Reports of Cases

JUDGMENT OF THE COURT (Fifth Chamber)

15 April 2021 *

(References for a preliminary ruling – Environment – Articles 16 and 17 of the Charter of Fundamental Rights of the European Union – Principles of legal certainty and of the protection of legitimate expectations – Energy Charter Treaty – Article 10 – Applicability – Directive 2009/28/EC – Article 3(3)(a) – Promotion of the use of energy from renewable sources – Production of electricity from solar photovoltaic installations – Alteration of a support scheme)

In Joined Cases C-798/18 and C-799/18,

TWO REQUESTS for a preliminary ruling under Article 267 TFEU from the Tribunale amministrativo regionale per il Lazio (Regional Administrative Court, Lazio, Italy), made by decisions of 28 September 2018, received at the Court on 17 December 2018, in the proceedings

Federazione nazionale delle imprese elettrotecniche ed elettroniche (Anie) and Others (C-798/18),

Athesia Energy Srl and Others (C-799/18)

v

Ministero dello Sviluppo economico,

Gestore dei servizi energetici (GSE) SpA,

interveners:

Elettricità Futura Unione delle imprese elettriche italiane,

Confederazione generale dell'agricoltura italiana – Confagricoltura,

THE COURT (Fifth Chamber),

composed of E. Regan, President of the Chamber, M. Ilešič, E. Juhász, C. Lycourgos and I. Jarukaitis (Rapporteur), Judges,

Advocate General: H. Saugmandsgaard Øe,

Registrar: A. Calot Escobar,

* Language of the case: Italian.

having regard to the written procedure,

after considering the observations submitted on behalf of:

– the Federazione nazionale delle imprese elettrotecniche ed elettroniche (Anie) and Others, by V. Onida, C. Montella and B. Randazzo, avvocati,

– the Elettricità Futura Unione delle imprese elettriche italiane and the Confederazione generale dell'agricoltura italiana – Confagricoltura, by V. Onida and B. Randazzo, avvocati,

– the Italian Government, by G. Palmieri, acting as Agent, and by F. Varrone and G. Aiello, avvocati dello Stato,

– the Czech Government, by M. Smolek and J. Vláčil, acting as Agents,

– the German Government, by S. Eisenberg and D. Klebs, acting as Agents,

– the Greek Government, by K. Boskovits, S. Charitaki and A. Magrippi, acting as Agents,

– the Spanish Government, by S. Centeno Huerta, M.J. Ruiz Sánchez and A. Rubio González, acting as Agents,

– the European Commission, by O. Beynet, K. Talabér-Ritz, Y. Marinova, G. Gattinara and T. Maxian Rusche, acting as Agents,

after hearing the Opinion of the Advocate General at the sitting on 29 October 2020,

gives the following

Judgment

1 These requests for a preliminary ruling concern the interpretation of Article 216(2) TFEU, read in conjunction with the Energy Charter Treaty, approved on behalf of the European Coal and Steel Community, the European Community and the European Atomic Energy Community by Council and Commission Decision 98/181/EC, ECSC, Euratom of 23 September 1997, on the conclusion, by the European Communities, of the Energy Charter Treaty and the Energy Charter Protocol on energy efficiency and related environmental aspects (OJ 1998 L 69, p. 1; 'the Energy Charter'), Articles 16 and 17 of the Charter of Fundamental Rights of the European Union ('the Charter'), and Directive 2009/28/EC of the European Parliament and of the Council of 23 April 2009 on the promotion of the use of energy from renewable sources and amending and subsequently repealing Directives 2001/77/EC and 2003/30/EC (OJ 2009 L 140, p. 16), read in the light of the principles of legal certainty, the protection of legitimate expectations, sincere cooperation, and effectiveness.

2 The requests have been made in proceedings between, on the one hand, in Case C-798/18, the Federazione nazionale delle imprese elettrotecniche ed elettroniche (Anie) (National Federation of Electrotechnical and Electronics Companies), together with 159 undertakings producing electricity from photovoltaic installations, and, in Case C-799/18, Athesia Energy Srl, together with 15 other undertakings operating in the same sector, and, on the other, the ministero dello

Sviluppo economico (Ministry of Economic Development, Italy) and Gestore dei servizi energetici (GSE) SpA concerning the annulment of decrees implementing national legislative provisions providing for a revision of the feed-in tariffs for electricity production by photovoltaic installations and the related payment arrangements.

Legal context

International law

3 Article 10 of the Energy Charter, entitled 'Promotion, Protection and Treatment of Investments', states, in paragraph 1 thereof:

'Each Contracting Party shall, in accordance with the provisions of this Treaty, encourage and create stable, equitable, favourable and transparent conditions for Investors of other Contracting Parties to make Investments in its Area. Such conditions shall include a commitment to accord at all times to Investments of Investors of other Contracting Parties fair and equitable treatment. Such Investments shall also enjoy the most constant protection and security and no Contracting Party shall in any way impair by unreasonable or discriminatory measures their management, maintenance, use, enjoyment or disposal. …'

European Union law

4 Recitals 14 and 25 of Directive 2009/28 are worded as follows:

'(14) The main purpose of mandatory national targets is to provide certainty for investors and to encourage continuous development of technologies which generate energy from all types of renewable sources. …

…

(25) Member States have different renewable energy potentials and operate different schemes of support for energy from renewable sources at the national level. … For the proper functioning of national support schemes it is vital that Member States can control the effect and costs of their national support schemes according to their different potentials. One important means to achieve the aim of this Directive is to guarantee the proper functioning of national support schemes, as under Directive 2001/77/EC [of the European Parliament and of the Council of 27 September 2001 on the promotion of electricity produced from renewable energy sources in the internal electricity market (OJ 2001 L 283, p. 33)], in order to maintain investor confidence and allow Member States to design effective national measures for target compliance. …'

5 Article 1 of Directive 2009/28, entitled 'Subject matter and scope', provides:

'This Directive establishes a common framework for the promotion of energy from renewable sources. It sets mandatory national targets for the overall share of energy from renewable sources in gross final consumption of energy and for the share of energy from renewable sources in transport. …'

6 Article 3 of that directive, entitled 'Mandatory national overall targets and measures for the use of energy from renewable sources', provides:

'1. Each Member State shall ensure that the share of energy from renewable sources … in gross final consumption of energy in 2020 is at least its national overall target for the share of energy from renewable sources in that year, as set out in the third column of the table in part A of Annex I. …

2. Member States shall introduce measures effectively designed to ensure that the share of energy from renewable sources equals or exceeds that shown in the indicative trajectory set out in part B of Annex I.

3. In order to reach the targets set in paragraphs 1 and 2 of this Article Member States may, inter alia, apply the following measures:

(a) support schemes;

…'

Italian law

7 Article 7 of decreto legislativo n. 387 – Attuazione della direttiva 2001/77/CE relativa alla promozione dell'energia elettrica prodotta da fonti energetiche rinnovabili nel mercato interno dell'elettricità (Legislative Decree No 387 tranposing Directive 2001/77/EC on the promotion of electricity produced from renewable energy sources in the internal electricity market) of 29 December 2003 (Ordinary Supplement to GURI No 25 of 31 January 2004, p. 5; 'Legislative Decree No 387/2003'), provided:

'1. Within a six-month period following the date of entry into force of the present decree, the Ministro delle attività produttive (Minister for Productive Activities), together with the Ministro dell'ambiente e della tutela del territorio (Minister for the Environment and the Protection of Natural Resources), in agreement with the Conferenza unificata (Unified Conference), shall adopt one or more decrees defining the criteria for incentivising the production of electricity from solar energy.

2. With no cost to the budget of the State and in compliance with the Community legislation in force, the criteria referred to in paragraph 1 shall:

(a) lay down the conditions which entities must satisfy in order to be eligible for the incentive;

…

(d) lay down the arrangements for determining the amount of the incentive. As regards electricity produced by photovoltaic conversion of solar energy, they shall provide for a specific feed-in tariff, in a decreasing amount and with a duration that ensures a fair return on investment and operating costs;

(e) lay down an objective for the rated power to be installed;

(f) set, in addition, the maximum limit on the cumulative electrical power of all installations that are eligible for the incentive;

…'

8 Article 24 of decreto legislativo n. 28 – Attuazione della direttiva 2009/28/CE sulla promozione dell'uso dell'energia da fonti rinnovabili, recante modifica e successiva abrogazione delle direttive 2001/77/CE e 2003/30/CE (Legislative Decree No 28 transposing Directive 2009/28/EC on the promotion of the use of energy from renewable sources and amending and subsequently repealing Directives 2001/77/EC and 2003/30/EC) of 3 March 2011 (Ordinary Supplement to GURI No 71 of 28 March 2011, p. 1; 'Legislative Decree No 28/2011'), entitled 'Incentive mechanisms', provided:

'1. The production of electricity by installations powered by renewable sources which become operational after 31 December 2012 shall be incentivised via instruments and on the basis of the general criteria referred to in paragraph 2 …

2. The production of electricity by the installations referred to in paragraph 1 shall be incentivised on the basis of the following general criteria:

(a) the incentive shall have the purpose of ensuring a fair return on investment and operating costs;

(b) the duration of the entitlement to incentives shall be equal to the standard average service life of the specific types of installation concerned and shall start to run from the date on which those installations become operational;

(c) the incentive shall remain constant for the entire duration of the entitlement and may take into account the economic value of the energy produced;

(d) the incentives shall be granted by means of private-law contracts concluded between GSE and the entity responsible for the installations, which shall be based on a standard form contract produced by the Autorità per l'energia elettrica e il gas (Regulatory Authority for Electricity and Gas) …

…'

9 Under Article 25 of that legislative decree:

'1. The production of electricity by installations which use renewable energy sources and have become operational by 31 December 2012 shall be incentivised through the mechanisms in existence at the date of entry into force of the present decree …

…

10. … incentives for the production of electricity from solar photovoltaic installations which become operational after [31 May 2011] shall be governed by decree of the Minister for Economic Development, which that minister, together with the Ministro dell'ambiente e della tutela del [territorio e del] mare (Minister for the Environment and the Protection of Natural Resources

and the Sea), after consulting the Unified Conference referred to in Article 8 of decreto legislativo [n. 281 (Legislative Decree No 281) of 28 August 1997], shall adopt by 30 April 2011, on the basis of the following principles:

(a) setting an annual limit on the cumulative electrical power of photovoltaic installations that are eligible for feed-in tariffs;

(b) setting feed-in tariffs, taking into account the reduced cost of the technology and the installations and the incentives applied in the Member States …;

(c) providing for feed-in tariffs and differentiated shares on the basis of the nature of the location of the installations;

(d) applying the provisions of Article 7 of Legislative Decree [No 387/2003] in so far as they are compatible with the present paragraph.'

10 Article 26 of decreto-legge n. 91 – Disposizioni urgenti per il settore agricolo, la tutela ambientale e l'efficientamento energetico dell'edilizia scolastica e universitaria, il rilancio e lo sviluppo delle imprese, il contenimento dei costi gravanti sulle tariffe elettriche, nonché per la definizione immediata di adempimenti derivanti dalla normativa europea (Decree-Law No 91 introducing urgent provisions in respect of the agricultural sector, the protection of the environment and the energy efficiency of school and university buildings, the recovery and development of undertakings, the limitation of the costs attaching to electricity tariffs, and the immediate definition of the formalities arising under European legislation) of 24 June 2014 (GURI No 144 of 24 June 2014), converted into a law, with amendments, by Law No 116 of 11 August 2014 (Ordinary Supplement to GURI No 192 of 20 August 2014) ('Decree-Law No 91/2014'), provides:

'1. In order to optimise the management of the periods for collection and payment of the incentives, and promote a more sustainable policy of support for renewable energies, the feed-in tariffs for electricity produced by solar photovoltaic installations, recognised pursuant to Article 7 of Legislative Decree [No 387/2003] and Article 25(10) of Legislative Decree [No 28/2011], shall be paid according to the arrangements set out in the present article.

2. With effect from the second half of 2014, [GSE] shall pay the feed-in tariffs referred to in paragraph 1 by way of equal monthly rates, based on 90% of the estimated average annual production capacity of the relevant installation during the calendar year of production, and shall adjust the amount, on the basis of actual production, before 30 June of the following year. The practical arrangements shall be defined by GSE within 15 days of the publication of the present decree and approved by decree of the Minister for Economic Development.

3. From 1 January 2015, the feed-in tariff for energy produced by installations with a rated power of more than 200 kW shall be restructured, at the discretion of the operator, on the basis of one of the following options to be notified to GSE by 30 November 2014:

(a) the tariff shall be paid for a period of 24 years, from the date on which the installation becomes operational, and shall consequently be recalculated using the percentage reduction indicated in the table provided in Annex 2 to the present decree;

(b) without prejudice to the 20-year payment period, the tariff shall be restructured by providing for an initial period of application of a tariff that is reduced in comparison with the current one and a second period of application of a tariff that is increased in equal measure. The restructuring percentages shall be set by means of a decree of the Minister for Economic Development, following consultation with the Autorità per l'energia elettrica, il gas e il sistema idrico (Regulatory Authority for Electricity, Gas and Water), to be issued by 1 October 2014 so as to enable, should all those eligible sign up for the option, a saving of at least EUR 600 million each year for the 2015-2019 period, in comparison with payments under the currently applicable tariffs;

(c) without prejudice to the 20-year payment period, the tariff shall be reduced by a percentage value of the incentive granted as at the date on which the present decree enters into force, for the remaining duration of the period of application of that incentive, according to the following quantities:
   (1) 6% for installations with a rated power of more than 200 kW, up to a rated power of 500 kW;
   (2) 7% for installations with a rated power of more than 500 kW, up to a rated power of 900 kW;
   (3) 8% for installations with a rated power of more than 900 kW.

If no notification is provided by the operator, GSE shall apply the option described under (c).

…

5. The beneficiary of the feed-in tariff referred to in paragraphs 3 and 4 shall have the option of obtaining bank financing of a maximum amount equal to the difference between the incentive already acquired as at 31 December 2014 and the incentive restructured under paragraphs 3 and 4. Such financing may benefit, cumulatively or alternatively, on the basis of special agreements with the banking system, from specific provisions or from guarantees granted by Cassa Depositi e Prestiti SpA …'

The disputes in the main proceedings and the question referred for a preliminary ruling

11 Anie represents undertakings which carry on, in Italy, activities which are associated with the production of goods and/or the provision of services in the electrotechnical and electronics sector, or in related sectors. It is a 'top-level federation', within which sectoral associations are organised, including the association Anie Energie Rinnovabili, which has the objective of protecting the renewable-energy sector industry. The other applicants in the main proceedings are companies and individual entrepreneurs, owners and managers of one or more photovoltaic installations with a rated power of more than 200 kW, located in various areas throughout Italy, which concluded 20-year agreements with GSE that were classified as private-law contracts for the purposes of Italian law, in order to be able to benefit from the feed-in tariff for the production of electricity from photovoltaic conversion. Those applicants thus benefited from the incentives provided for in Article 7 of Legislative Decree No 387/2003 and Article 25 of Legislative Decree No 28/2011. GSE is a public company which is controlled entirely by the ministero dell'economia e della finanze (Ministry of Economy and Finance, Italy) and which is entrusted with numerous public functions in the energy sector.

12 The Italian scheme for incentivising the production of electricity from photovoltaic installations was altered by Article 26 of Decree-Law No 91/2014, implemented by ministerial decrees of 16 and 17 October 2014, the annulment of which is sought by the applicants in the main proceedings before the Tribunale amministrativo regionale per il Lazio (Regional Administrative Court, Lazio, Italy).

13 The referring court states, in essence, that Article 26 of Decree-Law No 91/2014 provided for a restructuring of the incentives for installations with a rated power of more than 200 kW in order to optimise the management of the periods for collection and payment of the incentives, and promote a more sustainable policy of support for renewable energies. It also states that, pursuant to that provision, the Italian legislature required operators in the sector concerned to move to a different tariff system according to one of the options provided for in paragraph 3 of that provision. The referring court is of the view that each of those options clearly has an adverse effect on the position of those operators as established in the incentive agreements concluded between those operators and GSE, by introducing new elements into those agreements as regards the duration or the amount of the feed-in tariffs.

14 In particular, the referring court states that, in accordance with Article 26 of Decree-Law No 91/2014, for the second half of 2014, the feed-in tariffs had to be paid by way of equal monthly rates, based on 90% of the estimated average annual production capacity of the relevant installation during the calendar year of production, and the amount then had to be adjusted on the basis of actual production. Thus, that provision altered the contractual terms in force, by replacing the 'actual production' criterion with that of 'average annual production capacity', without taking into consideration the fact that the beneficiaries of the incentives in question had signed up for the support scheme under different conditions.

15 The applicants in the main proceedings assert, before that court, that the ministerial decrees of 16 and 17 October 2014 had an adverse effect on the existing relationships, already subject to respective decisions allowing them to benefit from the feed-in tariffs and to agreements consequently concluded with GSE, and seriously undermined their legitimate expectations. They also rely on an infringement of the principle of legal certainty and of Directive 2009/28, inasmuch as Article 26 of Decree-Law No 91/2014 retroactively introduced less favourable incentives liable to subvert the initial conditions of investments already made, and should therefore continue to be disapplied as being contrary to primary and secondary EU law. The Ministry of Economic Development contends that the actions directed against those ministerial decrees should be dismissed.

16 The referring court states that the disputes in the main proceedings form part of a wider dispute in the context of which undertakings in positions similar to that of the applicants in the main proceedings have raised the same issues as those arising in the cases in the main proceedings. Thus, the referring court had referred the issue of the constitutionality of Article 26(3) of Decree-Law No 91/2014 to the Corte costituzionale (Constitutional Court, Italy). The Corte costituzionale (Constitutional Court), by judgment of 24 January 2017, ruled that that provision was not contrary to the Italian Constitution. It stated that that provision constitutes an intervention that, as regards the fair balancing of the opposing interests at stake, addresses a public interest intended to combine the policy of supporting the production of energy from renewable sources with making the related costs payable by end users of electricity more sustainable. It held, furthermore, that the alteration of the incentive scheme at issue in the main

proceedings was neither unforeseeable nor unexpected, so that a prudent and circumspect economic operator would have been able to take account of possible legislative developments, considering the temporary and changeable nature of support schemes.

17 The referring court considers, however, that that judgment of the Corte costituzionale (Constitutional Court) did not resolve certain issues that are relevant to the outcome of the disputes in the main proceedings, and that it is necessary to refer a question to the Court of Justice for a preliminary ruling in order to determine whether the national legislature is permitted, under EU law, to intervene in a manner that adversely affects not only the general incentive scheme, applicable to the undertakings in the sector concerned, but also the agreements that those undertakings individually concluded with a public company, in this instance GSE, for the purpose of laying down concrete incentives for a 20-year period.

18 The referring court is uncertain, in particular, whether the national provisions concerned are compatible with the general principles of legal certainty and of the protection of legitimate expectations, inasmuch as the legislative intervention at issue in the main proceedings unilaterally altered the legal conditions on the basis of which the applicants in the main proceedings had initiated their economic activity, and there were no exceptional circumstances justifying such an alteration. For the same reasons, the referring court is also uncertain as regards the compatibility of those provisions with Articles 16 and 17 of the Charter, concerning the freedom to conduct a business and the right to property, respectively, and with Article 10 of the Energy Charter.

19 In addition, in the view of the referring court, the national provisions concerned could be contrary to Article 3(3)(a) of Directive 2009/28, inasmuch as they are capable of adversely affecting the support schemes for the production of electricity by photovoltaic installations which should, in accordance with the spirit of that directive, be secure and continuous. Those provisions could also be detrimental to the objectives of the energy policy referred to in that directive.

20 In those circumstances, the Tribunale amministrativo regionale per il Lazio (Regional Administrative Court, Lazio) decided to stay the proceedings and to refer the following question, which is worded identically in each of the joined cases, to the Court of Justice for a preliminary ruling:

‘Does EU law preclude the application of a provision of national law, such as that in Article 26(2) and (3) of [Decree-Law No 91/2014], which significantly reduces or delays the payment of incentives already granted by law and defined on the basis of corresponding agreements concluded by undertakings generating electrical energy by means of photovoltaic conversion with [GSE], a public company responsible for that process?

In particular, is that provision of national law compatible with the general principles of EU law relating to legitimate expectation, legal certainty, sincere cooperation and effectiveness, with Articles 16 and 17 of the [Charter], with Directive [2009/28] and with the rules governing support schemes laid down in that directive, and with Article 216(2) TFEU, in particular in relation to the [Energy Charter]?’

21 By decision of the President of the Court of Justice of 5 February 2019, Cases C-798/18 and C-799/18 were joined for the purposes of the written and oral procedure and the judgment.

Consideration of the question referred

22 By its question, the referring court asks, in essence, whether Article 3(3)(a) of Directive 2009/28 and Articles 16 and 17 of the Charter, read in the light of the principles of legal certainty and of the protection of legitimate expectations, as well as Article 10 of the Energy Charter, must be interpreted as precluding national legislation which provides for the reduction or delay of the payment of incentives for energy produced by solar photovoltaic installations which were previously granted by administrative decisions and confirmed by special agreements concluded between the operators of those installations and a public company.

23 That court states that Article 26 of Decree-Law No 91/2014 restructured the incentives for installations with a rated power of more than 200 kW, granted pursuant to Article 7 of Legislative Decree No 387/2003 or Article 25 of Legislative Decree No 28/2011, in order to optimise the management of the periods for collection and payment of the incentives, and promote a more sustainable policy of support for renewable energies. Article 26 of that decree-law thus provided, in paragraph 2 thereof, that, from the second half of 2014, the feed-in tariffs must be paid by way of equal monthly rates, based on 90% of the estimated average annual production capacity of the relevant installation during the calendar year of production, and the amount must then be adjusted on the basis of actual production. That article established, furthermore, the move to a different incentive system according to one of the options set out in paragraph 3 thereof, namely the extension of the duration of the incentive to 24 years, with a pro rata reduction of the annual payments by a specific percentage value, the reduction of the amounts for the period from 2015 to 2019, offset by an increase for the subsequent period, or a reduction of the tariff by a percentage value to be determined by reference to the rated power of the installations.

24 The referring court considers that Article 26 of that decree-law could be contrary to EU law since it reduced the tariffs and altered the arrangements for the payment of incentives previously granted pursuant to Article 7 of Legislative Decree No 387/2003 and Article 25(10) of Legislative Decree No 28/2011 and confirmed by agreements that GSE had concluded individually with the operators of photovoltaic installations, setting concrete feed-in tariffs and defining specific arrangements for the payment of those tariffs for a 20-year period.

25 In that regard, concerning, in the first place, Directive 2009/28, which the incentive scheme at issue in the main proceedings seeks to implement, the aim of that directive, as is apparent from Article 1 thereof, is to establish a common framework for the promotion of energy from renewable sources by setting, inter alia, mandatory national targets for the overall share of energy from such sources in gross final consumption of energy.

26 Article 3(3)(a) of Directive 2009/28 provides that Member States may, inter alia, apply support schemes in order to reach the targets set in Article 3(1) and (2) of that directive, in accordance with which, first, each Member State is to ensure that the share of energy from renewable sources in gross final consumption of energy in 2020 is at least its national overall target, as set out in part A of Annex I to that directive, and, second, Member States are to introduce measures effectively designed to ensure that the share of energy from such sources equals or exceeds that shown in the indicative trajectory set out in part B of Annex I to that directive.

27 Furthermore, under recital 25 of Directive 2009/28, 'Member States have different renewable energy potentials' and it is vital that they can, in order to ensure the proper functioning of national support schemes, control the effect and costs of their national support schemes according to their different potentials.

28 As is apparent from the very wording of Article 3(3)(a) of Directive 2009/28 and, in particular, the word 'may', Member States are not under any obligation, for the purpose of promoting the use of energy produced using renewable sources, to adopt support schemes. They have discretion as to the measures they consider appropriate for the purpose of reaching the mandatory national overall targets set in Article 3(1) and (2) of that directive, read in conjunction with Annex I thereto. That discretion means that Member States are free to adopt, alter or withdraw support schemes, provided that, inter alia, those targets are met (judgment of 11 July 2019, *Agrenergy and Fusignano Due*, C-180/18, C-286/18 and C-287/18, EU:C:2019:605, paragraph 27).

29 Moreover, it should be emphasised that, as can be seen from settled case-law, where Member States adopt, in that way, measures by which they implement EU law, they are required to respect the general principles of that law, which include the principles of legal certainty and of the protection of legitimate expectations (see, to that effect, judgment of 11 July 2019, *Agrenergy and Fusignano Due*, C-180/18, C-286/18 and C-287/18, EU:C:2019:605, paragraph 28 and the case-law cited).

30 It follows that Article 3(3)(a) of Directive 2009/28 does not preclude national legislation, such as Article 26(2) and (3) of Decree-Law No 91/2014, which alters a support scheme by reducing the tariffs and alters the arrangements for the payment of incentives for the production of electricity by photovoltaic installations, provided that that legislation is in line with those principles.

31 As regards, in the second place, Articles 16 and 17 of the Charter, it should be noted that, as is apparent from their respective titles and wording, Legislative Decree No 387/2003 transposes Directive 2001/77 and Legislative Decree No 28/2011 transposes into Italian law Directive 2009/28, which repealed that first directive. It follows that the provisions of those legislative decrees are implementing EU law within the meaning of Article 51(1) of the Charter, so that that charter is applicable to the disputes in the main proceedings. Consequently, the level of protection of fundamental rights provided for in the Charter must be achieved in such a transposition, irrespective of the Member States' discretion in transposing the directive (see, to that effect, judgment of 29 July 2019, *Pelham and Others*, C-476/17, EU:C:2019:624, paragraph 79).

32 As regards, first, Article 17 of the Charter, that article provides, in paragraph 1 thereof, that everyone has the right to own, use, dispose of and bequeath his or her lawfully acquired possessions and no one may be deprived of his or her possessions, except in the public interest and in the cases and under the conditions provided for by law, subject to fair compensation being paid in good time for their loss. In addition, the use of property may be regulated by law in so far as is necessary for the general interest.

33 It is apparent from the Court's case-law that the protection afforded by that article does not concern mere commercial interests or opportunities, the uncertainties of which are part of the very essence of economic activity, but concerns rights with an asset value creating an established legal position under the legal system, enabling the holder to exercise those rights autonomously and for his or her own benefit (judgments of 22 January 2013, *Sky Österreich*, C-283/11, EU:C:2013:28, paragraph 34, and of 21 May 2019, *Commission* v *Hungary (Usufruct over agricultural land)*, C-235/17, EU:C:2019:432, paragraph 69).

34 Thus, it must be assessed, in this instance, whether the guarantees afforded by Article 17(1) of the Charter cover incentives for the production of photovoltaic energy, such as those at issue in the main proceedings, which have not yet been paid but which were granted in the context of an existing support scheme.

35 In that regard, concerning whether it may be considered that those incentives have an asset value, it is apparent from the case-law of the European Court of Human Rights relating to Article 1 of Protocol No 1 to the European Convention for the Protection of Human Rights and Fundamental Freedoms, signed at Rome on 4 November 1950, which must be taken into consideration pursuant to Article 52(3) of the Charter, that the concept of 'possessions' referred to in the first part of Article 1 of that Protocol has an autonomous meaning which is not limited to the ownership of material goods and that certain other rights and interests constituting assets can also be regarded as 'property rights' (ECtHR, 22 June 2004, *Broniowski v. Poland*, CE:ECHR:2004:0622JUD003144396, § 129).

36 The European Court of Human Rights thus held that, in certain circumstances, 'possessions' can be assets, including claims (see, to that effect, ECtHR, 28 September 2004, *Kopecký v. Slovakia*, CE:ECHR:2004:0928JUD004491298, § 35).

37 In this instance, it is apparent from the files submitted to the Court of Justice that the agreements which GSE concluded with the photovoltaic installation operators concerned, pursuant to Article 7 of Legislative Decree No 387/2003 and Article 25(10) of Legislative Decree No 28/2011, were concluded in an ad hoc and individual manner and that those agreements laid down the specific feed-in tariffs and the duration of their payment. It therefore appears that the incentives granted on the basis of those provisions and confirmed by those agreements did not constitute mere commercial interests or opportunities but had an asset value.

38 However, in the light of the case-law cited in paragraph 33 of the present judgment, it is also necessary, for the right to receive incentives such as those at issue in the main proceedings to be eligible for the protection offered by Article 17 of the Charter, to examine whether that right constitutes an established legal position within the meaning of that case-law (see, by analogy, judgment of 22 January 2013, *Sky Österreich*, C-283/11, EU:C:2013:28, paragraph 36).

39 The Court of Justice recalled, in paragraph 61 of the judgment of 3 September 2015, *Inuit Tapiriit Kanatami and Others* v *Commission* (C-398/13 P, EU:C:2015:535), that it is apparent from the case-law of the European Court of Human Rights relating to Article 1 of Protocol No 1 to the European Convention for the Protection of Human Rights and Fundamental Freedoms that future income cannot be considered to constitute 'possessions' that may enjoy the protection of Article 17 of the Charter unless it has already been earned, it is definitely payable or there are specific circumstances that can cause the person concerned to entertain a legitimate expectation of obtaining an asset.

40 It is therefore appropriate, in the light of paragraphs 30 and 39 of the present judgment, to examine the scope of the principles of legal certainty and of the protection of legitimate expectations as regards the national legislation at issue in the main proceedings.

41 In accordance with the Court's settled case-law, the principle of legal certainty, the corollary of which is the principle of the protection of legitimate expectations, requires that rules of law be clear and precise and that the application of those rules be predictable for individuals, especially where they may have negative consequences for individuals and undertakings. In particular, that

principle requires that legislation enables those concerned to know precisely the extent of the obligations which are imposed on them, and that those persons are able to ascertain unequivocally what their rights and obligations are and take steps accordingly (judgment of 11 July 2019, *Agrenergy and Fusignano Due*, C-180/18, C-286/18 and C-287/18, EU:C:2019:605, paragraphs 29 and 30 and the case-law cited).

42 Also in accordance with the Court's settled case-law, the principle of the protection of legitimate expectations may be relied on by any economic operator on whose part national authorities have created reasonable expectations. However, where a prudent and circumspect economic operator could have foreseen the adoption of a measure likely to affect his or her interests, he or she cannot plead that principle if the measure is adopted. Moreover, economic operators cannot justifiably claim a legitimate expectation that an existing situation which may be altered by the national authorities in the exercise of their discretionary power will be maintained (judgment of 11 July 2019, *Agrenergy and Fusignano Due*, C-180/18, C-286/18 and C-287/18, EU:C:2019:605, paragraph 31 and the case-law cited).

43 It is for the referring court to determine whether national legislation such as that at issue in the main proceedings is consistent with those principles, as the Court of Justice, when giving a preliminary ruling under Article 267 TFEU, has jurisdiction only to provide the national court with all the criteria for the interpretation of EU law which may enable it to determine the issue of compatibility. The referring court may take into account, for that purpose, all relevant factors which are apparent in particular from the terms, objectives or general scheme of the legislation concerned (see, in particular, judgment of 11 July 2019, *Agrenergy and Fusignano Due*, C-180/18, C-286/18 and C-287/18, EU:C:2019:605, paragraphs 33 and 34 and the case-law cited).

44 In order to provide a useful answer to the referring court, the following matters, which are apparent from the files submitted to the Court of Justice, must be noted in particular.

45 As regards, first of all, Legislative Decree No 387/2003, which introduced the scheme incentivising the production of energy by solar photovoltaic installations in Italy by transposing Directive 2001/77, it is apparent from Article 7(2) of that legislative decree that, as regards electricity produced by photovoltaic installations, the ministerial decrees implementing that legislative decree laid down a specific feed-in tariff in a decreasing amount and with a duration ensuring a fair return on investment costs. Those decrees also set a maximum limit on the cumulative electrical power of all the installations eligible for the incentive.

46 The very wording of Article 7 of that legislative decree may therefore be considered, subject to verifications to be carried out by the referring court, as indicating to a prudent and circumspect economic operator, within the meaning of the case-law cited in paragraph 42 of the present judgment, that the incentives at issue were not guaranteed to all operators concerned during a specific period, in the light of, in particular, the reference to a decreasing amount of the feed-in tariffs, the limited duration of the incentive and the setting of a maximum limit on the cumulative electrical power eligible for that incentive.

47 As regards, next, Legislative Decree No 28/2011, which repealed Legislative Decree No 387/2003, the Court of Justice has previously made, in essence, the same finding, by ruling, in paragraph 44 of the judgment of 11 July 2019, *Agrenergy and Fusignano Due* (C-180/18, C-286/18 and C-287/18, EU:C:2019:605), that the provisions of national law adopted pursuant to that decree were of such a kind as to indicate at once to prudent and circumspect economic operators

that the support scheme applicable to solar photovoltaic installations might be altered, or even withdrawn, by the national authorities in order to take account of changes in certain circumstances.

48 Legislative Decree No 28/2011 provided, in Article 25 thereof, that the incentive for the production of electricity from photovoltaic installations is to be governed by a ministerial decree setting an annual limit on the cumulative electrical power of such installations that are eligible for the feed-in tariffs and providing for those tariffs by taking into account the reduced cost of the technology and the installations and the incentives applied in the other Member States, and the nature of the location of the installations.

49 As regards, lastly, the agreements concluded with GSE, it is apparent from the files submitted to the Court that, first, the agreements concluded with the owners of the photovoltaic installations concerned which became operational before 31 December 2012 did no more than lay down the practical conditions for the payment of the incentives which had been granted in the form of a previous administrative decision made by GSE. The Italian Government states that the Corte costituzionale (Constitutional Court) classified those agreements as public-law contracts arising from an administrative act.

50 Second, as regards the incentives for the installations which became operational after 31 December 2012, those incentives were 'granted', as is apparent from the wording of Article 24(2)(d) of Legislative Decree No 28/2011, by means of private-law contracts concluded between GSE and the entities responsible for the installations concerned, on the basis of a standard form contract produced by the Regulatory Authority for Electricity and Gas.

51 It appears, consequently, as stated by the Italian Government in its written observations, that the agreements concluded between the operators of the photovoltaic installations concerned and GSE were signed on the basis of standard form contracts, that they did not grant, as such, incentives to those installations but defined only the arrangements for the payment of incentives and that, at least as regards the agreements concluded after 31 December 2012, GSE reserved for itself the right to alter unilaterally the terms of those agreements as a result of possible legislative developments, as was expressly indicated in those agreements. Those elements therefore constituted a sufficiently clear indication to the economic operators that the incentives concerned might be altered or withdrawn.

52 Furthermore, the measures provided for in Article 26(2) and (3) of Decree-Law No 91/2014 do not affect incentives previously paid, but apply only as from the date of entry into force of that decree-law and only to incentives for which provision had been made but which were not yet due. Consequently, those measures are not retroactive, contrary to the assertions of the applicants in the main proceedings.

53 All those circumstances appear, subject also to verifications to be carried out by the referring court, to follow clearly from the national legislation at issue in the main proceedings, so that their application was, in principle, foreseeable. It is clear from the files before the Court that the legislative provisions at issue in the main proceedings were duly published, that they were sufficiently precise, and that the applicants in the main proceedings were aware of their content. Thus, a prudent and circumspect economic operator cannot rely on an infringement of the principles of legal certainty and of the protection of legitimate expectations as a result of amendments made to that legislation.

54 Consequently, it must be noted that, as the Advocate General also stated in point 48 of his Opinion, the right claimed by the photovoltaic installation operators concerned to enjoy the incentives at issue in the main proceedings with no changes for the entire duration of the agreements that they concluded with GSE does not constitute an established legal position and does not fall within the scope of the protection provided for in Article 17 of the Charter and, as a result, the alteration of the amounts of those incentives or the arrangements for their payment made by a national provision such as Article 26 of Decree-Law No 91/2014 cannot be equated to an infringement of the right to property as recognised in Article 17 of the Charter.

55 Second, as regards Article 16 of the Charter, it should be borne in mind that that article enshrines the freedom to conduct a business and provides that that freedom is recognised in accordance with EU law and national laws and practices.

56 In that regard, it is apparent from the Court's case-law that the protection afforded by Article 16 of the Charter covers the freedom to exercise an economic or commercial activity, the freedom of contract and free competition, as is apparent from the explanations relating to that article, which, in accordance with the third subparagraph of Article 6(1) TEU and Article 52(7) of the Charter, have to be taken into consideration for the interpretation of the Charter (judgment of 22 January 2013, *Sky Österreich*, C-283/11, EU:C:2013:28, paragraph 42 and the case-law cited).

57 Freedom of contract, for the purposes of Article 16 of the Charter, concerns, in particular, the freedom to choose with whom to do business and the freedom to determine the price of a service (judgment of 20 December 2017, *Polkomtel*, C-277/16, EU:C:2017:989, paragraph 50).

58 In this instance, the applicants in the main proceedings submit that Article 26(2) and (3) of Decree-Law No 91/2014 adversely affects the freedom of contract of the beneficiaries of the incentives provided for by the agreements concluded with GSE and their right to dispose of their economic and financial resources freely, on the ground that that decree-law altered the conditions for the granting of those incentives.

59 As has been noted in paragraphs 49 and 50 of the present judgment, it is apparent from the files submitted to the Court that, first, the agreements concluded with the owners of the installations which became operational before 31 December 2012 laid down only the practical conditions for the payment of the incentives granted by previous administrative decisions and that, second, the incentives for the installations which became operational after that date were confirmed through standard form contracts concluded between GSE and the installation operators concerned which defined only the arrangements for the payment of those incentives.

60 Consequently, it appears that the applicants in the main proceedings did not have bargaining power as regards the content of the agreements concluded with GSE. As noted by the Advocate General in point 70 of his Opinion, where the contract is a standard form contract drawn up by one of the contracting parties, the freedom of contract of the other party consists, essentially, in deciding whether or not to accept the terms of such a contract. Furthermore, as has been stated in paragraph 51 of the present judgment, at least as regards the agreements concluded after 31 December 2012, GSE reserved for itself the right to alter unilaterally the terms of those agreements.

61 Therefore, the national legislation at issue in the main proceedings cannot, subject to verifications to be carried out by the referring court, be regarded as interfering with the freedom of contract of the parties to the agreements at issue in the main proceedings for the purposes of Article 16 of the Charter.

62 Furthermore, the freedom to conduct a business enshrined in the latter provision also includes the right for any business to be able freely to use, within the limits of its liability for its own acts, the economic, technical and financial resources available to it (judgments of 27 March 2014, *UPC Telekabel Wien*, C-314/12, EU:C:2014:192, paragraph 49, and of 30 June 2016, *Lidl*, C-134/15, EU:C:2016:498, paragraph 27).

63 A restriction of that right is, inter alia, the obligation to take measures which may represent a significant cost for an economic operator, have a considerable impact on the organisation of his or her activities, or require difficult and complex technical solutions (see, to that effect, judgment of 27 March 2014, *UPC Telekabel Wien*, C-314/12, EU:C:2014:192, paragraph 50).

64 Nevertheless, in this instance, it does not appear that Article 26 of Decree-Law No 91/2014 restricted, for the purposes of the case-law cited in paragraphs 62 and 63 of the present judgment, the right of the operators of the photovoltaic installations concerned freely to use resources available to them, since the feed-in tariffs, as granted by the administrative acts and laid down in the agreements concluded between those operators and GSE, may not be regarded as such resources, in so far as, as is apparent, in essence, from paragraphs 51 to 53 of the present judgment, these were only incentives for which provision had been made but which were not yet due, and those operators cannot rely on a legitimate expectation so as to benefit from such incentives with no changes.

65 Thus, it does not appear from the files before the Court of Justice that Article 26(2) and (3) of Decree-Law No 91/2014 has rendered the operators of photovoltaic installations subject to restrictions such as those referred to in the case-law cited in paragraph 63 of the present judgment.

66 Consequently, a national provision such as Article 26 of Decree-Law No 91/2014 cannot be considered to be an infringement of the freedom to conduct a business enshrined in Article 16 of the Charter.

67 In the third place, since the referring court is uncertain as to the compatibility of Article 26(2) and (3) of Decree-Law No 91/2014 with Article 10 of the Energy Charter, it must be noted that, in the light of Article 216(2) TFEU, the Energy Charter, being a mixed agreement, is binding upon the EU institutions and the Member States.

68 Under Article 10 of the Energy Charter, each contracting party is, in accordance with the provisions of that charter, to encourage and create stable, equitable, favourable and transparent conditions for investors of 'other Contracting Parties' to make investments in its area.

69 It is apparent from the wording of Article 10 of the Energy Charter that the conditions defined in that article must be ensured in respect of investors of other contracting parties.

70 In this instance, it does not appear from the files before the Court that one or more of the investors concerned are investors of other contracting parties within the meaning of Article 10 of the Energy Charter or that they have alleged an infringement of that article in such a capacity.

Consequently, Article 10 of the Energy Charter does not seem to apply in the cases in the main proceedings, so that it is not necessary to examine the compatibility of the national legislation with that provision.

71 In the light of all the foregoing, the answer to the question referred is that, subject to verifications to be carried out by the referring court taking into account all the relevant factors, Article 3(3)(a) of Directive 2009/28 and Articles 16 and 17 of the Charter, read in the light of the principles of legal certainty and of the protection of legitimate expectations, must be interpreted as not precluding national legislation which provides for the reduction or delay of the payment of incentives for energy produced by solar photovoltaic installations which were previously granted by administrative decisions and confirmed by special agreements concluded between the operators of those installations and a public company, where that legislation concerns incentives for which provision has previously been made but which are not yet due.

Costs

72 Since these proceedings are, for the parties to the main proceedings, a step in the actions 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 (Fifth Chamber) hereby rules:

Subject to verifications to be carried out by the referring court taking into account all the relevant factors, Article 3(3)(a) of Directive 2009/28/EC of the European Parliament and of the Council of 23 April 2009 on the promotion of the use of energy from renewable sources and amending and subsequently repealing Directives 2001/77/EC and 2003/30/EC, and Articles 16 and 17 of the Charter of Fundamental Rights of the European Union, read in the light of the principles of legal certainty and of the protection of legitimate expectations, must be interpreted as not precluding national legislation which provides for the reduction or delay of the payment of incentives for energy produced by solar photovoltaic installations which were previously granted by administrative decisions and confirmed by special agreements concluded between the operators of those installations and a public company, where that legislation concerns incentives for which provision has previously been made but which are not yet due.

[Signatures]