Reports of Cases

JUDGMENT OF THE COURT (Second Chamber)

2 March 2017 [1]*

(Reference for a preliminary ruling — Environment — Directive 2009/28/EC — The second subparagraph of Article 2(a) — Energy from renewable sources — Hydropower — Meaning — Energy produced in a small-scale hydropower plant located at the point of discharge of industrial waste water from another plant)

In Case C-4/16,

REQUEST for a preliminary ruling under Article 267 TFEU from the Sąd Apelacyjny w Warszawie Wydział Cywilny (Court of Appeal, Warsaw, Civil Division, Poland), made by decision of 1 October 2015, received at the Court on 4 January 2016, in the proceedings

J. D.

v

Prezes Urzędu Regulacji Energetyki,

THE COURT (Second Chamber),

composed of M. Ilešič, President of the Chamber, A. Prechal, A. Rosas, C. Toader and E. Jarašiūnas (Rapporteur), Judges,

Advocate General: M. Campos Sánchez-Bordona,

Registrar: M. A. Calot Escobar,

having regard to the written procedure,

after considering the observations submitted on behalf of:

— J. D., by T. Gałecki, radca prawny,

— the Polish Government, by B. Majczyna, acting as Agent,

— the Italian Government, by G. Palmieri, acting as Agent, and by M. P. Garofoli, avvocato dello Stato,

— the European Commission, by K. Talabér-Ritz and K. Herrmann, acting as Agents,

after hearing the Opinion of the Advocate General at the sitting on 15 November 2016,

1 — Language of the case: Polish.

gives the following

Judgment

1 This request for a preliminary ruling concerns the interpretation of the second subparagraph of Article 2(a) of Directive 2009/28/EC of the European Parliament and of the Council of 23 April 2009 on the promotion of the use of energy from renewable sources and amending and subsequently repealing Directives 2001/77/EC and 2003/30/EC (OJ 2009 L 140, p. 16).

2 The request has been made in proceedings between J. D. and the Prezes Urzędu Regulacji Energetyki (Chairman of the Energy Regulatory Office, Poland) concerning the refusal of the latter to grant J. D. an extension of a licence to produce electricity in a small-scale hydropower plant located at the point of discharge of waste water from another plant.

Legal context

European Union law

Directive 2009/28

3 Recitals 1 and 30 of Directive 2009/28 state:

‘(1) The control of European energy consumption and the increased use of energy from renewable sources, together with energy savings and increased energy efficiency, constitute important parts of the package of measures needed to reduce greenhouse gas emissions … Those factors also have an important part to play in promoting the security of energy supply, promoting technological development and innovation and providing opportunities for employment and regional development …

…

(30) In calculating the contribution of hydropower and wind power for the purposes of this Directive, the effects of climatic variation should be smoothed through the use of a normalisation rule. Further, electricity produced in pumped storage units from water that has previously been pumped uphill should not be considered to be electricity produced from renewable energy sources.’

4 Article 1 of that directive, which defines the subject matter and scope thereof, 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. …’

5 Article 2 of that directive, which contains definitions, provides:

‘For the purposes of this Directive, the definitions in Directive 2003/54/EC [of the European Parliament and of the Council of 26 June 2003 concerning common rules for the internal market in electricity and repealing Directive 96/92/EC (OJ 2003 L 176, p. 37)] apply.

The following definitions also apply:

(a) “energy from renewable sources” means energy from renewable non-fossil sources, namely wind, solar, aerothermal, geothermal, hydrothermal and ocean energy, hydropower, biomass, landfill gas, sewage treatment plant gas and biogases;

…’

6 Article 3 of Directive 2009/28 is entitled ‘Mandatory national overall targets and measures for the use of energy from renewable sources’. Pursuant to Article 3(1) thereof, each Member State is to ensure that the share of energy from renewable sources, calculated in accordance with Articles 5 to 11 of that directive, in gross final consumption of energy in 2020 is at least its national overall target, as set out in the third column of the table in part A of Annex I to that directive.

7 Article 5 of that directive, entitled ‘Calculation of the share of energy from renewable sources’, provides:

‘(1) The gross final consumption of energy from renewable sources in each Member State shall be calculated as the sum of:

(a) gross final consumption of electricity from renewable energy sources;

…

(3) For the purposes of paragraph 1(a), gross final consumption of electricity from renewable energy sources shall be calculated as the quantity of electricity generated in a Member State from renewable energy sources, excluding the production of electricity in pumped storage units from water that has previously been pumped uphill.

…

The electricity generated by hydropower and wind power shall be accounted for in accordance with the normalisation rules set out in Annex II.

…

(7) The methodology and definitions used in the calculation of the share of energy from renewable sources shall be those of Regulation (EC) No 1099/2008 of the European Parliament and of the Council of 22 October 2008 on energy statistics [(OJ 2008 L 304, p. 1)].

…’

8 It is apparent from the normalisation rule for accounting for electricity generated from hydropower set out in Annex II to Directive 2009/28 that the quantity of electricity actually generated in a year by all hydropower plants of a Member State is determined, in particular, by taking into account the quantity of electricity actually generated by all hydropower plants of the Member State concerned, excluding production from pumped storage units using water that has previously been pumped uphill.

Directive 2003/54

9 Directive 2003/54 was repealed by Directive 2009/72/EC of the European Parliament and of the Council of 13 July 2009 concerning common rules for the internal market in electricity and repealing Directive 2003/54 (OJ 2009 L 211, p. 55). According to Article 48 of Directive 2009/72, that repeal took effect on 3 March 2011 and references to the repealed directive are read as references to Directive 2009/72.

10 Article 2(30) of Directive 2003/54 defined 'renewable energy sources' as 'renewable non-fossil energy sources (wind, solar, geothermal, wave, tidal, hydropower, biomass, landfill gas, sewage treatment plant gas and biogases)'. That definition was reproduced identically in Article 2(30) of Directive 2009/72.

Regulation No 1099/2008

11 Annex B to Regulation No 1099/2008 aims, in particular, to clarify the scope of the annual collection of energy statistics. Under the heading 'Renewable energy and energy from waste', the collection of data covers, according to point 5.1.1 of that annex, '[h]ydro power', which is defined as follows:

'Potential and kinetic energy of water converted into electricity in hydroelectric plants. Pumped storage must be included. …'

12 That Annex B was amended in particular by Commission Regulation No 147/2013 of 13 February 2013 (OJ 2013 L 50, p. 1), but the definition of hydropower remained unchanged.

Polish law

13 The Ustawa prawo energetyczne (Law on energy) of 10 April 1997, in the version applicable to the main proceedings (Dz. U. of 2012, position 1059) ('the Law on energy'), provides in Article 3:

'For the purposes of this Law:

…

(20) "renewable energy source" means a source using, in the conversion process, wind, solar, aerothermal, geothermal, hydrothermal, wave, current and tidal energy, the downward flow of rivers and energy obtained from biomass, biogas from landfill, and also biogas produced from the disposal or treatment of sewage or the decomposition of stored plant and animal remains.

…'

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

14 J. D. is an undertaking operating in the electricity generation sector. From 20 November 2004 to 20 November 2014, it held a licence authorising it to produce electricity from renewable sources in two small-scale biogas plants and a small-scale hydropower plant, the latter being located at the point of discharge of industrial waste water from another plant, which was not involved in electricity production.

15 On 5 March 2013, J. D. sought an extension of that licence for a new period. By decision of 6 November 2013, the Chairman of the Energy Regulatory Office rejected that application for an extension in respect of the small-scale hydropower plant on the grounds that only hydropower plant producing energy obtained from wave, current and tide and the downward flow of rivers could be regarded as plants producing energy from renewable sources.

16 J. D. brought an action against that decision before the Sąd Okręgowy w Warszawie — Sąd Ochrony Konkurencji i Konsumentów (Regional Court, Warsaw — Court for the Protection of Competition and Consumers, Poland), which dismissed that action by judgment of 5 November 2014. According to that court, it follows from the definition of renewable energy sources in Article 3(20) of the Law on Energy that electricity generated in a hydropower plant, which is not a pure pumped-storage station located at the point of discharge of waste water from another plant, cannot be considered to be generated from a renewable energy source.

17 J. D. appealed against that judgment before the Sąd Apelacyjny w Warszawie Wydział Cywilny (Court of Appeal, Warsaw, Civil Division, Poland). Before that court, J. D. claims, in essence, that the manner in which the water was taken by the other establishment is not relevant to this instance and that Article 3(20) of the Law on Energy is incompatible with the second subparagraph of Article 2(a) of Directive 2009/28, read in conjunction with recital 30 and Article 5(3) of that directive, in so far as it refers to 'energy obtained from the downward flow of rivers' rather than to the broader concept of 'hydropower' used by that directive.

18 The referring court expresses uncertainty as to whether hydropower, as energy from a renewable source, covers energy obtained using the gravity-induced flow of water in artificial water flows where, first, that water was dammed by another plant for its own purposes using another form of energy and, secondly, the plant at issue is not a pure pumped-storage or mixed-power station. It notes, in particular, that Directives 2009/28 and 2003/54 do not define the concept of hydropower and that the provisions of national law in force at the time the contested decision was adopted referred only to energy produced from the downward flow of natural rivers.

19 In those circumstances, the Sąd Apelacyjny w Warszawie Wydział Cywilny (Court of Appeal, Warsaw, Civil Division) decided to stay the proceedings and refer the following question to the Court of Justice for a preliminary ruling:

'Is the term "hydropower" as a renewable energy source, set out in [the second subparagraph of] Article 2(a) of Directive 2009/28 … in conjunction with Article 5(3) thereof and recital 30 in the preamble thereto, to be interpreted as relating only to energy produced by a hydropower plant using the downward flow of inland surface waters, including rivers, or as relating also to energy produced in a hydropower plant (which is not a pumped-storage power station or a hydropower plant with a pumping installation) located at the point of discharge of industrial waste water from another plant?'

Consideration of the question referred

20 By its question, the referring court asks, in essence, whether the concept of 'energy from renewable sources', in the second subparagraph of Article 2(a) of Directive 2009/28, must be interpreted as covering energy generated by a small-scale hydroelectric power station, which is not a pumped-storage power station or a hydroelectric power station with a pumping installation, sited at the point of discharge of industrial waste water from another plant which previously used the water for its own purposes.

21 Under the second subparagraph of Article 2(a) of Directive 2009/28, the concept of 'energy from renewable sources' covers 'energy from renewable non-fossil sources, namely [inter alia] … hydropower …'.

22 Although it follows from the wording of that definition that electricity generated from hydropower is energy generated from renewable sources, it must nevertheless be noted that, the absence of any specific details in that regard, that wording does not by itself allow it to be determined whether the concept of hydropower, within the meaning of the second subparagraph of Article 2(a) of Directive 2009/28, covers only electricity generated from hydropower provided by a natural water flow, or whether it covers also electricity generated from hydropower provided from an artificial water flow and, where appropriate, under what conditions.

23 According to the Court's settled case-law, the need for a uniform application of European Union law and the principle of equality require that the terms of a provision of European Union law which makes no express reference to the law of the Member States for the purpose of determining its meaning and scope must normally be given an independent and uniform interpretation throughout the European Union (judgment of 21 December 2011, *Ziolkowski and Szeja*, C-424/10 and C-425/10, EU:C:2011:866, paragraph 32 and the case-law cited).

24 In that regard, it should be noted that Directive 2009/28 does not make a reference to national law as regards the meaning of the term 'hydropower' in so far as that national law covers energy generated from renewable sources, within the meaning of that directive. It follows therefrom that that term must be regarded, for the purposes of that directive, as an autonomous concept of European Union law which must be interpreted in a uniform manner throughout the Member States.

25 In that regard, it must be borne in mind that the meaning and scope of terms for which European Union law provides no definition must be determined by considering, inter alia, the context in which they occur and the purposes of the rules of which they form part (judgment of 21 December 2011, *Ziolkowski and Szeja*, C-424/10 and C-425/10, EU:C:2011:866, paragraph 34 and the case-law cited).

26 As regards the context in which the terms at issue are used, it should be noted that, although the first subparagraph of Article 2 of Directive 2009/28 states that, for the purposes of that directive, the definitions in Directive 2003/54, since replaced by Directive 2009/72, apply, and although the latter provides, in Article 2(30) thereof, a definition of sources of renewable energy which corresponds, in essence, with that in the second subparagraph of Article 2(a) of Directive 2009/28, Directive 2009/72 does not explain how it is necessary to interpret hydropower generated from renewable sources.

27 However, first, Article 5(7) of Directive 2009/28 provides that the definitions used in the calculation of the share of energy from renewable sources are those of Regulation No 1099/2008. In point 5.1.1 of Annex B thereto, hydropower is defined as '[p]otential and kinetic energy of water converted into electricity in hydroelectric plants', that definition stating that '[p]umped storage must be included'.

28 Secondly, it is apparent from Article 5(1)(a) and the first subparagraph of Article 5(3) of Directive 2009/28 that, for the purposes of the calculation of the gross final consumption of energy from renewable sources in a given Member State, 'the quantity of electricity produced in [that] Member State from renewable energy sources, excluding the production of electricity in pumped storage units from water that has previously been pumped uphill' is taken into account as far as gross final consumption of electricity from renewable energy sources is concerned.

29 Similarly, Article 5(3) of Directive 2009/28 states, in the third subparagraph thereof, that the electricity generated by hydropower is to be accounted for in accordance with the normalisation rules set out in Annex II to that directive. According to those rules, the normalised electricity generated in a year by all hydropower plants of a Member State is determined by excluding production from pumped storage units using water that has previously been pumped uphill.

30 To that effect, recital 30 of Directive 2009/28 also states that electricity produced in pumped storage units from water that has previously been pumped uphill should not be considered to be electricity produced from renewable energy sources.

31 As was stated, in essence, by the Advocate General in points 36 to 38 of his Opinion, it follows from those factors that all hydropower constitutes energy from renewable sources, within the meaning of the second subparagraph of Article 2(a) of Directive 2009/28, whether it is generated by hydropower provided by a natural water flow, or whether it is generated from hydropower provided from an artificial water flow, with the exception of electricity generated from pumped storage units using water that has previously been pumped uphill.

32 That interpretation is supported by the objectives pursued by Directive 2009/28. It follows from Article 1 of the latter that it seeks to promote the production of energy from renewable sources, and, according to recital 1 thereof, the increased use of energy from renewable sources constitutes an important part of the package of measures needed to reduce greenhouse gas emissions and has a part to play in promoting the security of energy supply, promoting technological development and innovation and providing opportunities for employment and regional development. For those purposes, Article 3(1) of that directive provides that each Member State is to ensure that the share of energy from renewable sources in gross final consumption of energy in 2020 is at least the target assigned to it in part A of Annex I to that directive.

33 To exclude the concept of hydropower produced from renewable sources, for the purposes of Directive 2009/28, all electricity generated from hydropower provided from an artificial water flow, and that on the sole ground that it concerns water flow of that type, as is suggested, in essence, by the Polish Government, is not only contrary to the intention of the EU legislature, as was stated in paragraphs 26 to 31 of the present judgment, but also conflicts with the achievement of those objectives.

34 The mere fact that electricity is produced from hydropower provided from an artificial water flow does not imply a lack of contribution to achieving the objectives mentioned in paragraph 32 of the present judgment and, in particular, to reducing greenhouse gas emissions.

35 Moreover, in so far as a general exclusion, such as that suggested in paragraph 33 of the present judgment, would discourage any production of electricity from hydropower provided from an artificial water flow, even where that artificial water flow exists as a result of an uphill productive activity, independently of any downstream exploitation of its waste water in order to produce electricity, and even where that production of electricity takes place without resorting to pumped storage units, it could reduce the amount of hydroelectric energy capable of benefitting from measures promoting the production of energy from renewable sources which the Member States are to implement, in accordance with Directive 2009/28, and therefore undermine the full achievement of those objectives.

36 In order to avoid any risk of circumvention, it is nevertheless necessary that the uphill activity, which is at the source of that artificial water flow, does not exist solely to create that water flow for the purposes of its uphill exploitation in order to produce electricity. Therefore, in particular, electricity produced from hydropower provided from an artificial water flow where the latter was created uphill by pumping with the sole aim of producing that electricity downstream does not come within the concept of hydropower produced from renewable sources, for the purposes of Directive 2009/28.

37 In this case, it follows from the order for reference that the small-scale hydropower plant at issue in the main proceedings is neither a pumped-storage power station nor a hydropower plant with a pumping installation, and, therefore, the former does not come within the concept of ‘pumped storage units from water that has previously been pumped uphill’, within the meaning of Directive 2009/28, and that, furthermore, the artificial water flow used by it consists of water discharged by another plant, which used it for its own activities, which it is nevertheless a matter for the referring court to verify.

38 In the light of all the above considerations, the answer to the question referred is that the concept of 'energy from renewable sources', in the second subparagraph of Article 2(a) of Directive 2009/28 must be interpreted as covering energy generated by a small-scale hydropower plant, which is not a pumped-storage power station or a hydropower plant with a pumping installation, located at the point of discharge of industrial waste water from another plant which previously used the water for its own purposes.

Costs

39 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 (Second Chamber) hereby rules:

The concept of 'energy from renewable sources', in the second subparagraph of Article 2(a) of Directive 2009/28/EC of the European Parliament and of the Council of 23 April 2009 on the promotion of the use of energy from renewable sources and amending and subsequently repealing Directives 2001/77/EC and 2003/30/EC, must be interpreted as covering energy generated by a small-scale hydropower plant, which is not a pumped-storage power station or a hydropower plant with a pumping installation, located at the point of discharge of industrial waste water from another plant which previously used the water for its own purposes.

[Signatures]