



Reports of Cases

JUDGMENT OF THE COURT (First Chamber)

11 April 2019*

(Reference for a preliminary ruling — Energy — Liquefied petroleum gas (LPG) sector — Consumer protection — Requirement of general economic interest — Maximum price of a bottle of gas — Home delivery obligation — Article 106 TFEU — Directives 2003/55/EC, 2009/73/EC and 2006/123/EC — Interpretation of the judgment of 20 April 2010, *Federutility and Others* (C-265/08, EU:C:2010:205) — Principle of proportionality)

In Joined Cases C-473/17 and C-546/17,

TWO REQUESTS for a preliminary ruling under Article 267 TFEU from the Tribunal Supremo (Supreme Court, Spain), made by decisions of 29 June 2017 (C-473/17) and 19 July 2017 (C-546/17), received at the Court on 2 August 2017 (C-473/17) and 18 September 2017 (C-546/17), in the proceedings

Repsol Butano SA (C-473/17),

DISA Gas SAU (C-546/17)

v

Administración del Estado,

intervener:

Redexis Gas SL,

Repsol Butano SA (C-546/17),

THE COURT (First Chamber),

composed of R. Silva de Lapuerta, Vice-President of the Court, acting as President of the First Chamber, J.-C. Bonichot (Rapporteur), A. Arabadjiev, E. Regan and C.G. Fernlund, Judges,

Advocate General: E. Tanchev,

Registrar: L. Carrasco Marco, Administrator,

having regard to the written procedure and further to the hearing on 26 September 2018,

* Language of the case: Spanish.

after considering the observations submitted on behalf of:

- Repsol Butano SA and DISA Gas SAU, by F. Castedo Bartolomé, F. Castedo Álvarez, L. Moliner Oliva and A. Rueda García, abogados,
- the Spanish Government, by A. Rubio González and A. Gavela Llopis, acting as Agents,
- the European Commission, by O. Beynet and S. Pardo Quintillán, acting as Agents,

after hearing the Opinion of the Advocate General at the sitting on 5 December 2018,

gives the following

Judgment

- 1 These requests for a preliminary ruling concern the interpretation 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 of the principle of proportionality, as interpreted by the Court in the judgment of 20 April 2010, *Federutility and Others* (C-265/08, EU:C:2010:205).
- 2 The requests have been made in proceedings between (i) Repsol Butano SA and DISA Gas SAU and (ii) the Administración del Estado (State Administration, Spain) concerning the lawfulness of Orden IET/389/201 por la que se actualiza el sistema de determinación automática de precios máximos de venta, antes de impuestos, de los gases licuados del petróleo envasados y se modifica el sistema de determinación automática de las tarifas de venta, antes de impuestos, de los gases licuados del petróleo por canalización (Order IET/389/2015 updating the system for automatic determination of the maximum sale price, before tax, of bottled liquefied petroleum gas and amending the system for automatic determination of the sale tariffs, before tax, of piped liquefied petroleum gas) of 5 March 2015 (BOE No 58 of 9 March 2015, p. 20850, ‘Order IET/389/2015’).

Legal context

European Union law

Directive 2003/55

- 3 Directive 2003/55, which was repealed by Directive 2009/73/EC of the European Parliament and of the Council of 13 July 2009 concerning common rules for the internal market in natural gas and repealing Directive 2003/55 (OJ 2009 L 211, p. 94), provided, in Article 1:

‘1. This Directive establishes common rules for the transmission, 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.

2. The rules established by this Directive for natural gas, including liquefied natural gas (LNG), shall also apply to biogas and gas from biomass or other types of gas in so far as such gases can technically and safely be injected into, and transported through, the natural gas system.’

4 Article 3(2) of that directive provided:

‘Having full regard to the relevant provisions of the [EC] Treaty, in particular Article 86 thereof, Member States may impose on undertakings operating in the gas sector, in the general economic interest, public service obligations which may relate to security, including security of supply, regularity, quality and price of supplies, and environmental protection, including energy efficiency and climate protection. Such obligations shall be clearly defined, transparent, non-discriminatory, verifiable and shall guarantee equality of access for EU gas companies to national consumers. In relation to security of supply, energy efficiency/demand-side management and for the fulfilment of environmental goals, as referred to in this paragraph, Member States may introduce the implementation of long term planning, taking into account the possibility of third parties seeking access to the system.’

Directive 2009/73

5 Article 1 of Directive 2009/73 states:

‘1. This Directive establishes common rules for the transmission, 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.

2. The rules established by this Directive for natural gas, including LNG, shall also apply in a non-discriminatory way to biogas and gas from biomass or other types of gas in so far as such gases can technically and safely be injected into, and transported through, the natural gas system.’

6 Article 3(2) of that directive provides:

‘Having full regard to the relevant provisions of the [EC] Treaty, in particular Article 86 thereof, Member States may impose on undertakings operating in the gas sector, in the general economic interest, public service obligations which may relate to security, including security of supply, regularity, quality and price of supplies, and environmental protection, including energy efficiency, energy from renewable sources and climate protection. Such obligations shall be clearly defined, transparent, non-discriminatory, verifiable and shall guarantee equality of access for natural gas undertakings of the Community to national consumers. In relation to security of supply, energy efficiency/demand-side management and for the fulfilment of environmental goals and goals for energy from renewable sources, as referred to in this paragraph, Member States may introduce the implementation of long-term planning, taking into account the possibility of third parties seeking access to the system.’

Directive 2006/123/EC

7 Recitals 5, 8, 17, and 70 to 73 of Directive 2006/123/EC of the European Parliament and of the Council of 12 December 2006 on services in the internal market (OJ 2006 L 376, p. 36) state:

‘(5) It is ... necessary to remove barriers to the freedom of establishment for providers in Member States and barriers to the free movement of services as between Member States and to guarantee recipients and providers the legal certainty necessary for the exercise in practice of those two fundamental freedoms of the Treaty. Since the barriers in the internal market for services affect operators who wish to become established in other Member States as well as those who provide a service in another Member State without being established there, it is necessary to enable providers to develop their service activities within the internal market either by becoming

established in a Member State or by making use of the free movement of services. Providers should be able to choose between those two freedoms, depending on their strategy for growth in each Member State.

...

- (8) It is appropriate that the provisions of this directive concerning the freedom of establishment and the free movement of services should apply only to the extent that the activities in question are open to competition, so that they do not oblige Member States either to liberalise services of general economic interest or to privatise public entities which provide such services or to abolish existing monopolies for other activities or certain distribution services.

...

- (17) This Directive covers only services which are performed for an economic consideration ... Services of general economic interest are services that are performed for an economic consideration and therefore do fall within the scope of this Directive. However, certain services of general economic interest, such as those that may exist in the field of transport, are excluded from the scope of this Directive and certain other services of general economic interest, for example, those that may exist in the area of postal services, are the subject of a derogation from the provision on the freedom to provide services set out in this Directive ...

...

- (70) For the purposes of this Directive, and without prejudice to Article 16 of the Treaty, services may be considered to be services of general economic interest only if they are provided in application of a special task in the public interest entrusted to the provider by the Member State concerned. This assignment should be made by way of one or more acts, the form of which is determined by the Member State concerned, and should specify the precise nature of the special task.
- (71) The mutual evaluation process provided for in this Directive should not affect the freedom of Member States to set in their legislation a high level of protection of the public interest, in particular in relation to social policy objectives. Furthermore, it is necessary that the mutual evaluation process take fully into account the specificity of services of general economic interest and of the particular tasks assigned to them. This may justify certain restrictions on the freedom of establishment, in particular where such restrictions pursue the protection of public health and social policy objectives and where they satisfy the conditions set out in Article 15(3)(a), (b) and (c) ...
- (72) Services of a general economic interest are entrusted with important tasks relating to social and territorial cohesion. The performance of these tasks should not be obstructed as a result of the evaluation process provided for in this Directive. Requirements which are necessary for the fulfilment of such tasks should not be affected by this process while, at the same time, unjustified restrictions on the freedom of establishment should be addressed.
- (73) ... The evaluation of the compatibility of fixed minimum and/or maximum tariffs with the freedom of establishment concerns only tariffs imposed by competent authorities specifically for the provision of certain services and not, for example, general rules on price determination such as for the renting of houses.'

8 Under Article 1(1) and (2) of Directive 2006/123:

‘1. This Directive establishes general provisions facilitating the exercise of the freedom of establishment for service providers and the free movement of services, while maintaining a high quality of services.

2. This Directive does not deal with the liberalisation of services of general economic interest, reserved to public or private entities, nor with the privatisation of public entities providing services.’

9 Article 2 of that directive provides:

‘1. This directive shall apply to services supplied by providers established in a Member State.

2. This directive shall not apply to the following activities:

(a) non-economic services of general interest;

...’

10 Article 15 of that directive, entitled ‘Requirements to be evaluated’, in Chapter III of that directive relating to freedom of establishment for providers, provides:

‘1. Member States shall examine whether, under their legal system, any of the requirements listed in paragraph 2 are imposed and shall ensure that any such requirements are compatible with the conditions laid down in paragraph 3. Member States shall adapt their laws, regulations or administrative provisions so as to make them compatible with those conditions.

2. Member States shall examine whether their legal system makes access to a service activity or the exercise of it subject to compliance with any of the following non-discriminatory requirements:

...

(g) fixed minimum and/or maximum tariffs with which the provider must comply;

(h) an obligation on the provider to supply other specific services jointly with his service.

3. Member States shall verify that the requirements referred to in paragraph 2 satisfy the following conditions:

(a) non-discrimination: requirements must be neither directly nor indirectly discriminatory according to nationality nor, with regard to companies, according to the location of the registered office;

(b) necessity: requirements must be justified by an overriding reason relating to the public interest;

(c) proportionality: requirements must be suitable for securing the attainment of the objective pursued; they must not go beyond what is necessary to attain that objective and it must not be possible to replace those requirements with other, less restrictive measures which attain the same result.

4. Paragraphs 1, 2 and 3 shall apply to legislation in the field of services of general economic interest only insofar as the application of these paragraphs does not obstruct the performance, in law or in fact, of the particular task assigned to them.

...

6. From 28 December 2006 Member States shall not introduce any new requirement of a kind listed in paragraph 2, unless that requirement satisfies the conditions laid down in paragraph 3.

...'

Spanish law

- 11 Article 1(3) of Ley 34/1998 del sector de hidrocarburos (Law 34/1998 on the hydrocarbons sector) of 7 October 1998 (BOE No 241 of 8 October 1998, p. 33517), provides:

'The activities for the supply of liquid and gaseous hydrocarbons shall be exercised in conformity with the principles of objectivity, transparency and free competition.'

- 12 Article 37(1) of that law provides:

'The refining of crude oil and the transport, storage, distribution and sale of products derived from petroleum, including liquefied petroleum gas, may be conducted freely in accordance with the provision made in this Law, without prejudice to the obligations which may arise from other provisions and from the relevant sectoral legislation, in particular tax provisions, relating to planning, the environment and protection of consumers and users.'

- 13 Article 38 of that law provides:

'The prices of products derived from petroleum shall be freely formed.'

- 14 The Fourth Transitional Provision of Law No 34/1998 provided:

'By means of a formula determined by law, the Government may set the maximum retail price of bottled liquefied petroleum gas so long as the conditions of access to the market and competition in this market are not considered to be sufficient. The maximum price shall include the cost of home delivery.'

- 15 Article 5 of Real Decreto-ley 15/1999 por el que se aprueban medidas de liberalización, reforma estructural e incremento de la competencia en el sector de hidrocarburos (Royal Decree-Law 15/1999 adopting measures for liberalisation, structural reform and increased competition in the hydrocarbons sector) of 1 October 1999 (BOE No 236 of 2 October 1999, p. 35442) provided:

'1. The maximum retail price, before tax, of bottled liquefied petroleum gas with a net weight equal to, or greater than, 8 kilograms [kg] shall be set at 83.4 pesetas/kg, including home delivery. That price shall apply for a period of 12 months from the entry into force of this Royal Decree-Law.

2. The Minister for Industry and Energy, after agreement of the Government's executive committee for economic affairs, shall determine, by ministerial order, within the period of 12 months laid down in the preceding paragraph, a system for setting the price of bottled liquefied petroleum gas, having regard to the seasonal nature of markets.

3. If the conditions of access to the market and competition in this market are not considered to be sufficient, the Minister for Industry and Energy, after agreement of the Government's executive committee for economic affairs, may establish, by ministerial order, other systems for setting the maximum retail price of bottled liquefied petroleum gas. The maximum price shall include the cost of home delivery.'

16 Real Decreto-ley 8/2014 de aprobación de medidas urgentes para el crecimiento, la competitividad y la eficiencia (Royal Decree-Law 8/2014 adopting urgent measures for growth, competitiveness and efficiency) of 4 July 2014 (BOE No 163 of 5 July 2014) repealed the fourth transitional provision of Law 34/1998 and Article 5 of Royal Decree-Law 15/1999.

17 The thirty-third additional provision of Law 34/1998, as amended by Royal Decree-Law 8/2014, provides:

‘1. Users having a contract for the supply of bottled liquefied petroleum gas in containers with a net weight equal to, or greater than, 8 kg and less than 20 kg, except for containers for the use of liquefied petroleum gas as fuel, shall have the right to home delivery.

At a peninsular level and in each of the insular and extra-peninsular territories, the wholesale liquefied petroleum gas operator with the largest market share for its sales in the bottled liquefied petroleum gas sector, in containers with a net weight equal to, or greater than, 8 kg and less than 20 kg, except containers for the use of liquefied petroleum gas as fuel, shall be obliged to carry out home delivery of liquefied petroleum gas to all persons who require it within the corresponding territory.

2. The list of wholesale liquefied petroleum gas operators with the [home] delivery obligation shall be determined by resolution of the General Director of Energy Policy and Mines every 3 years. This resolution shall be published in the Official State Gazette.

When the evolution of the market and the business structure of the sector require it and, in any case, every 5 years, the Government shall review the conditions for exercising the obligation imposed by this provision or shall declare this obligation to be extinguished.

3. Notwithstanding the provisions of Article 38 of this Law, so long as the conditions of access to the market and competition in this market are not considered to be sufficient, the Minister for Industry, Energy and Tourism, after agreement of the Government’s executive committee for economic affairs, shall determine the maximum retail prices of bottled liquefied petroleum gas in containers with a net weight equal to, or greater than, 8 kg and less than 20 kg whose tare weight is greater than 9 kg, with the exception of containers for the use of liquefied petroleum gas as fuel, establishing specific values of those prices or a system for determining and automatically updating those prices. The maximum price shall include the cost of home delivery.

4. Without prejudice to the provisions of the preceding paragraphs, in the event that the wholesale operator of liquefied petroleum gas with the home delivery obligation for containers with a net weight equal to, or greater than, 8 kg and less than 20 kg does not have containers whose tare weight is greater than 9 kg, the home delivery obligation at the maximum price referred to in paragraph 3 shall be extended to containers with a tare weight of less than 9 kg, in the corresponding territory.

5. Wholesale liquefied petroleum gas operators must provide the General Directorate of Energy Policy and Mines with the information required for the performance of their duties, in particular for the purposes of the application, analysis and monitoring of the home delivery obligation, the liquefied petroleum gas supplies made and the maximum retail prices referred to in the preceding paragraphs.’

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

18 It is apparent from the order for reference that Repsol Butano and DISA Gas brought administrative proceedings before the Tribunal Supremo (Supreme Court, Spain) against Order IET/389/2015.

- 19 In support of its action, Repsol Butano submits that the system for setting the maximum prices of bottled liquefied petroleum gas (LPG) implemented by Order IET/389/2015 is contrary to the liberalisation of the relevant sector and is discriminatory. DISA Gas submits that the home delivery obligation for bottles of LPG at a regulated maximum price is discriminatory insofar as it is imposed on a single operator in each territorial zone defined by Spanish legislation. Furthermore, it is argued that that system is contrary to the liberalisation of the sector and to the principle of proportionality. It also leads to distortions of competition.
- 20 According to the referring court, Order IET/389/2015, the purpose of which is, in particular, to update the system for the automatic setting of maximum sale prices of bottled LPG, was adopted on the basis of the Spanish legislation relating to the hydrocarbons sector, namely the thirty-third additional provision of Law 34/1998, introduced by Royal Decree-Law 8/2014.
- 21 The referring court states that that provision provides, first, that the Ministro de Industria, Energía y Turismo (Minister for Industry, Energy and Tourism, Spain) is to establish ‘so long as the conditions of access to the market and competition in this market are not considered to be sufficient’, a maximum sale price for containers of bottled LPG with a net weight between 8 kg and 20 kg whose tare weight is greater than 9 kg. Where those containers are unavailable, the maximum sale price is also to apply to other containers.
- 22 Second, that law provides for a home delivery obligation for bottles of gas to which the regulated price applies. The cost of delivery is included in the maximum price. That obligation is imposed on operators who hold the largest share of the market in the bottled LPG sector in containers with a net weight between 8 kg and 20 kg, in the various territories of the Kingdom of Spain, namely in Peninsular Spain, the Balearic Islands, the Canary Islands, Ceuta and Melilla. The list of operators with the delivery obligation is to be determined by resolution of the General Director of Energy Policy and Mines every 3 years. According to the thirty-third additional provision of Law 34/1998, the government is to review the conditions for exercising that obligation ‘when the evolution of the market and the business structure of the sector require it and, in any case, every 5 years’.
- 23 The referring court notes, furthermore, that before the adoption of Royal Decree-Law 8/2014, other provisions of Law 34/1998 already provided for the possibility of setting a maximum sale price of bottled LPG and a home delivery obligation. According to that court, those measures have been continually implemented and extended since 1998, in spite of the fact that the relevant legislation expressly makes those measures transitional. The extension of those measures for a period of that length could impede the entry of new operators into the relevant market. Those new operators would be in a situation in which the operator holding the largest share of the market in a given territory offers bottled LPG at a maximum price set by the Administration, which also includes home delivery.
- 24 The referring court takes the view that imposing a maximum price including home delivery may constitute a barrier to new operators entering into the market. It is true that, if new operators use lighter bottles which are not subject to the regulated price, they could set the prices freely. However, in practice, they could not deviate from those prices unless they were to be at risk of demand not being sufficient to justify the investments to be made. There are therefore reasons for believing that those measures, in reality, freeze the market, contrary to free competition.
- 25 As regards whether the measures at issue in the main proceedings are compatible with EU law, the Court has held, in its judgment of 20 April 2010, *Federutility and Others* (C-265/08, EU:C:2010:205), that Directive 2003/55 governing the natural gas market does not preclude national legislation that, in the general economic interest, seeks to maintain the price of the supply of natural gas at a reasonable level by establishing a reference price, provided that that legislation takes account of the objectives of liberalisation and protection of final consumers, is necessary and is for a limited period.

- 26 The Tribunal Supremo (Supreme Court) has held that the criteria established in the judgment also apply to the bottled liquefied gas market, provided that that market has a Community dimension, even if there is no EU legislation specifically governing that market.
- 27 The referring court notes that, in the present cases, the measure which sets a maximum sale price for bottled liquefied gas may be classified as a measure for the protection of socially vulnerable consumers, in so far as it seeks to ensure that the price of supply to the final consumer is kept at a reasonable level. The same is true for the home delivery obligation. Consequently, those measures pursue objectives of general economic interest, within the meaning of Article 106 TFEU.
- 28 However, those measures are general and indiscriminate because they benefit all consumers. Furthermore, even though it is apparent from the relevant legislation that those measures are transitory in nature inasmuch as they are renewed ‘so long as the conditions of access to the market and competition in this market are not considered to be sufficient’, they have been in force for more than 18 years.
- 29 Consequently, it is doubtful whether those measures are compatible with EU law, in the light of the criteria established in the judgment of 20 April 2010, *Federutility and Others* (C-265/08, EU:C:2010:205), and the principle of proportionality.
- 30 In those circumstances, the Tribunal Supremo (Supreme Court) decided to stay the proceedings and to refer the following questions to the Court of Justice for a preliminary ruling:
- ‘(1) In the light of the case-law laid down in [the judgment of 20 April 2010, *Federutility and Others*, C-265/08, EU:C:2010:205], is a measure setting a maximum price for cylinders of bottled liquefied gas, in so far as it is a measure for the protection of socially vulnerable users, compatible with that case-law and with the principle of proportionality where, separately or together, any of the following circumstances occur:
- the measure is adopted as a general measure in relation to all consumers and for an indefinite period “so long as the conditions of access to the market and competition in this market are not considered to be sufficient”,
 - the measure has already been in force for more than 18 years,
 - the measure may contribute to freezing the situation of limited competition by impeding the entry of new operators?
- (2) In the light of the case-law laid down in [the judgment of 20 April 2010, *Federutility and Others*, C-265/08, EU:C:2010:205], is a measure for the compulsory home delivery of bottled liquefied gas, in so far as it is a measure for the protection of users who are socially vulnerable or resident in areas that are difficult to access, compatible with that case-law and with the principle of proportionality where, separately or together, any of the circumstances listed in the previous question occur?’

Consideration of the questions referred

- 31 By its questions, which it is appropriate to examine together, the referring court asks, in essence, whether the principle of proportionality must be interpreted as precluding measures such as those at issue in the disputes in the main proceedings, which set a maximum price for containers of bottled LPG with a net weight between 8 kg and 20 kg, whose tare weight is greater than 9 kg, and which require operators holding the largest share of the market in the relevant sector, in a given geographical

market, to carry out home delivery of that gas. The referring court mentions, in that context, the criteria deriving from the judgment of 20 April 2010, *Federutility and Others* (C-265/08, EU:C:2010:205).

- 32 In that regard, it should be recalled that, in that judgment, the Court ruled on the interpretation of Directive 2003/55, in particular Article 3(2) governing the intervention of Member States, in the general economic interest, in the natural gas sector, which is covered by that directive. In that context, the Court ruled on the criteria for assessing the proportionality of a measure that determines a reference price for the supply of natural gas to final consumers.
- 33 Directive 2003/55 was repealed by Directive 2009/73, Article 3(2) of which is, in essence, identical to Article 3(2) of Directive 2003/55 and was interpreted by the Court in the judgment of 7 September 2016, *ANODE* (C-121/15, EU:C:2016:637).
- 34 The scope of those two directives is defined, respectively, in Article 1 of each directive. In accordance with those provisions, the directives apply to natural gas, biogas and gas from biomass or other types of gas in so far as such gases can technically and safely be injected into, and transported through, the natural gas system.
- 35 As the Spanish Government and the European Commission have indicated in their observations submitted to the Court, it is not possible to inject, technically and safely, LPG into the natural gas system. Therefore, as the referring court correctly noted, it must be concluded that national rules governing only the sale of LPG do not fall either within the scope of Directive 2003/55 or of Directive 2009/73.
- 36 Consequently, Article 3(2) of Directive 2003/55 and Article 3(2) of Directive 2009/73, as interpreted by the Court in the judgments of 20 April 2010, *Federutility and Others* (C-265/08, EU:C:2010:205), and of 7 September 2016, *ANODE* (C-121/15, EU:C:2016:637), are not relevant for the purposes of resolving the disputes in the main proceedings.
- 37 However, the referring court is asking how it should apply, to the measures at issue in the disputes before it, the criteria established in the judgment of 20 April 2010, *Federutility and Others* (C-265/08, EU:C:2010:205), for assessing whether the principle of proportionality has been observed.
- 38 In that regard, it should be observed that, according to settled case-law, in the procedure laid down by Article 267 TFEU, providing for cooperation between national courts and the Court of Justice, it is for the latter to provide the national court with an answer which will be of use to it and enable it to determine the case before it. With that in mind, the Court may have to reformulate the questions referred to it. The Court may also find it necessary to consider provisions of EU law to which the national court has made no reference in the wording of its question (judgment of 29 November 2018, *baumgarten sports & more*, C-548/17, EU:C:2018:970, paragraph 22).
- 39 According to the case-law of the Court, the principle of proportionality is one of the general principles of EU law which must be observed by any national legislation which falls within the scope of EU law or which implements that law (judgment of 6 March 2014, *Siragusa*, C-206/13, EU:C:2014:126, paragraph 34).
- 40 In the present cases, it is common ground that the measures at issue in the main proceedings may impede the entry of new operators into a market with limited competition. The referring court considers that those measures could thus obstruct the fundamental freedoms enshrined in the FEU Treaty. It takes the view, however, that those measures pursue an objective in the general economic interest, namely the supply of energy at a reasonable price to vulnerable consumers. It is in that context that it is asking whether, in the light of their restrictive effects on the internal market and in the light of the objective pursued, the measures at issue in the main proceedings are proportionate.

- 41 It should be noted that measures such as those at issue in the main proceedings, which set a maximum price for bottled LPG in certain gas containers and which require operators holding the largest share of the market in the relevant sector, in a given geographical market, to carry out home delivery, constitute a restriction of the freedom of establishment of service providers, within the meaning of Directive 2006/123, and fall within the scope of that directive.
- 42 First, Article 15(2)(g) of Directive 2006/123 expressly classifies ‘... maximum tariffs with which the provider must comply’ as ‘requirements’ within the meaning of Article 4(7) of the directive, which are conditions affecting the freedom of establishment of service providers (see, by analogy, judgment of 23 December 2015, *Hiebler*, C-293/14, EU:C:2015:843, paragraph 51). Second, the home delivery obligation imposed on certain operators on the basis of their share of the market in the bottled LPG sector constitutes ‘[an]other specific service’ within the meaning of Article 15(2)(h) of Directive 2006/123, which, according to the applicable national rules, must be supplied jointly with the main service of selling that gas.
- 43 Furthermore, it is quite clear from Article 2(2)(a) of Directive 2006/123, read in conjunction with recitals 17, 70 and 72 of that directive, that the rules laid down by that directive are applicable, in principle, to services of general economic interest, only non-economic services of general interest being excluded from the scope of those rules (see, to that effect, judgment of 23 December 2015, *Hiebler*, C-293/14, EU:C:2015:843, paragraphs 43 and 44).
- 44 The requirements listed in Article 15(2) of Directive 2006/123 must be subject to evaluation by the Member States. In accordance with Article 15(1), Member States are, however, authorised to maintain or, if necessary, introduce requirements in their legal systems, on condition that they satisfy the conditions of non-discrimination, necessity and proportionality laid down in Article 15(3) (see, to that effect, judgment of 23 December 2015, *Hiebler*, C-293/14, EU:C:2015:843, paragraph 54).
- 45 Thus, Article 15(3) of Directive 2006/123 provides that a restriction of freedom of establishment, such as that resulting from setting a maximum price for LPG and the home delivery obligation, may be justified. It requires, for that purpose, compliance with conditions designed to ensure that the restriction, first, does not discriminate on grounds of nationality, next, is justified by an overriding reason relating to the public interest and, finally, is suitable for securing the attainment of the objective pursued, does not go beyond what is necessary to attain that objective and may not be replaced by other, less restrictive measures which attain the same result (see, to that effect, judgment of 23 December 2015, *Hiebler*, C-293/14, EU:C:2015:843, paragraph 55).
- 46 As regards undertakings responsible for managing services of general economic interest, it is apparent, furthermore, from Article 15(4) of Directive 2006/123 that paragraphs 1 to 3 of Article 15 apply to the relevant national legislation only in so far as the application of those paragraphs does not obstruct the performance, in law or in fact, of the particular tasks assigned to those undertakings.
- 47 However, as follows from the very wording of Article 15(4) of Directive 2006/123, inasmuch as the conditions of non-discrimination, necessity, and proportionality, referred to in Article 15(3), do not obstruct the particular task assigned by the competent authority to a service of general economic interest, those conditions must be complied with.
- 48 In the light of the foregoing and in order to give the referring court a useful answer, it should be considered that the referring court seeks to ascertain whether the condition of proportionality set out in Article 15(3)(c) of Directive 2006/123 must be interpreted as precluding measures, such as those at issue in the main proceedings, which set a maximum price for bottled LPG in containers with a net weight between 8 kg and 20 kg, whose tare weight is greater than 9 kg, and which require operators holding the largest share of the market in the relevant sector, in a given geographical market, to carry out home delivery of that gas.

- 49 While it is for the national court to determine whether national measures are compatible with EU law, the Court may nevertheless provide that court with any helpful guidance to resolve the dispute before it (judgment of 14 February 2019, *Nestrade*, C-562/17, EU:C:2019:115, paragraph 36).
- 50 It is apparent from paragraph 31 of the present judgment that the referring court raises a question, in that context, in particular regarding the applicability and interpretation of the criteria established in the judgment of 20 April 2010, *Federutility and Others*, (C-265/08, EU:C:2010:205), relating to the proportionality of State intervention in the natural gas sector.
- 51 As has also been noted in the present judgment, the natural gas sector is governed by Directive 2009/73. The aim of that directive is to pursue the achievement of an internal market in natural gas that is entirely and effectually open and competitive and in which all consumers can freely choose their suppliers and all suppliers can freely supply their products to their customers, which means that the price of supply of natural gas must be fixed exclusively by the interplay of supply and demand (see, to that effect, judgment of 7 September 2016, *ANODE*, C-121/15, EU:C:2016:637, paragraph 26).
- 52 Furthermore, the Court has held that in order for an obstacle resulting from a measure of State intervention in prices for the sale of natural gas to comply with the principle of proportionality, it must necessarily be of limited duration, which must not go beyond what is necessary in order to achieve the objective in the general economic interest (see, to that effect, judgment of 20 April 2010, *Federutility and Others*, C-265/08, EU:C:2010:205, paragraphs 33 and 35).
- 53 Those findings also apply to the condition of proportionality referred to in Article 15(3)(c) of Directive 2006/123.
- 54 It is true that Member States may maintain or, if necessary, introduce requirements of the type referred to in Article 15(2) of Directive 2006/123, on condition that those requirements satisfy the conditions of non-discrimination, necessity and proportionality laid down in Article 15(3) (judgment of 16 June 2015, *Rina Services and Others*, C-593/13, EU:C:2015:399, paragraph 33).
- 55 However, the assessment of whether such a requirement complies with the principle of proportionality may vary over time, depending on the relevant market and its evolution. Furthermore, a scenario should be avoided whereby maintaining one of the requirements laid down in Article 15(2) of Directive 2006/123 amounts to perpetuating an obstacle to the achievement of the internal market.
- 56 In that context, it is for the referring court to examine whether and to what extent the relevant national law requires the competent authorities to undertake a periodic re-examination, at close intervals, of the need for them to intervene and the manner of their doing so, having regard to the development of the relevant market (judgment of 20 April 2010, *Federutility and Others*, C-265/08, EU:C:2010:205, paragraph 35).
- 57 In that regard, it is apparent from the order for reference that the thirty-third additional provision of Law 34/1998, as amended by Royal Decree-law 8/2014, provides that the Minister for Industry, Energy and Tourism is to establish the maximum sale prices for LPG ‘so long as the conditions of access to the market and competition in this market are not considered to be sufficient’. Furthermore, it is apparent from that provision that the home delivery obligation is to be reviewed if ‘the evolution of the market and the business structure of the sector require it and, in any case, every 5 years’.
- 58 It is for the referring court to verify whether that national provision meets the requirement for periodic re-examination referred to in paragraph 56 of the present judgment.
- 59 Furthermore, it is apparent from the file before the Court that the applicable national law provides for a mechanism to adjust the maximum sale price of LPG at regular intervals, so that it reflects the evolution of costs, which is a matter for the referring court to verify. As the Court has held, such a

mechanism, which relates only to a periodical review of the level of those tariffs and does not concern the need for or the terms of the State intervention on prices, cannot be equated to a limitation of the duration of the measure at issue (judgment of 7 September 2016, *ANODE*, C-121/15, EU:C:2016:637, paragraph 62).

- 60 Next, it should be noted that the fact, referred to in the orders for reference, that measures such as those at issue in the main proceedings have been in force in Spain since 1998, in spite of their transitional nature, does not, itself, support the conclusion that those measures are not suitable. It is apparent from the observations that the Spanish Government has submitted to the Court that the Spanish market for bottled LPG is in recession due to the expansion of the natural gas market. According to the Spanish Government, the resulting reduction in sales increases the costs of the operators present in that market and makes it more difficult for new competitors who could exert pressure on prices to establish themselves. It is for the referring court to verify that information and to take it into account when assessing the proportionality of the measures at issue in the main proceedings.
- 61 Furthermore, the relevant regulated price and home delivery obligation apply, according to the information available to the Court, only to bottled LPG in containers with a net weight between 8 kg and 20 kg whose tare weight is greater than 9 kg. The sale of gas using other containers is not subject to those obligations. In that regard, it is for the referring court to verify whether the measures at issue in the main proceedings reduce, or even completely remove, the profitability of trade in unregulated LPG. That might in particular be the case if the maximum price, as set under the relevant Spanish legislation, were substantially lower than the market price, as the applicants in the main proceedings argue.
- 62 Finally, the requirement of proportionality must also be assessed with regard to the scope *ratione personae* of the measure in question and, more particularly, its beneficiaries (judgment of 20 April 2010, *Federutility and Others*, C-265/08, EU:C:2010:205, paragraph 39).
- 63 In that regard, it is apparent from the file before the Court that the measures at issue relate to domestic consumers and not to undertakings, which is in line with the objective pursued by those measures, namely supplying energy at a reasonable price to vulnerable consumers.
- 64 Moreover, it is common ground that domestic consumers benefit from the measures at issue in the main proceedings regardless of whether they are socially vulnerable or live in areas that are remote or far from LPG distribution points. Although that fact may, in principle, be an indication that those measures go beyond what is necessary in order to attain their objective, the fact remains that the principle of proportionality does not necessarily prevent the measures at issue from being applied to all domestic consumers (see, to that effect, judgment of 20 April 2010, *Federutility and Others*, C-265/08, EU:C:2010:205, paragraph 40). The referring court must examine, in that context, the possibility and the appropriateness of adopting measures aimed more at vulnerable consumers. In that regard, the arguments of the applicants in the main proceedings and of the Spanish Government, relating to the feasibility of adopting alternative measures and relating to the possible economic effects of such measures, are relevant.
- 65 In the light of all the foregoing considerations, the answer to the questions referred is that the condition of proportionality laid down in Article 15(3)(c) of Directive 2006/123 must be interpreted as not precluding measures such as those at issue in the main proceedings, which set a maximum price for bottled LPG and which require certain operators to carry out home delivery of that gas, provided that those measures are maintained only for a limited duration and do not go beyond what is necessary in order to achieve the objective of general economic interest pursued.

Costs

- ⁶⁶ 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 (First Chamber) hereby rules:

The condition of proportionality laid down in Article 15(3)(c) of Directive 2006/123/EC of the European Parliament and of the Council of 12 December 2006 on services in the internal market must be interpreted as not precluding measures such as those at issue in the main proceedings, which set a maximum price for bottled liquefied petroleum gas and which require certain operators to carry out home delivery of that gas, provided that those measures are maintained only for a limited duration and do not go beyond what is necessary in order to achieve the objective of general economic interest pursued.

[Signatures]