JUDGMENT OF THE COURT (Fourth Chamber)

9 December 2010 *

In Case C-241/09,

REFERENCE for a preliminary ruling under Article 234 EC from the Cour d'appel de Bruxelles (Belgium), made by decision of 29 June 2009, received at the Court on 3 July 2009, in the proceedings

Fluxys SA

v

Commission de régulation de l'électricité et du gaz (CREG),

* Language of the case: French.

THE COURT (Fourth Chamber),

composed of J.-C. Bonichot, President of the Chamber, K. Schiemann, L. Bay Larsen, C. Toader (Rapporteur) and A. Prechal, Judges,

Advocate General: V. Trstenjak,
Registrar: R. Şereş, Administrator,

having regard to the written procedure and further to the hearing on 17 June 2010,

after considering the observations submitted on behalf of:

— Fluxys SA, by R. Gonne, avocat,

— the Commission de régulation de l'électricité and du gaz (CREG), by L. Cornelis and P. de Bandt, avocats,

— the Belgian Government, by M. Jacobs, acting as Agent, and by J.-F. De Bock, avocat,

— the Czech Government, by M. Smolek, acting as Agent,

— the United Kingdom Government, by L. Seeboruth, acting as Agent,

— the European Commission, by O. Beynet and B. Schima, acting as Agents,

after hearing the Opinion of the Advocate General at the sitting on 28 September 2010,

gives the following

Judgment

1 This reference for a preliminary ruling concerns the interpretation of Articles 1, 2 and 18 of Directive 2003/55/EC of the European Parliament and of the Council of 26 June 2003 concerning common rules for the internal market in natural gas and repealing Directive 98/30/EC (OJ 2003 L 176, p. 57, and — corrigendum — OJ 2004 L 16, p. 75), and Article 3 of Regulation (EC) No 1775/2005 of the European Parliament and of the Council of 28 September 2005 on conditions for access to the natural gas transmission networks (OJ 2005 L 289, p. 1).

2 The reference was submitted in proceedings where the opposing parties are Fluxys SA ('Fluxys'), an undertaking responsible for the operation of the natural gas transmission [French: 'transport'] network in Belgium, and the Commission de régulation de l'électricité et du gaz (CREG) [the Belgian gas and electricity regulatory authority] in relation to the CREG decision of 6 June 2008 fixing the tariffs on the transportation

[French: 'transport'] of gas intended for distribution on the national market in the period from 2008 until 2011.

Legal context

European Union law

3 Article 1(1) of Directive 2003/55 states:

'This Directive establishes common rules for the transmission [French: "transport"], distribution, supply and storage of natural gas. It lays down the rules relating to the organisation and functioning of the natural gas sector, access to the market, the criteria and procedures applicable to the granting of authorisations for transmission, distribution, supply and storage of natural gas and the operation of systems.'

4 Article 2(3) of Directive 2003/55 provides that, for the purposes of the directive, 'transmission' means:

'the transport of natural gas through a high pressure pipeline network other than an upstream pipeline network with a view to its delivery to customers, but not including supply.'

5 Article 18(1) of Directive 2003/55 provides:

'Member States shall ensure the implementation of a system of third party access to the transmission and distribution system, and [liquefied natural gas] facilities based on published tariffs, applicable to all eligible customers, including supply undertakings, and applied objectively and without discrimination between system users. Member States shall ensure that these tariffs, or the methodologies underlying their calculation shall be approved prior to their entry into force by a regulatory authority referred to in Article 25(1) and that these tariffs — and the methodologies, where only methodologies are approved — are published prior to their entry into force.'

6 Article 3(1) of Regulation No 1775/2005 states:

'Tariffs, or the methodologies used to calculate them, applied by transmission system operators and approved by the regulatory authorities pursuant to Article 25(2) of Directive 2003/55 … shall be transparent, take into account the need for system integrity and its improvement and reflect actual costs incurred, insofar as such costs correspond to those of an efficient and structurally comparable network operator and are transparent, whilst including appropriate return on investments, and where appropriate taking account of the benchmarking of tariffs by the regulatory authorities. Tariffs, or the methodologies used to calculate them, shall be applied in a non-discriminatory manner.

…'

National law as stated in the reference for a preliminary ruling

7 In Belgium, the distribution of natural gas was regulated by the Law of 12 April 1965 on the transportation [French: 'transport'] of gas and other products by pipeline (*Moniteur belge* of 7 May 1965, p. 5260). It is apparent from the order for reference that the provisions relevant to the main proceedings when the order for reference was made were those resulting from that Law as amended by the Law of 10 March 2009 amending the Law of 12 April 1965 on the transportation of gas and other products by pipeline (*Moniteur belge* of 31 March 2009, p. 25173) ('the Gas Law').

8 Article 1/7a of the Gas Law defines 'transit' as follows:

'the activity consisting in the transportation of natural gas but not the distribution or supply of natural gas on Belgian territory'.

9 Article 15/5c of the Gas Law states:

'1. The natural gas transmission system operator, the natural gas storage facility operator and the [liquefied natural gas] facility operator shall individually submit an application for approval of their respective tariffs to the [CREG] and of the tariffs relating to ancillary services. They shall individually publish those tariffs which are approved for the respective activities, in accordance with the guidelines contained in this chapter.

...

§ 4. The operators shall submit to [CREG], for approval, a proposal of revenue and tariffs, drawn up on the basis of the total revenue referred to in Article 15/5a.

...'

10 Article 15/5d(1) of the Gas Law states:

'...the provisions of this chapter and the Royal Decree of 8 June 2007 concerning the methodology for determining the total income including the equitable margin, the general tariff structure, the basic principles relating to tariffs, procedures, publication of tariffs, annual reports, accounts, cost control, variances in the income of system operators and the objective index-linking formula, all referred to in the Law of 12 April 1965 on the transportation of gas and other products by pipeline, in the version published in the *Moniteur Belge* of 29 June 2007, shall be applicable to the natural gas transit tariffs and to the natural gas transmission system operator who exercises a transit activity, subject to the following derogations:

1 the tariffs shall be applicable for the periods fixed contractually between the transmission system operator and the users of the system;

2 in order to guarantee the stability of future prices, the regulatory period referred to in Article 15/5a(2) may exceed four years;

3 the equitable margin for transit is determined in accordance with Articles 4 to 8 of the aforementioned Royal Decree of 8 June 2007, provided that:

(a) the initial value of the regulated transit activity as at 31 December 2007 is approved by [CREG] on the proposal of the operator, taking into account all the transmission facilities situated in Belgium and used for transit;

(b) the product of the beta coefficient and the risk premium, as a component of rate of return R mentioned in Article 6 of the aforementioned Royal Decree is fixed at 7 %;

...'

11 Article 15/19 of the Gas Law provides that contracts which are concluded before 1 July 2004 in accordance with Article 3(1) of Council Directive 91/296/EEC of 31 May 1991 on the transit of natural gas through grids (OJ 1991 L 147, p. 37) ('the historical contracts') are to remain valid and are to continue to be performed in accordance with the provisions of that directive.

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

12 In 2007, in accordance with Article 15/5d of the Gas Law, Fluxys submitted to CREG for its approval proposed tariffs relating, on the one hand, to the tranportation of gas for distribution in another State ('transit') and, on the other hand, to the transportation

of gas for distribution in Belgium ('conveyance'; in French: 'acheminement') and storage, all relating to the period from 2008 to 2011.

13 As regards the proposed tariffs relating to transit, the CREG adopted two decisions, on 15 May and 6 June 2008 respectively. By judgment of the Cour d'appel of Brussels of 10 November 2008, the effects of those decisions were suspended because they were *prima facie* unlawful.

14 As regards the tariffs proposed by Fluxys relating to 'conveyance' and storage, CREG refused to approve them and itself fixed, by decision of 19 December 2007, provisional tariffs; it also ordered Fluxys to submit a fresh budget containing fresh proposed tariffs. CREG adopted on 6 June 2008, after those proposed tariffs were submitted, a fresh decision by which it fixed the provisional tariffs for 'conveyance' and storage. In that decision, CREG stated that it was unable, on the information provided by Fluxys, to allocate the costs in respect of the various transportation activities carried out by Fluxys and that it had therefore made a fresh calculation by redistributing the costs between those activities. On the basis of that calculation, CREG decided to fix, for the 'conveyance' activity, tariffs which were lower than those proposed by Fluxys.

15 Fluxys did not accept the method used by CREG to fix the 'conveyance' and storage tariffs and on 27 June 2008 it brought an action before the Cour d'appel of Brussels seeking the suspension and annulment of that decision of 6 June 2008 in relation to those tariffs. Fluxys claimed that CREG had erred in reallocating a proportion of the operational costs of the 'conveyance' activity to that of transit. Fluxys maintained in

particular that CREG had failed to comply with the Gas Law, which sets out rules for the calculation of separate tariffs for transit, on the one hand, and 'conveyance' and storage, on the other, by applying the same rules to all of those activities together.

16 In the main proceedings, CREG stated, inter alia, that European Union legislation, in particular Directive 2003/55, precludes national legislation such as that in force under Belgian law, which provides for a method of setting separate tariffs for different forms of transporting natural gas.

17 In the order for reference, the Cour d'appel of Brussels states that the resolution of the dispute is linked to examination of the Belgian legislation, in particular Article 15/5d of the Gas Law, as amended by the Gas Law of 2009, from which it is evident that the method of determining tariffs for transit differs from that applicable to determining the tariffs for other forms of transportation of natural gas. Under that legislation, in order to determine the tariffs for transit, the costs linked to the operation of the grid in respect of all the operator's activities cannot be taken into account. In the light of those considerations, the referring court suspended the CREG decision of 6 June 2008.

18 In those circumstances, the Cour d'appel of Brussels decided to stay proceedings and to refer the following question to the Court of Justice for a preliminary ruling

'Do Articles 1, 2 and 18 of Directive [2003/55] and Article 3 of Regulation [No 1775/2005] preclude national legislation establishing a separate tariff regime for the transit activity, which derogates from the rules governing transportation, by creating a distinction, within the transportation activity, between "conveyance" [French "acheminement"] and "transit"?'

Procedure before the Court

19 By letter of 7 April 2010, received at the Court's Registry on 28 April 2010, those representing Fluxys informed the Court that 'an agreement [had] been reached with CREG … on the application of a system of tariffs which is no longer based on a distinction between transportation for domestic purposes and transit, but which reflects, on the basis of the same methodology, the costs of the services provided in respect of each activity and specific to that activity'. That letter also recorded the fact that, 'as provided for in that agreement, Fluxys has withdrawn all pleas in law relied on before the Cour d'appel of Brussels which impugn the decisions of CREG, including those linked to the distinction [between] transit and domestic transportation', with the single exception of a plea in law relating to historical contracts benefiting from a derogation.

20 Following that letter, the Court asked the referring court to advise it of the consequences of that withdrawal for the preliminary ruling procedure.

21 By letter received at the Court's Registry on 17 May 2010, the Cour d'appel of Brussels intimated that it was maintaining its request for a preliminary ruling, because, notwithstanding the partial withdrawal of Fluxys, the CREG decision of 6 June 2008 had not been retracted and 'Fluxys is maintaining its action for annulment' of that decision so far as concerns its pleas in law other than those it had abandoned, which related to the non-compliance with the rules of the Gas Law on the method for the calculation of tariffs. Moreover, the referring court informed the Court that, pursuant to Article 825 of the Belgian Judicial Code, the validity of Fluxys' partial abandonment of the action 'is subject to its acceptance by the opposing party' and that, in the main proceedings, CREG had not accepted that abandonment. Lastly, the referring court added that 'in relation to matters which are within the ambit of public policy' it is

vested with unlimited jurisdiction, and accordingly it is not obliged to give a ruling solely on the basis of the pleas in law relied on by the parties.

22 By letter received at the Court's Registry on 1 June 2010, the Belgian Government informed the Court that, following a formal notice issued by the European Commission pursuant to Article 258 TFEU in relation to the Gas Law, that Law was amended by the Law of 29 April 2010 amending the Law of 12 April 1965 on the transport of gas and other products by pipeline as regards transit tariffs (*Moniteur belge* of 21 May 2010, p. 31397).

23 It is also apparent from the documents submitted to the Court that, by a judgment of 8 July 2010, the Belgian Constitutional Court annulled with retroactive effect the abovementioned Law of 10 March 2009 on the grounds, in particular, that it was incompatible with Directive 2003/55 and Regulation No 1775/2005.

The request to reopen the oral procedure

24 By letter of 17 November 2010 CREG requested the reopening of the oral procedure and argued, in essence, that it was necessary that both parties be heard on 'the question of the validity and temporal application of the derogation relating to historical contracts established by Article 32(1) of the Gas Directive' since the Advocate General relied, in her Opinion, on factors and considerations which were entirely new and on which CREG had not been able to submit its observations.

25 In that regard, the Court may of its own motion, or on a proposal from the Advocate General, or at the request of the parties, order the reopening of the oral procedure in accordance with Article 61 of its Rules of Procedure if it considers that it lacks sufficient information, or that the case must be dealt with on the basis of an argument which has not been debated between the parties (see, in particular, Case C-42/07 *Liga Portuguesa de Futebol Profissional and Bwin International* [2009] ECR I-7633, paragraph 31 and case-law cited).

26 However, neither the Statute of the Court of Justice of the European Union nor its Rules of Procedure make provision for the parties to submit observations in response to the Advocate General's Opinion (see *Liga Portuguesa de Futebol Profissional and Bwin International*, paragraph 32).

27 The Court holds, having heard the Advocate General, that, since there is no longer any need to answer the question referred for a preliminary ruling, the request to reopen the oral procedure must be rejected.

Consideration of the question referred for a preliminary ruling

28 It is evident from the Court's case-law that it is only for national courts before which actions have been brought, and which must assume responsibility for the subsequent judgment, to assess, in the light of the circumstances of each case, both the necessity

for a preliminary ruling in order to be able to give their judgment and the relevance of the questions they refer to the Court (see, in particular, Joined Cases C-422/93 to C-424/93 *Zabala Erasun and Others* [1995] ECR I-1567, paragraph 14).

29 However, in exercising that power of appraisal the national court, in collaboration with the Court of Justice, fulfils a duty entrusted to them both of ensuring that in the interpretation and application of European Union law the law is observed. Accordingly the problems which may be entailed in the exercise of its power of appraisal by the national court and the relations which it maintains within the framework of Article 267 TFEU with the Court of Justice are governed exclusively by the provisions of European Union law (see *Zabala Erasun and Others*, paragraph 15).

30 Accordingly, it is essential that the Court have available to it the factual and legislative background to the main proceedings, because the information furnished in orders for reference does not serve only to enable the Court to give helpful answers, but also to enable the governments of the Member States and other interested parties to submit observations in accordance with Article 23 of the Statute of the Court of Justice. It is the Court's duty to ensure that that possibility is safeguarded, bearing in mind that, by virtue of the abovementioned provision, only the orders for reference are notified to the interested parties (Joined Cases 141/81 to 143/81 *Holdijk and Others* [1982] ECR 1299, paragraph 6, and order in Case C-116/00 *Laguillaumie* [2000] ECR I-4979, paragraph 14).

31 Therefore, whilst the Court of Justice must be able to place as much reliance as possible upon the assessment by the national court of the extent to which the questions submitted are necessary, it must be in a position to make any assessment inherent in

the performance of its own duties in particular in order to determine, as all courts must, whether it has jurisdiction (*Zabala Erasun and Others*, paragraph 16).

32 In the present case, it is clear from the letters received at the Court after the lodging of the reference for a preliminary ruling that, first, Fluxys has withdrawn the pleas in law before the referring court concerning the illegality of the method of fixing tariffs applied by the CREG in the decision at issue before the referring court and it now seeks the annulment of the decisions at issue before the Cour d'appel of Brussels only in relation to historical contracts benefiting from a derogation under Article 32(1) of Directive 2003/55. Moreover, following the judgment of the Constitutional Court of 8 July 2010, the national legislation applicable by the referring court is no longer that under consideration in the context of the request for a preliminary ruling.

33 In those circumstances, the Court cannot but find, first, that the background of national law in which the dispute in the main proceedings is set is no longer that described by the Cour d'appel of Brussels in its order for reference, although, according to that court, the national rules applicable again after the abovementioned judgment of the Constitutional Court raise the same issue of compatibility with European Union law as those annulled by that judgment and, secondly, the applicant in the main proceedings no longer claims that CREG infringed Article 15/5d of the Gas Law.

34 It follows that, taking into account the developments in the proceedings before the referring court, in terms both of procedure and of the applicable law, the Court is no longer in a position to give a ruling on the question referred to it.

Costs

35 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 (Fourth Chamber) hereby rules:

There is no need to answer the question referred for a preliminary ruling in Case C-241/09.

[Signatures]