Reports of Cases

OPINION OF ADVOCATE GENERAL
SZPUNAR
delivered on 12 July 2018 [1]

Case C-238/17

UAB „Renerga“
v
AB „Energijos skirstymo operatorius“
AB „Lietuvos energijos gamyba“
joined parties:
UAB „BALTPOOL“,
Lietuvos Respublikos Vyriausybė,
Achema AB,
Achemos Grupė UAB

(Request for a preliminary ruling from the Vilniaus miesto apylinkės teismas (District Court of the City of Vilnius, Lithuania))

(Request for a preliminary ruling — Internal market in electricity — Directive 2009/72/EC — Article 3(2) — Public service obligations — Article 3(6) — Financial compensation — Article 3(15) — Member State obligation to inform the Commission of all measures adopted to fulfil universal service and public service obligations — Article 36, point (f) — Regulatory authority)

1. The present request for a preliminary ruling from the Vilniaus miesto apylinkės teismas (District Court of the City of Vilnius, Lithuania) stems from a dispute between an energy producer and two buyers as to the alleged late payment of public service compensation from the latter to the former.

2. My proposal is that the Court answer to the effect that the questions of the referring court are inadmissible for lack of a public service obligation pursuant to Directive 2009/72/EC. [2] The present case is simply not within the ambit of Directive 2009/72.

Legal framework

EU law

3. Recitals 46 and 50 of Directive 2009/72 are worded as follows:

‘(46) Respect for the public service requirements is a fundamental requirement of this Directive, and it is important that common minimum standards, respected by all Member States, are specified in this Directive, which take into account the objectives of consumer protection, security of supply,

1 Original language: English.

2 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).

environmental protection and equivalent levels of competition in all Member States. It is important that the public service requirements can be interpreted on a national basis, taking into account national circumstances and subject to the respect of Community law.

...

(50) The public service requirements, including as regards the universal service, and the common minimum standards that follow from them need to be further strengthened to make sure that all consumers, especially vulnerable ones, are able to benefit from competition and fair prices. The public service requirements should be defined at national level, taking into account national circumstances; Community law should, however, be respected by the Member States. …'

4. Pursuant to Article 3(2), (6) and (15) of Directive 2009/72:

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

...

6. Where financial compensation, other forms of compensation and exclusive rights which a Member State grants for the fulfilment of the obligations set out in paragraphs 2 and 3 are provided, this shall be done in a non-discriminatory and transparent way.

...

15. Member States shall, upon implementation of this Directive, inform the Commission of all measures adopted to fulfil universal service and public service obligations, including consumer protection and environmental protection, and their possible effect on national and international competition, whether or not such measures require a derogation from this Directive. They shall inform the Commission subsequently every two years of any changes to such measures, whether or not they require a derogation from this Directive.'

5. According to Article 36, point (f), of Directive 2009/72,

'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:

…

ensuring that system operators and system users are granted appropriate incentives, in both the short and the long term, to increase efficiencies in system performance and foster market integration'.

Lithuanian law

6. Directive 2009/72 has been transposed into Lithuanian law by the Energetikos įstatymas (Law on Energy), the Elektros energetikos įstatymas (Law on Electricity) and the Atsinaujinančių išteklių energetikos įstatymas (Law on Energy from Renewable Sources).

7. On the basis of the provisions of the Law on Electricity, the Lithuanian Government adopted on 18 July 2012 Vyriausybės nutarimas Nr. 916 Dėl Viešuosius interesus atitinkančių paslaugų elektros energetikos sektoriuje teikimo tvarkos aprašo patvirtinimo (Government Resolution No 916 on the approval of the procedure for the provision of public interest services in the electricity sector). Pursuant to point 3 of this Resolution, 'public service compensation' is managed in accordance with Vyriausybės nutarimas Nr. 1157 Dėl Viešuosius interesus atitinkančių paslaugų elektros energetikos sektoriuje lėšų administravimo tvarkos aprašo patvirtinimo (Government Resolution No 1157 of 19 September 2012 on the approval of the procedure for the administration of monies for public interest services in the electricity sector).

8. By virtue of point 18.1 of Resolution No 916[3] compensation paid to operators for the public services listed in that Resolution may be temporarily suspended in accordance with the terms and conditions laid down in Resolution No 1157, if the public service provider or persons connected to it fails to pay all or part of the public service compensation due for the electricity actually consumed,[4] in accordance with point 16 of Resolution No 1157.

9. Resolution No 1157 in turn defines 'connected persons' (point 3.5).[5] In point 26.1 it stipulates that the distribution system operator, the purchasing undertaking and the administrator are to suspend the payment of monies to public interest service providers if these providers and/or connected persons fail to pay public interest service monies for electricity actually consumed. The same provision defines when the payment of public service compensation may be resumed. Point 26.2 of Resolution No 1157 provides that, if the public interest service provider withdraws from the group of connected persons in which at least one person has not paid public interest service monies, in whole or in part, for electricity consumed, the outstanding public interest service monies for public interest service provision are to be paid to it only when the formerly connected persons have paid all public interest service monies due for electricity consumed until the withdrawal of that person from the group of connected persons.

Facts, procedure and questions referred

10. The applicant in the main proceedings, UAB „Renerga" ('Renerga'), operates five power plants in which it generates electricity from renewable energy sources. Renerga feeds the electricity generated into electrical grids.

11. Together with Achema as well as other companies, Renerga forms part of Achemos Grupė UAB (the 'Achema group').

3 Point 18.1 was inserted into Resolution No 916 by way of an amendment through Government Resolution No 76 of 25 January 2016.

4 The request for a preliminary reference does not contain any further details as to the nature or modalities of that public service compensation with regard to actual consumption.

5 It was amended by Government Resolution No 77 of 27 January 2016.

12. Under contracts of 7 January and 19 June 2013 concluded between Renerga and the defendants (AB Energijos skirstymo operatorius and AB Lietuvos energijos gamyba), Renerga undertakes to sell to the defendants, who undertake to buy and pay for, all the electricity it produces and supplies to the grid. Under these contracts, the price that the defendants must pay to Renerga for this electricity is composed of the market price of electricity and public service compensation, which corresponds to the difference between (i) the fixed rate applicable to the electricity produced by Renerga under the conditions provided for by the regulations and (ii) the market price.

13. By communication No 16-SD-108 of 25 February 2016, the administrator of the public service compensation, BALTPOOL, informed the defendants that, pursuant to Resolutions Nos 916 and 1157, payment of the public service compensation to Renerga was to be suspended in full until full payment had been made by Achema or other persons linked to it of the public service compensation for electricity actually consumed. According to BALTPOOL, Achema had not completely fulfilled its obligation to pay public service compensation for the electricity actually consumed. Since Achema's capital and the controlling stake in Renerga were held by the Achema group, Achema and Renerga were to be considered related persons.

14. On 26 February 2016, one of the two defendants, AB Energijos skirstymo operatorius, informed Renerga that payment of the public service compensation due to it was suspended. On 8 March 2016, the other defendant, AB Lietuvos energijos gamyba, sent a similar communication to Renerga, in which it stated that the payment of the public service compensation due to it was suspended for an indefinite period and that payment to it for the electricity sold would be made only at the market price.

15. By its communication No 16-SD-135 of 10 March 2016, BALTPOOL confirmed to Renerga that the payment of public service compensation was suspended and specified that on 31 January 2016 an invoice had been sent to Achema for a total amount of EUR 629 794.15, including VAT, the due date being 24 February 2016. Since on 25 February 2016 Achema had not paid this invoice, the payment of the public service compensation to Achema and to any person considered to be linked to this undertaking had to be suspended.

16. As a result of the defendants' failure to fulfil their obligation to pay Renerga the full price due for the electricity they purchase, in particular the public service compensation component, the payment of which, as part of the electricity price, was provided for in the contracts, the defendants accumulated a debt of EUR 1 248 199.81 to Renerga as unpaid public service compensation.

17. This debt was repaid to Renerga on 21 April 2016, the date on which BALTPOOL adopted communications Nos 16-SD-188 and 16-SD-189, addressed to the defendants, concerning the payment of suspended public service compensation.

18. On 12 December 2016, Renerga brought an action before the Vilniaus miesto apylinkės teismas (District Court of the City of Vilnius) seeking orders that the defendants pay, respectively EUR 9 172.84 and EUR 572.82 in damages, namely default interest for late payment of public service compensation, under the contracts for the purchase and sale of electricity concluded, respectively on 7 January and 19 June 2013. In addition, Renerga requests that both defendants be ordered to pay it interest at the annual rate of 8.05%.

19. Considering that the dispute requires clarification as to various provisions of Directive 2009/72, by its judgment of 11 April 2017, received at the Court on 9 May 2017, the Vilniaus miesto apylinkės teismas (District Court of the City of Vilnius) decided to stay proceedings and to refer the following questions to the Court for a preliminary ruling:

'(1) Is the objective of "ensuring that system operators and system users are granted appropriate incentives, in both the short and the long term, to increase efficiencies in system performance and foster market integration", laid down in Article 36, point (f), of Directive 2009/72 for the

regulatory authority carrying out the regulatory tasks specified in Directive 2009/72, to be understood and interpreted as prohibiting a failure to grant incentives (a failure to pay PIS [public interest service] compensation) or their restriction?

(2) Having regard to the fact that Article 3(2) of Directive 2009/72 provides that PIS obligations are to be clearly defined, transparent, non-discriminatory and verifiable, and Article 3(6) of Directive 2009/72 provides that financial compensation to PIS persons is to be determined in a non-discriminatory and transparent way, it is necessary to clarify the following:

(2.1) are the provisions of Article 3(2) and (6) of Directive 2009/72 to be interpreted as prohibiting the incentivisation of PIS providers from being restricted if they properly fulfil the obligations assumed by them that are related to PIS provision?

(2.2) is an obligation laid down in national law to suspend the payment of financial compensation received by PIS providers irrespective of the activities for PIS provision carried out by the PIS provider and of the fulfilment of the obligations assumed by it, but linking the ground for restricting (suspending) the payment of PIS compensation to, and making it dependent on, the performance by a person connected with the PIS provider (a controlling interest in which is held by the same undertaking as that which has a controlling interest in the PIS provider) of actions and obligations when accounting for the PIS consumption monies calculated for that undertaking, to be regarded as discriminatory, unclear and restrictive of fair competition for the purposes of the provisions of Article 3(2) and (6) of Directive 2009/72?

(2.3) is an obligation laid down in national law to suspend the payment of financial compensation received by PIS providers, while the PIS providers remain obliged to continue to fulfil in full their PIS provision obligations and related contractual obligations to undertakings purchasing electricity, to be regarded as discriminatory, unclear and restrictive of fair competition for the purpose of the provisions of Article 3(2) and (6) of Directive 2009/72?

(3) Under Article 3(15) of Directive 2009/72 which requires Member States to inform the European Commission every two years of changes to all measures adopted to fulfil universal service and public service obligations, is a Member State which has established in national legal measures legislation laying down grounds, rules and a mechanism for restricting compensation payable to PIS providers obliged to inform the European Commission of such new legislation?

(4) Does the laying down by a Member State in national law of grounds, rules and a mechanism for restricting compensation payable to PIS providers offend against the objectives of implementation of Directive 2009/72 and against general principles of EU law (legal certainty, legitimate expectations, proportionality, transparency and non-discrimination)?'

20. On 28 February 2018, the Court sent to the referring court a request for clarification pursuant to Article 101 of its Rules of Procedure, to which the referring court responded on 26 March 2018.

21. Written observations were submitted by the parties in the main proceedings, the Achema group, BALTPOOL, the Lithuanian Government and the European Commission. All of these, with the exception of the defendants in the main proceedings, took part at the hearing which was held on 3 May 2018.

Assessment

Admissibility

Issue

22. By its questions the referring court in essence seeks to ascertain whether various provisions of Directive 2009/72 and the general principles of EU law preclude the application of national rules providing for the possibility of suspending, vis-à-vis energy producers, payment of public service compensation, aimed at promoting the production of electricity from renewable energy sources, until such time as the persons linked to the said producers have paid the public service compensation to which they are liable for the electricity they have actually consumed.

23. The case at issue emanates from a dispute in which contracts between the electricity producer, Renerga, and the two companies Energijos skirstymo operatorius and Lietuvos energijos gamyba, provides for the former to *sell* all the electricity it produces (which is produced from renewable energy sources) to the latter. The two buying companies are in turn obliged to pay for the electricity bought. What the contracts do not oblige Renerga to do is to actually *produce* electricity. I understand the explanations of the referring court to imply that the contracts are legal relationships which are governed by civil law.

24. A defining feature of the case at issue is the way the price for the electricity bought by the two firms is calculated: a so-called public service compensation is added to the market price of electricity. This public service compensation, including the modalities of its administration is provided for, in particular, by Resolutions Nos 916 and 1157.

25. The procedure before the referring court concerns an action brought for damages for *late payment* of public service compensation. Ergo, these questions merely deal with the *rules on the arrangements for paying such compensation* and not the (initial) right of the service provider to public service compensation, let alone the possible classification of such compensation as unlawful State aid.

26. What the questions presuppose, however, is that Renerga was actually subject to public service obligations imposed by a Member State (the Republic of Lithuania).

27. I do not believe this to be the case, which is why in my view the questions posed by the referring court are inadmissible. There is no act of a Member State imposing a public service obligation.

Article 3(2) of Directive 2009/72

28. Pursuant to Article 3(2) of Directive 2009/72, having full regard to 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. Article 106(2) TFEU in turn stipulates that undertakings 'entrusted' with the operation of services of general economic interest are subject to the rules contained in the Treaties, in particular the rules on competition, in so far as the application of such rules does not obstruct the performance, in law or in fact, of the particular tasks assigned to them.

29. Both these provisions have in common that it is the *Member States* who are at the origin of imposing, in the general economic interest, public service obligations (Article 3(2) of Directive 2009/72) or entrusting undertakings with the operation of services in the general economic interest (Article 106(2) TFEU).

30. None of the Lithuanian regulatory acts, cited in the legal framework of this Opinion, contains a public service obligation imposed on Renerga.

31. In particular, Resolutions Nos 916 and 1157 are confined to the regulation of the procedure for the provision of public interest services in the electricity sector and the approval of the procedure for the administration of monies for public interest services in the electricity sector. The provisions of these resolutions do not impose obligations on electricity producers using renewable energy sources. Nowhere is it stipulated that a company such as Renerga is under an obligation to generate or transmit such electricity.

32. There is, therefore, a lack of an act of a Member State.

33. Nor do the contracts concluded between the parties in the main proceedings impose such an obligation.

34. Regardless of the question whether, in principle, a private-law *contract* can contain a public service obligation imposed by a Member State, I fail to detect a public service *obligation* in the contract. Indeed, the contracts, which were concluded freely, without, as it appears, intervention by the public authorities, merely provide that Renerga undertakes to sell to the defendants, who undertake to buy from it, the electricity it produces in its power stations and supplies to the grid, which is energy from renewable sources. It appears that Renerga merely exercised its contractual freedom and thus entered into an obligation [6] on a voluntary basis. Such actions cannot in my view be construed as an obligation within the meaning of Article 3(2) of Directive 2009/72.

35. As a consequence, the Republic of Lithuania cannot have imposed a public service obligation within the meaning of Article 3(2) of Directive 2009/72.

36. Interestingly, this too appears to be the opinion of the referring court, for while that court states that under points 7.1 and 8.1 of Resolution No 916 Renerga is regarded as a public interest service provider, [7] it itself considers, as has emerged in its reply to the Court's request for clarification, that Renerga has not had a public service obligation imposed on it *under Article 3 of Directive 2009/72*.

37. To complete the picture, it should be stressed that it is immaterial for the purposes of the present request for a preliminary ruling that, as outlined by the referring court, Renerga has been properly fulfilling its obligations related to the contracts, meaning that it has been feeding electricity generated from renewable energy sources into the defendants' grids, whereas the latter have failed to fulfil their counter-obligation to pay Renerga accordingly the full purchase price for the electricity, including the public service compensation.

38. The question to what extent parties to the contracts did not fulfil their obligations resulting from these contracts and the issue whether, in this context, they could rely on Resolutions Nos 916 and 1157 is for the national courts to determine. Directive 2009/72 does not, as explained, come into play here.

6 To sell, but not to produce.

7 Without, as stated above in this Opinion, it being specified what the public interest service would consist of.

39. I am well aware that where questions submitted by national courts concern the interpretation of a provision of EU law, the Court is, in principle, obliged to give a ruling.[8] The case at issue does not, however, in my view enable the Court to give a useful answer to the questions submitted, given that it is quite obvious that the interpretation sought of the various provisions of Directive 2009/72 bears no relation to the actual facts of the main action or its purpose.[9]

Result

40. All these considerations lead me to believe that the present request for a preliminary ruling is inadmissible.

Substance (on a hypothetical basis)

41. The remainder of my assessment is carried out for the eventuality that the Court should not share my analysis thus far and, instead, decide to reply to the questions of the referring court.

Question 1

42. By its first question, the referring court in essence seeks to ascertain whether Article 36, point (f), of Directive 2009/72 is to be interpreted as prohibiting the regulatory authority from not granting any incentives, including compensation for public service obligations, or from limiting such incentives.

43. Article 36 of Directive 2009/72 sets out the general objectives of the regulatory authority. It stipulates that in carrying out the regulatory tasks specified in this directive, the regulatory authority is to take all reasonable measures in pursuit of a range of objectives,[10] one of those objectives being to ensure that system operators and system users are granted appropriate incentives, in both the short and the long term, to increase efficiencies in system performance and foster market integration (point (f) of Article 36).

44. I do not see to what extent the interpretation of this provision is relevant for the purposes of the dispute in the main proceedings.

45. Those proceedings do not have as their object actions of the regulatory authority.[11] Moreover, it is nowhere explained by the referring court how the temporary suspension of compensation to producers of electricity produced from renewable sources is linked to an incentive the objective of which is to increase efficiencies in system performance.

46. My proposed reply to Question 1 is, therefore, that Article 36, point (f), of Directive 2009/72 does not preclude the application of national rules providing for the possibility of suspending the payment of compensation intended to promote the production of electricity from renewable energy sources to energy producers until such time as persons connected with the producer have paid public service compensation for actual electricity consumption.

8 See judgments of 17 July 1997, *Leur-Bloem* (C-28/95, EU:C:1997:369, paragraph 25), and of 2 March 2017, *Pérez Retamero* (C-97/16, EU:C:2017:158, paragraph 21).

9 See for comparable situations, judgments of 7 July 2011, *Agafiței and Others* (C-310/10, EU:C:2011:467, paragraph 27), and of 2 March 2017, *Pérez Retamero* (C-97/16, EU:C:2017:158, paragraph 22).

10 All this 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.

11 By virtue of Article 35(1) of Directive 2009/72, a Member State must designate a single national regulatory authority. The request for a preliminary ruling does not specify which body the Republic of Lithuania has designated as such an authority (it is the National Control Commission for Prices and Energy — https://ec.europa.eu/energy/en/national-regulatory-authorities). Instead, it refers in two instances to the Lithuanian Government.

Question 2

47. By its second question, the referring court would like to establish whether Article 3(2) and (6) of Directive 2009/72 preclude national legislation which allows, on grounds not directly linked to the activities of producers of electricity from renewable sources but attributable to the activities of persons linked to the producer, to suspend payment of public service compensation to producers, even if they fulfil all contractual obligations towards the companies purchasing electricity from them. Furthermore, the referring court seeks clarification as to whether the arrangements for payment of compensation, which make it possible to suspend payment of such compensation, are discriminatory, unclear or restrictive of competition.

48. According to Article 3(6) of Directive 2009/72, where financial compensation, other forms of compensation and exclusive rights which a Member State grants for the fulfilment of the obligations set out in paragraphs 2 and 3 of that article are provided, this is to be done in a non-discriminatory and transparent way.

49. The term 'where' in this provision indicates that Member States are under no obligation to financially compensate undertakings subject to public service obligations under Article 3(2) of Directive 2009/72.

50. Moreover, it should be recalled that it follows from recital 46 of Directive 2009/72 — which states that 'common minimum standards' are specified in the directive, which take into account inter alia environmental protection — that the directive does not fully and exhaustively harmonise all aspects covered by it.

51. At no point does the directive contain detailed rules for the application of support measures to public service providers in the Member States. I infer from this that, as long as they respect general principles, such as the principles of non-discrimination and transparency, Member States dispose of a certain margin of discretion.

52. Finally, the Court has also held, with respect to the precursor of Directive 2009/72,[12] that Member States are entitled to define the scope and the organisation of their services in the general economic interest. In particular, they may take account of objectives pertaining to their national policy.[13]

53. I therefore propose that the reply to Question 2 should be that Article 3(2) and (6) of Directive 2009/72 does not preclude national legislation which allows, on grounds not directly linked to the activities of producers of electricity from renewable sources but attributable to the activities of persons linked to the producer, the suspension of payment of public service compensation to producers, even if they fulfil all contractual obligations towards the companies purchasing electricity from them.

Question 3

54. By its third question, the referring court asks whether, in accordance with Article 3(15) of Directive 2009/72, the Republic of Lithuania was required to inform the Commission of the introduction in national law of the possibility of suspending payment of a support measure in favour of public service providers.

12 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 (OJ 2003 L 176, p. 37).

13 See judgment of 21 December 2011, *ENEL* (C-242/10, EU:C:2011:861, paragraph 50).

55. Article 3(15) of Directive 2009/72 requires Member States to inform the Commission of all measures adopted to fulfil universal service and public service obligations, including environmental protection, regardless of whether such measures require a derogation from the directive. They are also to inform the Commission every two years of any changes to such measures, again regardless of whether they require a derogation from the directive.

56. I cannot fathom how a modification and suspension of payment arrangements should constitute a measure *fulfilling* a public service obligation within the meaning of Article 3(15) of Directive 2009/72.

57. My proposed reply to Question 3 is, therefore, that Article 3(15) of Directive 2009/72 does not require a Member State to inform the Commission of the introduction in national law of the possibility of suspending payment of a support measure in favour of public service providers.

Question 4

58. By its fourth question, the referring court essentially seeks to ascertain whether the laying down by a Member State in national law of grounds rules and a mechanism for restricting compensation payable to public interest service providers go against the objectives of the implementation of Directive 2009/72 and against general principles of EU law (legal certainty, legitimate expectations, proportionality, transparency and non-discrimination).

59. The information furnished by the referring court does not put me in a position to assess to what extent the abovementioned general principles of EU law would be infringed.

60. Moreover, the relevant elements have already been dealt with in the sections on admissibility and the second question. Indeed, if it were assumed that the subject matter of the case at issue fell within the scope of Directive 2009/72, there would be no need to resort to the primary law principles advanced by the referring court.

Conclusion

61. In the light of the foregoing considerations, I propose that the Court answer the questions referred by the Vilniaus miesto apylinkės teismas (District Court of the City of Vilnius, Lithuania) as follows:

The request for a preliminary ruling of 11 April 2017 of the Vilniaus miesto apylinkės teismas (District Court of the City of Vilnius, Lithuania) is inadmissible.