**Case C-91/22**

**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:**

9 February 2022

**Referring court:**

Tribunale Amministrativo Regionale per il Lazio (Italy)

**Date of the decision to refer:**

25 January 2022

**Applicant:**

Fenice – Qualità per l'ambiente SpA

**Defendants:**

Ministero della Transizione Ecologica

Ministero dello Sviluppo Economico

Comitato nazionale per la gestione della direttiva 2003/87/CE e per il supporto nella gestione delle attività di progetto del protocollo di Kyoto

**Other parties:**

Hera SpA, Fca Italy SpA

…

**Subject matter of the main proceedings**

Action for annulment of the decision of the Comitato nazionale per la gestione della direttiva 2003/87/CE e per il supporto nella gestione delle attività di progetto del protocollo di Kyoto (Italian 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') of 12 April 2021 not to allocate any free $CO_2$ emission allowances for the period 2021-2025 to an installation run by the applicant.

## Subject matter and legal basis of the request

Article 267 TFEU.

## Questions referred for a preliminary ruling

1. Is the decision taken by the Italian national committee for the management of Directive 2003/87/EC and for support in the management of project activities under the Kyoto Protocol, considering the adoption procedure and, in particular, the mechanism for dialogue with the European Commission provided for in Delegated Regulation (EU) 2019/331, concerning the inclusion of installations in the list for the allocation of $CO_2$ allowances, open to appeal before the General Court pursuant to the fourth paragraph of Article 263 TFEU, where the contested measure produces binding legal effects and directly affects the applicant as an economic operator?

2. In the alternative, can the private economic operator directly affected by the exclusion from the allocation of $CO_2$ allowances, on the basis of the joint investigation conducted by the European Commission and the Italian national committee for the management of Directive 2003/87/EC and for support in the management of project activities under the Kyoto Protocol, challenge the decision taken by the European Commission to reject the inclusion of the installation in the list pursuant to Article 14(4) of Delegated Regulation (EU) 2019/331 before the General Court pursuant to the fourth paragraph of Article 263 TFEU?

3. Does the concept of 'electricity generator' within the meaning of Article 3(u) of Directive 2003/87/EC, as was evident from the judgment of the Court of Justice (Fifth Chamber) of 20 June 2019 in Case C-682/17, *ExxonMobil Production Deutschland GmbH* v *Bundesrepublik Deutschland*, concerning the request for a preliminary ruling submitted to the Court of Justice pursuant to Article 267 TFEU by the Verwaltungsgericht Berlin (Administrative Court, Berlin, Germany) by decision of 28 November 2017, also cover situations in which the installation marginally generates electricity from non-high-efficiency cogeneration, characterised by a variety of thermal energy sources other than cogeneration qualifying for the allocation of free emission allowances?

4. Is such an interpretation of the definition of 'electricity generator' compatible with the general principles of EU law on respect for competition between operators where incentives are granted, and with the principle of proportionality of the measure, where it completely excludes an installation that uses a variety of energy sources, without separating out the emission values relating to heat sources other than cogeneration, which are fully entitled to receive the benefits provided for?

**Provisions of European Union law and case-law relied on**

TFEU; the fourth paragraph of Article 263.

Directive 2003/87/EC (ETS Directive), as amended by Directive 2009/29/EU and, more recently, by Directive 2018/410/EU.

The ETS Directive regulates the European Union Emissions Trading Scheme (EU ETS), which is a key tool for combating climate change and for reducing greenhouse gas emissions cost-effectively. The system operates according to the principle of 'cap-and-trade': a cap is set on the total amount of certain greenhouse gases and this cap is reduced over time so that total emissions fall. Below this cap, undertakings buy or receive emission allowances, which they can trade with one another as needed. At the end of each year, companies must surrender enough allowances to cover their emissions if they want to avoid heavy fines. If an undertaking reduces its emissions, it can keep unused allowances to cover future needs or sell them to another undertaking. The ETS Directive stipulates that from 2013, electricity generators and installations that carry out carbon capture, transport and storage must purchase at auction allowances for all of their needs (allocation for consideration). By contrast, installations in the manufacturing sector are entitled to the free allocation of allowances, on the basis of their level of activity and benchmarks drawn up by the European Commission and valid at European level.

Directive 2012/27/EU, which, inter alia, defines high-efficiency cogeneration installations (high-efficiency CHP).

Commission Delegated Regulation (EU) 2019/331 of 19 December 2018, which, inter alia, sets out the information required with regard to installations falling within the scope of the directive, as well as the methods and procedures for Member States to send data to the Commission via their national competent authorities. (For Italy, it is the ETS Committee that determines the annual quantity of allowances to be allocated free of charge to eligible operators and that sends the Commission the list containing that information for each installation for which the free allocation of allowances is requested). The Commission examines the data submitted and may request further documentation from the Member State.

Judgment of the Court of Justice of 20 June 2019 (Case C-682/17).

Judgment of the Court of Justice of 3 December 2019 (Case C-414/18).

**Provisions of national law relied on**

Decreto legislativo del 4 aprile 2006, n. 216 (Legislative Decree No 216 of 4 April 2006) and decreto legislativo del 13 marzo 2013, n. 30 (Legislative Decree No 30 of 13 March 2013), which, inter alia, identify the ETS Committee as the competent national authority for the implementation of the ETS system.

Decreto legislativo del 9 giugno 2020, n. 47 (Legislative Decree No 47 of 9 June 2020), which establishes, inter alia, that the ETS Committee is also responsible for determining the annual quantity of allowances to be allocated free of charge in accordance with the rules of EU law.

Legge del 7 agosto 1990, n. 241 (Law No 241 of 7 August 1990); Articles 3 and 10*bis*.

**Succinct presentation of the facts and procedure in the main proceedings**

1 The company FENICE – Qualità per l'ambiente SpA, an environmental and alternative energy operator, runs three installations with a total rated thermal input of more than 20 MW, supplying third-party industrial installations and falling within the scope of the ETS system. One of the installations is the subject of this request for a preliminary ruling, while the other two are the subject of requests for a preliminary ruling C-92/22 and C-93/22.

2 In June 2019, the applicant submitted documents to the ETS Committee in relation to the request for the allocation of free emission allowances for the period 2021-2025. The Commission subsequently asked the applicant to clarify whether the installation in question, having been categorised as an electricity generator, was a high-efficiency CHP installation under Directive 2012/27. The applicant explained that the installation used a variety of thermal energy sources other than cogeneration. As such, it should be eligible for the allocation of the relevant allowances, since the electricity production component was completely marginal and in any case could be separated from the other combustion sources. Following investigations carried out in agreement with the Commission, the ETS Committee informed the applicant that the installation in question was not eligible for free emission allowances and so did not allocate any of those allowances to it.

3 The applicant brought an action, complaining that not being allocated any free emission allowances was unfair. It relied on a number of pleas based, inter alia, on the infringement of Directives 2003/87 and 2018/410, and – with regard to national law – of Law No 241/1990 (Articles 3 and 10*bis*) and Legislative Decree No 47/2020.

**The essential arguments of the parties in the main proceedings**

4 The **applicant**, who has not been allocated any free allowances, first submits, on the merits, that this is due to the fact that the actual situation at its installation was not given proper consideration. Article 10a(3) of Directive 2003/87 was applied to the applicant's installation as a result of a misinterpretation of the judgment of the Court of Justice of 20 June 2019 in Case C-682/17, which provided an interpretation of the concept of 'electricity generator' which consisted of continuously feeding, for consideration, even only a small part of the electricity produced into the public electricity network. According to the applicant, the

installation at issue in the present case cannot be considered an electricity generator in that sense, since it is an installation in which multiple sources are simultaneously present. This type of installation was not taken into consideration. The applicant also stated that the installation had benefited from the free allocation of allowances during the period 2013-2020. Therefore, the Commission and the ETS Committee should have made a distinction between the thermal energy produced by the thermal power plant (which could have received free allowances) and that produced by the non-high-efficiency cogeneration plant. Such a distinction would have been easily verifiable and identifiable from the various documents in their possession.

5 Second, as regards the possible inadmissibility of the action on the grounds of lack of jurisdiction, raised by the referring court of its own motion, the applicant submits that it is the ETS Committee (an interministerial body) that determines whether an installation is included in the list and that decides on the final allocation of free allowances to each of the installations included in that list. The ETS Committee acts as a body of the Ministero della Transizione Ecologica (Ministry of Ecological Transition). Since it is a national body and not an EU body, any measures it adopts have the same effect as an administrative act. Therefore, it is for the Member State – in this case the administrative court – to review their legality. The Court of Justice is expressly precluded from reviewing the legality of acts of Member State bodies, unless the measure is only formally adopted by a national body, but in reality is substantially the result of a decision at EU level. In this case, as stated in the judgment of the Court of Justice of 3 December 2019 in Case C-414/18, the private individual affected by that measure may challenge it before the General Court, as with a measure adopted directly by the bodies of the Union.

6 The **Ministry of Ecological Transition** contends that the action is unfounded and should be dismissed.

7 First, on the substance, the conditions for the allocation of free allowances are not met, given that the installation in question is not covered by the exceptional circumstances in which it is possible to recognise such allowances for electricity generators. The starting point for understanding the substance of the Commission's decision is the judgment of the Court of Justice of 20 June 2019 in Case C-682/17. That judgment states that an installation which produces, within the framework of its activity of combustion of fuels in installations with a total rated thermal input exceeding 20 MW, referred to in Annex I to Directive 2003/87, electricity intended essentially to be used for its own needs, must be regarded as an 'electricity generator', within the meaning of Article 3(u) of the directive, where that installation, first, carries out simultaneously an activity which does not fall within the scope of ETS, and, second, continuously feeds, for consideration, even a small part of the electricity produced into the public electricity network, to which that installation must be permanently connected for technical reasons. The consequence of an installation's status as an electricity generator is that it loses the right to allocate free allowances for any sub-

installation, except in certain cases expressly provided for in the directive. The same judgment states that an 'electricity generator', within the meaning of Article 3(u) of Directive 2003/87, is not entitled to be allocated free emission allowances in respect of the heat produced within the framework of its activity of combustion of fuels in installations with a total thermal input exceeding 20 MW, referred to in Annex I to that directive, where that heat is used for purposes other than the production of electricity, since such an installation does not fulfil the conditions laid down in Article 10a(4) and (8) of the directive. The consequences of that judgment are that an installation that can be categorised as an electricity generator, such as the one at issue in the main proceedings, is not entitled to free allowances, because it does not fall into any of the cases that represent exceptions to that exclusion. In the light of the foregoing, and following subsequent requests for clarification, the Commission held that, since this is not a high-efficiency CHP plant, none of the cases referred to in Article 10a(3), which constitute exceptions to the rule prohibiting the allocation of free allowances to electricity generators, applied.

8 Second, given that the applicant was actively involved in the data collection that preceded the exclusion decision, that decision was based on the Commission's assessments which were simply given binding effect by the decision of the ETS Committee. Moreover, as is evident from exchanges on the platform provided by the Commission for uploading data, the applicant not only actively participated in the preliminary investigation, alongside the ETS Committee and indirectly with the Commission, but had the opportunity to respond to the critical points identified by the Commission. Therefore, the applicant was fully aware of the reasons why the Commission finally decided not to include it among the installations eligible for the free allocation of allowances. By law, the Commission thus retains the right to make a final decision which is binding on the Member States. In the present case, the Commission requested the cancellation of the free allocation to the applicant's installation and the ETS Committee had to comply with that request under its limited jurisdiction. It follows that the Italian administrative court has no jurisdiction in the dispute, whereas the Court of Justice does have jurisdiction. The appeal against the acts of the ETS Committee, without an independent complaint against the Commission's assessments (which is within the jurisdiction of the Court of Justice), should in any case be considered inadmissible.

**Succinct presentation of the reasoning in the request for a preliminary ruling**

9 Given the importance of the interests involved and the complexity of the values at stake, the referring court considers it necessary to refer the above questions relating to the interpretation of EU law to the Court of Justice for a preliminary ruling.