Reports of Cases

OPINION OF ADVOCATE GENERAL
PIKAMÄE
delivered on 9 September 2021 [1]

Case C-179/20

Fondul Proprietatea SA
v
Guvernul României,
SC Complexul Energetic Hunedoara SA, in liquidation,
Compania Națională de Transport al Energiei Electrice 'Transelectrica' SA,
SC Complexul Energetic Oltenia SA,
intervener:
Ministerul Economiei, Energiei şi Mediului de Afaceri

(Request for a preliminary ruling made by the Curtea de Apel Bucureşti (Court of Appeal, Bucharest, Romania))

(Reference for a preliminary ruling – Common rules for the internal market in electricity – Free third-party access to the grids – Public service obligations – Security of supply – Directive 2009/72/EC – Guaranteed access to the electricity grids – Directive 2009/28/EC)

1. May a Member State grant guaranteed access to the transmission and distribution grids to certain electricity generating installations which use non-renewable energy sources?

2. That is the question which, among those forming the subject matter of the request for a preliminary ruling made by the Curtea de Apel București (Court of Appeal, Bucharest, Romania), will, at the Court's request, form the subject matter of the present Opinion.

3. In its forthcoming judgment, the Court will have, in particular, the opportunity to rule on the Member States' obligation to grant generating installations using renewable energy sources guaranteed access to the networks and on the impact of the grant of guaranteed access to certain generating installations using non-renewable energy sources on access to the grids of generating installations which do not enjoy guaranteed access.

[1] Original language: French.

I. Legal context

A. European Union law

1. Directive 2009/28/EC

4. Recital 60 of Directive 2009/28/EC [2] states:

‘Priority access and guaranteed access for electricity from renewable energy sources are important for integrating renewable energy sources into the internal market in electricity, in line with Article 11(2) and developing further Article 11(3) of Directive 2003/54/EC.[3] Requirements relating to the maintenance of the reliability and safety of the grid and to the dispatching may differ according to the characteristics of the national grid and its secure operation. Priority access to the grid provides an assurance given to connected generators of electricity from renewable energy sources that they will be able to sell and transmit the electricity from renewable energy sources in accordance with connection rules at all times, whenever the source becomes available. In the event that the electricity from renewable energy sources is integrated into the spot market, guaranteed access ensures that all electricity sold and supported obtains access to the grid, allowing the use of a maximum amount of electricity from renewable energy sources from installations connected to the grid. However, this does not imply any obligation on the part of Member States to support or introduce purchase obligations for energy from renewable sources. In other systems, a fixed price is defined for electricity from renewable energy sources, usually in combination with a purchase obligation for the system operator. In such a case, priority access has already been given.’

5. Article 16 of that directive, entitled ‘Access to and operation of the grids’, provides in paragraph 2:

‘Subject to requirements relating to the maintenance of the reliability and safety of the grid, based on transparent and non-discriminatory criteria defined by the competent national authorities:

…

(b) Member States shall also provide for either priority access or guaranteed access to the grid-system of electricity produced from renewable energy sources;

(c) Member States shall ensure that when dispatching electricity generating installations, transmission system operators shall give priority to generating installations using renewable energy sources in so far as the secure operation of the national electricity system permits and based on transparent and non-discriminatory criteria. …’

[2] Directive 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).

[3] Directive 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).

2. Directive 2009/72/EC

6. Article 3 of Directive 2009/72/EC,[4] entitled 'Public service obligations and customer protection', provides in paragraphs 2 and 14:

'2. Having full regard to the relevant provisions of the Treaty, in particular Article 86 thereof, Member States may impose on undertakings operating in the electricity 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 electricity 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.

…

14. Member States may decide not to apply the provisions of Articles 7, 8, 32 and/or 34 in so far as their application would obstruct the performance, in law or in fact, of the obligations imposed on electricity undertakings in the general economic interest and in so far as the development of trade would not be affected to such an extent as would be contrary to the interests of the Community. The interests of the Community include, inter alia, competition with regard to eligible customers in accordance with this Directive and Article 86 of the Treaty.'

7. Article 15 of Directive 2009/72, entitled 'Dispatching and balancing', provides:

'1. Without prejudice to the supply of electricity on the basis of contractual obligations, including those which derive from the tendering specifications, the transmission system operator shall, where it has such a function, be responsible for dispatching the generating installations in its area and for determining the use of interconnectors with other systems.

2. The dispatching of generating installations and the use of interconnectors shall be determined on the basis of criteria which shall be approved by national regulatory authorities where competent and which must be objective, published and applied in a non-discriminatory manner, ensuring the proper functioning of the internal market in electricity. The criteria shall take into account the economic precedence of electricity from available generating installations or interconnector transfers and the technical constraints on the system.

3. A Member State shall require system operators to act in accordance with Article 16 of Directive 2009/28/EC when dispatching generating installations using renewable energy sources. They also may require the system operator to give priority when dispatching generating installations producing combined heat and power.

4. A Member State may, for reasons of security of supply, direct that priority be given to the dispatch of generating installations using indigenous primary energy fuel sources, to an extent not

[4] Directive 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/EC (OJ 2009 L 211, p. 55).

exceeding, in any calendar year, 15% of the overall primary energy necessary to produce the electricity consumed in the Member State concerned.

…'

8. Article 32 of Directive 2009/72, entitled 'Third-party access', provides:

'1. Member States shall ensure the implementation of a system of third party access to the transmission and distribution systems based on published tariffs, applicable to all eligible customers and applied objectively and without discrimination between system users. Member States shall ensure that those tariffs, or the methodologies underlying their calculation, are approved prior to their entry into force in accordance with Article 37 and that those tariffs, and the methodologies – where only methodologies are approved – are published prior to their entry into force.

2. The transmission or distribution system operator may refuse access where it lacks the necessary capacity. Duly substantiated reasons must be given for such refusal, in particular having regard to Article 3, and based on objective and technically and economically justified criteria. …'

B. Romanian law

9. In order to transpose Directive 2009/72, Romania enacted a set of measures including the Legea energiei electrice și a gazelor naturale nr. 123/2012 (Law No 123/2012 on electricity and natural gas) of 10 July 2012 (*Monitorul Oficial al României*, 16 July 2012, No 485) ('Law No 123/2012') and, pursuant to that law, Hotărârea Guvernului nr. 138/2013 privind adoptarea unor măsuri pentru siguranța alimentării cu energie electrică (Government Decision No 138/2013 on the adoption of measures to safeguard security of electricity supply) of 3 April 2013 (*Monitorul Oficial al României*, 8 April 2013, No 196) ('Decision No 138/2013').

10. Law No 123/2012, first of all, provided in Article 5(3), entitled 'Energy programme':

'For reasons relating to the security of electricity supply, guaranteed access to the electricity grids may be granted, by Government decision, for the electricity produced by power plants which use domestically produced fuels, up to an annual limit corresponding to primary energy of not more than 15% of the total quantity of equivalent fuel needed to produce electricity corresponding to gross national final consumption.'

11. Decision No 138/2013 subsequently provided, in Article 1:

'Guaranteed access to the electricity grids shall be granted for electricity produced by the Mintia thermal electricity power station owned by Societatea Comercială Complexul Energetic Hunedoara SA, which shall ensure its continuous operation at an average electrical power of at least 200 MW.'

12. In similar terms, Article 2 of that decision provided:

'Guaranteed access to the electricity grids shall be granted for electricity produced by Societatea Comercială Complexul Energetic Oltenia SA, which shall ensure its continuous operation at an average electrical power of at least 500 MW.'

13. Article 3 of Decision No 138/2013 provided:

'The Compania Națională de Transport al Energiei Electrice "Transelectrica" SA, in its capacity as the distribution grid operator, shall be required to guarantee the priority dispatching of electricity produced by the thermal electricity power stations referred to in Articles 1 and 2 on the conditions laid down by the regulations adopted by the Autoritatea Națională de Reglementare în Domeniul Energiei ((ANRE), the National Energy Sector Regulatory Authority).'

14. Article 4 of Decision No 138/2013 provided:

'In order to maintain the security level of the national electricity system, Societatea Comercială Complexul Energetic Hunedoara SA shall be required to provide ancillary services to the transmission grid manager of electric power of at least 400 MW, in accordance with the regulations adopted by the [ANRE].'

15. In similar terms, Article 5 of that decision provided:

'In order to maintain the security level of the national electricity system, Societatea Comercială Complexul Energetic Oltenia SA shall be required to provide ancillary services to the transmission grid manager of electric power of at least 600 MW, in accordance with the regulations adopted by the [ANRE].'

16. Decision No 138/2013 provided in Article 6 that 'the measures laid down in this Decision shall apply from 15 April 2013 until 1 July 2015'.

17. By Government Decision No 941/2014, the period prescribed for the application of the measures laid down in Articles 1, 3 and 4 of Decision No 138/2013 to Complexul Energetic Hunedoara SA had been extended until 31 December 2017.

II. The facts giving rise to the dispute, the procedure in the main proceedings and the question referred for a preliminary ruling

18. SC Complexul Energetic Hunedoara and SC Complexul Energetic Oltenia are two electricity generating companies which use non-renewable energy sources. Romanian law, which I have just set out, establishes three measures in respect of those companies which may be summarised as follows:

– priority dispatch by Transelectrica [5] of the electricity produced by the thermal power station at Mintia owned by SC Complexul Energetic Hunedoara and that produced by SC Complexul Energetic Oltenia (Article 3 of Decision No 138/2013); [6]

– guaranteed access to the transmission and distribution grids for electricity produced by those thermal power stations, guaranteeing them a continuous operation of an average electrical

[5] Transelectrica is the electricity transmission system operator in Romania.

[6] It seems to me that Article 3 of Decision No 138/2013 does not set any limit on the quantity of electricity eligible for priority dispatching by Transelectrica in that the limit of 15% fixed by Article 5(3) of Law No 123/2012 applies only to the guaranteed access mechanism. However, it is possible that the quantity of electricity that has been produced by the production installations referred to Article 3 of Decision No 138/2013 which have benefited from priority dispatch has not exceeded the limit of 15% referred to in Article 15(4) of Directive 2009/72.

power of at least 200 MW and 500 MW respectively (Article 5(3) of Law No 123/2012 and Articles 1 and 2 of Decision No 138/2013; 'the measure at issue');

– a requirement for SC Complexul Energetic Hunedoara and SC Complexul Energetic Oltenia to provide Transelectrica with ancillary services of an electrical power of at least 400 MW and 600 MW respectively (Articles 4 and 5 of Decision No 138/2013).

19. Fondul Proprietatea SA, a shareholder in an electricity generating company using renewable energy sources, Hidroelectrica SA, considered that it is harmed by the adoption of those measures by Romania in that they constitute, in its view, State aid in favour of SC Complexul Energetic Hunedoara and SC Complexul Energetic Oltenia, which it regards as two of its competitors.

20. In order to protect its interests, Fondul Proprietatea therefore brought an action for annulment of Decision No 138/2013 before the Curtea de Apel București (Court of Appeal, Bucharest). By judgment of 10 March 2015, that court dismissed its action.

21. The applicant then appealed on a point of law before the Înalta Curte de Casație și Justiție – Secția de Contencios Administrativ și Fiscal (High Court of Cassation and Justice – Administrative and Fiscal Litigation Division, Romania). By judgment of 22 May 2018, that court quashed the judgment under appeal in part on the ground that the Curtea de Apel București (Court of Appeal, Bucharest) had not examined all the grounds of illegality raised by the applicant. The Înalta Curte de Casație și Justiție (High Court of Cassation and Justice) therefore referred the parties back to the Curtea de Apel București (Court of Appeal, Bucharest) for consideration of all of those grounds.

22. When examining the action for annulment, following that referral, the Curtea de Apel București (Court of Appeal, Bucharest), at the applicant's request, decided to stay the proceedings and to refer the following questions to the Court for a preliminary ruling:

'(1) Articles 107 and 108(3) TFEU: "Does the adoption by the Romanian State of a legislative act which, for the benefit of two companies of which the State is the majority shareholder, provides for:

(a) the grant of priority access to dispatching and an obligation for the transmission system operator to purchase ancillary services from those companies, and

(b) the grant of guaranteed access to the electricity grid for the electricity produced by those two companies, such as to ensure that they can operate continuously,

constitute State aid within the meaning of Article 107 TFEU, that is to say, is it a measure funded by the State or through State resources, is it selective in nature and may it affect trade between Member States? If so, is such State aid subject to notification as provided for by Article 108(3) TFEU?"

(2) Article 15(4) of Directive [2009/72]: "Is the grant by the Romanian State of a right of guaranteed access to the electricity grid to two companies of which the State is the majority shareholder, such as to ensure that they can operate continuously, consistent with the provisions of Article 15(4) of [that directive]?"'

III. The procedure before the Court

23. Those questions were the subject of written observations submitted by Fondul Proprietatea, SC Complexul Energetic Oltenia and the European Commission.

24. Fondul Proprietatea and the Commission presented oral argument at the hearing on 2 June 2021.

IV. Analysis

25. As indicated above, this Opinion, in accordance with the Court's request, will deal solely with the second question.

A. Preliminary observations on the concepts of 'priority dispatching' and 'guaranteed access'

26. Since the concepts of 'priority dispatching' and 'guaranteed access' are not defined by the provisions of Directives 2009/28 and 2009/72, I consider it necessary to introduce those concepts.

1. The concept of priority dispatch

27. As provided for in Article 15(1) of Directive 2009/72, the transmission system operator is responsible for dispatching the generating installations. In that regard, dispatching may be defined, as it was by the Court in the judgment in *ENEL*, as 'the operation whereby, depending on demand, the system operator "dispatches" generating installations in its area which have enough spare capacity, so as to ensure at all times that, within the network, the supply of electricity matches demand and to guarantee continuity in the provision of electricity'.[7]

28. In the words of Article 15(2) of Directive 2009/72, the generating installations dispatched on that occasion are to be determined on the basis of criteria which are to be objective, published and applied in a non-discriminatory manner and which take into account, in particular, the criterion of economic precedence. In that regard, that criterion is defined as 'the ranking of sources of electricity supply in accordance with economic criteria'.[8] In practical terms, the generating installations are dispatched, in principle, beginning with the lowest sale bids and continuing in ascending order until the entire demand is satisfied.[9]

29. However, the legislature has adapted dispatching as just explained by introducing the concept of 'priority despatching'. Priority dispatching consists, for the transmission system operator, in dispatching generating installations on the basis of criteria other than economic precedence. Following the adoption of Directive 2009/72, the legislature defined priority dispatching as, 'with regard to the self-dispatch model, the dispatch of power plants on the basis of criteria which are different from the economic order of bids and, with regard to the central dispatch model, the dispatch of power plants on the basis of criteria which are different from the economic order of

7 Judgment of 21 December 2011, *ENEL* (C 242/10, EU:C:2011:861, paragraph 11).

8 Article 2 of Directive 2009/72.

9 See judgment of 21 December 2011, *ENEL* (C-242/10, EU:C:2011:861, paragraph 87).

bids and from network constraints, giving priority to the dispatch of particular generation technologies'.[10] In the present case, Directive 2009/72 provides for priority despatching for two categories of generating installation.

30. In the first place, Member States are required to give priority to the dispatch of generating installations which use renewable energy sources, in accordance with Article 16(2)(c) of Directive 2009/28, to which Article 15(3) of Directive 2009/72 refers.[11] That priority dispatching, which is based on reasons of environmental protection,[12] is designed to be a mechanism to support those installations.[13]

31. In the second place, Member States may give priority to the dispatch of generating installations using indigenous primary energy fuel sources, under Article 15(4) of Directive 2009/72.[14] That priority dispatch, which is based on reasons of security of supply, is however to be limited, 'in any calendar year, [to] 15% of the overall primary energy necessary to produce the electricity consumed in the Member State concerned'.

2. The concept of 'guaranteed access'

32. Article 16(2)(b) of Directive 2009/28, entitled 'Access to and operation of the grids', requires Member States to provide for 'either priority access or guaranteed access to the grid-system of electricity produced from renewable energy sources'.[15]

33. That provision does not define the concept of 'guaranteed access', however, and contains no express reference to the law of the Member States for the purpose of determining its meaning and scope. Consequently, that concept must, in keeping with settled case-law, be given an independent and uniform interpretation that must take into account not only its wording but also its context and the objectives pursued by the rules of which it is part.[16]

34. In that regard, recital 60 of Directive 2009/28 sets out the function of guaranteed access, the effects to which its implementation leads and the objective pursued. According to that recital, the function of guaranteed access is to ensure that 'all electricity sold and supported obtains access to the grid'. Having regard to its function, the implementation of guaranteed access necessarily has the effect of 'allowing the use of a maximum amount of electricity from renewable energy sources from installations connected to the grid'. Finally, the objective pursued

[10] Article 2(20) of Regulation (EU) 2019/943 of the European Parliament and of the Council of 5 June 2019 on the internal market for electricity (OJ 2019 L 158, p. 54).

[11] Priority dispatching in favour of generating installations which use renewable energy sources was already provided for in the directives that preceded Directive 2009/72 (Article 8(3) of Directive 96/92/EC of the European Parliament and of the Council of 19 December 1996 concerning common rules for the internal market in electricity, (OJ 1997 L 27, p. 20), now Article 11(3) of Directive 2003/54). Furthermore, priority dispatch is also provided for installations producing combined heat and power (Article 15(3) of Directive 2009/72).

[12] See recital 28 of Directive 96/92.

[13] Communication from the Commission to the Council and the European Parliament, Completing the internal energy market (COM(2001) 125 final, p. 25).

[14] Provision for priority dispatch in favour of generating installations using indigenous primary energy fuel sources was already made in the directives provided for in the directives that preceded Directive 2009/72 (Article 8(4) of Directive 96/92, which became Article 11(4) of Directive 2003/54).

[15] Directive 2009/28 succeeded 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). Article 7(1) of Directive 2001/77, entitled 'Grid system issues', allowed the Member States to provide priority access to the grid-system of electricity produced from renewable energy sources.

[16] Judgment of 16 July 2015, *Abcur* (C-544/13 and C-545/13, EU:C:2015:481, paragraph 45 and the case-law cited).

by the EU legislature consisted in 'integrating renewable energy sources into the internal market in electricity' and developing further the priority dispatching granted to generating installations which use renewable energy sources.

35. All in all, it cannot be denied that the scarcity of material permitting an understanding of the concept of 'guaranteed access' does not help to make it comprehensible. However, without there being any need, for the purpose of the examination of the question for a preliminary ruling, to further define that concept, I consider that guaranteed access, as set out in recital 60 of Directive 2009/28, is a mechanism that guarantees generating installations using renewable energy sources access to the grids in order to transmit the electricity sold.

B. Reformulation of the second question

36. It is common ground that, by adopting Article 5(3) of Law No 123/2012 and Articles 1 and 2 of Decision No 138/2013, Romania granted guaranteed access to the grids to generating installations using non-renewable energy sources.

37. The wording of Article 5(3) of Law No 123/2012 may however lead to a kind of quid pro quo between guaranteed access and priority dispatching since that provision makes the grant of guaranteed access conditional on compliance with conditions relating to priority dispatching as referred to in Article 15(4) of Directive 2009/72. In fact, according to Article 5(3) of Law No 123/2012, guaranteed access to the grids can be granted only to 'power plants which use domestically produced fuels, up to an annual limit corresponding to primary energy of not more than 15% of the total quantity of equivalent fuel needed to produce electricity corresponding to gross national final consumption'. [17]

38. Furthermore, the Romanian Government maintained before the Curtea de Apel București (Court of Appeal, Bucharest) that the purpose of Article 5(3) of Law No 123/2012 had been to transpose priority dispatching as provided for in Article 15(4) of Directive 2009/72. That, in my view, led the referring court to refer to Article 15(4) of that directive when it formulated its second question concerning the compatibility with EU law of guaranteed access as provided for in Article 5(3) of Law No 123/2012.

39. However, for the purpose of answering the question concerning, in essence, the possibility for a Member State to grant guaranteed access to the grids to certain electricity generating installations which use non-renewable energy sources, Article 15(4) of Directive 2009/72 does not seem to me to be critical. That provision of the directive deals only with the priority dispatching, subject to conditions, of certain generating installations using indigenous primary energy fuel sources.

40. Conversely, I note that Article 16(2)(b) of Directive 2009/28 is the only provision that deals with guaranteed access. However, as the referring court observes, the obligation for Member States to grant guaranteed access to the grids covers only electricity produced from renewable energy sources ('green electricity'). To my mind, it is therefore necessary to determine whether that article reserves such access solely to green electricity.

[17] Nonetheless, Decision No 138/2013 clearly distinguishes guaranteed access (Articles 1 and 2) from priority dispatch (Article 3).

41. Furthermore, it seems to me that guaranteed access to the grid-system, as provided for in Article 16(2)(b) of Directive 2009/28, adapts, in part and solely for green electricity, the rules on third-party access to the systems set out in Article 32 of Directive 2009/72.

42. In fact, Article 32 of Directive 2009/72, and more particularly paragraph 1, establishes the principle of free third-party access to the grids, a principle which has as a corollary that Member States are prohibited from laying down rules on access to the grids that discriminate between users. Guaranteed access, being a mechanism that guarantees that the generating installations benefiting from such access will have access to the grids in order to transmit the electricity sold, has a definite impact on the access to those grids of generating installations which do not benefit from guaranteed access. Because of that impact, it seems necessary to me to examine guaranteed access as provided for in Romanian law in the light of Article 32(1) of Directive 2009/72.

43. Taking that examination further, it also seems necessary to me to ascertain whether Article 3(2) and (14) of Directive 2009/72 precludes guaranteed access as provided for by Romanian law. It is apparent from the order for reference that the grant of guaranteed access was vindicated before the referring court by the need to ensure security of the supply in electricity. When such vindication has been raised before the Court, it has invariably been examined by the Court in the light of Article 3(2) and (14) of Directive 2009/72, which allows Member States, on certain conditions, to restrict the free third-party access to the grids referred to in Article 32(1) of that directive where the application of that provision is likely to impede the discharge by undertakings in the electricity sector of their public service obligations.

44. In those circumstances, it seems necessary to me, with the aim of providing the referring court with an answer that will be useful in the resolution of the dispute, to reformulate the second question as submitted to the Court. [18]

45. I therefore suggest that that part of the second question be reformulated as follows:

'Must Article 16(2)(b) of Directive 2009/28 and Articles 3(2) and (14) and 32(1) of Directive 2009/72 be interpreted as precluding a national legislative act such as that at issue in the present case that grants guaranteed access to the transmission and distribution grids to certain electricity generating installations using non-renewable energy sources, in order to guarantee the security of the supply in electricity?'

C. Examination of the reformulated question

46. As stated above, I shall attempt to determine, first, whether Article 16(2)(b) of Directive 2009/28 reserves guaranteed access to the grids solely to green electricity. I shall then examine the limitation which guaranteed access as provided for in Romanian law places on the principle of free third-party access to the grid-system referred to in Article 32(1) of Directive 2009/72 and whether that limitation may be justified under Article 3(2) and (14) of that directive.

[18] See, to that effect, judgment of 14 May 2020, *T-Systems Magyarország* (C-263/19, EU:C:2020:373, paragraph 45 and the case-law cited).

1. The compatibility of guaranteed access to the grid-system for electricity produced from non-renewable energy sources with the guaranteed access established by Directive 2009/28

47. In the words of Article 16(2)(b) of Directive 2009/28, 'Member States shall also provide for either priority access or guaranteed access to the grid-system of electricity produced from renewable energy sources'. In order to determine whether, in deciding on the wording of that provision, the EU legislature intended to reserve guaranteed access to the grids solely to green electricity, I shall set out a literal and a teleological interpretation of that provision. [19] To my mind, that analysis must inevitably lead to the conclusion that the grant, subject to conditions, of guaranteed access to certain generating installations using non-renewable energy sources is compatible with Directive 2009/28.

(a) The literal interpretation

48. The literal interpretation of Article 16(2)(b) of Directive 2009/28 does not allow me to conclude that the Member States are prohibited from granting guaranteed access to the grids to certain generating installations which use non-renewable energy sources.

49. In the French-language version, Article 16(2)(b) of Directive 2009/28 states that 'les États membres prévoient, en outre, soit un accès prioritaire, soit un accès garanti au réseau pour l'électricité produite à partir de sources d'énergie renouvelables'. In the English-language version, it provides that 'Member States shall also provide for either priority access or guaranteed access to the grid-system of electricity produced from renewable energy sources'. Last, the Estonian-language version of that provision states that 'sätestavad ka taastuvatest energiaallikatest toodetud elektrienergia kas eelistatud või tagatud juurdepääsu võrgusüsteemile'.

50. Thus, although in respect of each of those language versions an obligation is laid down, that obligation consists in the Member States granting green electricity priority or guaranteed access to the grids, but does not go so far as to reserve such access solely to green electricity. In other words, none of those language versions of Article 16(2)(b) of Directive 2009/28 examined allows me to conclude that the EU legislature has prohibited Member States from granting guaranteed access to the grids to generating installations other than those using renewable energy sources.

(b) The teleological interpretation

51. For the purposes of the teleological interpretation of the provision at issue, I find it necessary to observe that the transmission and distribution grids have an intrinsically limited delivery capacity. Thus, those grids cannot necessarily deliver all the electricity produced or capable of being produced by all the installations connected to them. [20]

52. Turning, now, to Article 16(2)(b) of Directive 2009/28, it is apparent from recital 60 of that directive that guaranteed access to the grids aims in particular to integrate renewable energy sources into the internal market in electricity through the use of a maximum amount of green electricity. I therefore infer that the grid operators allocate to the generating installations which benefit from guaranteed access a delivery capacity corresponding to the amount of green electricity that can be used.

[19] Judgment of 10 September 2014, *Ben Alaya* (C-491/13, EU:C:2014:2187, paragraph 22 and the case-law cited).

[20] That situation is also envisaged in Article 32(2) of Directive 2009/72, moreover, which provides that 'the transmission or distribution system operator may refuse access where it lacks the necessary capacity'.

53. Thus, the intrinsically limited capacity of the transmission and distribution grids, on the one hand, and the allocation of the capacity to which guaranteed access leads, on the other, lead me to consider that the grant of guaranteed access to the grids to electricity produced from non-renewable energy sources may, in certain circumstances only, result in the access granted to green electricity not always being guaranteed. [21]

54. However, those circumstances should not, in my view, lead to Article 16(2)(b) of Directive 2009/28 being interpreted as prohibiting, in all cases, the grant of guaranteed access to the grids to certain generating installations which do not use renewable energy sources.

55. In fact, it is not necessary for Article 16(2)(b) of Directive 2009/28 to be regarded as prohibiting the grant of guaranteed access to generating installations that do not use renewable energy sources in order for the objective pursued by that provision – consisting in integrating renewable energy sources into the internal market in electricity by the use of a maximum amount of green electricity – to be achieved.

56. Furthermore, such an interpretation entails a kind of radicalism which to my mind is not compatible with the wide discretion which the Member States enjoy in that area. The Court considers that when adopting Directive 2009/28 the EU legislature did not seek to bring about exhaustive harmonisation of national support schemes for green energy production. [22] That interpretation is consistent, moreover, with the Court's more general finding that 'European Union rules do not seek to effect complete harmonisation in the area of the environment'. [23] I therefore consider that the Member States retain a wide discretion when they implement that directive. [24]

57. For all of those reasons, I consider, as does the Commission, that the grant, by a Member State, of guaranteed access to the grids to generating installations using non-renewable energy sources seems to be compatible with the obligation laid down in Article 16(2)(b) of Directive 2009/28, provided that the guaranteed access granted to green electricity is ensured. It will be for the referring court to ascertain that green electricity did in fact have guaranteed access to the grids as provided for in Article 16(2)(b) of that directive. [25]

2. The compatibility of guaranteed access to the grids for certain generating installations with the rules on access established by Directive 2009/72

58. When examining the compatibility of national measures with the rules on third-party access to the grids laid down in the directives on common rules for the internal market in electricity, [26] the Court has drawn up a singular analytical framework resulting from the interaction of the provisions governing such access, a framework which I shall describe and then propose to follow.

[21] For example, if a Member State granted guaranteed access to its grids to all generating installations connected to them, none of those installations could, in those circumstances, rely on such access. In that case, therefore, the Member State which had granted such access would be in breach of its obligations under Article 16(2)(b) of Directive 2009/28.

[22] Judgments of 1 July 2014, *Ålands Vindkraft* (C-573/12, EU:C:2014:2037, paragraph 59), and of 4 October 2018, *L.E.G.O.* (C-242/17, EU:C:2018:804, paragraph 53 et seq.).

[23] Judgment of 21 July 2011, *Azienda Agro-Zootecnica Franchini and Eolica di Altamura* (C-2/10, EU:C:2011:502, paragraph 48 and the case-law cited).

[24] Judgment of 4 October 2018, *L.E.G.O.* (C-242/17, EU:C:2018:804, paragraph 54).

[25] It seems to me that Article 16(2)(b) of Directive 2009/28 was transposed in Article 70(a) of Law No 123/2012.

[26] Directive 2009/72 succeeded Directive 2003/54, which itself succeeded Directive 96/92.

59. Set out in Article 32(1) of Directive 2009/72, the principle of third-party access to the grids has been described by the Court as an 'essential measure' for the achievement of the internal market in electricity.[27] The importance of that principle has thus led the Court to consider that any limitation imposed by a Member State is permitted only in those cases where Directive 2009/72 makes provision for exceptions or derogations.[28]

60. As regards such exceptions or derogations, the Court examines Article 3(2) and (14) of Directive 2009/72 in so far as it allows Member States to restrict, in certain circumstances, the free third-party access to the grids referred to in Article 32(1) of that directive where the application of that provision would obstruct the performance by electricity undertakings, of which the generating installations form part, of their public service obligations, which may relate to security of supply.[29]

61. At the same time as examination of the compatibility of national measures with Article 32(1), and Article 3(2) and (14) of Directive 2009/72, which requires for each of those provisions a review of proportionality, the Court will carry out such a review at the end of its examination in order, it seems to me, to avoid any unnecessary repetition.[30]

(a) Article 32(1) of Directive 2009/72

62. The principle of free third-party access to the grids was formulated, although in an embryonic fashion, with the adoption of Directive 96/92.[31] Subsequently, that principle, systematically reproduced, was expanded by the subsequent directives on common rules for the internal market in electricity.[32]

63. Article 32(1) of Directive 2009/72 provides, in particular, for 'the implementation of a system of third-party access to the transmission and distribution system … applicable to all eligible customers'. In that respect, the Court has consistently considered that that right constitutes 'one of the essential measures which the Member States are required to implement in order to bring about the internal market in electricity'.[33]

64. Furthermore, that principle prohibits Member States from organising third-party access to the grids in a discriminatory fashion. Article 32(1) of Directive 2009/72 provides that the access system in question is to be 'applied objectively and without discrimination between system users'.[34] The Court has compared the prohibition imposed on Member States from

[27] Judgments of 22 May 2008, *citiworks* (C-439/06, EU:C:2008:298, paragraph 44); of 29 September 2016, *Essent Belgium* (C-492/14, EU:C:2016:732, paragraph 76); and of 17 October 2019, *Elektrorazpredelenie Yug* (C-31/18, EU:C:2019:868, paragraph 41).

[28] Judgment of 22 May 2008, *citiworks* (C-439/06, EU:C:2008:298, paragraph 55).

[29] Judgment of 22 May 2008, *citiworks* (C-439/06, EU:C:2008:298, paragraph 58).

[30] Judgment of 29 September 2016, *Essent Belgium* (C-492/14, EU:C:2016:732, paragraphs 86 and 94).

[31] See Article 16 of Directive 96/92 and the related case-law (judgment of 7 June 2005, *VEMW and Others*, C-17/03, EU:C:2005:362, paragraphs 37 and 46).

[32] See Articles 20 of Directive 2003/54 and Article 6 of Directive (EU) 2019/944 of the European Parliament and of the Council of 5 June 2019 on common rules for the internal market for electricity and amending Directive 2012/27/EU (OJ 2019 L 158, p. 125).

[33] Judgments of 22 May 2008, *citiworks* (C-439/06, EU:C:2008:298, paragraph 44); of 29 September 2016, *Essent Belgium* (C-492/14, EU:C:2016:732, paragraph 76); and of 17 October 2019, *Elektrorazpredelenie Yug* (C-31/18, EU:C:2019:868, paragraph 41).

[34] Hidroelectrica has the right not to be discriminated against, under Article 32 of Directive 2009/72 (on that point, see judgment of 29 September 2016, *Essent Belgium*, C-492/14, EU:C:2016:732, paragraphs 71 to 75).

discriminating between third parties with that set out, more generally, in Article 3(1) of that directive,[35] which provides that Member States are not to discriminate between the electricity undertakings concerned as regards either rights or obligations.

65. The Court infers that those provisions 'are specific expressions of the general principle of equality',[36] which requires 'that comparable situations must not be treated differently and different situations must not be treated in the same way unless such treatment is objectively justified'.[37]

66. It is therefore appropriate to consider whether a difference in treatment exists in this instance.

67. In the present case, access to the grids was guaranteed for at least 700 MW, pursuant to Article 5(3) of Law No 123/2012 and Articles 1 and 2 of Decision No 138/2013, to SC Complexul Energetic Hunedoara and to SC Complexul Energetic Oltenia. That finding alone permits the conclusion that there was a difference in treatment to the detriment of electricity generators which had access to the grids in question and which used non-renewable energy sources.

68. Contrary to the Commission's contention, I see no need to draw a finer distinction between the categories of generating installations affected by the difference in treatment which I have just identified. First of all, if the measure at issue had been aimed at all electricity generating installations using indigenous fuels, I should nonetheless have established a difference in treatment since the combustibility of the energy source and its geographical origin are not differentiation criteria recognised by Article 32(1) of Directive 2009/72, which, moreover, recognises no such criteria. Next, the existence of other generating installations capable of providing the same services as those supplied by the generating installations covered by the measure at issue must be determined, as I shall explain below, when I examine Article 3(2) and (14) of Directive 2009/72.

69. In any event, the mere identification of that difference in treatment is not sufficient for the measure at issue to be characterised as discriminatory if it pursues a legitimate objective.[38]

70. As to whether such a difference in treatment may be justified, it should be observed that Article 5(3) of Law No 123/2012 relies, as justification for the grant of guaranteed access to electricity generated by power stations using domestically produced fuel, on reasons relating to the security of electricity supply. Furthermore, it is apparent on reading the order for reference that that justification was put forward by the parties which maintain that guaranteed access as provided for in Romanian law is consistent with EU law.

71. To my mind, the legitimacy of the objective pursued by the measure at issue, namely the security of the electricity supply in Romania, is not in doubt.

[35] Judgment of 7 June 2005, *VEMW and Others* (C-17/03, EU:C:2005:362, paragraph 46). Although Directive 96/92 was at issue, Article 3(1) of that directive is identical on that point with Article 3(1) of Directive 2009/72.

[36] Judgments of 7 June 2005, *VEMW and Others* (C-17/03, EU:C:2005:362, paragraph 47), and of 29 September 2016, *Essent Belgium* (C-492/14, EU:C:2016:732, paragraph 79).

[37] Judgment of 28 November 2018, *Solvay Chimica Italia and Others* (C-262/17, C-263/17 and C-273/17, EU:C:2018:961, paragraph 66).

[38] Judgment of 29 September 2016, *Essent Belgium* (C-492/14, EU:C:2016:732, paragraph 81).

72. In that regard, I recall that Article 3(2) of Directive 2009/72 allows Member States to impose public service obligations relating to security of supply on electricity generating installations. [39] In addition, as regards the provisions of the TFEU, and more particularly Article 36, I note that the Court has already observed that the protection of a secure energy supply can constitute a ground of public security. [40]

73. Nonetheless, the mere fact of pleading a legitimate objective is not sufficient to preclude a difference in treatment being characterised as 'discriminatory'. The objective in question must also be capable of justifying the abovementioned difference in treatment, 'that is to say, in essence, whether it is based on an objective and reasonable criterion that is proportionate to the aim pursued'. [41]

74. However, having regard to the analytical framework referred to above, I shall reserve my reasoning on compliance with the principle of proportionality to a later stage in my Opinion.

(b) Article 3(2) and (14) of Directive 2009/72

75. As I have already observed, the discretion left to the Member States to take the measures necessary to establish a system of third-party access does not authorise them to depart from the principle of free access to the systems laid down in Article 32(1) of Directive 2009/72 except in those cases where that directive provides for exceptions or derogations. [42]

76. Thus, Article 3(14) of Directive 2009/72 allows Member States not to apply the provisions of Article 32 of that directive 'in so far as their application would obstruct the performance … of the obligations imposed on electricity undertakings in the general economic interest and in so far as the development of trade would not be affected to such an extent as would be contrary to the interests of the Community'.

77. Expanding on that provision, Article 3(2) of Directive 2009/72 provides that, having full regard to Article 86 EC (now Article 106 TFEU), Member States may impose on electricity generating installations public service obligations which may relate to security of supply. [43]

78. Those obligations must therefore be understood as 'public intervention measures in the functioning of that market, which require undertakings operating in the electricity sector, for the purpose of pursuing a general economic interest, to act on that market on the basis of criteria imposed by the public authorities'. [44]

79. However, the public service obligations that a Member State may impose on electricity undertakings are restricted. Article 3(2) of Directive 2009/72 provides that those obligations are to be 'clearly defined, transparent, non-discriminatory, verifiable and [that they are to] guarantee equality of access for electricity undertakings of the Community to national consumers'.

[39] See also recital 46 of Directive 2009/72.

[40] Judgment of 17 September 2020, *Hidroelectrica* (C-648/18, EU:C:2020:723, paragraph 36)

[41] Judgment of 29 September 2016, *Essent Belgium* (C-492/14, EU:C:2016:732, paragraph 85).

[42] Judgment of 22 May 2008, *citiworks* (C-439/06, EU:C:2008:298, paragraph 55).

[43] Judgments of 21 December 2011, *ENEL* (C-242/10, EU:C:2011:861, paragraph 38), and of 29 September 2016, *Essent Belgium* (C-492/14, EU:C:2016:732, paragraph 87).

[44] Judgment of 19 December 2019, *Engie Cartagena* (C-523/18, EU:C:2019:1129, paragraph 45).

80. In order to take Article 106 TFEU into account, the Court has considered that it follows from the very wording of that provision that the public service obligations which Article 3(2) of Directive 2009/72 allows to be imposed on the generating installations must be consistent with the principle of proportionality. [45]

81. I infer from all of those provisions that Member States may impose public service obligations relating to security of supply on generating installations even though the fulfilment of those obligations would impede free third-party access to the grids.

82. The option thus left to the Member States is not unlimited, however, since the national measures that must be adopted in the general economic interest cannot in any circumstances affect the development of trade to an extent contrary to the interests of the European Union. The obligations which those measures entail must also be clearly defined, transparent, non-discriminatory and verifiable. Above all, the public service obligations must guarantee that the EU generating installations have equal access to national consumers. Lastly, those obligations are required to respect the principle of proportionality.

83. Although it is for the Curtea de Apel București (Court of Appeal, Bucharest) to ascertain that, in the present case, the measure at issue does in fact impose public service obligations, and that it satisfies all the requirements set out above, the Court will be able to provide it with all the information necessary for it to be able to do so.

84. I am surprised, moreover, to note that the parties which maintain that the measure at issue is compatible with EU law refer to security of supply, without any of them relying on the benefit of Article 3 of Directive 2009/72 and, consequently, setting out the reasons that lead them to consider that guaranteed access as provided for in Romanian law satisfies the requirements laid down by that provision.

85. As regards the existence of public service obligations imposed on the generating installations in question, I do not think that guaranteed access, as provided for in Romanian law, is among those obligations. Guaranteed access to the grids does not limit the freedom of action of generating installations that enjoy such access on the market in electricity. Quite to the contrary, those that are granted such access benefit from a definite economic advantage in that they are guaranteed transmission of the electricity sold.

86. In addition, the procedure followed by the Romanian Government and the reasons that led it to designate the generating installations in question are not evident. As regards, for example, the discriminatory nature of the measure at issue, it will be for the referring court to determine whether there were other generating installations capable of discharging the same public service obligations as those designated by Decision No 138/2013. [46]

87. As regards the requirement that the public service obligations must guarantee the EU electricity undertakings equal access to national consumers, guaranteed access is, as stated above, a mechanism that guarantees the generating installations that benefit from it access to the grids in order to transmit the electricity sold.

[45] Judgment of 21 December 2011, *ENEL* (C-242/10, EU:C:2011:861, paragraph 42).

[46] See judgments of 21 December 2011, *ENEL* (C-242/10, EU:C:2011:861, paragraph 86), and of 29 September 2016, *Essent Belgium* (C-492/14, EU:C:2016:732, paragraph 89).

88. I infer from the intrinsically limited capacity of the transmission and distribution grids, and from the allocation of capacity to which guaranteed access leads, that the capacity thus allocated reduces accordingly the capacity that can be assigned to delivery of the electricity produced by the installations that do not benefit from guaranteed access. Those installations then find it impossible to honour, in whole or in part, the agreements which they have entered into. In other words, although insufficient grid capacity is not the result of the guaranteed access granted, such access exacerbates its significance for the installations that do not benefit from it.

89. In that regard, I note that in the present case Article 5(3) of Law No 123/2012 and Articles 1 and 2 of Decision No 138/2013 guaranteed access to the electricity grids to the generating installations of at least 700 MW.

90. Accordingly, the measure at issue prevented, at least potentially and in part, the generating installations which do not benefit from that measure from honouring the agreements entered into and was thus liable to affect equal access by EU electricity producers to national consumers.

91. Those observations, if the Court should share them, ought to lead it to find that the measure at issue is incompatible with Article 3(2) and (14) and Article 32(1) of Directive 2009/72. Should that not be the case, however, the reasoning set out below continues to examine the compatibility of the measure at issue with the relevant provisions.

92. As regards the requirement that Article 106 TFEU is to be taken into account, the Court has held that the national measure imposing public service obligations must be consistent with the principle of proportionality and thus 'be appropriate for securing the objective which it pursues and must not go beyond what is necessary in order to attain it'.[47]

(c) Compliance with the principle of proportionality

93. According to the statements of the Ministerul Economiei, Energiei și Mediului de Afaceri (Ministry of the Economy, Energy and Business, Romania) before the referring court, the measure at issue was adopted, along with priority dispatching and the obligation to supply ancillary services, in order to establish production capacities, which was made more necessary for a number of reasons, all of which, however, threatened the security of the supply of electricity in Romania.

94. In fact, the objective was to establish production capacities using non-renewable energy sources in order, in the first place, to be in a position to satisfy demand during consumption peaks; in the second place, to have available installations that could replace those using renewable energy sources where the source was unavailable; and, in the third and last place, to respond to the expected increase in cross border trade in the context of the completion of the 4M MC project.[48]

95. As regards the examination of proportionality, it must be ascertained, in the first place, whether the measure is appropriate for achieving the objective of establishing production capacities. In that regard, I have reflected on the reason why both Decision No 138/2013 and the order for reference state that guaranteed access as provided for in Romanian law ensured

[47] Judgment of 21 December 2011, *ENEL* (C-242/10, EU:C:2011:861, paragraph 55).

[48] 'The 4M Market coupling is the day ahead electricity trading platform of the CEE region' (Sterpu, V., *The analysis of 4M MC electricity market*, Erasmus University Rotterdam, 2018, p. 8 – https://thesis.eur.nl/pub/44746/Sterpu-V.-447658-.pdf).

'continuous access' to the generating installations that benefited from it. To my mind, guaranteed access is incapable of ensuring in itself the continuous operation of a generating installation, since it constitutes only a guarantee of access to the grids. It seems more accurate to consider, for the reasons set out below, that the continuous operation of the installations of SC Complexul Energetic Hunedoara and SC Complexul Energetic Oltenia resulted from a combination of priority dispatching and guaranteed access, as provided for by Romanian law. [49]

96. First of all, priority dispatching allowed the dispatching of the installations of SC Complexul Energetic Hunedoara and SC Complexul Energetic Oltenia by Transelectrica without consideration, by definition, of economic precedence. Next, guaranteed access assured those installations that the electricity produced and eligible for priority dispatching would have access to the grids even though their capacities would probably not have allowed it.

97. In that regard, I note that the value of the guaranteed access depends on the capacity of the transmission and distribution grids. Thus, the assurance given by guaranteed access is of greater value for the generating installations that benefit from such access than for the transmission and distribution grids that suffer structurally from inadequate capacities. Conversely, guaranteed access to the grids becomes meaningless when the capacity of the grids is greater than the amount of electricity introduced.

98. As it ensures in part the continuous operation of the generating installations that enjoy it, I do not doubt that guaranteed access is capable of playing a part in establishing production capacities that make it possible to ensure security of the electricity supply of a Member State such as Romania. [50]

99. In the second place, it is necessary to address the question whether the measure at issue may be considered to be necessary in order to attain the objective of establishing production capacities. In that regard, it will be for the referring court to ascertain whether the absence of guaranteed access would have obstructed the discharge by the generating installations that benefited from it of their public service obligations and to determine whether those obligations could not be satisfied by other means that would not have impacted adversely on the right of access to the grids. [51]

100. As regards the risk that the generating installations would be obstructed in the performance of their public service obligations if they were deprived of the measure at issue, it seems to me that the referring court could investigate the capacity of the transmission and distribution systems and more particularly their structural adequacy or inadequacy.

101. As regards the existence of other means that would not have impacted adversely on the right of access to the grids and would have permitted the public service obligations to be discharged, the Court will find it useful to recall its case-law according to which, 'whilst it is true that it is incumbent upon a Member State which invokes Article 90(2) to demonstrate that the conditions laid down in that provision are met, that burden of proof cannot be so extensive as to require the Member State, when setting out in detail the reasons for which, in the event of elimination of the

[49] Furthermore, to this first mechanism consisting in priority dispatch and guaranteed access, a second, pursuing in my view the same purpose as the first, consisted in an obligation for SC Complexul Energetic Hunedoara and SC Complexul Energetic Oltenia to supply Transelectrica with ancillary services of an electric power of at least 1 000 MW.

[50] As stated previously, recital 60 of Directive 2009/28 states that guaranteed access 'allow[s] the use of a maximum amount of electricity from renewable energy sources from installations connected to the grid'.

[51] Judgment of 22 May 2008, *citiworks* (C-439/06, EU:C:2008:298, paragraph 60).

contested measures, the performance of the tasks of general economic interest under economically acceptable conditions would, in its view, be jeopardised, to go even further and prove, positively, that no other conceivable measure, which by definition would be hypothetical, could enable those tasks to be performed under the same conditions'. [52]

102. In conclusion, I consider that the answer to the second question should be that a Member State may grant guaranteed access to the grids to certain electricity generating installations using non-renewable energy sources in order to ensure security of supply in electricity, on condition, first, that access to the grids for electricity from renewable energy sources, granted in application of Article 16(2)(b) of Directive 2009/28 was ensured and, second, that the requirements laid down in Article 32(1) of Directive 2009/72 and, if the referring court were to identify public service obligations imposed on those electricity generating installations, in Article 3(2) and (14) of that directive were complied with and in so far as that legislative act does not go beyond what is necessary for the objective which it pursues to be achieved.

V. Conclusion

103. In the light of the foregoing considerations, I propose that the Court answer the second question referred by the Curtea de Apel București (Court of Appeal, Bucharest, Romania), as reformulated, as follows:

Article 16(2)(b) of Directive 2009/28/CE 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, Article 3(2) and (14) and Article 32(1) of Directive 2009/72/CE 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/EC must be interpreted as not precluding a national legislative act such as that in the present case which grants guaranteed access to the transmission and distribution grids to certain electricity generating installations using non-renewable energy sources in order to ensure security of supply in electricity, on condition that access to the grids for electricity from renewable energy sources, granted in application of Article 16(2)(b) of Directive 2009/28, was ensured and that the requirements laid down in Article 32(1) of Directive 2009/72 and, if the referring court were to identify public service obligations imposed on those electricity generating installations, in Article 3(2) and (14) of that directive were complied with and in so far as that legislative act does not go beyond what is necessary for the objective which it pursues to be achieved. It is for the referring court to ascertain whether that condition was satisfied in the case in the main proceedings.

[52] Judgment of 23 October 1997, *Commission* v *France* (C-159/94, EU:C:1997:501, paragraph 101).