Since, pursuant to Annex I to Legislative Decree No 30/2013, the activity of combustion of fuels in installations with a total rated thermal input exceeding 20 MW is subject to a requirement to have an ETS permit and to greenhouse gas emission monitoring measures, Granarolo S.p.A. was issued ETS permit No 1703 for that facility. In addition, the 'small emitters' scheme applies to that facility for the purposes of the monitoring and control of CO_2 emissions in accordance with Article 38 of Legislative Decree No 30/2013.

6 In 2013, Granarolo S.p.A. also established at the same facility an installation co-generating electricity and heat, intended for food production. The company therefore obtained from the ETS Committee an update of the abovementioned ETS permit No 1703. That installation was transferred, on 27 July 2017, from Granarolo S.p.A. to E.On Connecting Energies Italia S.r.L. ('E.On'), a company specialised in energy, on the basis of a contract for the transfer of part of a business. To that end, Granarolo S.p.A. transferred to E.On the permits for the operation of that installation.

7 Given that that installation was no longer under its management or control, Granarolo S.p.A. therefore asked the ETS Committee to amend ETS permit No 1703 and to re-determine the permitted emissions, removing the co-generator from that permit as a source of CO_2 emissions as regards Granarolo S.p.A. However, by Decision No 0007368 of 6 June 2018 ('the rejection decision'), the ETS Committee rejected that request stating that, despite the transfer of the co-generator, there remained a functional interconnection between the co-generator and Granarolo S.p.A.'s Pasturago di Vernate production facility that precluded the removal of the co-generator from ETS permit No 1703.

8 Granarolo S.p.A. brought an action for annulment of that rejection decision before the Tribunale Amministrativo Regionale per il Lazio (Regional Administrative Court, Lazio). First of all, the applicant alleged infringement of Article 3(e) and (f), Article 6 and Article 7 of Directive 2003/87/EC, Article 3(1)(t) and (v), Article 15 and Article 16 of Legislative Decree No 30/2013 and Articles 4 and 5 of Decision No 16/2013 of the ETS Committee. Granarolo S.p.A. also alleged infringement of Article 3(e) and (f) and Article 6 of Directive 2003/87/EC, infringement of Annex I to, and Article 3(1)(v) of, Legislative Decree No 30/2013 and infringement of the European Commission guidance adopted on 18 March 2010 and 14 April 2011.

The essential arguments of the parties in the main proceedings

9 According to the applicant, the rejection decision infringes, first, the fundamental principles and provisions of national law and EU law regarding ETS permits in so far as it states that, despite the transfer of the co-generator, the contract for provision of energy services between Granarolo S.p.A. and E.On is sufficient in itself for Granarolo S.p.A. to retain a power of management and control over the emissions from the co-generator. The applicant submits that, on the basis of Articles 6 and 3 of Directive 2003/87/EC and Articles 3 and 15 of Legislative Decree No 30/2013, the legal position which justifies the issuing (and maintenance) of an ETS permit for a particular installation is the applicant's classification as an 'operator', according to the definition set out in Article 3(1)(t) of the abovementioned legislative decree, as well as its actual powers of administration and control over that installation. The ETS permit cannot, therefore, cover installations over which the economic operator does not have economic and administrative powers.

10 As a result, according to Granarolo S.p.A. — supported in that regard by E.On appearing before the court as 'interested party' — the interpretation provided by the ETS Committee does not correspond to the actual relationship between Granarolo S.p.A. and E.On. In fact, the latter, through the operation of the co-generator it purchased, is able not only to provide energy to Granarolo S.p.A., but also independently to produce energy and feed electricity into the grid, from which it obtains the related revenue. Therefore, even if Granarolo S.p.A. takes a smaller amount of energy from the co-generator, that fact does not affect the quantity of that co-generator's emissions, with E.On being able to feed the grid with all the energy it produces.

11 Secondly, the applicant submits that the rejection decision fails to observe the principles of integration and coordination of environmental protection procedures, leading to an unreasonable duplication of the focus of liability for environmental protection standards in respect of a single installation, and is at variance with the provisions of national and EU law. In particular, it infringes Article 7 of Directive 2003/87/EC and Article 16 of Legislative Decree No 30/2013 which, by linking the issuance of an ETS permit to the applicant operator having management powers over the installation, require the monitoring plan to be updated in the event of a change in the identity of the installation's operator or in the nature or functioning of the installation.

12 Thirdly, Granarolo S.p.A. argues that the ETS Committee mistakenly characterised as a single installation the whole production site of Pasturago di Vernate, which includes the applicant's industrial site and the co-generator transferred to E.On, and erred in finding that there was a functional interconnection between them. According to the applicant, a functional interconnection requires that neither of the two installations can function without the other, while, in the present case, the ETS Committee wrongly identified as a 'functional interconnection' a mere technical connection between the two installations which, in reality, are functionally independent and have an instrumental and technical connection only for the purposes of providing energy services under the contract.

13 Fourthly, the interpretation on which the rejection decision is based constitutes a misapplication of the rule on the aggregation of sources of emissions which, as clarified in the European Commission's Guidance of 18 March 2010 and 14 April 2011, requires installations of equal capacity to be treated the same even if one carries out its activity by means of many small production units and the other by contrast by means of one single large unit. According to Granarolo S.p.A., such a rule implies, in fact, the existence of more than one technical unit inside a single installation and not the presence of separate installations, as is the situation, by contrast, in the case in question following the transfer of the co-generator to E.On.

14 Before the court, the defendant, the Ministry of Environment, contends that Granarolo S.p.A.'s action should be dismissed. First of all, with reference to the concept of 'installation', the defendant states that the rejection decision merely

applies Article 13 of Legislative Decree No 30/2013. In its view, the perimeter of the installation which was relevant for the purposes of updating the ETS permit included the technical units intended for the activities set out in Annex I to Directive 2003/87/EC and the transfer of part of the business has not affected the configuration of that installation.

15 In that regard, the defendant states that the rejection decision is based on the theory that a co-generator, even when not situated within the production facility, must be considered to form part of a single installation when it is technically linked to the technical production unit and is capable of affecting the combined emissions, it being thus subject to the single-permit principle. According to the defendant, first, sectoral legislation has established an inseparable link between the ETS permit and the existence of an 'installation' and, secondly, the definition of 'installation' is logically a precondition as regards the definition of 'operator'. As such, for the purposes of the change to the ETS permit requested by the applicant, it is even irrelevant if the holder of the ETS permit is not the actual operator of a technical unit inside the production facility.

16 Next, according to the defendant, on the basis of the content of the contract between E.On and Granarolo S.p.A., the applicant retains decisive economic power over the technical operation of that co-generation installation. That contract provides (i) that Granarolo S.p.A.'s consent is required in order for building works to be carried out on the co-generator, (ii) that Granarolo S.p.A. is to be reimbursed in the event of a failure to provide the minimum amounts of energy set out within the contract, (iii) that Granarolo S.p.A. will get a discount on the cost of the energy as from ten and a half years after the start-date of the contract, and (iv) for a pre-emptive right for Granarolo S.p.A. to repurchase the co-generator.

17 According to the defendant, those clauses place the applicant in a clear 'position of strength' compared with E.On, whereas if this situation were interpreted as the original installation having been split into two smaller installations, namely Granarolo S.p.A.'s production facility on the one hand and the co-generator transferred to E.On on the other, the result would be that the rules on CO_2 emissions are evaded. Indeed, on the basis of such an interpretation the co-generator, which on its own has a capacity of less than 20 MW, would not require an ETS permit pursuant to Article 13 of Legislative Decree No 30/2013 and would not come within the scope of the ETS system. In addition, the quantity of emissions produced by Granarolo S.p.A.'s production facility subject to offsetting by means of emissions allowances would be reduced. As such, by evading the ETS system, the emissions produced by the co-generator would not count towards the emissions ceiling permitted at national level and would not be offset by means of the purchase of CO_2 allowances, since they would be treated as CO_2 emissions that are freely permitted.

18 The defendant maintains that the principle of aggregation of sources of emissions has been correctly applied in the present case, since that principle was established precisely in order to prevent an excessive subdivision of emissions sources

leading to the exclusion of the majority of small to medium-sized installations — that is to say those sources having emissions which, alone, do not have thermal capacity over 20 MW — from the scope of the ETS system.