Reports of Cases

JUDGMENT OF THE COURT (Fifth Chamber)

29 April 2021 *

(Reference for a preliminary ruling – Environment – Directive 2003/87/EC – Greenhouse gas emission allowance trading scheme – Article 3(e) – Concept of 'installation' – Article 3(f) – Concept of 'operator' – Points 2 and 3 of Annex I – Aggregation rule – Aggregation of the capacities of the activities in an installation – Transfer of an electricity and heat cogeneration unit by the owner of an industrial facility – Contract for the supply of energy between the transferor and transferee undertakings – Updating of the greenhouse gas emissions permit)

In Case C-617/19,

REQUEST for a preliminary ruling under Article 267 TFEU from the Tribunale amministrativo regionale per il Lazio (Regional Administrative Court, Lazio, Italy), made by decision of 13 March 2019, received at the Court on 14 August 2019, in the proceedings

Granarolo SpA,

v

Ministero dell'Ambiente e della Tutela del Territorio e del Mare,

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,

intervener:

E.ON Business Solutions Srl, formerly E.ON Connecting Energies Italia Srl,

THE COURT (Fifth Chamber),

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

Advocate General: H. Saugmandsgaard Øe,

Registrar: R. Schiano, Administrator,

having regard to the written procedure and further to the hearing on 17 September 2020,

* Language of the case: Italian.

after considering the observations submitted on behalf of:

– Granarolo SpA, by A. Stalteri, avvocato,

– E.ON Business Solutions Srl, by C. Vivani and F. Triveri, avvocati,

– the Italian Government, by G. Palmieri, acting as Agent, and by G. Palatiello, avvocato dello Stato,

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

– the European Commission, by A.C. Becker and G. Gattinara, acting as Agents,

after hearing the Opinion of the Advocate General at the sitting on 10 December 2020,

gives the following

Judgment

1 This request for a preliminary ruling concerns the interpretation of Article 3(e) of, and Annex I to, Directive 2003/87/EC of the European Parliament and of the Council of 13 October 2003 establishing a scheme for greenhouse gas emission allowance trading within the Community and amending Council Directive 96/61/EC (OJ 2003 L 275, p. 32), as amended by Directive 2009/29/EC of the European Parliament and of the Council of 23 April 2009 (OJ 2009 L 140, p. 63) ('Directive 2003/87').

2 The request has been made in proceedings between Granarolo SpA and the Ministero dell'Ambiente e della Tutela del Territorio e del Mare (Ministry of the Environment and the Protection of Land and Sea, Italy), the Ministero dello Sviluppo economico (Ministry of Economic Development, Italy) and 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 (National Committee for the Management of Directive 2003/87/EC and for Support of the Management of Projects relating to the Kyoto Protocol, Italy; 'the ETS committee') regarding the rejection of a request for the updating of the greenhouse gas emissions permit held by Granarolo for one of its installations under the greenhouse gas emission allowance trading scheme at EU level ('the ETS').

Legal context

EU law

3 Article 2 of Directive 2003/87, entitled 'Scope', provides, in paragraph 1:

'This directive shall apply to emissions from the activities listed in Annex I and greenhouse gases listed in Annex II.'

4 Article 3 of that directive, entitled 'Definitions', provides:

'For the purposes of this directive[,] the following definitions shall apply:

…

(e) "installation" means 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 that site and which could have an effect on emissions and pollution;

(f) "operator" means any person who operates or controls an installation or, where this is provided for in national legislation, to whom decisive economic power over the technical functioning of the installation has been delegated;

…'

5 Article 4 of that directive, entitled 'Greenhouse gas emissions permits', is worded as follows:

'Member States shall ensure that, from 1 January 2005, no installation carries out any activity listed in Annex I resulting in emissions specified in relation to that activity unless its operator holds a permit issued by a competent authority in accordance with Articles 5 and 6, or the installation is excluded from the [EU ETS] pursuant to Article 27. This shall also apply to installations opted in under Article 24.'

6 Article 6 of Directive 2003/87, entitled 'Conditions for and contents of the greenhouse gas emissions permit', states, in paragraph 1:

'The competent authority shall issue a greenhouse gas emissions permit granting authorisation to emit greenhouse gases from all or part of an installation if it is satisfied that the operator is capable of monitoring and reporting emissions.

A greenhouse gas emissions permit may cover one or more installations on the same site operated by the same operator.

'The competent authority shall, at least every five years, review the greenhouse gas emissions permit and make any amendments as are appropriate.'

7 Under Article 7 of that directive, entitled 'Changes relating to installations':

'The operator shall inform the competent authority of any planned changes to the nature or functioning of the installation, or any extension or significant reduction of its capacity, which may require updating the greenhouse gas emissions permit. Where appropriate, the competent authority shall update the permit. Where there is a change in the identity of the installation's operator, the competent authority shall update the permit to include the name and address of the new operator.'

8 Annex I to that directive, entitled 'Categories of activities to which this directive applies', states, in points 2 and 3:

'2. The thresholds values given below generally refer to production capacities or outputs. Where several activities falling under the same category are carried out in the same installation, the capacities of such activities are added together.

3. When the total rated thermal input of an installation is calculated in order to decide upon its inclusion in the [EU ETS], the rated thermal inputs of all technical units which are part of it, in which fuels are combusted within the installation, are added together. …'

9 Annex I contains a table listing the categories of activities to which Directive 2003/87 applies. Those activities include 'combustion of fuels in installations with a total rated thermal input exceeding 20 MW (except in installations for the incineration of hazardous or municipal waste)'.

Italian law

10 Article 3(1)(t) and (v) of decreto legislativo n. 30 – Attuazione della direttiva 2009/29/CE che modifica la direttiva 2003/87/CE al fine di perfezionare ed estendere il sistema comunitario per lo scambio di quote di emissione di gas a effetto serra (Legislative Decree No 30 concerning the implementation of Directive 2009/29/EC amending Directive 2003/87/EC so as to improve and extend the greenhouse gas emission allowance trading scheme of the Community) of 13 March 2013 (GURI No 79 of 4 April 2013; 'Legislative Decree No 30/2013'), defines the concepts of 'operator' and 'installation' within the meaning of that legislative decree, in a manner analogous to Directive 2003/87.

11 Article 13(1) of Legislative Decree No 30/2013 provides that no installation may undertake the activities which are listed in Annex I to that legislative decree and which result in emissions of greenhouse gases without having obtained a permit issued by the ETS committee.

12 Article 15 of that legislative decree concerns the grant, conditions and content of such an emissions permit.

13 Article 16 of that legislative decree provides that the operator is to inform the ETS committee of any change in the identity of the operator, the nature and functioning of the installation, or in the extension or significant reduction of its capacity.

14 Article 38 of Legislative Decree No 30/2013 refers to the 'small emitters' scheme for the purpose of the monitoring and control of CO_2 emissions.

The dispute in the main proceedings and the questions referred for a preliminary ruling

15 Granarolo is a company operating in the fresh milk food sector and in the production and distribution of dairy products. It owns, in Pasturago di Vernate (Italy), a production facility composed of various units with a thermal power facility producing the heat necessary for its processing activities.

16 As regards that thermal power facility, Granarolo held, in accordance with the requirement under Article 4 of Directive 2003/87, a greenhouse gas emissions permit relating to the combustion of fuels in installations with a total rated thermal input exceeding 20 MW. Furthermore, under the national law, Granarolo is subject, in respect of that production facility, to the 'small emitters' scheme, for the purposes of the monitoring and control of CO_2 emissions.

17 In 2013, Granarolo built, on the industrial site of its production facility, an electricity and heat cogeneration unit for food production, with a total rated thermal input of less than 20 MW, and obtained from the ETS committee the updating of its greenhouse gas emissions permit, within the meaning of Article 7 of that directive.

18 In 2017, Granarolo transferred its cogeneration unit to E.ON Connecting Energies Italia Srl, an undertaking specialising in the energy sector ('E.ON'), while concluding with the latter a contract for the supply of electricity and heat. According to the referring court, that contract also set out an obligation on E.ON to obtain Granarolo's consent to carry out work on the cogeneration unit, a reimbursement to Granarolo in the event of non-compliance with the minimum quantities of energy to be supplied, a reduction in the price of energy supplied after 10 years and 6 months from the entry into force of the contract and an option for Granarolo to repurchase the cogeneration unit.

19 Following that transfer, Granarolo requested the ETS committee to update its greenhouse gas emissions permit, taking the view that the emission associated with the cogeneration unit, which was no longer operated by it or under its authority, should be subtracted from the amount of its CO_2 emissions.

20 As that request was rejected by decision of 6 June 2018 of the ETS committee, Granarolo brought an action before the referring court seeking the annulment of that decision. E.ON intervened in support of Granarolo in those proceedings.

21 In support of its action, Granarolo submits that the ETS committee, by basing its rejection decision on the maintenance of a formal interconnection between the cogeneration unit and Granarolo's production facility, misinterpreted the requirements of Directive 2003/87.

22 According to Granarolo, the production facility and the cogeneration unit cannot, on account of a connection for the purposes of supplying energy, be regarded as constituting a single installation when both are structurally and functionally independent.

23 Furthermore, it submits that, under Article 3(f) and Article 6 of that directive, a greenhouse gas emissions permit is issued to an operator which has the power to manage an installation and which, thus, may exercise control and monitoring of emissions. In the present case, Granarolo argues that it was on the basis of a misinterpretation of the energy supply contract between it and E.ON that the ETS committee concluded that Granarolo retained power to manage and control the cogeneration unit's emissions. Granarolo argues that that contract does not affect E.ON's ability independently to carry out its activity of generating energy and supplying electricity on the public network, so that, even if Granarolo were to take a smaller quantity of energy from the cogeneration unit, that would have no effect on the quantity of greenhouse gas emissions from that unit.

24 In addition, Granarolo submits that the ETS committee's decision of 6 June 2018 is based on a misinterpretation of the rule on the aggregation of sources of emissions laid down in Annex I to that directive, in so far as that rule applies only to situations in which several technical units form the same installation, and not to situations in which, as in the present case, there are several separate installations.

25 Before the referring court, the defendants in the main proceedings submit that the transfer of the cogeneration unit to E.ON did not affect the configuration of the installation and that a functional connection continues to exist between that cogeneration unit and Granarolo's production facility. In particular, they argue that there is an inseparable connection between the greenhouse gas emissions permit and the existence of an installation within the meaning of Article 3(e) of Directive 2003/87. In their view, the definition of an operator logically presupposes the definition of an installation, which means that any difference between the holder of such a permit and the actual operator of a technical unit inside the production facility is irrelevant.

26 The defendants also submit that where, as in the present case, a cogeneration unit is technically connected to the production facility and is likely to have an impact on overall emissions, it must be regarded as forming part with that facility of one and the same installation, with the result that it must be governed by a single permit, even though the cogeneration unit is located outside the production site.

27 Furthermore, the defendants in the main proceedings submit that, in the light of the clauses in the energy supply contract between Granarolo and E.ON, the former retained decisive economic power over the technical operation of the cogeneration unit and that, consequently, it remains the operator of that unit within the meaning of Article 3(f) of Directive 2003/87.

28 Furthermore, to adopt a contrary position would have the effect of infringing the aggregation rule set out in points 2 and 3 of Annex I to that directive, which seeks precisely to prevent an excessive subdivision of emissions sources from leading to the exclusion of most small or medium-sized installations from the scope of the ETS.

29 The defendants argue that, since the cogeneration unit at issue in the main proceedings has a power of less than 20 MW, it does not require a greenhouse gas emissions permit and falls outside the scope of the rules on the ETS. By contrast, as a result of the transfer of that cogeneration unit, Granarolo's production facility has seen a reduction in the amount of emissions produced annually which are offset by means of emission allowances.

30 The defendants also argue that, while the clauses in the energy supply contract place Granarolo in a position of strength in relation to E.ON, any interpretation to the effect that the initial installation was split into two facilities would give rise to circumvention of the rules on CO_2 emission.

31 In those circumstances, the Tribunale amministrativo regionale per il Lazio (Regional Administrative Court, Lazio, Italy) decided to stay the proceedings and to refer the following questions to the Court of Justice for a preliminary ruling:

'(1) Must Article 3(e) of Directive [2003/87] be interpreted as including within the concept of "installation" a situation such as that at issue in the present case, 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 together with 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, 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; an undertaking by 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]?

(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 [emissions] permit, following the transfer, and the possible effect that those emissions will 'evade' the [ETS] 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], or, on the contrary, is it merely a lawful consequence of the organisational choices of the operators, not prohibited by the [ETS]?'

Consideration of the questions referred for a preliminary ruling

32 As a preliminary point, it should be noted that, in the procedure laid down by Article 267 TFEU providing for cooperation between national courts and the Court of Justice, it is for the latter to provide the national court with an answer which will be of use to it and enable it to determine the case before it. To that end, the Court may have to reformulate the questions referred to it (judgment of 26 October 2016, *Yara Suomi and Others*, C-506/14, EU:C:2016:799, paragraph 29 and the case-law cited).

33 The fact that a national court has, formally speaking, worded its request for a preliminary ruling by referring to certain provisions of EU law does not preclude the Court of Justice from providing to the national court all the elements of interpretation which may be of assistance in adjudicating on the case pending before it, whether or not that court has referred to them in its questions. It is for the Court to extract from all the information provided by the national court, in particular from the grounds of the order for reference, the points of EU law which require interpretation, having regard to the subject matter of the dispute (judgment of 27 June 2018, *Turbogás*, C-90/17, EU:C:2018:498, paragraph 25 and the case-law cited).

34 In the present case, the dispute in the main proceedings concerns the rejection, by the ETS committee, of a request by Granarolo for the updating of its greenhouse gas emissions permit following the transfer of the cogeneration unit which it owned on the same industrial site as its food production facility to E.ON, an undertaking specialising in the energy sector, the transfer being accompanied by the conclusion with E.ON of a contract for the supply of energy.

35 As is apparent from the order for reference, the reason for rejecting the request for updating was that, having regard, in particular, to the clauses of the energy supply contract between Granarolo and E.ON, the production facility retained a functional interconnection with the cogeneration unit, so that they constituted one and the same installation within the meaning of Article 3(e) of Directive 2003/87, and that Granarolo remained, after the transfer, the operator of the cogeneration unit within the meaning of Article 3(f) of that directive. Furthermore, the question arises as to whether granting that request for updating would have been contrary to the aggregation rule set out in points 2 and 3 of Annex I to that directive and would have had the effect of allowing the ETS rules to be circumvented.

36 In the light of the foregoing, it must be held that, by its questions, which it is appropriate to examine together, the referring court asks, in essence, whether Article 3(e) and (f) of Directive 2003/87, read in conjunction with points 2 and 3 of Annex I to that directive, must be interpreted as precluding an owner of a production facility, which has a thermal power facility the activity of which comes under Annex I, from being able to obtain the updating of its greenhouse gas emissions permit within the meaning of Article 7 of that directive where it has transferred a cogeneration unit situated on the same industrial site as that production facility, implementing an activity the capacity of which is below the threshold provided for in Annex I, to an undertaking specialising in the energy sector, whilst at the same time concluding with that undertaking a contract providing, inter alia, that the energy produced by that cogeneration unit will be provided to that production facility.

37 In the present case, for the purposes of the present judgment, it should be pointed out that, as is apparent from the order for reference, the production facility in question in the main proceedings is a facility that produces dairy products and, for the purposes of the manufacturing process, has a thermal power facility with a total rated thermal input exceeding 20 MW which therefore comes under the activities indicated in Annex I to Directive 2003/87. As regards the cogeneration unit, its total rated thermal input is less than 20 MW, as a result of which it does not, as such, come under the activities referred to in that annex.

38 In the first place, as regards the referring court's question as to whether the cogeneration unit and the production facility in question in the main proceedings constitute, on account of the relationship existing between the former and the latter, one and the same installation within the meaning of Article 3(e) of that directive, it must be noted that that provision defines the concept of 'installation' as a stationary technical unit where one or more activities listed in Annex I to that directive are carried out and any other directly associated activities which have a technical connection with the activities carried out on that site and which could have an effect on emissions and pollution.

39 Therefore, in accordance with the criteria set out in that provision, first, it is only with the production facility's thermal power facility that the cogeneration unit at issue in the main proceedings is capable of forming one and the same installation and, second, that can be the case

only if the combustion activity carried out within that cogeneration unit relates directly to the activity of that thermal power facility carried out on the site of the production facility, if it is technically connected to it and if it is capable of having an effect on emissions and pollution.

40 At the outset, it must be stated that it follows from the very nature of those criteria that they require an assessment of a substantive nature. Accordingly, the question of whether those criteria, in particular the criterion relating to the existence of a technical connection and to which the referring court's questions relate in particular, are satisfied, in circumstances such as those at issue in the main proceedings, cannot depend on the contractual terms binding the transferor and transferee undertakings.

41 Furthermore, it is common ground that the criterion relating to the effects on emissions and pollution is satisfied where the cogeneration unit emits greenhouse gases.

42 As regards the other criteria laid down in Article 3(e) of Directive 2003/87, the Court has held that an activity relates directly to an activity covered by Annex I to that directive where it is essential to the carrying out of that activity and where that direct association is, moreover, evidenced by the existence of a technical connection in circumstances where the relevant activity is integrated into the same technical process of the activity covered by Annex I (see, to that effect, judgment of 9 June 2016, *Elektriciteits Produktiemaatschappij Zuid-Nederland EPZ*, C-158/15, EU:C:2016:422, paragraph 30).

43 It follows, first, that the condition relating to the existence of a direct association between the relevant activities requires that, in a situation such as that at issue in the main proceedings, the cogeneration activity must take place for the purposes of carrying out the activity of combustion of fuels in the thermal power facility of the production facility.

44 That condition cannot therefore be satisfied if, as Granarolo and the European Commission submitted, inter alia, during the hearing before the Court, the carrying out of that cogeneration activity is intended exclusively for food production within Granarolo's facility, which it is for the referring court to verify.

45 Second, the condition relating to the existence of a technical connection giving rise to such a direct association requires, as the Advocate General noted, in essence, in point 57 of his Opinion, that the connection between the activities concerned contributes to the integrity of the overall technical process of the activity covered by Annex I to Directive 2003/87.

46 Such a finding cannot be inferred from the mere existence, as is normally the case in the context of any industrial activity, of a connection between the relevant activities for the purposes of the supply of energy. While it is possible that a connection of that kind may be regarded as constituting a technical connection within the meaning of Article 3(e) of that directive, it is only on condition that it has a specific and distinctive form of integration within the technical process specific to the activity covered by Annex I to that directive.

47 In the present case, it is apparent from the file before the Court, as is confirmed, moreover, by the wording of the second question referred for a preliminary ruling, that Granarolo's production facility, more particularly, the thermal power facility which supplies the heat needed for that production, could continue to carry on its activity even if the supply of electricity and heat by the cogeneration unit is interrupted or if that unit's activity malfunctions or ceases.

48 Thus, since the connection between the cogeneration unit and the production facility does not contribute to the integrity of the technical process of the activities taking place in the thermal power facility of that production facility and since, consequently, subject to verification by the referring court, the criteria laid down in Article 3(e) of Directive 2003/87 are not satisfied, the cogeneration unit and the thermal power facility cannot be regarded as constituting one and the same installation within the meaning of that provision.

49 In the second place, as regards the question of whether, after the transfer of the cogeneration unit to E.ON, Granarolo remained the operator of that unit, it must be noted that, first, Article 6(1) of that directive, relating to the conditions for issuing greenhouse gas emissions permits, provides, in its first subparagraph, that the competent authority must issue such a permit in respect of emissions from all or part of an installation if it considers that the operator is capable of monitoring and reporting emissions and, in the second subparagraph, that a greenhouse gas emissions permit may cover one or more installations on the same site operated by the same operator. Furthermore, under Article 7 of that directive, that authority, where appropriate, must update the permit in the light of the information provided to it by the operator regarding changes relating to the installation concerned. Second, Article 3(f) of that directive defines the concept of 'operator' as being any person who operates or controls an installation or, where this is provided for in national legislation, any person to whom decisive economic power over the technical functioning of the installation has been delegated.

50 As is apparent from those provisions, it is necessary to examine, in circumstances such as those at issue in the main proceedings, where the owner of a production facility has transferred to an undertaking specialising in the energy sector a cogeneration unit situated on the same industrial site as that production facility, whether, on account of that transfer, that owner's control over the operation of that cogeneration unit and, therefore, over the greenhouse gas emissions resulting from that unit's activities came to an end. If that is the case, that owner cannot be regarded, after that transfer, as the operator of that cogeneration unit, within the meaning of Article 3(f) of Directive 2003/87.

51 In that regard, as the Advocate General observed in point 45 of his Opinion, it is for the purposes of identifying the operator of such a cogeneration unit that account must be taken, inter alia, of the contractual terms binding the transferor and the transferee.

52 In the present case, in the light of the information provided by the referring court, it cannot be inferred from the contractual provisions binding E.ON and Granarolo that the latter retained control over the functioning of the cogeneration unit in question in the main proceedings and, therefore, over the greenhouse gas emissions resulting from its activities.

53 First, as is apparent from the wording of the first question referred for a preliminary ruling, Granarolo transferred ownership of the cogeneration unit to E.ON and, to that end, transferred to E.ON, inter alia all the documents required for the operation of that unit and for the carrying out of the activity in that unit.

54 Second, under the energy supply contract between Granarolo and E.ON, the latter may increase the activity of the cogeneration unit and supply electricity generated on the public network. It is also free to reduce the amount of energy generated subject, in the event of non-compliance with the supply of the minimum quantities of energy specified in the contract, to a reimbursement of an amount equivalent to the difference between the costs of supplying energy on the market and the prices stipulated in the contract. Such a compensation mechanism, of a contractual nature,

cannot, however, be equated with a delegation, to Granarolo, of decisive economic power over the technical functioning of the cogeneration installation, within the meaning of the last part of Article 3(f) of Directive 2003/87.

55 Furthermore, it must be held that the other contractual clauses to which the referring court refers, in particular those relating to the sale price of energy, to Granarolo's repurchase option or to the need for Granarolo's authorisation in order for work to be carried out on the cogeneration unit, likewise do not confer on Granarolo control over the functioning of that unit, as required in Article 3(f) of the directive and, therefore, the clauses do not in themselves give Granarolo the right to determine or monitor, in a general manner, the quantity of greenhouse gas emissions resulting from that unit's activity.

56 It thus follows from the considerations set out in paragraphs 52 to 55 of the present judgment that, subject to verification by the referring court, Granarolo is, in any event, no longer the operator of the cogeneration unit, within the meaning of Article 3(f) of Directive 2003/87, with the result that it would be entitled to obtain the updating of its greenhouse gas emissions permit, in accordance with Article 7 of that directive.

57 Such updating of that authorisation cannot mean that there is a circumvention of the ETS rules.

58 In the first place, it must be noted that the updating of the permit does not infringe the aggregation rule, as set out in points 2 and 3 of Annex I to that directive.

59 As its title indicates, Annex I identifies the categories of activities to which that directive applies, as provided for in Article 2(1) of that directive. In particular, the aggregation rule specifies the conditions under which it is necessary to assess whether the activities taking place within an installation, in particular the activity of combustion of fuels, reach the thresholds referred to in Annex I in order to decide whether that installation should be included in the ETS.

60 As noted in paragraph 48 of the present judgment, a thermal power facility and a cogeneration unit such as those in question in the main proceedings are two separate entities which do not constitute a single installation within the meaning of Article 3(e) of Directive 2003/87.

61 Furthermore, it is common ground that, even after the transfer of the cogeneration unit to E.ON, the production facility's thermal power facility has continued to be covered by the ETS, given that its total rated thermal input is above the 20 MW threshold referred to in Annex I to that directive.

62 Furthermore, it must be pointed out that the aggregation rule relates to the methods for calculating the capacity of activities taking place within an installation and is not intended, in the light of the conditions referred to in paragraph 49 of the present judgment, to identify the operator of that installation. In the present case, contrary the apparent assertions made by the defendants in the main proceedings, such a rule cannot therefore result either in Granarolo being designated as the operator of the cogeneration unit in question in the main proceedings, when it can no longer be regarded as having control over the functioning of that unit and is therefore no longer in a position to monitor greenhouse gas emissions caused by the activity of that unit, or in depriving Granarolo of the right to request the updating of its greenhouse gas emissions permit.

63 In the second place, it must be noted that the principle of prohibition of fraud and abuse of rights is a general principle of EU law with which individuals must comply. The application of EU legislation cannot be extended to cover transactions carried out for the purpose of fraudulently or wrongfully obtaining advantages provided for by EU law (judgment of 28 October 2020, *Kreis Heinsberg*, C-112/19, EU:C:2020:864, paragraph 46 and the case-law cited).

64 In particular, the principle that abusive practices are prohibited is intended to bar wholly artificial arrangements which do not reflect economic reality and are set up with the sole aim of obtaining an undue advantage (see, by analogy, judgment of 18 June 2020, *KrakVet Marek Batko*, C-276/18, EU:C:2020:485, paragraph 84 and the case-law cited).

65 In the file before the Court, there is nothing to suggest that such abusive or fraudulent transactions, in particular the existence of a wholly artificial arrangement, took place in the present case. In particular, there is nothing in that file to cast doubt on the reality of the independent economic activity carried out by the transferee undertaking of the cogeneration unit in question in the main proceedings.

66 In the light of the foregoing considerations, the answer to the questions referred is that Article 3(e) and (f) of Directive 2003/87, read in conjunction with points 2 and 3 of Annex I to that directive, must be interpreted as not precluding an owner of a production facility which has a thermal power facility the activity of which comes under Annex I from being able to obtain the updating of its greenhouse gas emissions permit within the meaning of Article 7 of that directive where it has transferred a cogeneration unit situated on the same industrial site as that production facility, implementing an activity the capacity of which is below the threshold provided for in Annex I, to an undertaking specialising in the energy sector, while at the same time concluding with that undertaking a contract providing, inter alia, that the energy produced by that cogeneration unit will be provided to that production facility in the event that the thermal power facility and the cogeneration unit do not constitute a single installation within the meaning of Article 3(e) of that directive and where, in any event, the owner of the production facility is no longer the operator of the cogeneration unit within the meaning of Article 3(f) of that directive.

Costs

67 Since these proceedings are, for the parties to the main proceedings, a step in the action 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:

Article 3(e) and (f) 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, read in conjunction with points 2 and 3 of Annex I to Directive 2003/87, must be interpreted as not precluding an owner of a production facility which has a thermal power facility the activity of which comes under Annex I from being able to obtain the updating of its greenhouse gas emissions permit within the meaning of Article 7 of that directive where it has transferred a cogeneration unit situated on the same industrial site as that production facility, implementing an activity the capacity of which is below the threshold provided for in

Annex I, to an undertaking specialising in the energy sector, whilst at the same time concluding with that undertaking a contract providing, inter alia, that the energy produced by that cogeneration unit will be provided to that production facility in the event that the thermal power facility and the cogeneration unit do not constitute a single installation within the meaning of Article 3(e) of that directive and where, in any event, the owner of the production facility is no longer the operator of the cogeneration unit within the meaning of Article 3(f) of that directive.

[Signatures]