Reports of Cases

JUDGMENT OF THE COURT (Seventh Chamber)

27 June 2024*

(Reference for a preliminary ruling – Environment – Directive 2009/28/EC – Article 1 – Article 3(3)(a) – Principles of legal certainty and the protection of legitimate expectations – Charter of Fundamental Rights of the European Union – Article 16 – Promotion of the use of energy from renewable sources – Alteration of the applicable support scheme – Grant of the aid concerned subject to the conclusion of contracts)

In Case C-148/23,

REQUEST for a preliminary ruling under Article 267 TFEU from the Consiglio di Stato (Council of State, Italy), made by decision of 27 February 2023, received at the Court on 10 March 2023, in the proceedings

Gestore dei Servizi Energetici SpA – GSE

v

Erg Eolica Ginestra Srl,

Erg Eolica Campania SpA,

Erg Eolica Fossa del Lupo Srl,

Erg Eolica Amaroni Srl,

Erg Eolica Adriatica Srl,

Erg Eolica San Vincenzo Srl,

Erg Eolica San Circeo Srl,

Erg Eolica Faeto Srl,

Green Vicari Srl,

Erg Wind Energy Srl,

Erg Wind Sicilia 3 Srl,

* Language of the case: Italian.

Erg Wind Sicilia 6 Srl,

Erg Wind 4 Srl,

Erg Wind 6 Srl,

Erg Wind Sicilia 5 Srl,

Erg Wind 2000 Srl,

Erg Wind Sicilia 2 Srl,

Erg Wind Sardegna Srl,

Erg Wind Sicilia 4 Srl,

Enel Hydro Appennino Centrale Srl, formerly Erg Hydro Srl,

Erg Power Generation SpA,

Ministero dello Sviluppo economico,

THE COURT (Seventh Chamber),

composed of F. Biltgen, President of the Chamber, A. Prechal (Rapporteur), President of the Second Chamber, acting as Judge of the Seventh Chamber, and M.L. Arastey Sahún, Judge,

Advocate General: A. Rantos,

Registrar: A. Juhász-Tóth, Administrator,

having regard to the written procedure and further to the hearing on 7 February 2024,

after considering the observations submitted on behalf of:

– Gestore dei Servizi Energetici SpA – GSE, by F. Degni, P.R. Molea and A. Pugliese, avvocati,

– Erg Eolica Ginestra Srl, Erg Eolica Campania SpA, Erg Eolica Fossa del Lupo Srl, Erg Eolica Amaroni Srl, Erg Eolica Adriatica Srl, Erg Eolica San Vincenzo Srl, Erg Eolica San Circeo Srl, Erg Eolica Faeto Srl, Green Vicari Srl, Erg Wind Energy Srl, Erg Wind Sicilia 3 Srl, Erg Wind Sicilia 6 Srl, Erg Wind 4 Srl, Erg Wind 6 Srl, Erg Wind Sicilia 5 Srl, Erg Wind 2000 Srl, Erg Wind Sicilia 2 Srl, Erg Wind Sardegna Srl, Erg Wind Sicilia 4 Srl, Enel Hydro Appennino Centrale Srl, formerly Erg Hydro Srl, and Erg Power Generation SpA, by E. Bruti Liberati, A. Canuti and P. Tanferna, avvocati,

– the Italian Government, by G. Palmieri, acting as Agent, and by L.G.V. Delbono, S. Fiorentino and P. Garofoli, avvocati dello Stato,

– the European Commission, by B. De Meester and G. Gattinara, acting as Agents,

having decided, after hearing the Advocate General, to proceed to judgment without an Opinion,

gives the following

Judgment

1 This request for a preliminary ruling concerns the interpretation, first, of Articles 1 and 3 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 (OJ 2009 L 140, p. 16), read in the light of recitals 8, 14 and 25 of that directive and of the principles of legal certainty and the protection of legitimate expectations, and, secondly, of Article 16 of the Charter of Fundamental Rights of the European Union ('the Charter').

2 This request has been made in proceedings between Gestore dei Servizi Energetici SpA – GSE, the energy services provider in Italy, and 21 companies producing electricity from renewable non-photovoltaic sources, namely Erg Eolica Ginestra Srl, Erg Eolica Campania SpA, Erg Eolica Fossa del Lupo Srl, Erg Eolica Amaroni Srl, Erg Eolica Adriatica Srl, Erg Eolica San Vincenzo Srl, Erg Eolica San Circeo Srl, Erg Eolica Faeto Srl, Green Vicari Srl, Erg Wind Energy Srl, Erg Wind Sicilia 3 Srl, Erg Wind Sicilia 6 Srl, Erg Wind 4 Srl, Erg Wind 6 Srl, Erg Wind Sicilia 5 Srl, Erg Wind 2000 Srl, Erg Wind Sicilia 2 Srl, Erg Wind Sardegna Srl, Erg Wind Sicilia 4 Srl, Enel Hydro Appennino Centrale Srl, formerly Erg Hydro Srl, and Erg Power Generation SpA, and the Ministero dello Sviluppo economico (Ministry of Economic Development, Italy) concerning the replacement of a support scheme for producers of that electricity by another which requires those producers to conclude an agreement with GSE in order to benefit from the latter support scheme.

Legal context

European Union law

3 Recitals 8, 14 and 25 of Directive 2009/28 are worded as follows:

'(8) The [European] Commission communication of 10 January 2007 entitled "Renewable Energy Roadmap – Renewable energies in the 21st century: building a more sustainable future" demonstrated that a 20% target for the overall share of energy from renewable sources and a 10% target for energy from renewable sources in transport would be appropriate and achievable objectives, and that a framework that includes mandatory targets should provide the business community with the long-term stability it needs to make rational, sustainable investments in the renewable energy sector which are capable of reducing dependence on imported fossil fuels and boosting the use of new energy technologies. Those targets exist in the context of the 20% improvement in energy efficiency by 2020 set out in the Commission communication of 19 October 2006 entitled "Action Plan for Energy Efficiency: Realising the Potential", which was endorsed by the European Council of March 2007, and by the European Parliament in its resolution of 31 January 2008 on that Action Plan.

…

(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. Deferring a decision about whether a target is mandatory until a future event takes place is thus not appropriate.

…

(25) Member States have different renewable energy potentials and operate different schemes of support for energy from renewable sources at the national level. The majority of Member States apply support schemes that grant benefits solely to energy from renewable sources that is produced on their territory. 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. …'

4 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. It lays down rules relating to statistical transfers between Member States, joint projects between Member States and with third countries, guarantees of origin, administrative procedures, information and training, and access to the electricity grid for energy from renewable sources. It establishes sustainability criteria for biofuels and bioliquids.'

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

'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. Such mandatory national overall targets are consistent with a target of at least a 20% share of energy from renewable sources in the [European] Community's gross final consumption of energy in 2020. In order to achieve the targets laid down in this Article more easily, each Member State shall promote and encourage energy efficiency and energy saving.

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

Legislative Decree No 79/1999

6 By Decreto legislativo n. 79 – Attuazione della direttiva 96/92/CE recante norme comuni per il mercato interno dell'energia elettrica (Legislative Decree No 79 on the implementation of Directive 96/92/EC concerning common rules for the internal market in electricity) of 16 March 1999 (GURI No 75 of 31 March 1999, p. 8), the Italian Republic had established a support scheme for the production of electricity from renewable sources by requiring importers and producers of electricity from non-renewable sources to feed into the national network, during the subsequent year, a quota of electricity produced from renewable sources or alternately to acquire, in whole or in part, the equivalent of the quota or related rights, in the form of certificates, known as 'green certificates', granted to producers of that electricity, from other producers, provided that the latter introduce that electricity into the network ('the green certificate scheme').

Legislative Decree No 28/2011

7 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 (GURI No 71 of 28 March 2011, Ordinary Supplement to GURI No 81; 'Legislative Decree No 28/2011'), which entered into force on 29 March 2011, provides that, from 2013, the green certificate scheme was to be phased out and replaced, from 2016, by a support scheme based on the grant of incentive feed-in tariffs ('incentive feed-in tariff scheme').

8 Article 24 of that legislative decree provides:

'1. The production of electricity by plantsplantpowered 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 and specific criteria referred to in paragraphs 3 and 4. …

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

…

(d) the incentives shall be granted by means of private-law contracts concluded between GSE and the entity responsible for the plants, on the basis of a standard contract defined by the Autorità per l'Energia Elettrica e il Gas [(AEEG) (Regulatory Authority for Electricity and Gas, Italy), now the Autorità di Regolazione per Energia Reti e Ambiente (ARERA) (Regulatory Authority for Energy, Networks and Environment, Italy)] within three months of the date of entry into force of the first of the decrees referred to in paragraph 5;

…

5. By decrees of the Minister for Economic Development in consultation with the Ministro dell'Ambiente et della Tutela del Territorio e del Mare [(Minister for the Environment and the Protection of Natural Resources and the Sea, Italy)] and, for the competence profiles, with the Ministro delle Politiche Agricole e Forestali [(Minister for Agricultural and Forestry Policy, Italy)], after consulting the [AEEG] and the Conferenza unificata [(Unified Conference, Italy)], referred to in Article 8 of decreto legislativo n. 281 (Legislative Decree No 281) of 28 August 1997, the detailed rules for implementing the incentive schemes provided for in this article shall be defined in accordance with the criteria set out in paragraphs 2, 3 and 4 above. The decrees shall govern, in particular:

…

(c) the detailed rules of the transition from the old to the new incentive mechanism. The detailed rules shall relate in particular to the replacement of the right to collect green certificates for the years after 2015, including for plants not powered by renewable sources, by a right of access, for the remaining period of the right to collect green certificates, to an incentive scheme of the type referred to in paragraph 3, so as to ensure the profitability of the investments made.

…'

9 Article 25(4) of Legislative Decree No 28/2011 provides that GSE is to withdraw annually the green certificates issued for the production of energy from renewable sources in the years 2011 to 2015 which may exceed those required to comply with the quota relating to the renewable energy purchase obligation. The withdrawal price of the certificates referred to above is to be 78% of the price referred to in Article 2(148) of legge n. 244 – Disposizioni per la formazione del bilancio annuale e pluriennale dello Stato (legge finanziaria 2008) (Law No 244 on provisions for drawing up the annual and multiannual State budget (2008 Finance Law)) of 24 December 2007 (GURI No 300 of 28 December 2007, Ordinary Supplement to GURI No 285).

Decree of 6 July 2012

10 The Minister for Economic Development, in consultation with the Minister for the Environment and the Protection of Natural Resources and the Sea and the Minister for Agricultural and Forestry Policy, adopted the decreto – Attuazione dell'art. 24 del decreto legislativo del 3 marzo 2011, n. 28, recante incentivazione della produzione di energia elettrica da impianti a fonti rinnovabili diversi dai fotovoltaici (Decree – Implementing Article 24 of Legislative Decree No 28 of 3 March 2011 promoting the production of electricity from renewable non-photovoltaic sources) of 6 July 2012 (GURI No 159 of 10 July 2012, Ordinary Supplement to GURI No 143; 'Decree of 6 July 2012').

11 Article 19 of the Decree of 6 July 2012, entitled 'Conversion of the right to collect green certificates to incentives', provides:

'1. The production of electricity by plants using renewable energy sources operating before 31 December 2012 …, which has acquired the right to collect green certificates, shall be granted, for the remaining period after 2015, a feed-in tariff I on net production covered by the incentive scheme under the previously applicable provisions … [a mathematical formula is then set out in order to calculate that feed-in tariff I]

…'

12 Article 20 of that decree, entitled 'Provisions concerning the withdrawal of green certificates issued for annual production until 2015', provides:

'1. For the purposes of the issue and withdrawal of green certificates relating to production from 2012 to 2015, pursuant to the first sentence of Article 24(5)(c) of Legislative Decree [No 28/2011], the provisions of the following paragraphs apply.

2. At the request of the producer, GSE shall issue, on a quarterly basis, green certificates relating to production in the preceding quarter, on the basis of the measures sent monthly by the network operators to GSE, on the basis of a specific procedure published by GSE within 60 days of the entry into force of the present decree.

3. … at the request of the holder, GSE shall withdraw, at the price defined in Article 25(4) of Legislative Decree No 28/2011 …:

…

(b) green certificates relating to production in the first half of 2012 before 31 March 2013; green certificates relating to production in the second half of 2012 before 30 September 2013;

(c) green certificates relating to production in the first quarter of 2013 before 31 December 2013; green certificates relating to production in the second quarter of 2013 before 31 March 2014; green certificates relating to production in the third quarter of 2013 before 30 June 2014; green certificates relating to production in the fourth quarter of 2013 before 30 September 2014;

(d) green certificates relating to production in the first quarter of 2014 before 30 September 2014; green certificates relating to production in the second quarter of 2014 before 31 December 2014; green certificates relating to production in the third quarter of 2014 before 31 March 2015; green certificates relating to production in the fourth quarter of 2014 before 30 June 2015;

(e) green certificates relating to production in the first quarter of 2015 before 30 September 2015; green certificates relating to production in the second quarter of 2015 before 31 December 2015; green certificates relating to production in the third quarter of 2015 before 31 March 2016; green certificates relating to production in the fourth quarter of 2015 before 30 June 2016.

…'

13 Article 21(8) of that decree provides:

'For each plant, before obtaining the right of access to the incentive mechanisms referred to in this decree, the entity responsible shall conclude a private-law contract with GSE. GSE shall provide the [AEEG] with the information necessary to enable it to draw up, within three months of the entry into force of this decree, the standard contract referred to in Article 24(2)(d) of Legislative Decree [No 28/2011].'

14 Article 30 of the Decree of 6 July 2012, entitled 'Transition from the old to the new incentive mechanism', provides:

'1. In order to protect investments in the process of completion and to ensure a gradual transition from the old to the new mechanism, for plants put into service before 30 April 2013, or before 30 June 2013 only in respect of plants powered by waste as referred to in Article 8(4)(c), it is possible to opt for an incentive mechanism other than that established by this decree, in accordance with the following terms and conditions:

…

(b) the plants put into service within the time period referred to in paragraph 1 are subject to the overall tariffs and to multipliers for the green certificates indicated in Tables 1 and 2 annexed to Law No 244 of 2007, as amended, and to paragraph 382c of legge n. 296 – Disposizioni per la formazione del bilancio annuale e pluriennale dello Stato (Law No 296 on provisions for drawing up the annual and multiannual State budget) of 27 December 2006 (GURI No 299 of 27 December 2006, Ordinary Supplement No 244), as amended, applicable from the entry into force of this decree and reduced by 3% per month from January 2013; that reduction shall apply from May only in respect of plants powered by waste as referred to in Article 8(4)(c).

…

2. The plants referred to in paragraph 1 must have a permit prior to the date of entry into force of this decree.

…'

The standard agreements

15 By Decision No 207/2013/R/EFR of 16 May 2013, the AEEG approved the draft standard agreement entitled 'Fonti energetiche rinnovabili' (agreement on renewable sources; 'the ERF Agreement') prepared by GSE for the purposes of granting the incentives provided for in the Decree of 6 July 2012. It was published on the AEEG's website on 17 May 2013.

16 On 20 April 2016, GSE published on its website a draft standard agreement entitled 'Gestione Riconoscimento Incentivo' (standard agreement on the management of the recognition of an incentive; 'the GRIN Agreement').

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

17 The 21 companies referred to in paragraph 2 of the present judgment ('the defendants in the main proceedings') are owners of plants producing electricity from renewable sources, other than photovoltaic energy, which benefited from support for the production of that electricity provided for under the green certificate scheme and, therefore, could sell green certificates to other operators in order to fulfil their obligation to inject a certain quantity of that electricity into the Italian electricity system.

18 Following the adoption of Legislative Decree No 28/2011 and the Decree of 6 July 2012, which provide for the replacement of the green certificate scheme by the incentive feed-in tariff scheme, those owners brought an action before the Tribunale amministrativo regionale per il Lazio (Regional Administrative Court, Lazio, Italy), seeking to challenge the legality of the GRIN Agreement which they had to conclude with GSE in order to implement the transition between those schemes.

19 That court upheld the action brought by those owners on the ground that neither Legislative Decree No 28/2011 nor the Decree of 6 July 2012 had expressly provided that that transition required the conclusion of an agreement with GSE. According to that court, the obligation to conclude a 'private-law contract' in order to benefit from the incentive feed-in tariff scheme, as provided for in Article 24(2)(d) of Legislative Decree No 28/2011, applied only to operators of plants powered by renewable sources which had been operating after 31 December 2012, and not to operators of plants, such as those of the same owners, which had operated before that date and whose operators benefited from the green certificate scheme.

20 GSE brought an appeal against the decision of the Tribunale amministrativo regionale per il Lazio (Regional Administrative Court, Lazio) before the Consiglio di Stato (Council of State, Italy), which is the referring court.

21 As a preliminary point, that court notes, in essence, that it is apparent from its case-law and from that of the Corte suprema di cassazione (Supreme Court of Cassation, Italy) that, contrary to what was held at first instance, the obligation to conclude an agreement with GSE in order to be able to benefit from the incentive feed-in tariff scheme applied both to operators whose plants had entered into service before 31 December 2012 and to operators whose plants had entered into service after 31 December 2012. According to the referring court, GSE could therefore use, subject to the necessary amendments linked to the particular features of the transition, the ERF Agreement approved by the AEEG or the GRIN Agreement, which followed the ERF Agreement, to make the grant of tariff support measures to operators of plants which had operated before 31 December 2012 conditional.

22 However, the referring court takes the view that it could be considered that, in so far as it requires the conclusion of an agreement with GSE on operators benefiting from the green certificate scheme in order to benefit from the incentive feed-in tariff scheme, the national legislation at issue in the main proceedings unilaterally altered the legal conditions on which the defendants in the main proceedings had based their economic activity, which could run counter to the objective of Directive 2009/28 of offering investors a degree of security.

23 The obligation on the undertakings concerned to conclude such an agreement is not the result of free negotiation. Moreover, that agreement imposes additional obligations on those undertakings. The latter does not merely provide for the conversion, on the basis of a mathematical formula, of those undertakings' green certificates into tariff support, but contains, inter alia, the obligation for them to install new remote reading equipment in order to enable GSE to collect metering data (Article 5 of the GRIN Agreement), limitations on the assignment of credits (Articles 7 and 8 of the GRIN Agreement), GSE's power to unilaterally alter or terminate incentives in the event that the plant concerned is sold to third parties (Article 9(2) of the GRIN Agreement), GSE's option to terminate the agreement merely on the ground that false or inaccurate data exist (Article 12 of the GRIN Agreement) and GSE's right to terminate and suspend the agreement (Article 13(3) and (4) of the GRIN Agreement).

24 According to the referring court, by unilaterally altering the legal conditions on which the defendants in the main proceedings had based their economic activity, the obligation to conclude such an agreement is liable to run counter both to the objective of Directive 2009/28, as is apparent from recitals 8, 14 and 25 of that directive and from Articles 1 and 3 thereof, which is to offer investors a degree of certainty, and to the principle of the protection of legitimate expectations.

25 The referring court doubts whether it can be argued that, in the present case, a prudent and circumspect operator would have been perfectly able to foresee precisely the development of the legislation at issue in the main proceedings and the risk of measures liable to harm his or her interests being adopted as a result. The referring court considers that, unlike the cases which gave rise to the judgment of 15 April 2021, *Federazione nazionale delle imprese elettrotecniche ed elettroniche (Anie) and Others* (C-798/18 and C-799/18, EU:C:2021:280), the previously applicable legislation did not contain a sufficiently clear indication for economic operators that the incentives for the green certificate scheme could be altered or withdrawn.

26 Furthermore, the referring court is of the view that, in the present case, there could also be an infringement of the freedom to conduct a business enshrined in Article 16 of the Charter. First, the national legislation at issue in the main proceedings could be regarded as constituting an interference with the freedom of contract of plant operators benefiting from the green certificate scheme, since the legislature replaced that scheme with the incentive feed-in tariff scheme and imposed on those operators new conditions in order to benefit from the latter scheme, even though they had planned and organised their economic activity for a period which should have remained stable for a reasonable period of time. Second, that national legislation affects the right of any undertaking, within the limits of responsibility for its actions, to use the economic and financial resources available to it freely,.

27 In those circumstances, the Consiglio di Stato (Council of State) decided to stay the proceedings and to refer the following question to the Court of Justice for a preliminary ruling:

‘Must Directive [2009/28], and in particular recitals 8, 14, 25 and Articles 1 and 3 thereof, and Article 16 of the [Charter], read in the light of the principles of legal certainty and the protection of legitimate expectations, be interpreted as precluding a rule of national law, such as that resulting from the provisions of Legislative Decree [No 28/2011] and [of the Decree of 6 July 2012], as interpreted by the settled case-law of the Consiglio di Stato [(Council of State)] – which makes the granting of incentives subject to the conclusion of private-law contracts between GSE and the entity responsible for the plant concerned, including plants for the production of electricity powered by renewable sources which began operating before 31 December 2012?’

Admissibility of the request for a preliminary ruling

28 GSE submits that the request for a preliminary ruling is inadmissible because it is not decisive for the resolution of the dispute in the main proceedings. GSE considers that the action which gave rise to that dispute should be declared inadmissible by the referring court or lead to a finding that there is no need to adjudicate following its plea of inadmissibility based on the fact that the GRIN Agreement contested by the defendants in the main proceedings did not adversely affect them.

29 In that regard, it should be borne in mind that, in the context of the cooperation between the Court of Justice and the national courts provided for in Article 267 TFEU, it is solely for the national court, before which a dispute has been brought, and which must assume responsibility for the subsequent judicial decision, to determine in the light of the particular circumstances of the case both the need for a preliminary ruling in order to enable it to deliver judgment and the relevance of the questions which it submits to the Court of Justice. Consequently, where the questions referred concern the interpretation of EU law, the Court is, in principle, required to give a ruling (judgment of 22 February 2024, *Consejería de Presidencia, Justicia e Interior de la Comunidad de Madrid and Others*, C-59/22, C-110/22 and C-159/22, EU:C:2024:149, paragraph 43 and the case-law cited).

30 It follows that the questions relating to EU law enjoy a presumption of relevance. The Court may refuse to rule on a question referred by a national court only where it is quite obvious that the interpretation of a rule of EU law sought bears no relation to the actual facts of the main action or its purpose, where the problem is hypothetical, or where the Court does not have before it the factual or legal material necessary to give a useful answer to the questions submitted to it (judgment of 22 February 2024, *Consejería de Presidencia, Justicia e Interior de la Comunidad de Madrid and Others*, C-59/22, C-110/22 and C-159/22, EU:C:2024:149, paragraph 44 and the case-law cited).

31 It is therefore not for the Court to determine whether a decision whereby a matter is brought before it was taken in accordance with the rules of national law governing the organisation of the courts and legal proceedings or to call the national court's assessment of the admissibility of the main action into question (see, to that effect, judgment of 16 June 2015, *Gauweiler and Others*, C-62/14, EU:C:2015:400, paragraph 26 and the case-law cited).

32 Therefore, the request for a preliminary ruling cannot be declared inadmissible on the ground that GSE claimed before the referring court that the action in the main proceedings was inadmissible or that it should result in a finding that there was no need to adjudicate.

Consideration of the question referred

33 By its question, the referring court asks, in essence, whether Articles 1 and 3 of Directive 2009/28, read in the light of recitals 8, 14 and 25 thereof and the principles of legal certainty and the protection of legitimate expectations, and Article 16 of the Charter must be interpreted as precluding national legislation which, in the context of the replacement of a national support scheme for electricity produced from renewable sources based on quotas for that electricity to be injected into the national network and on the granting of green certificates to undertakings producing that electricity by a national support scheme for the same electricity based on the grant of incentive feed-in tariffs to those undertakings, makes the benefit of the latter scheme subject to the conclusion of an agreement on the conditions for granting that support between such an undertaking and an entity controlled by the State responsible for the management and review of the latter scheme, including for undertakings which, in view of the date on which their plants began operating, benefited from the national support scheme based on quotas and the granting of green certificates.

34 In that regard, it is apparent from Article 1 of Directive 2009/28 that its purpose is to establish a common framework for the promotion of energy from renewable sources by setting, in particular, mandatory national targets for the overall share of energy from renewable sources in gross final

consumption of energy. In accordance with that objective, Article 3(1) and (2) of that directive sets targets to be achieved consisting, first, in each Member States' share of energy from renewable sources in gross final consumption of energy in 2020 being at least their national overall target, as set out in Part A of Annex I to that directive, and, second, in Member States adopting measures effectively designed to ensure that their 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.

35 As is apparent from recitals 8 and 14 of Directive 2009/28, the definition of that common framework and those objectives should provide the business community with the long-term stability it needs to make rational, sustainable investments in the renewable energy sector which enable the continuous development and use of new technologies generating energy from all types of renewable sources to grow.

36 Article 3(3)(a) of Directive 2009/28, read in the light of recital 25 thereof, provides that Member States may apply support schemes in order to reach those targets and that, in order to ensure the proper functioning of those support schemes, it is vital that those Member States can control the effects and costs of their schemes according to their renewable energy potential, since they vary from one Member State to another. That recital also states that guaranteeing the proper functioning of national support schemes under Directive 2001/77 is an important means of maintaining investor confidence and achieving the aim of Directive 2009/28.

37 Thus, while ensuring a certain stability for the business community is important for achieving sustainable investments in the renewable energy sector which will contribute to increasing consumption of those renewable energies, such assurance is conferred on those communities, first, by establishing a common framework providing for mandatory targets for the share of energy from renewable sources in the gross final consumption of energy in each Member State and, second, by ensuring the proper functioning of the support schemes adopted by Member States in order to promote the production of electricity from renewable energy sources.

38 The need to offer certainty to investors recognised in recitals 8 and 14 of Directive 2009/28 cannot, however, as such, affect the discretion conferred on the Member States by Article 3(3)(a) of that directive, read in the light of recital 25 thereof, to adopt and maintain efficient support schemes, and therefore not too costly, enabling them to achieve the mandatory targets set by that directive for the consumption of energy from renewable sources. It has been held that the Member States' discretion as to the measures they consider appropriate for reaching the targets means that Member States are free to adopt, alter or withdraw support schemes, provided that, inter alia, those targets are met (see, to that effect, judgment of 15 April 2021, *Federazione nazionale delle imprese elettrotecniche ed elettroniche (Anie) and Others*, C-798/18 and C-799/18, EU:C:2021:280, paragraph 28, and order of 1 March 2022, *Milis Energy and Others*, C-306/19, C-512/19, C-595/19 and C-608/20 to C-611/20, EU:C:2022:164, paragraph 30).

39 Accordingly, Directive 2009/28 does not, in itself, preclude the Italian legislature from replacing the green certificate scheme by the incentive feed-in tariff scheme, bringing to an end, for certain undertakings, the advantage conferred on them by the first scheme and requiring those undertakings to conclude an agreement with GSE, an entity wholly controlled by the State responsible for managing and controlling the granting of incentives provided for by a national support scheme to producers of electricity from renewable sources, in order to be able to benefit from the second scheme, provided that the latter scheme enables the Italian Republic to achieve its aims as regards the share of energy from renewable sources in the gross final consumption of energy laid down by that directive.

40 However, as it is apparent from settled case-law that, when Member States adopt measures that implement EU law, they must exercise their discretion in compliance with the general principles of law, which include the principles of legal certainty and the protection of legitimate expectations (see, to that effect, judgments of 19 December 2019, *Coöperatieve Producentenorganisatie en Beheersgroep Texel*, C-386/18, EU:C:2019:1122, paragraph 55, and of 15 April 2021, *Federazione nazionale delle imprese elettrotecniche ed elettroniche (Anie) and Others*, C-798/18 and C-799/18, EU:C:2021:280, paragraph 29 and the case-law cited).

41 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 from the terms, objectives or general scheme of the legislation concerned (judgment of 15 April 2021, *Federazione nazionale delle imprese elettrotecniche ed elettroniche (Anie) and Others*, C-798/18 and C-799/18, EU:C:2021:280, paragraph 43 and the case-law cited). However, in order to give the referring court a useful answer, the Court may, in a spirit of cooperation with national courts, provide it with all the guidance that it deems necessary for such an assessment of compatibility (see, to that effect, judgment of 16 November 2023, *Viterra Hungary*, C-366/22, EU:C:2023:876, paragraph 31 and the case-law cited).

42 In that respect, as regards, in the first place, compliance with the principle of legal certainty, it should be recalled that that principle requires, on the one hand, that rules of law be clear and precise and, on the other, that their application be foreseeable by those subject to the law, in particular where they may have adverse consequences. That principle requires, inter alia, that legislation must enable those concerned to know precisely the extent of the obligations imposed on them, and those persons must be able to ascertain unequivocally their rights and obligations and take steps accordingly (judgment of 16 February 2022, *Hungary* v *Parliament and Council*, C-156/21, EU:C:2022:97, paragraph 223 and the case-law cited).

43 However, those requirements cannot be interpreted as precluding the national legislature from having recourse, in a norm that it adopts, to an abstract legal notion, nor as requiring that such an abstract norm refer to the various specific hypotheses in which it applies, given that all those hypotheses could not be determined in advance by the legislature (see, by analogy, judgment of 16 February 2022, *Hungary* v *Parliament and Council*, C-156/21, EU:C:2022:97, paragraph 224 and the case-law cited).

44 Consequently, the fact that a law confers discretion on the authorities responsible for implementing it is not in itself inconsistent with the requirement of foreseeability, provided that the scope of the discretion and the manner of its exercise are indicated with sufficient clarity, having regard to the legitimate aim in question, to give adequate protection against arbitrary interference (judgment of 16 February 2022, *Hungary* v *Parliament and Council*, C-156/21, EU:C:2022:97, paragraph 225 and the case-law cited).

45 In the present case, and subject to verification by the referring court, the provisions of Legislative Decree No 28/2011 and of the Decree of 6 July 2012 appear to set out clearly and precisely the gradual withdrawal of the green certificate scheme and its replacement by the feed-in tariff scheme and the detailed rules for that gradual withdrawal and that replacement.

46 Article 24 of Legislative Decree No 28/2011 provides that plants producing electricity powered by renewable sources put into service after 31 December 2012 may benefit from a support scheme based on incentive feed-in tariffs provided that certain criteria are met. In addition, for plants using renewable energy sources entered into service before 31 December 2012, Article 19 of the Decree of 6 July 2012 lays down the detailed rules for the conversion of rights to collect green certificates into rights to incentive feed-in tariffs from 1 January 2016. Article 25(4) of Legislative Decree No 28/2011 and Article 20 of the Decree of 6 July 2012 lay down the conditions for the withdrawal of green certificates issued for annual production until the end of 2015. Finally, Article 30 of the Decree of 6 July 2012 provides for the possibility for plants which operated before 30 April 2013 to opt for a specific incentive mechanism during the transition from the old to the new incentive mechanism.

47 Furthermore, Article 24(2)(d) of Legislative Decree No 28/2011 and Article 21(8) of the Decree of 6 July 2012 clearly state that the grant of incentive feed-in tariffs requires the conclusion of an agreement between GSE and the entity responsible for the plants.

48 The application of those provisions was foreseeable for all producers of electricity from renewable sources, whether their plants operated before or after 31 December 2012, since Legislative Decree No 28/2011 and the Decree of 6 July 2012 were adopted before the beginning of the period from 1 January 2013 to 31 December 2015 during which the green certificate scheme was to be gradually replaced by the incentive feed-in tariff scheme.

49 As regards the clauses of the agreement to be concluded by undertakings with GSE in order to be able to benefit from the incentive feed-in tariff scheme, it should be noted that, pursuant to Article 24(2)(d) of Legislative Decree No 28/2011, read in conjunction with Article 21(8) of the Decree of 6 July 2012, the AEEG adopted, on 6 July 2012, on a proposal from GSE, a standard contract, namely the ERF Agreement. In addition, on 20 April 2016, GSE published the draft GRIN Agreement, the successor to the ERF Agreement.

50 As regards the GRIN Agreement, which is the subject of the dispute in the main proceedings, its clauses appear at first sight to be clear and precise within the meaning of the case-law cited in paragraph 42 of the present judgment.

51 As GSE and the Commission submit in their written observations, the content of the clauses of the GRIN Agreement appears to correspond to the content of the provisions of the ERF Agreement or of the regulatory framework applicable to producers of electricity from renewable sources in Italy and, in particular, of Legislative Decree No 28/2011 and of the Decree of 6 July 2012 or to follow therefrom. If, after verification, the referring court were to confirm that assessment, the content of those clauses should be regarded as foreseeable, within the meaning of the case-law cited in paragraph 42 of the present judgment.

52 That assessment is not necessarily called into question by the fact that some of those clauses confer, as is apparent from paragraph 23 of the present judgment, a certain discretion on GSE, in particular, to unilaterally terminate or suspend the agreement at issue in the event of the sale of the plant to third parties or to unilaterally terminate or suspend that agreement in the event of substantial variations in the configuration of the plant concerned compared with that which has been declared.

53 As is apparent from paragraph 44 of the present judgment, it is only if the referring court reaches the conclusion that the scope of GSE's discretion and the manner in which it is exercised are not sufficiently established, having regard to the legitimate aim in question, to provide adequate protection against arbitrary interference that it may find an infringement of the principle of legal certainty.

54 As regards, in the second place, the principle of the protection of legitimate expectations, which is corollary to the principle of legal certainty, it is apparent from settled case-law that the right to rely on that principle extends to any economic operator in a situation in which a national authority has caused that operator to entertain expectations which are justified, in particular, by precise assurances provided to it (see, to that effect, judgment of 17 November 2022, *Avicarvil Farms*, C-443/21, EU:C:2022:899, paragraph 39 and the case-law cited). However, where a prudent and circumspect economic operator could have foreseen the adoption of a measure likely to affect his or her interests, that operator cannot plead that principle if the measure is adopted. Moreover, economic operators have no foundation to 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 15 April 2021, *Federazione nazionale delle imprese elettrotecniche ed elettroniche (Anie) and Others*, C-798/18 and C-799/18, EU:C:2021:280, paragraph 42 and the case-law cited).

55 In the present case, and subject to an assessment by the referring court, it is not apparent from the documents before the Court that, before the adoption of Legislative Decree No 28/2011 and the Decree of 6 July 2012, the Italian authorities had adopted any measure or any assurance which could have given rise to expectations which are justified on the part of operators, such as the defendants in the main proceedings, that the green certificate scheme would be maintained.

56 Furthermore, as stated in paragraph 38 of the present judgment, Directive 2009/28 conferred discretion on the Italian authorities in order to alter or withdraw the support schemes put in place to achieve the targets for energy from renewable sources set out in that directive.

57 It follows that prudent and circumspect economic operators should have been able to foresee that the Italian authorities might exercise that discretion. They were therefore not justified in placing their legitimate expectation in an aid scheme providing for the granting of green certificates being maintained and new obligations not being imposed, such as the obligation to conclude an agreement with GSE, in order to be able to benefit from an incentive feed-in tariff for the electricity they produce from renewable sources.

58 As regards, more specifically, the obligation to conclude the GRIN Agreement, again subject to the referring court's assessment, it does not appear that producers whose plants operated before 31 December 2012 had any assurance that they would not be subject to that obligation in order to benefit from an incentive feed-in tariff. On the contrary, as the referring court observes, it is apparent both from its case-law and from that of the Corte suprema di cassazione (Supreme Court of Cassation) that Article 24(2)(d) of Legislative Decree No 28/2011, read in conjunction with Article 21(8) of the Decree of 6 July 2012, must be interpreted as making both producers whose plants entered into service after 31 December 2012 and those whose plants operated before that date subject to that obligation in order to be able to benefit from such a tariff.

59 As regards the terms of the GRIN Agreement, in so far as it can be established that they correspond, in essence, to the content of the provisions of the ERF Agreement, adopted by the decision of the AEEG of 16 May 2013, and the regulatory framework applicable to the production of electricity from renewable sources in Italy, which it is for the referring court to verify, those producers must be regarded as having been able to foresee them.

60 Consequently, the defendants in the main proceedings, whose plants had been operating before 31 December 2012 and which benefited from the green certificate scheme, could not place a legitimate expectation in that scheme being maintained and in there being no obligation to conclude an agreement with GSE, such as the GRIN Agreement, in order to be able to benefit from the incentive feed-in tariff scheme replacing that scheme.

61 As regards, in the third place, the interpretation of Article 16 of the Charter, it should be noted, first, that, in the light of Article 51(1) of the Charter, Article 16 applies in the present case since Legislative Decree No 28/2011 and the Decree of 6 July 2012 transpose Directive 2009/28 into Italian law.

62 Secondly, it is important to recall that Article 16, which relates to the freedom to conduct a business, protects the freedom to pursue an economic or commercial activity, the freedom to use, within the limits of its liability for its own acts, the economic, technical and financial resources at an undertaking's disposal and the freedom of contract (see, to that effect, judgment of 15 April 2021, *Federazione nazionale delle imprese elettrotecniche ed elettroniche (Anie) and Others*, C-798/18 and C-799/18, EU:C:2021:280, paragraphs 56 and 62 and the case-law cited).

63 Subject to the referring court's assessment, the replacement of the green certificate scheme by the incentive feed-in tariff scheme provided for by Legislative Decree No 28/2011 and by the Decree of 6 July 2012 does not appear to affect the freedom of undertakings benefiting from that first scheme to pursue an economic or commercial activity. In particular, that replacement does not appear to affect the right of such undertakings to make free use of the economic, technical and financial resources at their disposal.

64 In that regard, it must be borne in mind that 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 that operator's activities, or require difficult and complex technical solutions (judgment of 15 April 2021, *Federazione nazionale delle imprese elettrotecniche ed elettroniche (Anie) and Others*, C-798/18 and C-799/18, EU:C:2021:280, paragraph 63 and the case-law cited). However, the transition between the schemes concerned does not appear to have a significant cost, require difficult and complex technical solutions or have a considerable impact on the activities of the defendants in the main proceedings.

65 Regarding the freedom of contract enshrined in Article 16 of the Charter, it should be pointed out that it refers to, in particular, the freedom to choose with whom to do business and the freedom to determine the price of a given service (see, to that effect, judgment of 15 April 2021, *Federazione nazionale delle imprese elettrotecniche ed elettroniche (Anie) and Others*, C-798/18 and C-799/18, EU:C:2021:280, paragraph 57 and the case-law cited).

66 However, in the present case, the obligation on the undertakings benefiting from the green certificate scheme to conclude an agreement, such as the GRIN Agreement, with GSE, in order to be able to benefit from incentive feed-in tariffs, does not appear to affect that freedom.

67 In the light of the information contained in the documents before the Court, that agreement appears to be merely a tool for implementation by GSE, an entity, as set out in paragraph 39 of the present judgment, wholly controlled by the State responsible for managing and reviewing the granting of incentives, of the incentive feed-in tariff scheme. That agreement appears to be merely ancillary to an administrative decision on access to the benefits of tariff incentive measures and has no effect on the amount of the incentive in question since it is established by the applicable regulatory framework and is therefore non-negotiable.

68 In such circumstances, it is justified that undertakings do not have the choice of their contractual partner and do not have negotiating power as to the content of the GRIN Agreement or the amount of aid. The freedom of contract of such undertakings is legitimately limited to deciding whether or not they accept the terms of that agreement.

69 In the light of all of the foregoing considerations, the answer to the question referred is that Articles 1 and 3 of Directive 2009/28, read in the light of recitals 8, 14 and 25 thereof and of the principles of legal certainty and the protection of legitimate expectations, and Article 16 of the Charter must be interpreted as not precluding national legislation which, in the context of the replacement of a national support scheme for electricity produced from renewable sources based on quotas for that electricity to be injected into the national network and based on the granting of green certificates to undertakings producing that electricity by a national support scheme for the same electricity based on the grant of incentive feed-in tariffs to those undertakings, makes the benefit of that latter scheme subject to the conclusion of an agreement on the conditions for granting that support between such an undertaking and an entity controlled by the State responsible for the management and review of that latter scheme, including for the undertakings which, in view of the date on which their plants were operating, benefited from the national support scheme based on quotas and the granting of green certificates.

Costs

70 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 (Seventh Chamber) hereby rules:

Articles 1 and 3 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, read in the light of recitals 8, 14 and 25 thereof and of the principles of legal certainty and the protection of legitimate expectations, and Article 16 of the Charter of Fundamental Rights of the European Union

must be interpreted as not precluding national legislation which, in the context of the replacement of a national support scheme for electricity produced from renewable sources based on quotas for that electricity to be injected into the national network and based on the granting of green certificates to undertakings producing that electricity by a national support scheme for the same electricity based on the grant of incentive feed-in tariffs to those undertakings, makes the benefit of that latter scheme subject to the conclusion of an agreement on the conditions for granting that support between such an undertaking and an

entity controlled by the State responsible for the management and review of that latter scheme, including for the undertakings which, in view of the date on which their plants were operating, benefited from the national support scheme based on quotas and the granting of green certificates.

[Signatures]