Reports of Cases

OPINION OF ADVOCATE GENERAL
HOGAN
delivered on 8 May 2019[1]

Joined Cases C-80/18 to C-83/18

Asociación Española de la Industria Eléctrica (UNESA) (C-80/18)
Endesa Generación, SA (C-82/18)
v
Administración General del Estado,
Iberdrola Generación Nuclear SAU (C-80/18 and C-82/18)
and
Endesa Generación, SA (C-81/18)
Iberdrola Generación Nuclear SAU (C-83/18)
v
Administración General del Estado (C-81/18 and C-83/18)

(Request for a preliminary ruling from the Tribunal Supremo (Supreme Court, Spain))

(Request for a preliminary ruling — Article 191 TFEU — Polluter-pays principle — Directive 2009/72/EC — Common rules for the internal market in electricity — Articles 3(1) and (2) — Non-discrimination principle — Directive 2005/89/EC — Financing the tariff deficit — Taxes levied only on companies that use nuclear energy to produce electricity)

I. Introduction

1. The present requests for a preliminary ruling concern the interpretation of Article 191(2) TFEU, Article 3(1) and (2) of Directive 2009/72/EC of the European Parliament and of the Council of 13 July 2009 concerning common rules for the internal market in electricity and repealing Directive 2003/54/EC,[2] Articles 3 and 5 of Directive 2005/89/EC of the European Parliament and of the Council of 18 January 2006 concerning measures to safeguard security of electricity supply and infrastructure investment,[3] and Articles 20 and 21 of the Charter of Fundamental Rights of the European Union ('the Charter').

2. The requests were made in proceedings between, on the one hand, the Asociación Española de la industria eléctrica (Spanish electrical industry association, 'Unesa'), Endesa Generación ('Endesa') and Iberdrola Generación nuclear SA ('Iberdrola') and, on the other hand, the Administración General del Estado (General administration of the State, Spain) concerning the validity of taxes on the production of spent nuclear fuel, radioactive waste from nuclear power generation and the storage of such fuel and waste.

1 Original language: English.

2 OJ 2009 L 211, p. 55.

3 OJ 2006 L 33, p. 22.

3. These requests give the Court the opportunity to clarify the scope of Directive 2009/72 and the obligations imposed on a Member State when it exercises its power of taxation in the matters covered by that directive. Specifically, one of the key issues raised by this reference is whether the non-discrimination provisions of Article 3(1) of Directive 2009/72 can be said to apply to a taxation measure adopted by the Kingdom of Spain in 2012.

II. Legal context

A. EU law

1. Directive 2009/72

4. Article 1 of Directive 2009/72 is entitled 'Subject matter and scope'. It provides that the directive 'establishes common rules for the generation, transmission, distribution and supply of electricity, together with consumer protection provisions, with a view to improving and integrating competitive electricity markets in the Community. It lays down the rules relating to the organisation and functioning of the electricity sector, open access to the market, the criteria and procedures applicable to calls for tenders and the granting of authorisations and the operation of systems. It also lays down universal service obligations and the rights of electricity consumers and clarifies competition requirements'.

5. Under Article 2(1) of Directive 2009/72, 'generation' means the production of electricity.

6. Article 3 of Directive of Directive 2009/72 is entitled 'Public service obligations and customer protection'. It provides in its two first paragraphs:

'1. Member States shall ensure, on the basis of their institutional organisation and with due regard to the principle of subsidiarity, that, without prejudice to paragraph 2, electricity undertakings are operated in accordance with the principles of this Directive with a view to achieving a competitive, secure and environmentally sustainable market in electricity, and shall not discriminate between those undertakings as regards either rights or obligations.

2. Having full regard to the relevant provisions of the Treaty, in particular Article [106 TFEU], 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.'

2. Directive 2005/89

7. Article 3(1) and (4) of Directive 2005/89 provides:

'1. Member States shall ensure a high level of security of electricity supply by taking the necessary measures to facilitate a stable investment climate and by defining the roles and responsibilities of competent authorities, including regulatory authorities where relevant, and all relevant market actors and publishing information thereon. ...

…

4. Member States shall ensure that any measures adopted in accordance with this Directive are non-discriminatory and do not place an unreasonable burden on the market actors, including market entrants and companies with small market shares. …'

8. Article 5(1) of Directive 2005/89 provides that 'Member States shall take appropriate measures to maintain a balance between the demand for electricity and the availability of generation capacity'.

B. Spanish law

9. The preamble to Ley 15/2012, de 27 de diciembre, de medidas fiscales para la sostenibilidad energética (Law 15/2012 of 27 December 2012 on fiscal measures for sustainable energy[4]), provides:

'I.

The objective of this Law is to adapt our tax system to more efficient and environmentally friendly use and sustainable development ...

…

The basic foundation of this Law is Article 45 of the Constitution, a provision in which the protection of our environment becomes one of the guiding principles of social and economic policies. Thus, one of the axes of this tax reform is to internalise the environmental costs resulting from electricity production and from the storage of spent nuclear fuel or radioactive waste. In this way, [this] Law must serve as a stimulus to improve our levels of energy efficiency while at the same time ensuring better management of natural resources and continuing to enhance the new model of sustainable development, both from an economic and social point of view, as well as from an environmental point of view.

…

To this end, this Act regulates three new taxes: the tax on the value of electricity production, the tax on the production of spent nuclear fuel and radioactive waste resulting from the generation of nuclear power, and the tax on the storage of spent nuclear fuel and radioactive waste in centralised facilities...

III.

…

4 BOE No 312 of 28 December 2012, p. 88081.

The production of electricity using nuclear energy implies the acceptance by society of a number of burdens and obligations, due to the particular characteristics of this type of energy, whose economic impact is difficult to determine. Society must assume a wide range of responsibilities resulting from specific aspects of this production, such as the management of the radioactive waste generated and the possible use of materials for non-peaceful purposes.

… The assessment of the total cost of decommissioning nuclear power plants and the final management of radioactive waste still present significant uncertainties that will ultimately affect society after the cessation of operation of nuclear power plants, in particular with regard to the final management of spent nuclear fuel and high-level waste.

Thus, given the long life span of some radioactive waste, which extends over generations, it is essential to establish, after its final management, the necessary measures to prevent an external agent from causing its release into the environment or any other adverse effects, which will require long-term institutional monitoring, which will be the responsibility of the State.

Another distinctive feature of the nuclear power industry is the use and production of materials that must be strictly controlled in order to avoid their use for non-peaceful purposes or any other type of malicious act affecting them, which forces Spain … to assume the consequent responsibilities and, therefore, to provide resources to deal with them.

Thus, the State must provide the necessary resources to keep existing nuclear emergency plans operational.

In view of the above, it is appropriate to establish a levy on the production of spent nuclear fuel and radioactive waste in nuclear installations and on their storage in central facilities in order to offset the costs that the society has to bear as a result of this production.

…'

10. Article 12 of Law 15/2012 provides:

'Nature. The tax on the production of spent nuclear fuel and radioactive waste from nuclear power generation and the tax on the storage of spent nuclear fuel and radioactive waste in central facilities are direct taxes of a real nature, which are levied on activities which, including the respective events that give rise to liability, are defined in Articles 15 and 19 of this Law.'

11. Article 15 of Law 15/2012 provides:

'The production of spent nuclear fuel and radioactive waste resulting from the production of nuclear electricity constitutes the event giving rise to liability for the tax.'

12. Article 19 of Law 15/2012 provides:

'The event giving rise to liability for the tax is the activity of storing spent nuclear fuel and radioactive waste in a central facility.

For the purposes of this tax, storage of spent nuclear fuel and radioactive waste means any activity consisting in temporarily or permanently immobilising them, in any manner whatsoever, and central installation means a facility that can store such materials from different installations or origins.'

13. The second additional provision of Law 15/2012, relating to the costs of the electricity system, provides:

'Each year, the State's general finance laws allocate to the financing of the costs of the electricity system provided for in Article 16 of Ley 54/1997, de 27 de noviembre, del Sector Eléctrico [Law No 54/1997 of 27 November 1997 on the electricity sector] an amount equivalent to the sum of: (a) an estimate of the annual amounts collected by the State in respect of the levies and charges included in this Law; (b) the estimated revenue generated by the auctioning of greenhouse gas emission allowances, with a maximum of EUR 500 million.'

III. Facts of the main proceedings

14. The applicants in the main proceedings are companies producing electricity, in particular of nuclear origin. They brought an action before the Audiencia Nacional (National High Court, Spain) against a statutory order approving the forms required for the self assessment and payment of taxes on the production of spent nuclear fuel and radioactive waste from nuclear power generation and on the storage of such nuclear fuel and waste in central facilities ('taxes on nuclear waste'). Their essential complaint is that this form of taxation amounts, in effect, to a form of special taxation on nuclear energy producers which distorts the Spanish electricity market and that such should be considered to be unlawful, both by reference to national constitutional law and EU law.

15. Following the dismissal of their appeals, these companies appealed to the referring court on 30 October 2014.

16. According to the national court, the objective of these taxes on nuclear waste is to increase the volume of revenue in the electricity financial system so that nuclear power producers assume a larger share of the financing of the 'tariff deficit' [5] than other power producers.

17. For that court, free competition in the electricity market is distorted if certain undertakings are taxed because of their form of production, even if the levy does not directly affect electricity production itself or the electricity produced, but fuel and waste and the storage of the means used for this purpose, without objective justification. Moreover, such a difference in treatment could be contrary to EU law if it were established that their institution is not based on environmental protection and that they were introduced for reasons relating solely to the tariff deficit.

18. In an order dated 12 April 2016, the referring court ordered that the question of the unconstitutionality of these taxes be referred to the Tribunal Constitucional (Constitutional Court, Spain), on the grounds that they might be in breach of the principle of economic capacity affirmed in Article 31(1) of the Spanish Constitution. The Tribunal Constitucional (Constitutional Court) ruled, however, that the reference of the question of unconstitutionality was inadmissible, on the ground that the Tribunal Supremo (Supreme Court, Spain) had voiced doubts as to the compatibility of the national legislation with EU law and it should have first made a reference for a preliminary ruling.

5 The 'tariff deficit' corresponds to the difference between the revenues that Spanish electricity companies receive from consumers and the costs of electricity supply recognised by national regulations.

IV. The request for a preliminary ruling and the procedure before the court

19. In that context, the Tribunal Supremo (Supreme Court) has decided to stay the proceedings and to refer the following questions to the Court for a preliminary ruling:

'(1) Does the "polluter pays" principle, affirmed in Article 191(2) [TFEU], together with Articles 20 and 21 of [the Charter], which establish the basic principles of equality and non-discrimination, when applied to the provisions in Article 3(1) and (2) of Directive 2009/72, insofar as it is intended, among other aims, to achieve a competitive and non-discriminatory market in electricity that may be altered only on grounds of general economic interest, including the protection of the environment, preclude the introduction of taxes that apply solely to electricity generation companies that use nuclear energy, when the main purpose of those taxes is not environmental but to increase the volume of the electric power financial system in such a way that these companies contribute more to funding the tariff deficit than other companies that carry on the same activity?

(2) In a competitive and non-discriminatory electricity market, does EU legislation permit the levying of environmental taxes on grounds of the pollution caused by nuclear activities, although this is not specified in the legislation (the grounds are referred to in the Preamble to the Law), with the result that, as regards the tax on the production of spent nuclear fuel and radioactive waste, the statutory provisions having legislative force fail to reflect the internalisation of the costs to be covered, and there is also a lack of specificity as regards the storage of radioactive waste, given that the management and storage costs are already covered by other levies, and there is also a failure to establish clearly what the revenue raised is to be used for, and the companies in question are required to assume civil liabilities of up to [EUR] 1 200 million in this regard?

(3) Is Article 3(2) of [Directive 2009/72], which requires any obligations imposed on grounds of general economic interest, including environmental protection, to be clearly defined, transparent, non-discriminatory and verifiable, satisfied if the environmental objective and the essential characteristics that define environmental taxes are not specified in the statutory provision having legislative force?

(4) Do the "polluter pays" principle in Article 191(2) [TFEU], the principles of equality and non-discrimination in Articles 20 and 21 of the [Charter], and Articles 3 and 5 of Directive 2005/89, insofar as they seek to ensure "the proper functioning of the internal market for electricity" and call on Member States to ensure "that any measures adopted in accordance with this Directive are non-discriminatory and do not place an unreasonable burden on the market actors", preclude a provision in national legislation that requires all electricity companies (other than generators of hydroelectricity, which is classified as renewable energy) to fund the tariff deficit, but which imposes a particularly heavy tax burden on nuclear generators, which are required to contribute more than other actors in the energy market, some of which are more polluting, but that do not have to pay these charges, the reasons given being grounds of environmental protection in view of the risks and uncertainties inherent in nuclear activities, without specifying the costs involved or stipulating that the revenue raised is to be used for environmental protection purposes (and given that waste management and storage are already covered by other levies, and nuclear generation companies assume civil liability), and that distorts the free competition required by the liberalised internal market by favouring other electricity generators that do not have to pay environmental taxes even when their sources of production are more highly polluting?

(5) Is a tax on the production of spent nuclear fuel and radioactive waste from nuclear power generation imposed on the nuclear generation industry alone and not applicable to any other sector that may generate such waste, which means that other firms that could use nuclear

material or nuclear sources in their activities are not taxed, even though they affect the environment that is to be protected, contrary to the "polluter pays" principle in Article 191(2) [TFEU]?'

20. Written observations were submitted by the applicants in the main proceedings, the Spanish Government and by the European Commission. In addition, they all presented oral argument at the hearing on 28 February 2018.

V. Analysis

21. As requested by the Court, I will confine my observations in this Opinion to the first two questions which are the subject of the reference made by the Tribunal Supremo (Supreme Court). I will examine those questions as far as they concern the interpretation of Article 3(1) of Directive 2009/72, since the other provisions relied on in support of them are inadmissible or unnecessary.

22. Firstly, the interpretation of Article 3(2) of Directive 2009/72 is the object of the third question. Secondly, it is unnecessary to interpret Articles 20 and 21 of the Charter, since the principle of non-discrimination has been given practical expression in the field of the electricity market in Article 3(1) of Directive 2009/72. Thirdly, Article 191(2) TFEU provides that EU policy on the environment is to aim at a high level of protection and is to be based, inter alia, on the 'polluter pays' principle. That provision thus does no more than define the general environmental objectives of the European Union, since Article 192 TFEU confers on the EU legislator responsibility for deciding what action is to be taken in order to attain those objectives. Consequently, as correctly pointed out by the Spanish Government and the Commission, since Article 191(2) TFEU, which establishes the 'polluter pays' principle, is directed at action at EU level, that provision cannot be relied on as such by individuals in order to exclude the application of national legislation in an area covered by environmental policy for which there is no EU legislation adopted on the basis of Article 192 TFEU that specifically covers the situation in question.[6] It must be noted that neither Directive 2009/72 nor Directive 2005/89 (which is also relied on by the referring court) were adopted on the basis of Article 175 EC, now Article 192 TFEU.

23. In those circumstances, I think that the first two questions can be answered together on the understanding that by these questions, the national court asks, in substance, whether Article 3(1) of Directive 2009/72 must be interpreted as precluding national legislation, such as that at issue in the main proceedings, imposing taxes on the production and storage of nuclear fuel and waste, which are imposed only on electricity undertakings using nuclear energy and whose main objective is not to protect the environment but to increase the volume of revenue to compensate for tariff deficit.

A. Scope of application of Directive 2009/72

24. First of all, it is appropriate to examine the applicability of Directive 2009/72 on taxes such as the taxes on nuclear waste at issue in the main proceedings.

25. According to the Spanish Government, this directive merely establishes common rules for the organisation of the internal electricity market without affecting the fiscal competence of the Member States. The Spanish Government pleads that the taxes at issue in the main proceedings were adopted pursuant to that competence.

6 See, to that effect, judgments of 9 March 2010, *ERG and Others* (C-379/08 and C-380/08, EU:C:2010:127, paragraphs 38 and 39), and of 4 March 2015, *Fipa Group and Others* (C-534/13, EU:C:2015:140, paragraphs 39 and 40).

26. For their part, the applicants contend — and the referring court seems to agree — that taxes on nuclear waste have an impact, albeit indirect, on the access of nuclear power generators to the electricity market on an equal footing with non-nuclear power generators. In that way, these taxes would inevitably affect the costs of these first companies, which could in turn have an impact on their participation regarding conditions of equal competition in the electricity market. National legislation, by imposing taxes on the production of spent nuclear fuel and radioactive waste from nuclear power generation and on the storage of such spent nuclear fuel and radioactive waste in central facilities, imposes obligations on nuclear electricity companies operating in the electricity market, and could thus be covered by the scope of Directive 2009/72, which aims to establish common rules in the context of that market.

27. I do not share this last interpretation of the scope of Directive 2009/72 for the following reasons.

28. The scope of a rule of EU law is determined by the usual methods of interpretation accepted by the Court. That means that the wording, scheme and objectives of Directive 2009/72 must be examined. [7]

29. First, Article 1 of the directive states that 'this Directive establishes common rules for the generation, transmission, distribution and supply of electricity, together with consumer protection provisions, *with a view to improving and integrating competitive electricity markets in the Community*'. [8]

30. With that wording, the definition of the scope of the directive may seem broad, encompassing the entire 'life' of electricity, from its production to its supply to the consumer. The legislator, however, approaches this process from a specific perspective, namely the improvement and integration of competitive electricity markets in the Union.

31. Second, even if that directive pursues a wider range of goals such as consumer and environmental protection, [9] the internal market is 'the key objective'. [10] The focus is still on cross-border access for new suppliers of electricity from different energy sources as well as for new providers of power generation. [11] As explained by recital 59 of Directive 2009/72, 'the development of a true internal market in electricity, through a network connected across the Community, should be one of the main goals of this Directive'. In other words, Directive 2009/72 aims essentially at establishing an open and competitive internal market in electricity which enables consumers freely to choose their suppliers and those suppliers freely to deliver their products to their customers, create a level playing field in this market, ensure a secure supply of energy and a sustainable climate change policy. [12]

32. Third, the taxes on nuclear waste at issue in the main proceedings do not concern the production or the consumption of electricity but spent nuclear fuel and radioactive waste from nuclear power generation (and the storage of such nuclear fuel and waste). One can obviously admit that the spent nuclear fuel and radioactive waste are inherent in the process of nuclear energy production. [13] This is not, however, a sufficient reason to fall within the scope of Directive 2009/72.

7 See, to that effect, judgment of 7 February 1985, *Abels* (135/83, EU:C:1985:55, paragraph 13), and Opinion of Advocate General Léger in *Berliner Kindl Brauerei* (C-208/98, EU:C:1999:537, point 32).

8 Emphasis added.

9 See recitals 42, 43 and 51 of Directive 2009/72. See also, to that effect, Johnston, A., and Block, G., *EU Energy Law*, Oxford, Oxford University Press, 2012, No 2.45.

10 See Delvaux, B., *Eu Law and the Development of a Sustainable, Competitive and Secure Energy Policy*, Cambridge-Antwerp-Portland, Intersentia, 2013, No 141.

11 See recitals 8 and 39 of Directive 2009/72.

12 See recitals 3, 4, 5 and 7 of Directive 2009/72.

13 See recitals 19 and 20 of Directive 2011/70/Euratom of the Council of 19 July 2011 establishing a Community framework for the responsible and safe management of spent fuel and radioactive waste (OJ 2011 L 199, p. 48) and Article (i) of the Preamble of the Joint Convention on the Safety of Spent Fuel Management and on the Safety of Radioactive Waste Management adopted by the International Atomic Energy Agency on 5 September 1997.

33. Indeed, if the word 'generation' is used in Article 1 of Directive 2009/72 and defined by Article 2(1) as 'the production of electricity', that concept is developed in Chapter III. It must be noted, in this respect, that the concept of 'generation' is limited to the rules governing the construction of new generating capacity and the tendering procedure for new capacity.

34. Furthermore — and, perhaps, most fundamentally of all — even if it were to be accepted that a tax such as the taxes on nuclear waste is able to have an impact on the access of nuclear power generators to the electricity market, Directive 2009/72 does not contain any rule in the field of taxation.

35. It could not have been otherwise since Directive 2009/72 was adopted on the basis of Article 95(1) EC (now Article 114 TFEU), in accordance with the procedure laid down in Article 251 EC, and the second paragraph of Article 95 EC stated that the first paragraph does not apply to fiscal provisions.

36. The willingness of the Member States to retain the competence for taxation in the field of electricity has become even clearer since the adoption of the Lisbon Treaty. Indeed, while Article 194(2) TFEU provides that the measures to achieve the objective of the Union's energy policy shall be adopted in accordance with the ordinary legislative procedure, the third paragraph of that article states that the Council shall act in accordance with a special legislative procedure and after consulting the European Parliament, unanimously, when the measures are 'primarily of a fiscal nature'.

37. As I have already said, I therefore believe that the scope of application of Directive 2009/72 is limited to the generation, transmission, distribution and supply of electricity. In that context, the tax harmonisation issue is of some importance. Here a legislative measure has been adopted at EU level. It is true that Article 3(1) of Directive 2009/72 merely lays down a rule of non-discrimination. Yet, as it prescribes an EU law rule of application, it must be regarded as a harmonisation measure.

38. However, as the Union did not have jurisdiction under Article 95(1) EC (now Article 114 TFEU) to adopt such a tax measure, if Article 3(1) of Directive 2009/72 were to apply to a national taxation measure it would, by definition, be unlawful. It is consequently thus necessary to give this legislative provision a more restrictive interpretation than perhaps the generality of its language might otherwise suggest. Any other conclusion would lead to an extension of the scope of the directive and would require, in my view, reliance on the exercise by the EU of a fiscal competence which it simply does not possess. Accordingly, if the directive is to be understood as making this principle of non-discrimination applicable to taxes on the electricity market, then it must be considered to amount, in substance, to a tax measure in respect of which the Union did not have competence having regard to the terms of Article 114 TFEU.

39. In the light of the foregoing considerations, I find myself obliged to conclude that Article 3(1) of Directive 2009/72 must be interpreted as not being applicable to taxes such as those at issue in the main proceedings.

B. In the alternative, the question of the discrimination

40. In the event that the Court does not share this interpretation of the scope of Directive 2009/72 and concludes that this directive is applicable to taxes on nuclear waste, I propose now to consider, in the alternative, whether Article 3(1) of Directive 2009/72 must be interpreted as precluding taxes of the kind adopted by the Kingdom of Spain in the present case. The remainder of this Opinion, accordingly, proceeds on the assumption — contrary to my own view — that Article 3(1) of Directive 2009/72 does apply to the present case.

1. Scope of application of Article 3(1) of Directive 2009/72 and public service obligations

41. According to Article 3(1) of Directive 2009/72, 'Member States shall ensure, on the basis of their institutional organisation and with due regard to the principle of subsidiarity, that, without prejudice to paragraph 2, electricity undertakings are operated in accordance with the principles of this Directive with a view to achieving a competitive, secure and environmentally sustainable market in electricity, *and shall not discriminate between those undertakings as regards either rights or obligations*'.[14]

42. Even though this article is entitled 'Public service obligations and customer protection', I do not think that the prohibition of discrimination enshrined in Article 3(1) is limited to the field of the 'public service obligations' or consumer protection.

43. First, the scope of this article is much broader than its title. Obviously, it allows Member States to impose public service obligations on undertakings operating in the electricity sector in the general economic interest[15] and provides for measures in favour of consumers, such as information obligations for example.[16] It also requires, however, Member States to implement other measures aimed, for example, at achieving the objectives of social and economic cohesion and environmental protection or ensuring that an independent mechanism such as an energy ombudsman or a consumer body is in place in order to ensure efficient treatment of complaints and out-of-court dispute settlements.[17]

44. Second, as the Court has already held in relation to the previous directive concerning common rules for the internal market in electricity,[18] the provisions referring to the principle of non-discrimination in that directive, 'are specific expressions of the general principle of equality'.[19]

45. In the light of the foregoing considerations, I consider that, if Directive 2009/72 is applicable to taxes such as taxes on nuclear waste, then Article 3(1) of that directive as a specific expression of the general principle of equality is also applicable to them.

2. Discrimination

46. In accordance with settled case-law, the prohibition of discrimination 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.[20] A difference in treatment is justified if it is based on an objective and reasonable criterion, that is, if the difference relates to a legally permitted aim pursued by the legislation in question, and it is proportionate to the aim pursued by the treatment.[21]

14 Emphasis added.

15 See Article 3(2) of Directive 2009/72.

16 See, Article 3(5) of Directive 2009/72.

17 See Article 3(10) and (13) of Directive 2009/72.

18 Directive 2003/54/EC of the European Parliament and of the Council of 26 June 2003 concerning common rules for the internal market in electricity and repealing Directive 96/92/EC (OJ 2003 L 176, p. 37).

19 See judgment of 29 September 2016, *Essent Belgium* (C-492/14, EU:C:2016:732, paragraph 79). See also, for an implicit application of that reasoning, with regard to Articles 15(7) and 37(6)(b) of Directive 2009/72, judgment of 28 November 2018, *Solvay Chimica Italia and Others* (C-262/17, C-263/17 and C-273/17, EU:C:2018:961, paragraphs 64 and 66).

20 See, to that effect, judgment of 7 March 2017, *RPO* (C-390/15, EU:C:2017:174, paragraph 41).

21 See, to that effect, judgment of 29 September 2016, *Essent Belgium* (C-492/14, EU:C:2016:732, paragraph 81).

47. In order to categorise situations as 'similar' or 'different', they must be considered in the light of the aims of the measure in question.[22] Indeed, as consistently held by the Court, 'whether the requirement that situations must be comparable for the purpose of determining whether there is a breach of the principle of equal treatment has been met must be assessed in the light of all the elements which characterise them and, in particular, in the light of the subject matter and purpose of the national legislation which makes the distinction at issue'.[23]

48. It is true that, in a situation where the general principle of equal treatment is not at issue, but a provision giving substance to this principle is, the question of whether the comparability of two situations should not be assessed in the light of the objective pursued by that provision instead of in the light of national legislation instituting the alleged discrimination may arise.

49. In my opinion, the answer to this question depends on how the principle of equal treatment is referred to in the provision giving this principle its substance. If the latter expressly provides that two categories of persons must be treated identically, national courts have to consider that their situations are comparable. However, if a directive merely states that Member States must not discriminate among a certain category of persons, those Member States are obliged not to treat all persons as being in the same situation, but should ensure that, in the exercise of their normative competence, they do not create any arbitrary distinction and that the substance of equal treatment is thus preserved.

50. In the present case, since Article 3(1) does not provide that all producers of electricity must be treated identically, but rather that 'Member States … shall not discriminate between [electricity] undertakings as regards either rights or obligations', I think that the comparability of the situations should be determined solely in the light of the subject matter of the national legislation and of the aim pursued.

51. It is thus necessary to determine whether the situation of nuclear power plants is comparable to that of other energy producers with regard to the objective of the national legislation at issue.

52. According to the preamble to Ley 15/2012, the introduction of taxes on nuclear waste is justified by the particularity of nuclear power generation in environmental terms and of safety terms.

53. In that context, I would point out that the Court already ruled in *Kernkraftwerke Lippe-Ems* that 'methods of producing electricity, other than that based on nuclear fuel … are not, in the light of the objective pursued by those rules, in a factual and legal situation that is comparable to that of the production method based on nuclear fuel, as only that method generates radioactive waste arising from the use of such fuel'.[24] It must be noted that the national rule at issue in that previous case pursued a similar objective to the taxes on nuclear waste at issue in the present case since it was a duty on the use of nuclear fuel for the commercial production of electricity which contributed, in the context of fiscal consolidation and in accordance with the polluter-pays principle, to a reduction in the burden on the German federal budget by the rehabilitation required at a specific mining site where radioactive waste from the use of nuclear fuel was stored.[25]

22 Lenaerts, K., and Van Nuffel, P., *European Union Law*, third edition, London, Sweet & Maxwell, 2011, No 7-061.

23 Judgment of 22 January 2019, *Cresco Investigation* (C-193/17, EU:C:2019:43, paragraph 42). See also, inter alia, judgments of 1 October 2015, *O* (C-432/14, EU:C:2015:643, paragraph 32), and of 26 June 2018, *MB (Change of gender and retirement pension)* (C-451/16, EU:C:2018:492, paragraph 42).

24 Judgment of 4 June 2015 (C-5/14, EU:C:2015:354, paragraph 79).

25 See judgment of 4 June 2015, *Kernkraftwerke Lippe-Ems* (C-5/14, EU:C:2015:354, paragraph 78).

54. Even if this reasoning of the Court in *Kernkraftwerke Lippe-Ems* took place in the part of the judgment relating to the compatibility of the national rule with Article 107 TFEU, I do not see why the Court's findings on the comparability of the situations of energy producers with regard to the environmental impact should also not apply so far as the present case is concerned. It also deals with taxes on the use of nuclear fuel (since the taxes on nuclear waste concern spent nuclear fuel and radioactive waste) which were prompted by concerns, inter alia, in respect of the environmental and safety difficulties associated with this type of waste.

55. In the light of the foregoing considerations, I share the point of view of the Commission and consider that nuclear energy is not in a comparable situation to other sources of electricity with regard to environmental protection, due to the specific health and safety risks involved, in particular, in the treatment and storage of the nuclear waste it generates. This, however, is not in itself necessarily a decisive consideration because the task of the referring court in such circumstances is really to evaluate whether, making all due allowances for the State's margin of appreciation in such cases, this different tax treatment can genuinely be justified by reference to the special and distinctive environmental and safety difficulties associated with the production of nuclear energy.

56. In that regard it must be recalled that in the context of requests for preliminary rulings, the Court has no jurisdiction to decide upon the validity or the interpretation of a provision of national law, as would be possible for it under Article 258 TFEU. It is ultimately for the national court, which has sole jurisdiction to determine the facts in the case before it and to interpret the national legislation, to determine whether that is the case here. However, in preliminary ruling proceedings, the Court, which is called on to provide answers of use to the national court, may provide guidance based on the documents in the file and on the written and oral observations submitted to it, in order to enable the national court to give judgment.[26]

57. In that respect, the referring court and the applicants raise serious doubts regarding the ostensible environmental basis for this legislation and suggest that the real basis for the legislation in question relates solely to the need to raise finance in order to reduce the tariff deficit. In other words, the essential purpose of the taxes on nuclear waste appears to be to increase the volume of public revenue generated by the financial system of the electricity sector.

58. If this were indeed to be confirmed by a finding of the referring court, then the situation would admittedly be different. Indeed, given the particular situation of tariff deficit in Spain and the need to reduce it, all energy producers are in a comparable situation since the deficit is due to the difference between the revenues that Spanish electricity companies receive from consumers and the costs of electricity supply recognised by national regulations.

59. In this context it must be admitted that, on the one hand, the fact that there are several other obligations to cover the risks associated with nuclear power generation[27] and, on the other hand, that the second additional provision of Law 15/2012 provides that the State's general finance laws allocate to the financing of the costs of electricity, inter alia, an estimate of the annual amounts collected by the State in respect of the levies and fees included in Law 15/2012, are elements that may seriously call into question the environmental grounds as presented in the preamble to Law 15/2012.

26 See, to that effect, judgment of 6 December 2018, *Montag* (C-480/17, EU:C:2018:987, paragraph 34).

27 According to the national court, the public resources necessary to make the management and storage of radioactive waste possible and viable would be covered by at least four taxes intended to support the Fondo nacional para la financiación de las actividades del Plan General de Residuos Radioactivos (the National Fund for the Financing of Activities Under the General Plan on Radioactive Waste) (Paragraph 8.3, page 26, of the request for a preliminary ruling in Case C-80/18). The referring court invokes also the nuclear producers' obligation to assume civil liabilities of up to EUR 1 200 million. In addition to those obligations, Endesa Generación also invokes the fact that nuclear power plants in Spain are subject to taxes to finance the Nuclear Safety Council and taxes to finance the assignment of State security corps to guarantee the security of plant installations.

60. All of this would tend to undermine the ostensible justification for the electricity tax on nuclear energy producers (inter alia, the need to address special and particular environmental concerns). If the referring court were to make such a finding, it would tend to suggest that this tax was, while masquerading as an environmental measure, in truth operating as a form of special taxation measure which had the effect of discriminating against such nuclear producers by subjecting them to higher taxation as compared with other electricity producers, which differential treatment was not objectively justified by these appropriate environmental concerns.

61. However, it is for the referring court to assess if the purpose of the law at issue in the main proceedings is genuinely related to environmental protection and safety and, if necessary, making all due allowances for the Member State's margin of appreciation in this regard, whether the different tax treatment of electricity producers is objectively justifiable for the purposes of this interpretation of Article 3(1) of Directive 2009/72. Indeed, if environmental protection can be, without any doubt, considered to be an objective and reasonable criterion in the field of the internal electricity market — as express words of both Article 3(2) of Directive 2009/72 or Article 194(1) TFEU make clear — the difference in treatment is justified only if it *relates* to the legally permitted aim. [28]

VI. Conclusion

62. Accordingly, I propose that the Court should answer the first two questions referred by the Tribunal Supremo (Supreme Court, Spain) as follows:

Article 3(1) of Directive 2009/72/EC of the European Parliament and of the Council of 13 July 2009 concerning common rules for the internal market in electricity and repealing Directive 2003/54/EC must be interpreted as not being applicable to taxes such as those at issue in the main proceedings which are taxes on the production of spent nuclear fuel and radioactive waste from nuclear power generation and on the storage of such spent nuclear fuel and radioactive waste in central facilities.

In the alternative,

Article 3(1) of Directive 2009/72 must be interpreted as not precluding in principle national legislation such as the taxes at issue in the main proceedings since the situation of electricity undertakings using nuclear energy is not in a comparable situation to other producers of electricity with regard to environmental protection and safety.

It is, however, for the referring court to assess if the purpose of the law at issue in the main proceedings is genuinely related to environmental protection and safety and, if necessary, whether the differential treatment for tax purposes of the different types of electricity producers is objectively justified by these environmental concerns.

28 See, to that effect, judgment of 29 September 2016, *Essent Belgium* (C-492/14, EU:C:2016:732, paragraph 81).