

**Case C-514/23**

**Request for a preliminary ruling**

**Date lodged:**

8 August 2023

**Referring court:**

Consiglio di Stato (Italy)

**Date of the decision to refer:**

8 August 2023

**Appellant:**

Tiberis Holding Srl

**Respondents:**

Gestore dei servizi energetici (GSE) SpA

Ministero dello Sviluppo Economico

Ministero dell'ambiente e della sicurezza energetica

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**ITALIAN REPUBLIC**

**The Consiglio di Stato (Sezione Seconda)**

**(Council of State, Second Chamber, Italy)**

**sitting in its judicial capacity**

delivered the following

**ORDER**

in the appeal with general registration number 8263 of 2022, brought by Tiberis Holding s.r.l., [...];

**against**

GSE – Gestore dei servizi energetici s.p.a. [...];

the Ministero dello sviluppo economico (Ministry of Economic Development, Italy) [...] and the Ministero dell'ambiente e della sicurezza energetica (Ministry of Environment and Energy Security, Italy) [...];

**in relation to**

Conza Energia s.r.l. [...] [other party to the proceedings];

seeking the variation of

judgment No 8256/2022 [...] of the Tribunale amministrativo regionale per il Lazio (Sezione Terza Ter) (Regional Administrative Court, Lazio, Third Chamber) [...].

[...].

[...] [national procedure]

1. Tiberis Holding s.r.l. operates a hydroelectric power plant on the river Tiber, in the territory of the municipality of Fiano Romano (RM), with a power of 2.747 megawatts.

1.1 On 8 September 2017, the Gestore dei Servizi Energetici granted that company's request for access to the incentive mechanisms provided for by the Ministry of Economic Development, Italy, in the Decreto 23 giugno 2016 'Incentivazione dell'energia elettrica prodotta da fonti rinnovabili diverse dal fotovoltaico' (Decree of 23 June 2016 establishing 'Incentivisation of electricity produced from renewable sources other than photovoltaic') [...], as supplemented by the implementation procedures adopted by Gestore on 15 July 2016 pursuant to Article 26(1) of that ministerial decree.

1.2 On 5 October 2017, Tiberis Holding s.r.l. entered into a contract with Gestore for the recognition of incentive tariffs for electricity produced by renewable energy plants other than photovoltaic plants, which governed the conditions for payment of the incentives accruing to the party concerned.

1.3 By virtue of that incentive, the appellant received, over five years (from 2017 to 2021), a total amount of EUR 4 044 340.75 by way of contributions.

1.4 By invoice Nos 561085 and 561087 of 4 April 2022 and invoice No 63405 of 2 May 2022, Gestore requested Tiberis Holding s.r.l. to reimburse part of the contributions for a total amount of EUR 1 224 210.86.

2. [Tiberis Holding s.r.l.] brought an action against that request, as well as against the alleged negotiated and regulatory provisions, before the Regional Administrative Court, Lazio.

2.1 In support of the action, it [set out] two pleas in law: (a) infringement [...] of Article 3 of Directive 2009/28/EC and Article 4 of Directive (EU) 2018/2001,

with a request to make a reference to the Court of Justice of the European Union for a preliminary ruling [...]. [plea in law based on national law and not relevant to the Court's examination]

3. Gestore and the other party to the proceedings Conza Energia s.r.l. [...] [maintained] that the action was inadmissible on the ground that it was out of time and, in any event, [requested] that it be dismissed.

4. By the judgment [cited above], the Regional Administrative Court, [Lazio], after finding the action admissible, dismissed it in its entirety, stating in essence that, in consideration of the legislative parameters and in the light of the facts of the case, *‘the appellant had access to the incentives through the “registration in the register” system: the electricity produced by the plant remains available to the operator, which feeds it into the grid and sells it on the free market. That arrangement guarantees the beneficiary of the incentive a constant overall remuneration (free sale + GSE incentive) for the energy produced, suitable for remunerating the investments made for the construction of the power plant. The Gestore Incentive guarantees a tariff commensurate with the costs of the project submitted by the applicant. It is, therefore, a method which, at the launch of the initiative, protects the entrepreneur from the uncertainty of the market price of energy over time and guarantees it a fixed tariff by which to recover the amount invested in the construction of the plant [...]. The only disadvantage [...] is that a possible increase in the market price of energy over time (such as that in recent months) cannot turn into an increase in the company's revenues, but results in a “negative incentive” (that is, a rebate in favour of GSE: when the market price falls below a certain level, it ensures a certain constant level of revenues for the operator; conversely, when the market price increases, given the invariance of the revenues ensured to the operator, Gestore collects the difference in the energy price). However, this is the (unforeseeable and uncertain) consideration for the guarantee of a constant tariff and in any event remunerative of the original investment, where, as was the case until 2021, the market price of energy is lower than the tariff guaranteed by Gestore (the incentive goes to cover the difference between the price of the energy sold and the guaranteed basic tariff remunerating the investment). [...] [In the light of those rules, the appellant's complaints, concerning the impossibility of earning extra profits due to market variations, are unfounded. When the appellant submitted the request for incentives and then concluded the corresponding contract of 5 October 2017, it also accepted the business risk that followed]. This type of incentive mechanism is in line with that stated by the European Commission in Communication 2014/C 200/01, which sets out the conditions under which aid for energy and environment may be considered compatible with the internal market under Article 107(3)(c) of the EU Treaty ... That mechanism can[not] be said to be discriminatory because the operators that have obtained the incentives as a result of the various auction procedures “can collect the full market price”, whereas those that have obtained them by virtue of registration in the register “must reimburse the difference between the market price and the incentive”, as the appellant claims. Indeed, the two situations are completely different: [...] operators participating in descending price auctions*

*benefit from a lower overall tariff than those that register in the register, but, in return, they can benefit from possible increases in the market. On the other hand, those [registered] in the register enjoy higher tariffs, but cannot benefit from rises in the market. [...] [other considerations to the same effect] The mechanism outlined by the legislation is, by contrast, different and on the whole, rational. It enables smaller undertakings to be guaranteed the economic sustainability of the investment, by protecting them from the uncertainty of the market by providing more robust public support (that is to say, by a higher tariff guaranteed from the outset and irrespective of market developments), whereas it reserves only for larger undertakings remuneration more based on sales revenue on the market, on the assumption that, in general, the largest undertakings are financially more capable of dealing with market developments. Overall, the incentive system does not run counter to European legislation, it protects investment “certainty”, it is not discriminatory and it guarantees the general interest in the production of energy from renewable sources, protecting smaller producers with respect to larger ones, precisely during adverse market phases’.*

5. On [...] appeal, Tiberis Holding s.r.l. sought the variation of that decision at first instance before [the referring court], criticising the conclusions reached by the first court and reiterating, in essence, the [plea raised] in the application initiating proceedings.

6. Gestore and Conza Energia s.r.l. [...] request that the appeal be dismissed.

7. [...]

8. [...] [national procedure]

9. [The referring court] observes that it appears at first sight that there is a potential conflict between the domestic legislation, which must necessarily apply to the specific circumstances, and [EU law] [...].

On the other hand, the question of interpretation does not appear to be readily resolved and does not appear to have been the subject of proceedings before the Court of Justice of the European Union, and, since the appeal court is a court of last instance in the national legal system, a reference to the Court of Justice for a preliminary ruling is necessary under Article 267 TFEU.

10. [...]

[...] [The referring court states that it has followed the Court of Justice of the European Union ‘Recommendations to national courts and tribunals in relation to the initiation of preliminary ruling proceedings’ and that, in the preliminary ruling procedure, the parties’ rights of defence are protected].

11. [...] The provision of national law which is relevant in the present case and is alleged to be contrary to [EU] law [...] is point 2 of Annex 1 to the Decree of the Ministry of Economic Development of 23 June 2016, by which, as regards

plants with a capacity exceeding 500 kilowatts, it is established that ‘GSE shall ensure that, for each plant, the Innovation incentive is determined on the basis of data on the production of net electricity put into the network and zonal hourly prices, applying the following formula for new plants:  $Innovation = Tb + Pr - Pz$  where:  $Tb$  is the basic incentive tariff calculated for each source and type of plant in Table 1.1 and, if the plant has successfully participated in an auction procedure, reduced by the percentage awarded in the same procedure;  $Pr$  is the total amount of any premiums to which the plant is entitled;  $Pz$  is the zonal hourly price, of the zone in which the electricity produced by the plant is put into the network. In the event that the value of the incentive is negative: (a) it shall be set at zero for plants which access the incentives as a result of their participation in the auction procedures; (b) for other plants, the value shall be kept negative and GSE shall make appropriate adjustments in the settlement of the amounts, in accordance with the procedures laid down in Article 22 of the Ministerial Decree of 6 July 2012’.

12. Such a provision is potentially contrary to Article 3 of Directive 2009/28/EC and Article 4 of Directive (EU) 2018/2001, which set out five cumulative parameters for the legality of incentives: (a) that the incentives are market-based; (b) that they allow beneficiaries to be market-responsive; (c) that they avoid unnecessary distortions of markets; (d) that they ensure that producers are responding to market price signals [...] (e) that they ensure that producers maximise their market revenues; [and] (f) that they are granted in an open, transparent, competitive, non-discriminatory and cost-effective manner.

12.1 In particular, the national legislation could have the effect of compelling producers to abandon the incentive, contrary to the purpose of the incentive mechanism.

In this regard, it is noted that the Ministerial Decree of 23 June 2016 provides that access to incentive mechanisms is to be carried out according to three different procedures: ‘pre-registration in appropriate registers’ (Article 4(1)); ‘following participation in competitive descending price auction procedures’ (Article 4(2)); [and] directly for small plants, with differentiated thresholds per source (Article 4(3)). Membership of one scheme or the other is not voluntary, but depends exclusively on the power plant’s production capacity, so that Tiberis Holding s.r.l. was not in fact able to decide freely whether to apply for registration in the electronic register, as it actually did, or to participate in the auction, since they are two distinct categories defined *a priori* on the basis of the type and maximum capacity of the plant.

[Following that clarification], it is observed that, if the value of the incentive, obtained by way of the difference between the recognised tariff and the zonal hourly price, is negative, it is, according to point 2 of Annex 1 to the Ministerial Decree of 23 June 2016, ‘equal to zero, for plants that access the incentives as a result of their participation in auction procedures’, whereas, for other plants, such as the appellant’s, ‘the value is kept negative and GSE makes appropriate

*adjustments as part of the settlement of the amounts’, with the clarification, [contained in] the implementing procedures adopted by Gestore on 15 July 2016, that ‘the energy produced and put into the network by plants requesting access to the “Incentive” remains available to the Responsible Entity’.*

Based on these parameters, the electricity produced by the Tiberis Holding s.r.l. plant, which has had access to the incentives through the registration system, remains available to it to be put into the network and sold on the free market.

That arrangement guarantees to the beneficiary of the incentive an overall income consisting of the total revenue from the sale on the market of the energy produced and the incentive paid to it by Gestore, suitable for remunerating the investments made for the construction of the power plant, given that Gestore guarantees a fixed tariff commensurate with the costs of the project submitted and assessed as clearly appropriate by the entrepreneur at the time of freely signing the contract, protecting [in this way] the producer from the uncertainty of the market price for energy over time.

Nevertheless, a possible increase in the market price of energy over time (as has occurred in recent years) does not result in an increase in the operator’s revenues, given the presence of a fixed tariff, but results in a so-called ‘negative incentive’, that is to say, an economic return in favour of Gestore, which [...], if the market price falls, ensures in any event a constant level of revenue for the operator, while where the market price rises, Gestore collects the difference between the energy price and the fixed incentive tariff.

In essence, for medium-sized plants (between 1 and 5 megawatts), producers, which access the incentives by registering in the electronic register referred to in Article 9 et seq. of the Ministerial Decree of 23 June 2016, must reimburse the difference between the market price and the incentive, unlike producers with large plants (over 5 megawatts), which access the incentive by means of the auction governed by Article 12 et seq. of that Ministerial Decree and may collect the full market price.

Considering that the negative incentive is not a quid pro quo for the guarantee of a constant tariff, since the undertaking sells energy on the market, which has its dynamics and risks, it should be noted that the adjustment measure in the case of negative indemnity seems potentially contrary to Directives 2009/28/EC and (EU) 2018/2001, which require the State to allow the operator to react to market dynamics in order to prevent distortions resulting from the elimination of elasticity of demand by producers, which, due to the negative incentive adjustment, would not have an interest in reacting to market dynamics.

13. In those circumstances, the following question is referred [to the] Court: *‘Do the principles set out in Article 3 of Directive 2009/28/EC and Article 4 of Directive (EU) 2018/2001 preclude or not preclude national legislation which, in the context of a national incentive scheme, provides, in situations where*

*producers sell energy on the free market, for an incentive tariff that guarantees a minimum price, which is at the same time also a maximum price, by virtue of an adjustment/reimbursement mechanism for sums exceeding the value of the incentive where the market price is higher than the latter (the so-called negative incentive), and, moreover, applies the adjustment mechanism only where the producer selling energy on the free market accesses the incentive by registering in the relevant register and not also where it accesses it by participating in an auction procedure?’*

For those reasons

The Council of State, Second Chamber, Italy, sitting in its judicial capacity hereby:

(a) refers the question set out above to the Court of Justice of the European Union for a preliminary ruling [...]

[...]

[...] [stay of the national proceedings and directions for the national registry]

[...] Rome [...] 28 March 2023 [...]

WORKING DOCUMENT