Reports of Cases

OPINION OF ADVOCATE GENERAL
RANTOS
delivered on 17 November 2022 [1]

Case C-580/21

EEW Energy from Waste Großräschen GmbH
v
MNG Mitteldeutsche Netzgesellschaft Strom GmbH,
intervener in the main proceedings:
50 Hertz Transmission GmbH

(Request for a preliminary ruling from the Bundesgerichtshof (Federal Court of Justice, Germany))

(Reference for a preliminary ruling – Environment – Directive 2009/28/EC – Promotion of the use of energy from renewable sources – Article 5(3) – Article 16(2)(c) – Electricity generating installation using renewable energy sources – Mixed waste containing a proportion of industrial and municipal biodegradable waste – Priority dispatch for the feeding of electricity into the grid – Discretion of Member States to implement that priority)

I. Introduction

1. Under Article 194(1)(c) TFEU, Union policy on energy is to aim, in a spirit of solidarity between Member States, to develop renewable forms of energy. [2] The challenges posed by the development of renewable energy, the scope of which is far-reaching, particularly in today's geopolitical context, are thrown into relief by recital 1 of Directive 2009/28/EC, [3] which refers to reducing greenhouse gas emissions within the framework of action to combat global warming, promoting the security of energy supply, promoting technological development and innovation, and providing opportunities for employment and regional development. [4]

1 Original language: French.

2 On the trends in EU legislation on renewable energy, see Johnston, A. and Block, G., *EU Energy Law*, Oxford University Press, Oxford, 2012, Nos 12.01 to 12.185.

3 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). That directive was repealed and replaced by Directive (EU) 2018/2001 of the European Parliament and of the Council of 11 December 2018 on the promotion of the use of energy from renewable sources (OJ 2018 L 328, p. 82). Nevertheless, given the date of the relevant facts, Directive 2009/28 remains applicable to the dispute in the main proceedings.

4 See also judgment of 20 September 2017, *Elecdey Carcelen and Others* (C-215/16, C-216/16, C-220/16 and C-221/16, EU:C:2017:705, paragraph 38 and the case-law cited).

2. This request for a preliminary ruling concerns the concept of 'electricity generating installation using renewable energy sources', for the purposes of Article 16(2)(c) of Directive 2009/28, and the scope of priority dispatch for the feeding of electricity into the grid enjoyed by such an installation. More specifically, the Bundesgerichtshof (Federal Court of Justice, Germany) seeks to ascertain whether, and to what extent, an installation which produces electricity by means of thermal recovery from mixed waste containing a proportion of industrial and municipal biodegradable waste must be granted such priority access.

3. The request has been made in proceedings between EEW Energy from Waste Großräschen GmbH ('EEW'), which operates a waste thermal treatment installation, and MNG Mitteldeutsche Netzgesellschaft Strom GmbH ('MNG Strom'), an electricity transmission system operator, concerning EEW's right to compensation following a feed-in curtailment due to congestion. 50 Hertz Transmission GmbH ('50 Hertz'), the upstream transmission system operator of MNG Strom, participated in the main proceedings as intervener in support of MNG Strom.

II. Legal context

A. European Union law

1. Directive 2001/77/EC

4. Article 2 of Directive 2001/77/EC,[5] headed 'Definitions', states:

'For the purposes of this Directive, the following definitions shall apply:

(a) "renewable energy sources" shall mean renewable non-fossil energy sources (wind, solar, geothermal, wave, tidal, hydropower, biomass, landfill gas, sewage treatment plant gas and biogases);

(b) "biomass" shall mean the biodegradable fraction of products, waste and residues from agriculture (including vegetal and animal substances), forestry and related industries, as well as the biodegradable fraction of industrial and municipal waste;

(c) "electricity produced from renewable energy sources" shall mean electricity produced by plants using only renewable energy sources, as well as the proportion of electricity produced from renewable energy sources in hybrid plants also using conventional energy sources and including renewable electricity used for filling storage systems, and excluding electricity produced as a result of storage systems;

…'

[5] Directive 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). That directive was repealed and replaced by Directive 2009/28.

2. Directive 2009/28

5. Recitals 1, 11, 25, 60 and 61 of Directive 2009/28 state:

‘(1) The control of European energy consumption and the increased use of energy from renewable sources, together with energy savings and increased energy efficiency, constitute important parts of the package of measures needed to reduce greenhouse gas emissions and comply with the Kyoto Protocol to the United Nations Framework Convention on Climate Change, and with further Community and international greenhouse gas emission reduction commitments beyond 2012. Those factors also have an important part to play in promoting the security of energy supply, promoting technological development and innovation and providing opportunities for employment and regional development, especially in rural and isolated areas.

…

(11) It is necessary to set transparent and unambiguous rules for calculating the share of energy from renewable sources and for defining those sources. …

…

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

…

(60) 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. [6] 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.

6 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).

(61) In certain circumstances it is not possible fully to ensure transmission and distribution of electricity produced from renewable energy sources without affecting the reliability or safety of the grid system. In such circumstances it may be appropriate for financial compensation to be given to those producers. Nevertheless, the objectives of this Directive require a sustained increase in the transmission and distribution of electricity produced from renewable energy sources without affecting the reliability or safety of the grid system. To this end, Member States should take appropriate measures in order to allow a higher penetration of electricity from renewable energy sources, inter alia, by taking into account the specificities of variable resources and resources which are not yet storable. …'

6. Article 1 of Directive 2009/28, headed 'Subject matter and scope', states:

'This Directive establishes a common framework for the promotion of energy from renewable sources. It sets mandatory national targets for the overall share of energy from renewable sources in gross final consumption of energy and for the share of energy from renewable sources in transport. It lays down rules relating to statistical transfers between Member States, joint projects between Member States and with third countries, guarantees of origin, administrative procedures, information and training, and access to the electricity grid for energy from renewable sources. …'

7. Article 2 of that directive, headed 'Definitions', provides:

'For the purposes of this Directive, the definitions in Directive [2003/54] apply.

The following definitions also apply:

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

…

(e) "biomass" means the biodegradable fraction of products, waste and residues from biological origin from agriculture (including vegetal and animal substances), forestry and related industries including fisheries and aquaculture, as well as the biodegradable fraction of industrial and municipal waste;

…'

8. Article 5 of Directive 2009/28, headed 'Calculation of the share of energy from renewable sources', provides in paragraphs 1 and 3:

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

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

…

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

In multi-fuel plants using renewable and conventional sources, only the part of electricity produced from renewable energy sources shall be taken into account. For the purposes of this calculation, the contribution of each energy source shall be calculated on the basis of its energy content.

…'

9. Article 15 of that directive, headed 'Guarantees of origin of electricity, heating and cooling produced from renewable energy sources', provides in paragraph 1:

'For the purposes of proving to final customers the share or quantity of energy from renewable sources in an energy supplier's energy mix in accordance with Article 3(6) of Directive [2003/54], Member States shall ensure that the origin of electricity produced from renewable energy sources can be guaranteed as such within the meaning of this Directive, in accordance with objective, transparent and non-discriminatory criteria.'

10. Article 16 of Directive 2009/28, headed 'Access to and operation of the grids', provides in paragraphs 1 and 2:

'1. Member States shall take the appropriate steps to develop transmission and distribution grid infrastructure, intelligent networks, storage facilities and the electricity system, in order to allow the secure operation of the electricity system as it accommodates the further development of electricity production from renewable energy sources, including interconnection between Member States and between Member States and third countries. Member States shall also take appropriate steps to accelerate authorisation procedures for grid infrastructure and to coordinate approval of grid infrastructure with administrative and planning procedures.

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:

(a) Member States shall ensure that transmission system operators and distribution system operators in their territory guarantee the transmission and distribution of electricity produced from renewable energy sources;

(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. Member States shall ensure that appropriate grid and market-related operational measures are taken in order to minimise the curtailment of electricity produced from renewable energy sources. If significant measures are taken to curtail the renewable energy sources in order to guarantee the security of the national

electricity system and security of energy supply, Members States shall ensure that the responsible system operators report to the competent regulatory authority on those measures and indicate which corrective measures they intend to take in order to prevent inappropriate curtailments.'

B. German law

11. Paragraph 3, headed 'Definitions', of the Erneuerbare-Energien-Gesetz (German law on renewable energy; 'the EEG') of 25 October 2008, in the version in force between 1 January 2012 and 31 July 2014 ('the 2012 EEG'),[7] states:

'For the purposes of the present law:

1. "installation" means any facility for producing electricity from renewable energy sources …;

…

3. "Renewable energy" … means energy from biomass … and from the biodegradable fraction of industrial and municipal waste;

…'

12. Paragraph 8 of that law, headed 'Purchase, transmission and distribution', provides, in subparagraph 1:

'Subject to Paragraph 11, system operators shall be obliged to purchase, transmit and distribute, on a priority basis without undue delay, all electricity from renewable energy sources which is offered. …'

13. Paragraph 11 of that law, headed 'Feed-in management', provides, in subparagraph 1:

'… system operators shall be entitled, by way of exception, to regulate installations … directly or indirectly connected to their systems, in so far as …:

(1) failure to do so would give rise to system congestion in the relevant part of the system, including the upstream system;

(2) priority is given to electricity from renewable energy sources, … unless other installations for producing electricity must remain connected to the grid in order to ensure the security and reliability of the electricity supply system …;

…'

14. Paragraph 12 of that law, headed 'Special provisions', provides in subparagraph 1:

'If the feed-in of electricity from installations for producing electricity from renewable energy sources … is curtailed due to system congestion within the meaning of Paragraph 11(1), the

[7] BGBl. 2011 I, p. 1634.

operators affected by the measure shall be compensated … for 95% of the lost revenue plus any additional expenses incurred and less any expenses saved. …'

15. Paragraph 16 of the 2012 EEG, headed 'Entitlement to remuneration', states in subparagraph 1:

'System operators shall remunerate installation operators for electricity from installations using only renewable energy sources … in accordance with, as a minimum, Paragraphs 18 to 33. …'

16. Those provisions of the 2012 EEG correspond, in essence, to those of the EEG in the version in force between 1 January 2009 and 31 December 2011 [8] and those of the EEG in the version in force between 1 August 2014 and 31 December 2016. [9]

III. The dispute in the main proceedings, the questions referred for a preliminary ruling and the procedure before the Court

17. EEW operates a waste thermal treatment installation by means of which it produces electricity and thermal energy ('the installation at issue'). That installation almost exclusively uses industrial and municipal waste, which is mixed before combustion and has a biodegradable fraction that varies in size and accounts for up to 50% of the waste, according to information provided by EEW. The installation at issue feeds part of the electricity produced into the electricity distribution system of MNG Storm, to which it is bound by a connection and purchase agreement.

18. Between 2011 and 2016, MNG Strom, in the performance of its system security management tasks, instructed EEW on numerous occasions to curtail the feed-in of electricity temporarily due to system congestion. Consequently, EEW claimed compensation of EUR 2.24 million from MNG Strom on the basis, inter alia, of the special provisions laid down in the EEG, in the versions in force between 1 January 2011 and 31 December 2016, including Paragraph 12(1) of the 2012 EEG.

19. The appellate court ruling on the case dismissed EEW's claim for compensation on the ground that the electricity produced by the installation at issue was not obtained exclusively from renewable energy sources.

20. EEW brought an appeal on a point of law against the appellate court's judgment before the Bundesgerichtshof (Federal Court of Justice), the referring court. The referring court states that the outcome of the dispute before it depends on whether the installation at issue must be classified as an 'installation for producing electricity from renewable energy sources', within the meaning of Paragraph 12(1) of the 2012 EEG. According to that court, the fact that the installation at issue does not produce electricity exclusively from renewable energy sources does not preclude the application of that provision.

21. In that regard, the referring court points out that the EEG, in the first version which entered into force in 2000, applied to electricity produced by installations using only renewable energy sources. However, when Directive 2001/77, particularly Article 2(c) thereof, was transposed into

[8] BGBl. 2008 I, p. 2074.

[9] BGBl. 2014 I, p. 1066. As the referring court observes, during the period covered by the order for reference, those three versions of the EEG each applied in turn. Since the wording or content of the relevant provisions were identical in those three versions of the EEG, reference will be made, in the interests of simplification, only to the 2012 EEG.

German law, the scope of the EEG was extended in 2004 to include the proportion of electricity produced from renewable energy sources by hybrid installations using conventional energy sources.

22. It follows from the wording of the special provisions in Paragraph 12 of the 2012 EEG and from the general scheme of that law that those provisions, inserted into the EEG for the first time in 2009, also apply to installations which do not exclusively use renewable energy sources. Therefore, if an installation produces electricity from renewable energy sources and must therefore be given priority with regard to feed-in in accordance with the EEG, any curtailment or interruption in the purchase of electricity within the framework of feed-in management triggers the obligation to pay compensation under those special provisions.

23. According to the referring court, although the German legislature chose to follow EU law and to depart from the rule that only electricity obtained exclusively from renewable energy resources is to be taken into account, it is unclear whether, under German law, every electricity generating installation that uses a proportion of renewable energy sources, however small, is to be categorised as an 'installation' within the meaning of Paragraph 3(1) of the 2012 EEG, with the result that priority for the purposes of connection and feed-in applies to it. In that regard, the relevant provisions of German law should be interpreted in accordance with the concept of 'electricity produced from renewable energy sources' within the meaning of Article 2(c) of Directive 2001/77. That provision refers to the concept of 'hybrid plant', which is not defined in that directive and is not without ambiguity. The terms 'hybrid plant' generally refer, in technical language, to an installation which uses several different technologies to produce energy, such as solar energy and gas. According to that interpretation, the concept of 'hybrid plant' would not cover installations that merely use a mix of different energy sources, both renewable and conventional, in one and the same electricity production process. That is the case both where the different energy sources are mixed just before being used to produce energy and where, as with the installation in question, the installation uses renewable and fossil energy sources in a pre-existing, variable and unalterable mix in order to produce electricity.

24. The referring court notes, however, that Article 2(a) of Directive 2001/77 defines 'biomass' as a renewable energy source and that Article 2(b) of that directive states that it includes the 'biodegradable fraction of industrial and municipal waste'. Those provisions militate in favour of the view that electricity produced by means of the incineration of that biodegradable fraction should be regarded as electricity from renewable energy sources, so that the installations producing energy in that way would have to be categorised as 'installations' within the meaning of the EEG and be granted priority access to the grid.

25. That court observes that, since Directive 2001/77 was replaced by Directive 2009/28, which is applicable to the dispute in the main proceedings,[10] German law must be interpreted in accordance with the latter directive. It also states that, having regard to EU law, it is inclined to interpret the provisions of the EEG on priority for the feeding of electricity into the grid as meaning that they apply to installations which do not exclusively use renewable energy sources only if renewable and conventional energy sources are used in separate systems. In any event, the special provisions laid down in Paragraph 12(1) of the 2012 EEG should apply to installations using a pre-existing, variable and unalterable mix of renewable and conventional energy sources, as in the case of the production of electricity by means of waste incineration, only where the proportion of renewable energy sources is greater, on average, than the proportion of

[10] Article 27 of Directive 2009/28 required Member States to transpose that directive by 5 December 2010 at the latest.

conventional energy sources. In the dispute in the main proceedings, that interpretation would mean that EEW would not be able to claim any compensation under those special provisions, since the installation at issue uses energy sources that have been mixed beforehand in variable amounts and the proportion of renewable energy sources does not predominate according to information provided by EEW.

26. The referring court adds that, if Article 16(2)(c) of Directive 2009/28 is to be interpreted as covering installations in which the proportion of renewable energy sources does not predominate, the question arises as to whether a threshold exists below which an installation producing electricity from such energy sources can no longer be regarded as an installation using renewable energy sources for the purposes of that provision.

27. Lastly, that court asks whether, where electricity produced only partly from biodegradable waste qualifies for priority access to the grid, it is possible to apply the legal rationale underlying the second subparagraph of Article 5(3) of Directive 2009/28, according to which, in multi-fuel plants using renewable and conventional sources, only the part of electricity produced from renewable energy sources is to be taken into account. That question is important for determining whether the claim for compensation based on the special provisions laid down in Paragraph 12(1) of the 2012 EEG covers the revenue lost in connection with all electricity produced by the installation at issue or only the part of electricity produced from the biodegradable fraction of the waste mix.

28. In those circumstances, the Bundesgerichtshof (Federal Court of Justice) decided to stay the proceedings and to refer the following questions to the Court of Justice for a preliminary ruling:

‘(1) Is Article 16(2)(c) of Directive 2009/28, read in conjunction with Article 2(a) and (e) thereof, to be interpreted as meaning that priority in respect of the feeding of electricity into the grid must also be given to generating installations in which electricity is produced by means of thermal recovery from mixed waste, whereby the waste contains a variable proportion of industrial and municipal biodegradable waste?

(2) If Question 1 is answered in the affirmative, is the giving of priority in respect of the feed-in of electricity pursuant to Article 16(2)(c) of Directive 2009/28 dependent on the proportion of biodegradable waste used in the production of electricity in the manner described in Question 1?

(3) If Question 2 is answered in the affirmative, is there a materiality threshold for the proportion of biodegradable waste below which the rules applicable to electricity from renewable energy sources do not apply to the electricity produced?

(4) If Question 3 is answered in the affirmative, what is the level of that threshold, or how is the threshold to be determined?

(5) If Questions 1 and 2 are answered in the affirmative, when applying the rules on electricity from renewable energy sources to electricity which has been produced only partly from biodegradable waste, can the legal rationale underlying the second subparagraph of Article 5(3) of Directive 2009/28/EC be applied in such a way that those rules apply only to the part of electricity produced from renewable energy sources, and that part is calculated on the basis of the energy content of the individual energy sources?’

29. Written observations were submitted by EEW, MNG Strom, 50 Hertz and the European Commission. Those parties also presented oral argument at the hearing held on 8 September 2022.

IV. Analysis

A. The first question referred

30. By its first question, the referring court asks, in essence, whether Article 16(2)(c) of Directive 2009/28 must be interpreted as meaning that priority access to the electricity grid enjoyed by electricity generating installations using renewable energy sources must be granted not only to installations producing electricity exclusively from renewable energy sources, but also to installations producing electricity by thermal recovery from mixed waste containing a proportion of industrial and municipal biodegradable waste.

31. Article 16(2)(c) of Directive 2009/28 provides that Member States are to ensure that, when dispatching electricity generating installations, transmission system operators give priority to generating installations using renewable energy sources in so far as the secure operation of the national electricity system so permits and based on transparent and non-discriminatory criteria.

32. I note that that provision reflects the fact that, from a technical point of view, electricity transmission and distribution systems have an intrinsically limited delivery capacity and cannot necessarily deliver all the electricity produced or capable of being produced by the installations connected to them, taking account of consumption.[11] In those circumstances, the EU legislature chose to give preference to electricity generating installations using renewable energy sources. In that regard, as the Court has held, although Article 32(2) of Directive 2009/72/EC[12] provides that the operator of a distribution system may refuse access where it lacks the necessary capacity, on condition that duly substantiated reasons are given for such refusal, that possibility of refusing access to the system is to be assessed on a case-by-case basis and does not authorise the Member States to lay down those derogations in a general manner without, in respect of each operator, a concrete assessment of the technical incapacity of the system to meet the demand for access from third parties.[13]

33. In the light of the first question referred, it is necessary to ascertain what is meant by the term 'electricity generating installation using renewable energy sources', referred to in Article 16(2)(c) of Directive 2009/28, in order to determine whether that concept covers an installation producing electricity by thermal recovery from mixed waste containing a proportion of industrial

[11] See Opinion of Advocate General Pikamäe in *Fondul Proprietatea* (C-179/20, EU:C:2021:731, point 51). See also judgment of 27 January 2022, *Fondul Proprietatea* (C-179/20, EU:C:2022:58, paragraphs 59 and 60), according to which access to the transmission system is not unlimited, since it depends on the system's maximum capacity. 'Redispatching' is now governed by 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). Article 2(26) of that regulation defines it as 'a measure, including curtailment, that is activated by one or more transmission system operators or distribution system operators by altering the generation, load pattern, or both, in order to change physical flows in the electricity system and relieve a physical congestion or otherwise ensure system security'.

[12] 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). That directive was repealed and replaced by 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).

[13] 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 60).

and municipal biodegradable waste. If so, that installation must be granted priority access to the electricity grid as laid down in that provision and, if the distribution system operator refuses such access, it would then qualify for financial compensation, as recital 61 of that directive makes clear.

34. Directive 2009/28 does not define the concept of 'electricity generating installation using renewable energy sources'. According to the settled case-law of the Court, it follows from the need for uniform application of EU law and from the principle of equality that the terms of a provision of EU law which makes no express reference to the law of the Member States for the purpose of determining its meaning and scope must normally be given an autonomous and uniform interpretation throughout the European Union; that interpretation must take into account not only its wording but also its context and the objective pursued by the legislation in question. [14]

35. Against that background, it should be noted, in the first place, that the wording of Article 16(2)(c) of Directive 2009/28, which refers only to installations *using* renewable energy sources, does not in itself make it possible to determine whether that provision covers installations producing electricity by thermal recovery from mixed waste containing a proportion of industrial and municipal biodegradable waste.

36. In the second place, regarding the context of which that provision forms part, as the referring court pointed out, Article 2(c) of Directive 2001/77 defined 'electricity produced from renewable energy sources' as 'electricity produced by plants using only renewable energy sources, as well as the proportion of electricity produced from renewable energy sources in *hybrid plants* also using conventional energy sources'. [15] However, that directive was no longer in force at the time of the facts in the main proceedings. Article 2(a) of Directive 2009/28, for its part, defines 'energy from renewable sources' as 'energy from renewable non-fossil sources, namely wind, solar, aerothermal, geothermal, hydrothermal and ocean energy, hydropower, biomass, landfill gas, sewage treatment plant gas and biogases'. Consequently, as 50 Hertz stated in its written observations, in the dispute in the main proceedings, the classification of electricity as 'renewable electricity' no longer depends, therefore, on the installation in which the electricity was produced, but only on the energy sources used.

37. Article 2(a) of Directive 2009/28 states that biomass energy [16] is to be regarded as energy obtained from renewable sources. According to the definition in Article 2(e) of that directive, biomass includes the 'biodegradable fraction of industrial and municipal waste'. It follows from those provisions, read together, that energy produced by thermal recovery from mixed waste containing a proportion of industrial and municipal biodegradable waste must be regarded, for that proportion, as energy from renewable sources.

38. In the present case, it follows from the order for reference that the installation at issue treats mixed waste containing proportions of municipal and industrial biodegradable waste, which thus constitutes biomass within the meaning of Article 2(e) of that directive. [17]

[14] Judgment of 2 June 2022, *T.N. and N.N. (Declaration concerning the waiver of succession)* (C-617/20, EU:C:2022:426, paragraph 35 and the case-law cited).

[15] Emphasis added. Directive 2001/77 did not define the concept of 'hybrid plant', which was open to several interpretations.

[16] On biomass in the European Union, see, in English, European Commission, Joint Research Centre, *Brief on biomass for energy in the European Union*, Publications Office of the European Union, 2019.

[17] I note that Member States must respect the waste hierarchy laid down in Article 4 of Directive 2008/98/EC of the European Parliament and of the Council of 19 November 2008 on waste and repealing certain Directives (OJ 2008 L 312, p. 3), which lists disposal in last place.

39. Furthermore, Article 5(3) of Directive 2009/28 states that, in multi-fuel plants using renewable and conventional sources, only the *part* of electricity produced from renewable energy sources is to be taken into account. Consequently, that directive does not exclude from its scope, as a matter of principle, installations which partly use renewable energy sources.

40. In the third place, concerning the objectives pursued by Directive 2009/28, the purpose of that directive, as is apparent from Article 1 thereof, is to lay down a common framework for the promotion of energy from renewable sources by setting, inter alia, mandatory national targets for the overall share of energy from renewable sources in gross final consumption of energy. [18] To that effect, Article 16(2)(c) of that directive provides that Member States are to ensure that appropriate grid and market-related operational measures are taken in order to *minimise the curtailment* of electricity produced from renewable energy sources. Moreover, recital 60 of Directive 2009/28 states that, 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. Recital 61 makes clear that the objectives of the directive require a *sustained increase* in the transmission and distribution of electricity produced from renewable energy sources without affecting the reliability or safety of the grid system.

41. In addition, I note that, according to the Court's case-law, the purpose of guaranteed access to the grid system provided for in Article 16(2)(b) of Directive 2009/28 is to integrate renewable energy sources into the internal market for electricity by ensuring that *all electricity* produced from renewable energy sources has access to the grids, allowing the use of a maximum amount of electricity produced from renewable energy sources. [19]

42. Consequently, the aim of Directive 2009/28 is to achieve the widest possible use of renewable energy sources. Not granting priority to installations producing electricity by thermal recovery from mixed waste containing a proportion of biodegradable waste would result in that proportion of renewable energy sources being lost if the distribution system operator were to refuse to give the electricity producer concerned access to its system due to congestion.

43. I therefore propose that the following answer be given to the first question referred for a preliminary ruling: Article 16(2)(c) of Directive 2009/28 is to be interpreted as meaning that priority access to the electricity grid enjoyed by electricity generating installations using renewable energy sources must be granted not only to installations producing electricity exclusively from renewable energy sources, but also to installations producing electricity by thermal recovery from mixed waste containing a proportion of industrial and municipal biodegradable waste.

B. The second to fifth questions referred for a preliminary ruling

44. By the second to fifth questions, which should be examined together, the referring court asks, in essence, whether Article 16(2)(c) of Directive 2009/28 must be interpreted as meaning that an electricity generating installation enjoys priority access to the electricity grid only for electricity produced from the biodegradable fraction of the industrial and municipal waste used and, if so, what are the detailed rules for applying that priority access.

[18] See, inter alia, judgment of 3 March 2021, *Promociones Oliva Park* (C-220/19, EU:C:2021:163, paragraph 62).

[19] See judgment of 27 January 2022, *Fondul Proprietatea* (C-179/20, EU:C:2022:58, paragraph 62).

45. As explained in the answer given to the first question, it follows from Article 2(a) and (e) of Directive 2009/28 that energy obtained from biomass is energy from renewable sources but, as regards industrial and municipal waste, only the biodegradable fraction of such waste is taken into account. It follows that an electricity generating installation enjoys priority access to the electricity grid, on the basis of Article 16(2)(c) of that directive, solely for electricity produced from that biodegradable fraction and not from the fraction made up of conventional waste.

46. In the same vein, the Court has found, in connection with Article 16(2)(b) of that directive, that although that provision refers to the possibility of establishing 'guaranteed access' to the grid for electricity produced from renewable energy sources, that possibility applies only to 'green' electricity and that provision cannot therefore serve as a legal basis for national provisions on guaranteed access for installations producing energy from a non-renewable energy source.[20] That interpretation may apply by analogy to priority access to the grid referred to in Article 16(2)(c) of that directive.

47. According to its wording, that provision establishes such priority access for installations producing electricity from renewable energy sources, but does not, where those installations use renewable and conventional energy sources simultaneously, require the renewable energy source to attain a minimum share. In other words, priority for the feeding of electricity into the grid laid down in that provision does not depend on whether the proportion of biodegradable waste used for the production of electricity is large or small, since the share of conventional waste does not affect that priority. Accordingly, there is no threshold below which electricity produced from renewable energy sources does not qualify for priority access to the grid.[21]

48. In so far as an electricity generating installation enjoys priority access to the grid solely for electricity produced from that biodegradable fraction, the referring court asks how that priority access should be applied, by reference to the second subparagraph of Article 5(3) of Directive 2009/28.

49. In that regard, I note that, from a legal point of view, it follows from the Court's case-law that, far from seeking to bring about exhaustive harmonisation of national support schemes for green energy production, the EU legislature based its approach on the finding that Member States apply different support schemes and on the principle that it is important to ensure the proper functioning of those schemes in order to maintain investor confidence and to enable those States to define effective national measures in order to achieve their mandatory national overall targets under that directive.[22] In my view, the same reasoning may be applied in connection with the implementation of Article 16(2)(c) of Directive 2009/28. Therefore, it must be found that Member States have significant freedom of action when applying priority access to the electricity grid to installations using renewable energy sources.

50. Furthermore, from a technical point of view, MNG Strom explained that the electricity transmission system operator does not know, in real time, what proportion of biodegradable waste is being used by an electricity generating installation when that operator has to decide on the order in which installations are to be shut down; indeed, the operators of those installations do not know what proportion of energy is being produced from renewable sources at any given time. For its part, 50 Hertz stated that the decision on priority is an emergency measure taken in virtually a split second and that it has repercussions for downstream operators, as a result of which

[20] See judgment of 27 January 2022, *Fondul Proprietatea* (C-179/20, EU:C:2022:58, paragraph 65).

[21] I will elaborate on that finding in point 56 of this Opinion.

[22] Judgment of 4 October 2018, *L.E.G.O.* (C-242/17, EU:C:2018:804, paragraph 53 and the case-law cited).

priority criteria must make it possible for the system operator to be given specific guidance. In addition, the Commission submitted that, in some cases, it may be technically impossible to apply priority access to the grid to only part of the electricity produced by an installation, in this case the part obtained from renewable energy sources.

51. Against that legal and technical backdrop, I take the view that it is not for the Court to set out in detail how priority access to the electricity grid should be applied, since that is the task, in accordance with the wording of Article 16(2)(c) of Directive 2009/28, of the Member States, which are the best acquainted with the specific nature of the national electricity transmission system. [23] At the hearing, MNG Strom thus pointed to the existence of guidelines in Germany on the management of the electricity transmission system, which, having as their objective the reliability and security of that system, have established the order in which installations are to be disconnected in order to reduce physical congestion in that system.

52. Nevertheless, and having regard to the written observations of the interested parties and the submissions made during the hearing, the Court still has jurisdiction to provide guidance, based on the provisions of Directive 2009/28, on the factors to be taken into account by Member States for the purpose of applying priority access to the electricity grid.

53. In that regard, first, it follows from the wording of Article 16(2)(c) of that directive that priority access must be implemented in so far as the secure operation of the national electricity system so permits. In that connection, as stated in recital 60 of that directive, 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.

54. Second, it is also apparent from Article 16(2)(c) of that directive that priority access to the electricity grid must be granted on the basis of transparent and non-discriminatory criteria, which requires that those criteria be clear, that they be notified in advance by the Member States and that their application be foreseeable for all the parties concerned.

55. Third, it follows from the objectives of Directive 2009/28 that Member States must give installations which exclusively produce energy from renewable sources access to the electricity grid as a matter of maximum priority, so that any refusal to grant them access to the grid must be a last resort.

56. Fourth, in the case of installations producing electricity by treating mixed waste containing a proportion of biodegradable waste, my view is that those installations must be taken into account where that proportion is *stable over time, quantifiable and significant*. Otherwise, there is a *risk of abuse*, particularly if it is technically impossible to apply priority access to the grid to only part of the electricity produced by an installation and the installation enjoys such priority even though, in practice, the electricity is mainly produced from conventional energy sources. That would be the case, for example, if the share of energy produced from renewable sources were to vary depending on the period concerned, with the result that, for some periods, that share was negligible or nil.

[23] I would point out that Regulation 2019/943 set out detailed rules on redispatching, stating, inter alia, in Article 13(6)(a) thereof, that where non-market-based downward redispatching is used, power-generating facilities using renewable energy sources are only to be subject to downward redispatching if no other alternative exists or if other solutions would result in significantly disproportionate costs or severe risks to network security. However, that regulation is not applicable to the facts in the main proceedings.

57. Fifth, EEW submits that, during the period at issue in the main proceedings, it consistently received from the Umweltbundesamt (Federal Office for the Environment, Germany) the guarantees of origin referred to in Article 15 of Directive 2009/28, which enabled it to prove that approximately 50% of its electricity output came from renewable energy sources. However, as is apparent from Article 2(j) of that directive, 'guarantee of origin' is defined as an electronic document *which has the sole function of providing proof to a final customer* that a given share or quantity of energy was produced from renewable sources. Consequently, that guarantee is drawn up retrospectively and does not enable the share of those energy sources to be ascertained in real time, that is to say, when the system operator has to decide to curtail feed-in temporarily due to congestion. [24] Therefore, in my view, a 'guarantee of origin' cannot serve as a benchmark, as such, for determining the criteria for granting priority access to the electricity grid.

58. Sixth, the referring court enquires whether the legal rationale underlying the second subparagraph of Article 5(3) of Directive 2009/28 can be applied in respect of electricity produced only partly from biodegradable waste. I would point out that, under that provision, in multi-fuel plants using renewable and conventional sources, only the part of electricity produced from renewable energy sources is to be taken into account and that, for the purposes of that calculation, the contribution of each energy source is to be calculated on the basis of its energy content. In view of the significant freedom of action granted to Member States, I consider that, in the absence of any indication to the contrary in that directive, they may take the second subparagraph of Article 5(3) as a benchmark in order to implement priority access to the electricity grid. [25] In that context, a claim for compensation made by the operator of an electricity generating installation following a refusal to grant access to the grid due to congestion covers only the part of electricity produced from the biodegradable fraction of the waste mix.

59. In view of all the above, I propose that the following answer be given to the second to fifth questions referred for a preliminary ruling: Article 16(2)(c) of Directive 2009/28 must be interpreted as meaning that an electricity generating installation enjoys priority access to the grid only for electricity produced from the biodegradable fraction of the industrial and municipal waste used. It is for the Member States, in so far as the secure operation of the national electricity system so permits, to establish transparent and non-discriminatory criteria for the purpose of laying down the detailed rules for applying that priority access to such an installation.

V. Conclusion

60. In the light of the foregoing considerations, I propose that the Court answer the questions referred for a preliminary ruling by the Bundesgerichtshof (Federal Court of Justice, Germany) as follows:

(1) Article 16(2)(c) of Directive 2009/28/EC of the European Parliament and of the Council of 23 April 2009 on the promotion of the use of energy from renewable sources and amending and subsequently repealing Directives 2001/77/EC and 2003/30/EC

[24] See also judgment of 1 July 2014, *Ålands Vindkraft* (C-573/12, EU:C:2014:2037, paragraph 90).

[25] See also recital 11 of Directive 2009/28.

must be interpreted as meaning that priority access to the electricity grid enjoyed by electricity generating installations using renewable energy sources must be granted not only to installations producing electricity exclusively from renewable energy sources, but also to installations producing electricity by thermal recovery from mixed waste containing a proportion of industrial and municipal biodegradable waste.

(2) Article 16(2)(c) of Directive 2009/28

must be interpreted as meaning that an electricity generating installation enjoys priority access to the grid only for electricity produced from the biodegradable fraction of the industrial and municipal waste used. It is for the Member States, in so far as the secure operation of the national electricity system so permits, to establish transparent and non-discriminatory criteria for the purpose of laying down the detailed rules for applying that priority access to such an installation.