



Reports of Cases

JUDGMENT OF THE COURT (Fifth Chamber)

11 June 2020*

(Reference for a preliminary ruling – Internal market for electricity – Directive 2009/72/EC – Article 35(4) and (5) – Independence of the regulatory authorities – National legislation transferring the power to appoint the chairperson of the national regulatory authority from the Head of State to the government – Participation of national ministries in the tariff regulation procedures)

In Case C-378/19,

REQUEST for a preliminary ruling under Article 267 TFEU from the Ústavný súd Slovenskej republiky (Constitutional Court of the Slovak Republic), made by decision of 23 January 2019, received at the Court on 14 May 2019, in the proceedings initiated by

Prezident Slovenskej republiky

interested parties:

Národná rada Slovenskej republiky,

Vláda Slovenskej republiky,

THE COURT (Fifth Chamber),

composed of E. Regan, President of the Chamber, I. Jarukaitis, E. Juhász, M. Ilešič and C. Lycourgos (Rapporteur), Judges,

Advocate General: M. Bobek,

Registrar: A. Calot Escobar,

having regard to the written procedure,

having considered the observations submitted on behalf of:

- the Prezident Slovenskej republiky, by Z. Čaputová,
- the Slovak Government, by B. Ricziová, acting as Agent,
- the Spanish Government, by S. Jiménez García, acting as Agent,

* Language of the case: Slovak.

– the European Commission, by O. Beynet, R. Lindenthal and A. Tokár, acting as Agents,
having decided, after hearing the Advocate General, to proceed to judgment without an Opinion,
gives the following

Judgment

- 1 This request for a preliminary ruling concerns the interpretation of Article 35(4) and (5) 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 (OJ 2009 L 211, p. 55).
- 2 The request has been made in proceedings initiated by the Prezident Slovenskej republiky (President of the Slovak Republic) concerning the compatibility with the Slovak Constitution, read in conjunction with EU law, of the national rules on the nomination and dismissal of the chairperson of the Úrad pre reguláciu siet'ových odvetví (Network Industries Regulatory Authority, Slovakia; 'the Regulatory Authority') and on the participation of representatives of the national ministries in tariff regulation procedures before that authority.

Legal context

European Union law

- 3 Recitals 33 and 34 of Directive 2009/72 state:

'(33) 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)] introduced a requirement for Member States to establish regulators with specific competences. However, experience shows that the effectiveness of regulation is frequently hampered through a lack of independence of regulators from government, and insufficient powers and discretion. For that reason, at its meeting on 8 and 9 March 2007, the European Council invited the Commission to develop legislative proposals providing for further harmonisation of the powers and strengthening of the independence of national energy regulators. It should be possible for those national regulatory authorities to cover both the electricity and the gas sectors.

(34) Energy regulators need to be able to take decisions in relation to all relevant regulatory issues if the internal market in electricity is to function properly, and to be fully independent from any other public or private interests. This precludes neither judicial review nor parliamentary supervision in accordance with the constitutional laws of the Member States. In addition, approval of the budget of the regulator by the national legislator does not constitute an obstacle to budgetary autonomy. The provisions relating to the autonomy in the implementation of the allocated budget of the regulatory authority should be implemented in the framework defined by national budgetary law and rules. While contributing to the independence of the national regulatory authority from any

political or economic interest through an appropriate rotation scheme, it should be possible for Member States to take due account of the availability of human resources and of the size of the board.'

- 4 Under the heading 'Designation and independence of regulatory authorities', Article 35 of that directive provides:

'1. Each Member State shall designate a single national regulatory authority at national level.

...

4. Member States shall guarantee the independence of the regulatory authority and shall ensure that it exercises its powers impartially and transparently. For this purpose, Member States shall ensure that, when carrying out the regulatory tasks conferred upon it by this Directive and related legislation, the regulatory authority:

- (a) is legally distinct and functionally independent from any other public or private entity;
- (b) ensures that its staff and the persons responsible for its management:
 - (i) act independently from any market interest; and
 - (ii) do not seek or take direct instructions from any government or other public or private entity when carrying out the regulatory tasks. This requirement is without prejudice to close cooperation, as appropriate, with other relevant national authorities or to general policy guidelines issued by the government not related to the regulatory powers and duties under Article 37.

5. In order to protect the independence of the regulatory authority, Member States shall in particular ensure that:

- (a) the regulatory authority can take autonomous decisions, independently from any political body, and has separate annual budget allocations, with autonomy in the implementation of the allocated budget, and adequate human and financial resources to carry out its duties; and
- (b) the members of the board of the regulatory authority or, in the absence of a board, the regulatory authority's top management are appointed for a fixed term of five up to seven years, renewable once.

In regard to point (b) of the first subparagraph, Member States shall ensure an appropriate rotation scheme for the board or the top management. The members of the board or, in the absence of a board, members of the top management may be relieved from office during their term only if they no longer fulfil the conditions set out in this Article or have been guilty of misconduct under national law.'

5 Article 36 of that directive, entitled ‘General objectives of the regulatory authority’, states:

‘In carrying out the regulatory tasks specified in this Directive, the regulatory authority shall take all reasonable measures in pursuit of the following objectives within the framework of their duties and powers as laid down in Article 37, in close consultation with other relevant national authorities including competition authorities, as appropriate, and without prejudice to their competencies:

(a) promoting, in close cooperation with the Agency, regulatory authorities of other Member States and the Commission, a competitive, secure and environmentally sustainable internal market in electricity within the Community, and effective market opening for all customers and suppliers in the Community and ensuring appropriate conditions for the effective and reliable operation of electricity networks, taking into account long-term objectives;

...’

6 Under the heading ‘Duties and powers of the regulatory authority’, Article 37(1) of that directive provides:

‘The regulatory authority shall have the following duties:

(a) fixing or approving, in accordance with transparent criteria, transmission or distribution tariffs or their methodologies;

...’

Slovak law

7 Zákon č. 250/2012 Z.z. o regulácii v sieťových odvetviach (Law No 250/2012 on the regulation of the network industries) transposed into Slovak law Directive 2009/72 and Directive 2009/73/EC of the European Parliament and of the Council of 13 July 2009 concerning common rules for the internal market in natural gas and repealing Directive 2003/55/EC (OJ 2009 L 211, p. 94). That law was amended by Zákon č. 164/2017 Z.z., ktorým sa mení a dopĺňa zákon č. 250/2012 Z.z. o regulácii v sieťových odvetviach v znení neskorších predpisov (Law No 164/2017 amending and supplementing Law No 250/2012 on regulation in the network industries, as amended).

8 According to the explanatory memorandum to Law No 164/2017:

‘The manner in which the position of chairperson of the Regulatory Authority is conferred is to be changed. Under current law, the chairperson is appointed and dismissed by the President of the Slovak Republic on a proposal from the Government of the Slovak Republic. It is proposed that the chairperson be appointed by the Government of the Slovak Republic. This step reflects the actual responsibility of the Government of the Slovak Republic in the energy regulation sector, without prejudice to the independence of the Authority in the context of further changes. The Government of the Slovak Republic bears full responsibility for energy policy in the Slovak Republic and the powers of the President of the Republic in this sector are very limited. Therefore, it is appropriate and logical that the power to appoint and dismiss the chairperson of the Authority should be vested in the Government of the Slovak Republic.

...

The Ministry of the Economy of the Slovak Republic and the Ministry of the Environment of the Slovak Republic are granted, in certain tariff regulation procedures, the procedural status of a party to the procedure, thereby providing them, in those tariff regulation procedures, with the procedural arrangements which they require for consistent protection of the public interest.

...'

- 9 The first sentence of Article 5(1) of Law No 250/2012, as amended by Law No 164/2017, provides:

'The Regulatory Authority shall be directed by a chairperson nominated and dismissed by the Government of the Slovak Republic ...'

- 10 The third sentence of Article 14(3) of that law provides:

'The regulated person who has presented a tariff proposal shall be a party to the tariff regulation procedure. If the tariff regulation procedure is initiated of the Authority's own motion, the regulated person whose tariffs the Authority intends to regulate shall be a party to the procedure. The Ministry [of the Economy] shall also be a party to the tariff regulation procedure where there is a tariff regulation procedure pursuant to Article 11(1)(d) and Article 11(1)(e) for regional distribution system operators, and Article 11(2)(c) and Article 11(2)(d) for regional distribution system operators to which more than 100 000 delivery points are connected, or the Ministry of the Environment of the Slovak Republic shall also be a party thereto where there is a tariff regulation procedure pursuant to Article 11(4)(a) to (c).'

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

- 11 On 16 October 2017, the President of the Slovak Republic brought an action before the referring court, the Ústavný súd Slovenskej republiky (Constitutional Court of the Slovak Republic), for a declaration that the first sentence of Article 5(1) and the third sentence of Article 14(3) of Law No 250/2012, as amended by Law No 164/2017, are incompatible with Article 1(1) and (2) of the Constitution of the Slovak Republic, read in conjunction with Article 4(3) TEU and Article 288 TFEU, on the ground that those provisions of that law, as amended, constitute an incorrect transposition of Directives 2009/72 and 2009/73.
- 12 According to the President of the Slovak Republic, who after 15 June 2019 continued the proceedings initiated by his predecessor, those provisions of Law No 250/2012, as amended by Law No 164/2017, do not comply with the obligation to guarantee the independence of the Regulatory Authority, which arises under Article 35(4) and (5) of Directive 2009/72 and Article 39(4) and (5) of Directive 2009/73.
- 13 In that regard, the referring court states that, in order to resolve the dispute before it, it is necessary to define the scope of the notion of 'independence' of the Regulatory Authority, within the meaning of those directives. It observes that, in the interest of simplifying the questions referred for a preliminary ruling, those questions refer only to the interpretation of Directive 2009/72, as the answers to those questions can be transposed to the interpretation of Directive 2009/73, the relevant rules of which are identical to those of Directive 2009/72.

- 14 According to the referring court, the President of the Slovak Republic has identified, in Law No 250/2012, as amended by Law No 164/2017, two instances of interference with the independence of the Regulatory Authority. The first is the amendment of the power to appoint and dismiss the chairperson of that authority, which was transferred from the President of the Slovak Republic, who is directly elected by the citizens, to the Slovak Government. The second interference consists in the extension of the group of parties to the tariff regulation procedure before that authority to representatives of national ministries who, in the context of that procedure, are supposed to defend the public interest.
- 15 Before that court, the Slovak Government maintains that the relevant provisions of Law No 250/2012, as amended by Law No 164/2017, do not undermine the independence of the Regulatory Authority, since that law contains a set of other guarantees relating to that independence that were not affected by that legislative amendment.
- 16 The referring court observes, in that regard, that its doubts as to the correctness of the transposition of Directive 2009/72 may be explained by the fact that the objective pursued by that directive consists specifically, as may be seen from recital 33, in contributing to strengthening the independence of the Regulatory Authority, in particular vis-à-vis the governments of the Member States.
- 17 It considers that, before the amendment introduced by Law No 164/2017, the provisions of Law No 250/2012, which were adopted in order to transpose that directive, made it possible to strengthen that independence. Under Law No 250/2012, it was not the Slovak Government but the President of the Slovak Republic that had the power to nominate and dismiss the chairperson of the Regulatory Authority and, moreover, no representatives of the ministries took part in the tariff regulation procedure before that authority.
- 18 However, Law No 250/2012, as amended by Law No 164/2017, restores the situation that prevailed before Directive 2009/72 was transposed, which, contrary to the objective pursued by that directive, does not contribute to strengthening the independence of the Regulatory Authority.
- 19 In those circumstances, the Ústavný súd Slovenskej republiky (Constitutional Court of the Slovak Republic) decided to stay the proceedings and to refer the following questions to the Court of Justice for a preliminary ruling:
 - ‘(1) Can Article 35(4) of Directive [2009/72] be interpreted, in particular in the light of recital 33 thereof, as precluding, in a Member State, in the context of the amendment of a national measure transposing that directive, the power to nominate and dismiss the chairperson of the Regulatory Authority from being withdrawn from the President of the Republic, who is directly elected by the citizens, and conferred instead on the Government, with the result that the legal situation which existed prior to the transposition of the directive is restored?
 - (2) Is it possible to interpret Article 35(5) of Directive [2009/72], in particular in the light of recital 34 thereof, as precluding a rule of national law which, in order to ensure defence of the public interest, permits ministers to take part in the tariff regulation procedure at the Regulatory Authority?’

Consideration of the questions referred

Preliminary observations

- 20 It is apparent from the order for reference that the provisions of Law No 250/2012, as amended by Law No 164/2017, at issue in the main proceedings restored, as regards the nomination and dismissal of the chairperson of the Regulatory Authority and the participation of representatives of the national ministries in certain tariff regulation procedures, the rules applicable in Slovak law when Directive 2003/54 was in force. Following the amendments introduced by Law No 164/2017, the power to nominate and dismiss the chairperson of that authority was conferred on the Slovak Government instead of the President of the Slovak Republic and certain ministries were granted the status of ‘parties’ to those procedures.
- 21 As Directive 2003/54 was repealed by Directive 2009/72, one of the stated objectives of which is to strengthen the independence of national regulatory authorities, a return to the legal situation that prevailed before that directive was adopted may, in the referring court’s view, constitute an interference with the independence of the national regulatory authority, within the meaning of Directive 2009/72, whereas Law No 250/2012, in its initial version, ensured the correct transposition of that directive into Slovak law.
- 22 It should be observed, in that regard, that Directive 2009/72 seeks, in essence, to establish an open and competitive internal market in electricity which enables consumers freely to choose their suppliers and suppliers freely to deliver to their customers, to create a level playing field in that market, to ensure security of supply and to combat climate change (judgment of 12 December 2019, *Slovenské elektrárne*, C-376/18, EU:C:2019:1068, paragraph 32).
- 23 In order to pursue those objectives, Directive 2009/72 confers wide powers on the national regulatory authority to regulate and monitor the market in electricity.
- 24 As stated in recital 33 of that directive, at its meeting on 8 and 9 March 2007, the European Council invited the Commission to develop legislative proposals providing for further harmonisation of the powers and strengthening of the independence of national energy regulators. In addition, according to recital 34 of that directive, energy regulators need to be able to take decisions in relation to all relevant regulatory issues if the internal market in electricity is to function properly, and to be fully independent from any other public or private interests.
- 25 It follows that, as the referring court states, Directive 2009/72 seeks to strengthen the independence of the national regulatory authority by comparison with the arrangements established by Directive 2003/54, which it repealed. Such strengthening is reflected in the provisions of Chapter IX of Directive 2009/72, entitled ‘National regulatory authorities’, which includes, in particular, Article 35 of that directive, the interpretation of which is sought by the present request for a preliminary ruling.
- 26 It should be observed, however, that the fact, pointed out by the referring court, that Law No 250/2012, as amended by Law No 164/2017, restored the legal situation which prevailed in the Slovak Republic when Directive 2003/54 was in force, as concerns the rules on the nomination and dismissal of the chairperson of the Regulatory Authority and the participation of representatives of national ministries in certain tariff regulation procedures, does not necessarily

mean, for that reason alone, that the relevant provisions of Directive 2009/72, on the independence of the Regulatory Authority, preclude the provisions of that law that laid down such rules.

- 27 Provided that those rules are adopted within the limits of the powers which Directive 2009/72 confers on Member States and are accompanied by the guarantees relating to the independence of the national regulatory authority provided for in that directive, a legal situation in which the legislature of a Member State introduced certain rules relating to the organisation and functioning of the national regulatory authority that were in force in that Member State when Directive 2003/54 was applicable is not necessarily contrary to Directive 2009/72.
- 28 It follows that, in order to provide the referring court with an answer that will be of use to it in the context of the present request for a preliminary ruling, it must be determined whether Article 35(4) and (5) of Directive 2009/72 is to be interpreted as precluding provisions of national law, such as those laid down in Law No 250/2012, as amended by Law No 164/2017, independently of their compatibility with EU law before that legislative amendment.

The first question

- 29 It should be observed that even if, formally, the referring court has limited its question to the interpretation of Article 35(4) of Directive 2009/72, that does not prevent this Court from providing the referring court with all the elements of interpretation of EU law that may be of assistance in adjudicating in the case before it, whether or not the referring court has referred to them in the wording of its questions (see, to that effect, judgment of 12 March 2020, *Caisse d'assurance retraite et de la santé au travail d'Alsace-Moselle*, C-769/18, EU:C:2020:203, paragraph 40 and the case-law cited).
- 30 Thus, it must be considered that, by its first question, the referring court is asking, in essence, whether Article 35(4) and (5) of Directive 2009/72 is to be interpreted as precluding legislation of a Member State under which the government of that Member State is competent to appoint and remove the chairperson of the national regulatory authority.
- 31 Under Article 35(4) of Directive 2009/72, Member States are required to guarantee the independence of the national regulatory authority and to ensure that it exercises its powers impartially and transparently.
- 32 Although the concept of 'independence' is not defined in Directive 2009/72, the Court has already held that, as regards public bodies, that concept, in its normal meaning, refers to a status that ensures that the body in question is able to act completely freely in relation to those bodies in respect of which its independence is to be ensured, shielded from any instructions or pressure (see, by analogy, judgment of 13 June 2018, *Commission v Poland*, C-530/16, EU:C:2018:430, paragraph 67).
- 33 In order to guarantee such independence, Article 35(4) of Directive 2009/72 provides, in paragraph (a), that that authority is to be legally distinct and functionally independent from any other public or private entity. Furthermore, paragraph (b)(i) and (ii) of Article 35(4) sets out the requirements applicable to the staff and the persons responsible for the management of that authority, who must act independently from any market interest and must not seek or take direct

instructions from any government or other public or private entity when carrying out the regulatory tasks. Those requirements mean that the national regulatory authority must carry out its regulatory tasks without being exposed to any external influence.

- 34 In addition, in order for the independence of the national regulatory authority to be protected, Article 35(5)(b) of Directive 2009/72 requires that the members of the board of the regulatory authority or, in the absence of a board, its top management be appointed for a fixed term of five up to seven years, renewable once. In that context, Member States are to ensure an appropriate rotation scheme for the board or the top management, while the board or the top management may be relieved from office during their term only if they no longer fulfil the conditions set out in Article 35 or have been guilty of misconduct under national law.
- 35 In order for those requirements to be satisfied, the power to nominate and dismiss the board of the national regulatory authority or, in the absence of a board, its top management must be framed strictly by legislation and exercised on the basis of objective criteria which are clearly and exhaustively set out and verifiable (see, by analogy, judgment of 13 June 2018, *Commission v Poland*, C-530/16, EU:C:2018:430, paragraph 86).
- 36 Nonetheless, it should be noted that no provision of Directive 2009/72 specifies the authority or authorities of the Member States that should be responsible for appointing and dismissing the members of the board or the top management of the national regulatory authority, including the chairperson of that authority.
- 37 It should be noted, in that regard, that it follows from Article 288 TFEU that the Member States are required, when transposing a directive, to ensure that it is fully effective, whilst retaining a broad discretion as to the choice of ways and means of ensuring that the directive is implemented. That freedom of choice does not affect the obligation imposed on all Member States to which the directive is addressed to adopt all the measures necessary to ensure that the directive concerned is fully effective in accordance with the objective which it seeks to attain (judgment of 19 October 2016, *Ormaetxea Garai and Lorenzo Almendros*, C-424/15, EU:C:2016:780, paragraph 29 and the case-law cited).
- 38 Member States thus enjoy institutional autonomy as regards the organisation and the structuring of their regulatory authorities within the meaning of Article 35 of Directive 2009/72, which must, however, be exercised in accordance with the objectives and obligations laid down in that directive (see, by analogy, judgment of 19 October 2016, *Ormaetxea Garai and Lorenzo Almendros*, C-424/15, EU:C:2016:780, paragraph 30 and the case-law cited).
- 39 It follows that Directive 2009/72 and, in particular, Article 35 thereof do not preclude the government of a Member State from being able to appoint and remove the chairperson of the national regulatory authority.
- 40 That power of nomination and dismissal must, however, be exercised in such a way that the independence of that authority is guaranteed, in the sense that all the requirements set out in Article 35(4) and (5) of Directive 2009/72 must be met.
- 41 In this instance, the Slovak Government states in its written observations that the independence of the Regulatory Authority is guaranteed by all the national provisions that transpose Directive 2009/72 that are currently in force. It refers to the provisions, first, of Article 4(2) and (3) of Law No 250/2012, as amended by Law No 164/2017, which establishes the impartiality and

independence of the Regulatory Authority and defines its bodies; second, of Article 5 of that law, as amended, which governs, inter alia, the nomination, legal status, activity and dismissal of the chairperson of that authority; third, of Article 6 of that law, as amended, which relates to the activity of the regulatory board; and, fourth, of Article 7 of that law, as amended, which governs the nomination and dismissal of members of the regulatory board and the requirements applicable to them. In particular, the chairperson of the Regulatory Authority has a term of six years, his or her salary is fixed in a clear and transparent fashion by Law No 250/2012, as amended by Law No 164/2017, and he or she can be removed from office only for the reasons expressly set out in that law.

- 42 The Slovak Government maintains that those provisions of Slovak law ensure that it exercises no influence over the chairperson of the Regulatory Authority that might to undermine the independence of that authority.
- 43 It should be borne in mind in that regard that, since the Court must take into account the factual and legal context of the question referred for a preliminary ruling as defined by the order for reference, it must answer the question referred having regard solely to the provisions set out by the referring court (see, to that effect, judgment of 28 July 2016, *Autorità per le Garanzie nelle Comunicazioni*, C-240/15, EU:C:2016:608, paragraphs 30 and 31).
- 44 In fact, the information provided in orders for reference not only enables the Court to give useful answers but also serves to ensure that the governments of the Member States and other interested persons are given an opportunity to submit observations in accordance with Article 23 of the Statute of the Court of Justice of the European Union. It is for the Court to ensure that that opportunity is safeguarded, given that, under Article 23, only the orders for reference are notified to the interested parties (see, to that effect, judgment of 4 May 2016, *Pillbox 38*, C-477/14, EU:C:2016:324, paragraph 26 and the case-law cited).
- 45 Thus, the Court cannot take account of provisions of national law, such as those referred to by the Slovak Government in its written observations, since they were not mentioned by the referring court in its request for a preliminary ruling. It will be for that court to determine whether those provisions make it possible to guarantee the independence of the Regulatory Authority, as required by Directive 2009/72, and the answer to that question is not prejudged by the fact that, as is apparent from paragraph 39 of this judgment, that directive does not preclude the Slovak Government from being able to appoint and remove the chairperson of the Regulatory Authority.
- 46 It follows from the foregoing considerations that the answer to the first question must by that Article 35(4) and (5) of Directive 2009/72 is to be interpreted as not precluding legislation of a Member State under which the government of that State is competent to appoint and remove the chairperson of the national regulatory authority, provided that all the requirements set out in those provisions are satisfied, which it is for the referring court to verify.

The second question

- 47 Having regard to the Court's case-law referred to in paragraph 29 of this judgment, it must be considered that, by its second question, the referring court is asking, in essence, whether Article 35(4) and (5) of Directive 2009/72 must be interpreted as precluding legislation of a Member States which, with the aim of guaranteeing the protection of the public interest, provides for the participation of representatives of ministries of that State in certain tariff regulation procedures before the national regulatory authority.

- 48 It should be stated, by way of preliminary point, that by that question that court is referring to the participation in the abovementioned procedures of representatives of the Ministry of the Economy and the Ministry of the Environment of the Slovak Republic. Subject to the verifications to be carried out by the referring court, it is apparent from the request for a preliminary ruling that the participation of the Ministry of the Environment relates only to tariff regulation procedures in connection with the production and supply of drinking water. Thus, in such a case, the provisions of Directive 2009/72, which apply, in particular, to the common rules on the generation, transmission, distribution and supply of electricity, and also to provisions relating to consumer protection, with the aim of improving and integrating competitive markets for electricity in the European Union, should not apply to such participation.
- 49 That preliminary point having been made, it should be observed that the second question concerns the conditions that the functioning of the national regulatory authority must meet in order for its independence in taking decisions to be guaranteed.
- 50 In that regard, it follows from Article 35(5)(a) of Directive 2009/72 that the national regulatory authority must take autonomous decisions, independently from any political body.
- 51 Furthermore, as stated in paragraph 33 of this judgment, the independence of the staff and the persons responsible for the management of the national regulatory authority, required by Article 35(4)(b)(ii) of Directive 2009/72, means that that authority carries out its regulatory tasks free from any external influence.
- 52 That being the case, according to that provision, the requirement of independence of the staff and the persons responsible for the management of the national regulatory authority is without prejudice, in particular, to the general guidelines laid down by the government of the Member State concerned, which, however, cannot affect the regulatory duties and powers referred to in Article 37 of Directive 2009/72. These include duties and powers relating to the fixing, approval and monitoring of various tariffs and prices, in particular those set out in Article 37(1)(a), consisting in fixing or approving, in accordance with transparent criteria, transmission or distribution tariffs or their methodologies.
- 53 In fact, in that latter regard, it follows from Article 36 of that directive that, within the framework of the duties and powers as laid down in Article 37 of that directive, the national regulatory authority is to take all reasonable measures in pursuit of the objectives of public interest listed in Article 36, including, inter alia, promoting a competitive, secure and environmentally sustainable internal market, energy efficiency or consumer protection.
- 54 It follows that independence in decision-making, within the meaning of Article 35(4)(b)(ii) and (5)(a) of that directive, means that, within the framework of the regulatory duties and powers referred to in Article 37 of that directive, the national regulatory authority is to adopt autonomous decisions, on the sole basis of the public interest, to ensure compliance with the objectives pursued by that directive, without being subject to external instructions from other public or private bodies.
- 55 It should be observed, however, that Article 35(4) and (5) of Directive 2009/72 contains no provision that would preclude the participation of representatives of national ministries in certain tariff regulation procedures, which concern, in particular, access to the electricity transmission and distribution network and the transmission and distribution of electricity.

- 56 It follows that, given the wide discretion which they enjoy when implementing the obligations arising under Directive 2009/72, to which reference is made in paragraphs 37 and 38 of this judgment, Member State may adopt rules that allow such participation, provided that the independence of the national regulatory authority in taking decisions, within the meaning of Article 35(4) and (5) of that directive, continues to be guaranteed.
- 57 Therefore, in the present case the fact that the provisions at issue of Law No 250/2012, as amended by Law No 164/2017, provide for the participation of representatives of national ministries in certain tariff regulation procedures does not necessarily have the effect, for that sole reason, that the Regulatory Authority does not carry out its tariff regulating tasks independently, within the meaning of Directive 2009/72 and, in particular, of Article 35 thereof.
- 58 The Slovak Government states, in that regard, in its written observations that such participation is necessary and relevant in order for those ministries to be informed of the tariff regulation procedures, since those procedures are of general interest for society as a whole, as they relate principally to the objectives and priorities of the energy policy of the Slovak Republic.
- 59 It further observes that the representatives of those ministries have no specific right that allows them to interfere in the adoption of the decisions of the Regulatory Authority, as their participation is, in essence, subject to the rules of general administrative procedure of Slovak law. Those rules ensure that all parties to the procedures in question are able to participate actively and thus to defend their rights and their interests, express their views and submit proposals, lodge observations and take part in the discussions, produce evidence, consult the files, be notified of decisions and, where appropriate, challenge them in by means of appeals before the regulatory board of that authority and also before the national courts.
- 60 On the other hand, the President of the Slovak Republic claims, in his written observations, that, even under Law No 250/2012, before it was amended by Law No 164/2017, the Regulatory Authority had, during 2017, cancelled initial decisions under pressure from the Slovak Government and replaced them by decisions in line with the government's political will.
- 61 It should be emphasised, in that regard, that in its request for a preliminary ruling the referring court neither mentioned the national rules and provisions to which the Slovak Government refers – which, as is clear from paragraph 45 of this judgment, prevents the Court from taking them into account – nor provided any information concerning the national regulatory authority's practice in taking decisions.
- 62 That being the case, in order to provide a useful answer to the second question, it must be observed that, as the Commission stated in its written observations, Article 35(4) and (5) of Directive 2009/72 requires that, in this case, the representatives of the national ministries must not be able to use their participation in those tariff regulation procedures to put any pressure whatsoever on the Regulatory Authority or to give it instructions that might influence its decisions within the framework of its duties and powers under Article 37 of that directive.
- 63 Although Directive 2009/72 does not preclude the government of a Member State, in particular through the participation of representatives of its ministries, from being able to state its position before the national regulatory authority on the way in which it considers that that authority might take the public interest into account in the framework of its regulatory tasks, that participation

and, in particular, the views expressed by those representatives during the tariff regulation procedures cannot be binding or in any case be regarded by the regulatory authority as instructions with which it would be required to comply when exercising its duties and its powers.

- 64 In addition, the rules on the participation of representatives of national ministries in tariff regulation procedures must not affect the scope of the regulatory authority's decisions, adopted in application of the duties and powers provided for in Article 37. In particular, where such duties or powers so require, those rules on participation cannot affect the mandatory nature and the direct applicability of the decisions of that authority, for example by requiring that those decisions be first approved or authorised by those representatives before being implemented.
- 65 It follows from the foregoing considerations that the answer to the second question must be that Article 35(4) and (5) of Directive 2009/72 is to be interpreted as not precluding legislation of a Member State which, with the aim of guaranteeing the protection of the public interest, provides for the participation of representatives of ministries of that State in certain tariff regulation procedures before the national regulatory authority, provided that the independence of that authority in taking decisions is observed, which it is for the referring court to verify.

Costs

- 66 Since these proceedings are, for the parties to the main proceedings, a step in the action pending before the national court, the decision on costs is a matter for that court. Costs incurred in submitting observations to the Court, other than the costs of those parties, are not recoverable.

On those grounds, the Court (Fifth Chamber) hereby rules:

- 1. Article 35(4) and (5) 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 is to be interpreted as not precluding legislation of a Member State under which the government of that State is competent to appoint and remove the chairperson of the national regulatory authority, provided that all the requirements set out in those provisions are satisfied, which it is for the referring court to verify.**
- 2. Article 35(4) and (5) of Directive 2009/72 is to be interpreted as not precluding national legislation of a Member State which, with the aim of guaranteeing the protection of the public interest, provides for the participation of representatives of ministries of that State in certain tariff regulation procedures before the national regulatory authority, provided that the independence of that authority in taking decisions is observed, which it is for the referring court to verify.**

[Signatures]