



Reports of Cases

OPINION OF ADVOCATE GENERAL
MENGOZZI
delivered on 12 April 2016¹

Case C-121/15

Association nationale des opérateurs détaillants en énergie (ANODE)

v

**Premier ministre,
Ministre de l'Économie, de l'Industrie et du Numérique,
Commission de régulation de l'énergie,
ENGIE, formerly GDF Suez**

(Request for a preliminary ruling from the Conseil d'État (France))

(Reference for a preliminary ruling — Directive 2009/73/EC — Internal market in natural gas — State intervention in prices for the supply of natural gas — Obstacle to the achievement of a competitive market in natural gas — Public service obligation — General economic interest — Objectives of security of supply and territorial cohesion — Costs covered in full)

1. In this case the Court is again called upon to address the sensitive matter of the extent of the power of the Member States to intervene in the fixing of prices for the supply of natural gas. This is a sensitive matter because it involves reconciling two requirements which are not without mutual contradiction: on the one hand, the express objective of Directive 2009/73² of opening up the national markets so as to achieve a completely open internal market in natural gas in the European Union and, on the other hand, the public service requirements in the general economic interest, in respect of which the Member States still have a wide discretion.

2. The questions raised by the French Conseil d'État in this reference for a preliminary ruling are connected with proceedings concerning the validity of the French legislation relating to regulated tariffs for the sale of natural gas. That legislation requires certain suppliers, including inter alia the incumbent supplier, to offer to supply certain categories of final consumer with natural gas at regulated tariffs. However, offers competing with the regulated tariffs may be freely made by all suppliers, including those affected by the regulated tariffs. Consumers entitled to be supplied at a regulated price may therefore choose between two types of offer: offers at regulated tariffs, proposed only by certain suppliers, and offers at the market price proposed by all market operators.

3. The questions asked by the Conseil d'État are designed, in essence, to ascertain whether legislation of this kind constitutes, by its very nature, an obstacle to the achievement of an open and competitive market in natural gas as provided for by Directive 2009/73 and, if so, whether the pursuit of the objectives of security of supply and territorial cohesion may possibly justify such an intervention. The

¹ — Original language: French.

² — 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).

Conseil d'État is also unsure whether such a State intervention may be based on the principle that the incumbent supplier's costs be covered in full. In order to reply to these questions the Court, in line with its previous case-law and in particular with its fundamental ruling in *Federutility* (C-265/08, EU:C:2010:205), will have to find the right balance between all the interests involved.

I – Legal framework

A – EU law

4. Directive 2009/73 forms part of the third energy package.³ It aims to establish within the Union a fully open market which enables all consumers freely to choose their suppliers and all suppliers freely to deliver to their customers.⁴ In that context, it recognises, however, that respect for public service requirements is fundamental.⁵ It therefore aims to set common minimum standards in that regard, which must be respected by all the Member States, taking into account the objectives of consumer protection, security of supply, environmental protection and equivalent levels of competition in all Member States. It also recognises that it is important for public service requirements, which must be defined at national level, to be interpreted on a national basis, taking into account national circumstances and in compliance with EU law.⁶

5. In accordance with that approach, Article 3(1) of Directive 2009/73 provides that '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, natural gas undertakings are operated in accordance with the principles of this Directive with a view to achieving a competitive, secure and environmentally sustainable market in natural gas, and shall not discriminate between those undertakings as regards their rights or obligations'.

6. Under Article 3(2) of that directive, '[h]aving full regard to the relevant provisions of the Treaty, in particular [Article 106 TFEU] thereof, Member States may impose on undertakings operating in the gas 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 natural gas undertakings of the [Union] 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'.

3 — The third energy package was adopted in July 2009 and includes, as well as Directive 2009/73, also 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), Regulation (EC) No 713/2009 of the European Parliament and of the Council of 13 July 2009 establishing an Agency for the Cooperation of Energy Regulators (OJ 2009 L 211, p. 1), Regulation (EC) No 714/2009 of the European Parliament and of the Council of 13 July 2009 on conditions for access to the network for cross-border exchanges in electricity and repealing Regulation (EC) No 1228/2003 (OJ 2009 L 211, p. 15), and Regulation (EC) No 715/2009 of the European Parliament and of the Council of 13 July 2009 on conditions for access to the natural gas transmission networks and repealing Regulation (EC) No 1775/2005 (OJ 2009 L 211, p. 36).

4 — See recital 3 of Directive 2009/73.

5 — See recitals 44 and 47 of Directive 2009/73.

6 — Ibid.

B – *French law*

7. In France, the Code de l'énergie (Energy Code) sets out the objectives of energy policy. It aims to ensure the strategic independence of the nation and to promote its economic competitiveness, and in particular to ensure security of supply, maintain a competitive energy price and guarantee social and territorial cohesion by ensuring universal access to energy.⁷ The code provides that public service obligations are to be assigned to natural gas suppliers and relate inter alia to security of supply and the quality and price of the products provided.⁸

8. Article L. 410-2 of the Code de commerce (Commercial Code) lays down the principle that, except in cases where the law specifies otherwise, the prices of goods, products and services are to be determined by the free play of competition. However, the second paragraph of that article allows prices to be regulated, by decree after consultation of the Conseil d'État, the Autorité de la concurrence (Competition Authority) having been consulted, 'in sectors or areas in which price competition is limited by monopoly situations or long-term supply problems, or by laws or regulations'. The third paragraph of that provision provides that '[t]he provisions of the first two paragraphs shall not prevent the government from adopting by decree after consultation of the Conseil d'État, to counter excessive price increases or reductions, temporary measures motivated by a crisis situation, exceptional circumstances, a public disaster or a clearly abnormal situation on the market in a given sector. The decree shall be adopted after consulting the Conseil national de la consommation (National Consumer Council). It shall specify its period of validity, which may not exceed six months'.

9. Pursuant to the second paragraph of Article L. 410-2,⁹ Articles L. 445-1 to L. 445-4 of the Code de l'énergie provide for regulated tariffs for the sale of natural gas. The rules governing the determination of those tariffs are laid down in Decree No 2009-1603 of 18 December 2009 ('Decree No 2009-1603'), as amended by Decree No 2013-400 of 16 May 2013 ('Decree No 2013-400').¹⁰ The latter decree is the measure whose annulment is sought in the national proceedings.

10. According to the order for reference, the scheme of regulated tariffs for the sale of natural gas has the following characteristics.

11. As regards, first, the undertakings affected by the regulated tariffs for the sale of natural gas, they are limited in number. Those tariffs are to be applied exclusively by the incumbent supplier, GDF Suez (now Engie), by 22 local distribution companies and by the company Total Energie Gaz.¹¹

12. As regards, secondly, the scope *ratione personae* of those tariffs, and more specifically of the customers who may benefit from them, following a legislative amendment made in 2014,¹² from 1 January 2016 only domestic consumers (including associations of owners of flats in multi-apartment buildings with a consumption of less than 30 000 kWh per year) and non-domestic final consumers with a consumption of less than 30 000 kWh per year remain eligible to benefit from the sale of natural gas at regulated tariffs.

7 — See Article L. 100-1 of the Code de l'énergie.

8 — See Article L. 121-32 of the Code de l'énergie. With regard to the provision for public service contracts between the State and GDF Suez, see Article L. 121-46 of the Code de l'énergie, and footnote 52 to this Opinion.

9 — See Article L. 445-1 of the Code de l'énergie.

10 — Decree No 2009-1603 of 18 December 2009 on regulated tariffs for the sale of natural gas, as amended by Decree No 2013-400 of 16 May 2013 (JORF No 113, 17 May 2013, p. 8189, text No 2).

11 — See Article 2 of Decree No 2009-1603, as amended by Decree No 2013-400.

12 — See Law No 2014-344 of 17 March 2014 on consumption (JORF No 65, 18 March 2014, p. 5400, text No 1).

13. As regards, thirdly, the criteria for determining the regulated tariffs, this is based on the principle that costs are to be covered. Those tariffs are defined in accordance with the intrinsic characteristics of supplies and the costs related to the supplies and they cover all of those costs other than subsidies provided to customers who have exercised their right to accept an offer at market price.¹³ The tariffs are calculated by taking into account the supply costs and costs other than supply costs of the gas suppliers concerned.¹⁴ They consist of a variable part linked to actual consumption and a flat-rate part calculated on the basis of the fixed costs of supplying natural gas which may also take into account the amount consumed, purchased or reserved by the customer and the conditions of use, *inter alia* the distribution of the amounts ordered during the year.¹⁵

14. As regards, fourthly, the procedure for determining the regulated tariffs, it is apparent from Article L. 445-2 of the Code de l'énergie that decisions concerning regulated tariffs for the sale of natural gas are to be taken jointly by the ministers responsible for the economy and for energy, after consulting the Commission de régulation de l'énergie (Energy Regulatory Commission, CRE).

15. More specifically, it is apparent from Article 4 of Decree No 2009-1603, as amended by Decree No 2013-400, that two ministerial orders define, after obtaining the opinion of the CRE, a tariff formula for each supplier which reflects all the costs of supplying natural gas and a methodology for evaluating the costs other than the costs of supply. From the tariff formula and the costs other than the costs of supply, it is possible to determine the average cost of supplying natural gas, on the basis of which the regulated tariffs for selling it are fixed, according to the procedures for supplying the customers concerned. Every year the CRE carries out a detailed analysis of all the supply costs and costs other than the costs of supply in respect of natural gas.

16. For each supplier, an order of the ministers responsible for the economy and energy, after obtaining the opinion of the CRE, fixes, after the detailed analysis submitted by the CRE, the regulated tariff rates on the basis, as the case may be, of proposals from the supplier.¹⁶ Those rates are reviewed and revised if necessary, after obtaining the opinion of the CRE and on the basis, if appropriate, of proposals from the supplier, depending on the development of the tariff formula and on the development of the costs other than supply costs.¹⁷

17. Finally, the supplier concerned amends, as frequently as provided by ministerial order and once a month at most, his regulated tariff rates by passing on variations in the costs of supplying natural gas, as they result from the application of his tariff formula, unless the Prime Minister objects if there is an exceptional rise in the price of oil products or the market price of natural gas, over the last month or over a cumulative period of three months.¹⁸

13 — Article L. 445-3 of the Code de l'énergie, read in conjunction with Article L. 441-1 of that code.

14 — See Article 3 of Decree No 2009-1603, as amended by Decree No 2013-400. Under Article 4 of that decree, the costs other than supply costs include the costs of using the natural gas transmission networks, storage and marketing of the services provided, including a reasonable commercial margin. See also Avis de l'Autorité française de concurrence (Opinion of the French Competition Authority) No 13-A-09 of 25 March 2013 concerning a draft decree on regulated tariffs for the sale of natural gas, p. 4.

15 — See Article 3 of Decree No 2009-1603, as amended by Decree No 2013-400.

16 — Article 5 of Decree No 2009-1603, as amended by Decree No 2013-400.

17 — *Ibid.*

18 — Article 6 of Decree No 2009-1603, as amended by Decree No 2013-400.

II – Facts of the main proceedings, the national proceedings and the questions referred for a preliminary ruling

18. By application lodged on 17 July 2013, the Association nationale des opérateurs détaillants en énergie (National Association of Energy Retailers) (ANODE) brought an action before the Conseil d'État seeking the annulment as *ultra vires* of Decree No 2013-400. In its application ANODE maintains inter alia that Articles L. 445-1 to L. 445-4 of the Code de l'énergie, implemented by the decree of which it seeks annulment, do not comply with the objectives of Directive 2009/73.

19. In those proceedings, the Conseil d'État is uncertain, first, whether State intervention in prices such as that provided for by the French legislation is to be regarded as leading to a situation in which price levels for the supply of natural gas to final consumers are determined independently of the free play of the market and as constituting therefore, by its very nature, an obstacle to the achievement of a competitive market in natural gas, contrary to Article 3(1) of Directive 2009/73.

20. If so, the Conseil d'État asks, secondly, what criteria should be used to assess the compatibility of such legislation and, in particular, whether Article 106(2) TFEU, read in conjunction with Article 3(2) of Directive 2009/73, allows Member States to pursue, by establishing regulated prices, objectives such as security of supply and territorial cohesion. The Conseil d'État also wonders whether a State may intervene in determining the price on the basis of the principle that the incumbent supplier's costs be covered in full and what cost components may be taken into account in determining the regulated tariffs.

21. In those circumstances, the Conseil d'État decided to stay the proceedings and to refer the following questions to the Court for a preliminary ruling:

- '(1) Must the intervention of a Member State consisting in requiring the incumbent operator to offer to supply final consumers with natural gas at regulated tariffs, but not precluding competing offers from being made at prices lower than those tariffs by the incumbent supplier or alternative suppliers, be regarded as leading to determining the level of prices for the supply of natural gas to final consumers independently of the free play of the market, and does it constitute by its very nature an interference with the achievement of a competitive market in natural gas, as mentioned in Article 3(1) of Directive 2009/73/EC?
- (2) If so, in the light of which criteria should the compatibility with Directive 2009/73 of such State intervention in the price of the supply of natural gas to final consumers be assessed?

In particular:

- (a) To what extent and under what conditions does Article 106(2) TFEU in conjunction with Article 3(2) of Directive 2009/73 allow the Member States, by intervening in prices for the supply of natural gas to consumers, to pursue objectives other than maintaining the price of supply at a reasonable level, such as security of supply and territorial cohesion?
- (b) Having regard in particular to the objectives of security of supply and territorial cohesion, does Article 3(2) of Directive 2009/73 allow a Member State to intervene in fixing the price of the supply of natural gas on the basis of the principle that the incumbent supplier's costs are covered in full, and may the costs intended to be covered by the tariffs include components other than the portion representing long-term supply?

III – Procedure before the Court

22. The order for reference was received at the Court on 18 December 2014. ANODE, Engie, the French, Hungarian and Polish Governments and the European Commission lodged observations.

IV – Legal assessment

23. Both questions referred for a preliminary ruling raise, in essence, the issue of the compatibility with Directive 2009/73 and Article 106(2) TFEU of a scheme concerning regulated tariffs for the sale of natural gas such as that in France, described in points 7 to 17 of this Opinion.

24. In its case-law, and in particular in the judgment in *Federutility and Others* (C-265/08, EU:C:2010:205), the Court has already outlined the analytical framework for assessing the compatibility with EU law of State intervention in prices, specifically in the natural gas sector. In that judgment and in subsequent case-law,¹⁹ the Court has provided several indications regarding the criteria on the basis of which such an assessment should be made. It is therefore in line with that case-law that the questions raised by the Conseil d'État must be analysed.

A – Obstacle to the achievement of a competitive market in natural gas

25. The referring court harbours doubts, first of all, as to whether State intervention in the prices of national gas such as that provided for by the French legislation at issue constitutes, by its very nature, an obstacle to the achievement of a competitive market in natural gas as envisaged in Article 3(1) of Directive 2009/73.

26. The referring court points out in particular that the French legislation is characterised, first, by the fact that the regulated prices are not imposed on all gas suppliers but only on some of them, in particular on the incumbent supplier, secondly, by the fact that that legislation does not preclude either the suppliers affected by the regulated tariffs or other suppliers from offering all consumers prices which are lower than the regulated tariffs and, thirdly, by the fact that that legislation is based on the principle that costs must be covered. According to the national court, that last characteristic has made it possible to prevent the incumbent operator offering tariffs which are unfairly low.

27. In that regard, it should be pointed out that it is apparent from the Court's case-law that, although it is not stated in any provision of Directive 2009/73²⁰ that the price for the supply of natural gas must be determined solely by the operation of supply and demand, that requirement follows from the very purpose and the general scheme of that directive, which, as several of its recitals²¹ and several of its provisions²² state, is designed to achieve a completely and effectively open and competitive internal market in natural gas, in which all consumers may freely choose their suppliers and all suppliers may freely supply their products to their customers.²³

19 — See, in particular, judgment in *Enel Produzione* (C-242/10, EU:C:2011:861), relating to 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), and judgment in *Commission v Poland* (C-36/14, EU:C:2015:570).

20 — The Court originally adopted that interpretation in the judgment in *Federutility and Others* (C-265/08, EU:C:2010:205, paragraph 18) concerning Directive 2003/55/EC of the European Parliament and of the Council of 26 June 2003 concerning common rules for the internal market in natural gas and repealing Directive 98/30/EC (OJ 2003 L 176, p. 57). It subsequently stated that that interpretation and the guidelines concerning the admissibility of State intervention consisting in regulating prices, set out in the judgment in *Federutility*, are also wholly valid for Directive 2009/73 (see judgment in *Commission v Poland*, C-36/14, EU:C:2015:570, paragraphs 45 and 53).

21 — See recitals 3, 5, 22, 33 and 44 of Directive 2009/73.

22 — See Article 3(1) and (4), Article 13(1)(a), Article 34(2), Article 37, Article 40(a) and Article 48(3)(a) of Directive 2009/73.

23 — See, to that effect, judgment in *Federutility and Others* (C-265/08, EU:C:2010:205, paragraph 18). See also judgment in *Commission v Poland* (C-36/14, EU:C:2015:570, paragraph 45).

28. It should also be pointed out that in the judgment in *Federutility and Others* (C-265/08, EU:C:2010:205) the Court described a measure of State intervention in prices for the sale of natural gas as a measure which, ‘by its very nature, constitutes an obstacle to the realisation of an operational internal market in gas’.²⁴

29. In the present case, the French legislation at issue provides for State intervention consisting, in essence, in requiring certain undertakings to offer natural gas for sale on the market to certain categories of customer at prices which are the result of a calculation made according to criteria and using tariff rates established by the public authorities.

30. As the Commission has rightly pointed out, the tariffs established under that legislation are regulated prices which are by no means the result of a free determination arising from market supply and demand. Quite the contrary, those tariffs are the result of a determination made on the basis of criteria imposed by the public authorities and therefore outside the dynamics of market forces.

31. A measure which requires a product or service to be offered on the market at a determined price necessarily affects the freedom of the undertakings concerned to act in the market in question and, accordingly, the competitive process taking place in that market. Although the level of impact of such a measure on the market depends on its subjective and objective scope, that takes nothing away from the finding that such a measure, by affecting that competitive process, is by its very nature contrary to the objective of achieving an open and competitive market, such a finding obviously being separate from the fact that the measure may be justified within the legal framework in force.

32. In the present case, it is true, as both the national court and the French Republic point out, that several elements differentiate the French legislation at issue in this case from the Italian legislation which gave rise to the proceedings in *Federutility* (C-265/08, EU:C:2010:205), and which provided for the definition of a reference price which all natural gas suppliers had to incorporate into their commercial offers.

33. However, none of the characteristics of the legislation at issue in the present case, pointed out by the referring court and mentioned in point 26 of this Opinion, can refute the finding that fixing of tariffs as a result of a requirement imposed by the public authorities necessarily affects the play of competition and, therefore, that legislation such as that at issue in the main proceedings is incompatible with the objective of achieving an open and competitive market in natural gas as provided for in Article 3(1) of Directive 2009/73.

34. First, the fact that the French scheme of regulated tariffs imposes an obligation to offer natural gas on the market at a determined price only on certain market operators takes nothing from the finding that, in so far as it restricts the freedom of those undertakings to operate in the market, it affects the competitive process taking place there. Such legislation detracts from equality between market operators and is manifestly contrary to the requirement, stated in recital 3 of Directive 2009/73 and in the case-law mentioned in point 27 of this Opinion, that *all* operators may *freely* supply their customers with their products.

35. Secondly, from the same perspective, the fact that the undertakings concerned by the regulated tariffs may also freely determine their offers in the market cannot call in question the finding that the State intervention at issue adversely affects the operation of market competition. Notwithstanding that possibility, following State intervention, there are bound to be two segments in the market: a ‘regulated’ segment — which, moreover, is of very significant size in the natural gas sector in France²⁵ — in which

24 — See paragraph 35 of that judgment. See also judgment in *Commission v Poland* (C-36/14, EU:C:2015:570, paragraph 56).

25 — Thus it is apparent from the annual activity report of the CRE for the year 2014 (p. 3) that, in 2014, 67.5% of all residential sites (representing 68.7% of annualised consumption) and 40.2% of all non-residential sites (representing 10.4% of annualised consumption) were supplied at regulated tariffs.

the prices of the product or service are not established within a competitive framework, and a free segment. Such a market division is in itself incompatible with the notion of a completely and effectively open and competitive internal market in natural gas. In that regard, the assertion of the French Government, repeated by the national court, that the regulated tariffs in practice play the role of setting a reference ceiling for other suppliers when determining their prices proves that those tariffs have a tangible impact on the market.

36. Thirdly, the fact that the determination of the regulated tariffs is founded on the principle that all costs must be covered likewise cannot alter the finding that the regulated tariffs affect competition. That characteristic, far from having a pro-competitive effect, seems to me rather to have the effect of giving the suppliers concerned a kind of guarantee that, by means of the related tariffs, they will be able to recover their costs in full, at least in respect of those of their customers who use those tariffs. However, the other suppliers clearly do not have a similar guarantee, which undoubtedly puts them at a competitive disadvantage generated by that legislation.

37. As regards, finally, the national court's observation that the regulated tariffs have prevented the dominant operator offering tariffs which are unfairly low, this does not seem to me to be relevant for the assessment of the competitive impact of those tariffs, since such a practice is already prohibited by the legislation on abuse of a dominant position and specifically by Article 102 TFEU.

38. In conclusion, I consider that intervention by a Member State consisting in requiring certain suppliers, including the incumbent supplier, to offer to supply final consumers with natural gas at regulated tariffs, but not precluding competitive offers at prices lower than those tariffs from all the suppliers in the market, constitutes by its very nature an obstacle to the achievement of a competitive market in natural gas as referred to in Article 3(1) of Directive 2009/93.

B – Conditions for intervention by Member States

39. It is apparent from the Court's case-law that, although State intervention in the fixing of prices for the supply of natural gas to final consumers constitutes an obstacle to the achievement of a competitive market in natural gas, that intervention may nevertheless be permitted under Directive 2009/73, provided the conditions which it sets out are met.²⁶

40. Directive 2009/73, as stated in recitals 43 and 44, aims to create an open and competitive internal market in natural gas, but also to ensure the maintenance of 'high standards' of public service, to protect final consumers and to ensure security of supply. It is to meet these last objectives that Article 3(1) of Directive 2009/73 states that it applies 'without prejudice' to paragraph 2 of that article.

41. It is apparent from the Court's case-law that, in the light of that last provision²⁷ and of Article 106 TFEU mentioned therein,²⁸ an intervention by a Member State in fixing prices for the supply of natural gas is permitted only if three conditions are met. First, the intervention must pursue an objective of general economic interest, secondly, it must comply with the principle of proportionality and, thirdly, it must establish public service obligations which are clearly defined, transparent, non-discriminatory and verifiable and it must guarantee equality of access for EU gas undertakings to consumers. It is with regard to the scope of those conditions and their application in the present case that the referring court expresses doubts in the second question referred for a preliminary ruling.

26 — See, as regards Directive 2003/55, judgment in *Federutility and Others* (C-265/08, EU:C:2010:205, paragraph 24) and, as regards Directive 2009/73, judgment in *Commission v Poland* (C-36/14, EU:C:2015:570, paragraphs 52 and 53). See also footnote 20 to this Opinion.

27 — See, as regards Directive 2003/55, judgments in *Federutility and Others* (C-265/08, EU:C:2010:205, paragraphs 20 to 22 and 47) and *Commission v Poland* (C-36/14, EU:C:2015:570, paragraphs 51 and 52).

28 — See, as regards Directive 2003/55, judgment in *Federutility and Others* (C-265/08, EU:C:2010:205, paragraph 33) and, as regards Directive 2003/54, judgments in *Enel Produzione* (C-242/10, EU:C:2011:861, paragraph 42) and *Commission v Poland* (C-36/14, EU:C:2015:570, paragraph 51).

1. General economic interest

42. With regard to the first condition, namely that State intervention in the fixing of prices for the supply of natural gas must be justified by the pursuit of the general economic interest, the referring court, in part (a) of its second question, asks to what extent and under what conditions a Member State may pursue objectives of general economic interest other than maintaining the price of supply at a reasonable level, recognised by the Court in the judgment in *Federutility* (C-265/08, EU:C:2010:205). The referring court specifically mentions the objectives of security of supply and territorial cohesion, mentioned in Article L. 100-1 of the Code de l'énergie, which were relied on by the French Government in the main proceedings as objectives of the regulated tariff scheme.

43. In that regard, I would start by pointing out that, although Directive 2009/73 gives no definition of the concept of 'general economic interest',²⁹ it is apparent from the case-law that the reference in Article 3(2) of that directive both to that concept and to Article 106 TFEU, which concerns undertakings entrusted with the management of a service of general economic interest, implies that that concept should be interpreted in the light of that provision of the Treaty.³⁰

44. More generally, I think that, according to a systematic and coherent approach in EU law, the condition laid down by Directive 2009/73 that public service obligations in the gas sector must be imposed 'in the general economic interest' should be interpreted in the light of the other relevant provisions of EU law, in particular of primary law. In that respect, it is inevitable to set that interpretation in the new context resulting from the entry into force of the Treaty of Lisbon, which includes, as well as Article 106 TFEU, Article 14 TFEU, the new Protocol No 26 on services of general interest ('Protocol No 26') and Article 36 of the Charter of Fundamental Rights of the European Union concerning access to services of general economic interest, which has acquired the same legal value as the Treaties.

45. In this new context, an analysis of the relevant provisions and of the Court's case-law leads me to make the following observations.

46. A first observation concerns the role which must be accorded to the Member States in defining the objectives of general economic interest which may justify the imposition of public service obligations. In that regard, I would point out that Protocol No 26 expressly recognises in general the essential role and the wide discretion of the authorities of the Member States in providing, commissioning and organising services of general economic interest.³¹ With regard specifically to the natural gas sector, the second sentence of recital 47 of Directive 2009/73 states that 'public service requirements should be *defined at national level*, taking into account national circumstances; [EU] law should, however, be respected by the Member States'.³²

29 — On this concept see the observations of Advocate General Ruiz-Jarabo Colomer in points 53 to 55 of his Opinion in *Federutility and Others* (C-265/08, EU:C:2009:640).

30 — See judgment in *Federutility and Others* (EU:C:2010:205, paragraph 26) and footnote 20 to this Opinion.

31 — See Article 1, first indent, of Protocol No 26.

32 — My emphasis.

47. That approach, which is intended to give wide discretion to the Member States,³³ is reflected in the case-law concerning public service obligations in the energy sector, in which the Court, referring to the aims of Article 106 TFEU and the corresponding case-law,³⁴ has stated that Member States are entitled, while complying with EU law, to define the scope and the organisation of their services in the general economic interest.³⁵

48. A second consideration which is to some extent linked to the first concerns the possibility for the Member States, when defining the objectives of general economic interest, to take their national circumstances and policies into consideration. Accordingly, in general, Protocol No 26 expressly recognises the requirement to take into account the diversity of services of general economic interest and the differences in the needs and preferences of users that may exist as a result of different geographical, social or cultural situations.³⁶ The same requirement finds expression, with regard to the natural gas sector, both in recital 44 of Directive 2009/73³⁷ and in the Court's case-law according to which the Member States, when defining the scope and organisation of their services in the general economic interest, may take account of objectives pertaining to their national policy.³⁸

49. It is apparent from these considerations that, in principle, it is for the Member States, taking account of their national circumstances and policies, to define the objectives of general economic interest which they intend to pursue by the imposition of public service obligations in the gas sector. However, that power to define the objectives of general economic interest is not the expression of an absolute freedom of the Member States,³⁹ but must be carried out in compliance with EU law.

50. It is therefore a matter of seeing *in concreto* how the discretion accorded to the Member States with regard to the objectives of general economic interest which they intend to pursue by imposing public service obligations is to be reconciled with the requirement to comply with EU law.

51. In that regard, it is first necessary to examine the issue, which has been the subject of some debate, of the interpretation of the list in Article 3(2) of Directive 2009/73, mentioned in point 6 of this Opinion. It has been maintained that that provision contains an exhaustive list of the reasons of general economic interest capable of justifying State intervention.⁴⁰ The Court has not yet taken a position on this question, which is not insignificant because, if such a restrictive interpretation were upheld, the consequence would be that State intervention pursuing an objective of general economic interest, as for example territorial cohesion, which is not mentioned in that list could not be justified.

33 — In that regard, I note that Advocate General Ruiz-Jarabo Colomer, in his Opinion in *Federutility and Others* (C-265/08, EU:C:2009:640, point 46), had already observed that the lack of precision of Directive 2009/73 with regard to the provision of public service obligations in the general economic interest revealed the EU legislature's intention to grant the Member States wide discretion. That finding was made in respect of Directive 2003/55. However, since Directive 2009/73 made no changes to the relevant provisions of Directive 2003/55, that finding also applies to Directive 2009/73.

34 — The Court has stated that that provision is designed to reconcile the Member States' interest in using certain undertakings as an instrument of economic or social policy with the EU's interest in ensuring compliance with the rules on competition and preservation of the unity of the common market. See, to that effect, judgments in *Albany* (C-67/96, EU:C:1999:430, paragraph 103); *Federutility and Others* (C-265/08, EU:C:2010:205, paragraph 28); and *Enel Produzione* (C-242/10, EU:C:2011:861, paragraph 41).

35 — See judgments in *Federutility and Others* (C-265/08, EU:C:2010:205, paragraph 29 and the case-law cited) and *Enel Produzione* (C-242/10, EU:C:2011:861, paragraph 50).

36 — See Article 1, second indent, of Protocol No 26.

37 — In the words of the second sentence of that recital, '[i]t 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 [EU] law'.

38 — See judgment in *Federutility and Others* (C-265/08, EU:C:2010:205, paragraphs 29 and 30).

39 — That expression has already been used by Advocate General Ruiz-Jarabo Colomer in his Opinion in *Federutility and Others* (C-265/08, EU:C:2009:640, point 47).

40 — See the references to legal writing in footnote 30 to the Opinion of Advocate General Ruiz-Jarabo Colomer in *Federutility and Others* (C-265/08, EU:C:2009:640).

52. In that regard, I wholly agree, however, with the approach suggested by Advocate General Ruiz-Jarabo Colomer that that list does not concern reasons of general interest, but rather specifies ‘types of action’ which may be the subject of public service obligations.⁴¹ Such an interpretation is, in my view, in accordance with the literal content of the provision at issue, which states that public service obligations ‘may relate’ to security, regularity, quality and price of supplies and other elements listed there. Accordingly, under that provision Member States may impose on undertakings public service obligations relating to — that is to say, aiming to achieve — inter alia, security, regularity, quality and price of supplies. However, those obligations must always be aimed at the attainment of one or more objectives of general economic interest.⁴² It follows from these considerations that the list contained in Article 3(2) of Directive 2009/73 is by no means an exhaustive list of the objectives of general economic interest which the Member States may pursue under that directive.

53. In those circumstances, although the Member States are free to define the objectives of general economic interest which they wish to pursue by imposing public service obligations, it is none the less impossible to ignore the fact that the natural gas sector is a domain in which the EU legislature has legislated in express pursuit of specific objectives.

54. In that regard, the Court has stated that, in the assessment which Directive 2009/73 requires Member States to make as to whether, in the general economic interest, it is necessary to impose public service obligations on undertakings operating in the gas sector, it is for the Member States to reconcile the objective of liberalisation with the other objectives pursued by Directive 2009/73.⁴³

55. That requirement for balancing, which the Court has expressed with regard to the objectives which the EU legislature expressly provided for in Directive 2009/73, in my view reflects the particular importance of those objectives. They are in fact objectives which the EU legislature has expressly regarded as being necessary to pursue. It follows that the pursuit of those objectives is likely to play a more important role in the analysis of the proportionality of a measure imposing a public service obligation which may undermine the more general objective also pursued by Directive 2009/73 of opening up the markets in order to create an internal market in natural gas.

56. In the present case, it is apparent from the foregoing considerations that the security of energy supply is without a doubt an objective of general economic interest which may, in compliance with the other conditions, justify State intervention relating to the price of natural gas supplies. Already, at primary law level, Article 194(1)(b) TFEU identifies security of energy supply in the EU as one of the fundamental objectives of EU policy on energy. Next, as regards specifically natural gas, it is apparent from several recitals and articles of Directive 2009/73 that the directive expressly provides that security of energy supply is one of its fundamental aims.⁴⁴ More specifically, Directive 2009/73 expressly envisages security of supply as one of the objectives to be taken into account in any imposition of public service obligations in the natural gas sector.⁴⁵

41 — Ibid.

42 — Thus, inter alia, in *Federutility* (C-265/08, EU:C:2010:205) the Member State had imposed an obligation ‘relating to price’ — that is, designed to impose an action relating to the price of gas supplies — with the aim of pursuing the objective of general economic interest of stabilising prices in order to protect final consumers. See the judgment in *Federutility and Others* (C-265/08, EU:C:2010:205, paragraphs 20, 24 and 32). In the present case, the public service obligation relates to price but, according to the assertions of the French Government before the referring court, it is designed to pursue the objectives of general economic interest of security of supply and territorial cohesion.

43 — See, to that effect, as regards the objective of protecting final consumers, judgment in *Federutility and Others* (C-265/08, EU:C:2010:205, paragraph 32).

44 — Recitals 1, 8, 21, 22, 35, 40, 44, 47 and 55 and Articles 3(2), (5) and (7), Articles 5 and 6, Article 11(3)(b) and (5)(b), Articles 11(7) and (8) and 13(2), Article 17(2)(f), Articles 22(1), 34(2), Article 36(1)(a), Article 41(8), Articles 48(3)(b) and 52(1)(d) and Article 52(4) and (6) of Directive 2009/73.

45 — See, in particular, recitals 44 and 47 of Directive 2009/73.

57. On the other hand, territorial cohesion is not specifically mentioned by Directive 2009/73 as an objective of general economic interest which might justify the imposition of public service obligations in the natural gas sector. However, in that regard, it should be pointed out that Article 14 TFEU expressly recognises the role played by services of general economic interest in promoting the territorial cohesion of the Union, and that Article 36 of the Charter of Fundamental Rights of the European Union expressly mentions territorial cohesion in connection with the right of access to services of general economic interest. Furthermore, in so far as State intervention is designed to achieve territorial cohesion in the sense that it seeks to provide universal and equal access to natural gas throughout the territory of a Member State, the objective being to avoid a situation in which certain regions of the country, for example owing to their geographical situation or the natural conditions, are deprived of that access, the pursuit of such an objective must undoubtedly be regarded as being in accordance with Directive 2009/73, and particularly with Article 3(3), which provides that ‘[i]n particular, [the Member States] shall take appropriate measures to protect final customers in remote areas who are connected to the gas system’. In those circumstances, it must be considered that, interpreted in that way, the objective of territorial cohesion forms an integral part of the objectives pursued by Directive 2009/73.

58. In conclusion, it is apparent from the foregoing considerations that Directive 2009/73, in particular Article 3(2), interpreted in the light of Articles 14 TFEU and 106 TFEU and Protocol No 26 allows Member States to assess whether, in the general economic interest, it is necessary to impose on undertakings operating in the gas sector public service obligations relating to the price of supplying natural gas in order inter alia to ensure security of supply and territorial cohesion, provided that all the other conditions which it lays down are met.

2. Compliance with the principle of proportionality

59. The second condition which must be met for an intervention by a Member State in the fixing of the price of supplying natural gas to be allowed is that the public service obligations imposed on the undertakings comply with the principle of proportionality. Highlighting the need for a strict control of compliance with that principle, the Court has stated that those public service obligations may compromise the freedom to determine the price for the supply of natural gas only in so far as is necessary to achieve the objective of general economic interest which they pursue.⁴⁶

60. Compliance with the principle of proportionality requires, first, that the measure is appropriate for securing the objective of general economic interest pursued.⁴⁷ Secondly, as regards the duration of the State intervention in prices, the Court has held that it must be limited to what is strictly necessary for achieving the objective pursued in order, in particular, not to render permanent a measure which by its very nature constitutes an obstacle to the realisation of an operational internal market in gas.⁴⁸ Thirdly, the Court has stated that the method of intervention used must not go beyond what is necessary to achieve the objective which is being pursued in the general economic interest.⁴⁹ Fourthly, the proportionality of the measure must also be assessed with regard to its scope *ratione personae*.⁵⁰

46 — See judgment in *Federutility and Others* (C-265/08, EU:C:2010:205, paragraph 33) and, to that effect, judgment in *Enel Produzione* (C-242/10, EU:C:2011:861, paragraph 42).

47 — See judgment in *Enel Produzione* (C-242/10, EU:C:2011:861, paragraph 56).

48 — Judgments in *Federutility and Others* (C-265/08, EU:C:2010:205, paragraphs 33 and 35); *Enel Produzione* (C-242/10, EU:C:2011:861, paragraph 75); and *Commission v Poland* (C-36/14, EU:C:2015:570, paragraph 56).

49 — Judgment in *Federutility and Others* (C-265/08, EU:C:2010:205, paragraph 36).

50 — Judgments in *Federutility and Others* (C-265/08, EU:C:2010:205, paragraph 39) and *Commission v Poland* (C-36/14, EU:C:2015:570, paragraph 60).

61. It is for the referring court to assess, in the dispute in the main proceedings, whether the imposition on certain suppliers of the obligation to offer to supply natural gas to certain categories of customer at regulated tariffs satisfies the requirements of proportionality. The Court may, however, provide the referring court, in so far as possible and on the basis of the information available, with all the necessary indications for that purpose from the point of view of EU law.⁵¹

a) Appropriateness of the measure for achieving the objectives of general economic interest pursued

62. In the first place, the referring court will be called on to assess whether the measure at issue, in the form it takes, is appropriate for attaining the stated objectives, namely security of supply and territorial cohesion. The appropriateness of the measure presupposes the existence of a direct link between the obligation imposed and the stated objective. In that regard, a distinction must be drawn between those two objectives.

63. With regard to security of supply, the referring court cites the French Government's argument that the supply choices of the incumbent supplier and the fact that its supply portfolio is made up principally of long-term contracts indexed to oil prices guarantee greater security of supply. Furthermore, in its observations, the French Government adds that the instability of the wholesale market in natural gas may generate volatile gas prices which affect the price of gas supplies to final customers. The regulated tariffs and the methods of calculating them comprise a mechanism for smoothing gas prices which has the effect of cushioning the impact on the final consumer of sudden changes due to the volatility of oil and gas prices.

64. In this regard I should first point out that there is no indication in the documents before the Court that suppliers affected by regulated tariffs (or other suppliers) are required to conclude long-term supply agreements with the aim of ensuring secure supply at reasonable prices (namely regulated tariffs) in the event of an energy crisis or significant price volatility.⁵² The order for reference refers, furthermore, to the supply 'choices' of the incumbent supplier, which seems to indicate that the conclusion of long-term contracts is a commercial decision of that supplier rather than a legal obligation imposed on him. In the absence of a link between the conclusion of long-term supply contracts and the regulated tariffs, it is not clear, on the basis of the information in the documents before the Court, how the imposition of those tariffs may be justified by the existence of those contracts.

65. Secondly, although it cannot be ruled out that, in the event of an energy crisis leading to a very significant increase in prices, a measure consisting in the obligation to offer and supply natural gas at a specific price might be considered appropriate for ensuring security of supply, it is clear that provision is made for such an intervention, as an exception, under strict conditions, in the third indent of Article L. 410-2 of the Code du commerce. It is for the referring court to assess whether there are sudden changes in natural gas prices due to the volatility of the price of gas itself or of oil

51 — See, to that effect, judgments in *Federutility and Others* (C-265/08, EU:C:2010:205, paragraph 34) and *Enel Produzione* (C-242/10, EU:C:2011:861, paragraph 49).

52 — The order for reference mentions Article L. 121-46 of the Code de l'énergie, which provides that 'the objectives and detailed rules for ensuring implementation of the public service missions ... shall be laid down in contracts' concluded between the State and GDF-Suez on the basis of public service missions assigned to the latter and that those contracts relate inter alia to public service requirements concerning security of supply. However, the referring court, while mentioning that provision, does not provide any information with regard to the very existence of those contracts. More specifically, it was stated before the Court that the last public service contract expired on 31 December 2013 and was not renewed, and that there is no indication that any public service contract concluded by the French State and GDF Suez lays down an obligation to conclude long-term supply contracts.

which justify the adoption of a measure which constitutes, in essence, a permanent State intervention in prices. In the assessment of the proportionality of the measure at issue in the light of the objective of security of supply, the referring court will also have to take into account the measures adopted under Regulation No 994/2010.⁵³

66. As regards territorial cohesion, the order for reference mentions the argument of the French Government that the regulated tariffs for sales of gas enable prices to be harmonised throughout national territory. In its observations, the French Republic claims that the cost of using the transmission network invoiced to the gas suppliers by the carrier may vary significantly depending on the distance of the customer from the main transport infrastructures and that, in those circumstances, regulation of the tariffs makes it possible to reduce the differences in cost for the customer by introducing a partial equalisation.

67. It does not appear to be inconceivable that the objective of territorial cohesion, as defined in point 57 of this opinion, may be achieved by imposing an obligation to provide gas at a determined price. However, it will be for the referring court to evaluate, when analysing the need for the measure, whether there are not measures which are also appropriate for achieving that objective but which constitute less of an obstacle to the realisation of an open internal market in natural gas than a generalised imposition of prices applicable not to certain categories of customer in remote areas, identified according to objective geographical criteria, but to certain whole categories of customer, identified on the basis of their gas consumption.

b) Duration of the measure

68. In the second place, as to the duration of the measure, it should be pointed out that, on the basis of the information available to the Court, it appears that the French legislation at issue does not lay down any limitation on the duration of the obligation to offer to supply the final customer with natural gas at regulated tariffs, which makes that obligation permanent. It is true, as the French Government points out in its observations, that the French legislation lays down an obligation to re-examine the regulated tariffs periodically.⁵⁴ However, it appears that that obligation of periodic review concerns the fixing of the level of the tariffs and not the need for the State to intervene in prices and the manner of its doing so, depending on the development of the gas sector. It does not therefore appear capable of rebutting the conclusion that the intervention is permanent.⁵⁵

69. It will be for the referring court to assess whether, in the form it takes, the imposition of an essentially permanent obligation to supply natural gas at a certain price may be considered as limited to what is strictly necessary to attain the two stated objectives.

c) The need for the measure

70. In the third place, it will also be for the referring court to assess the need for the legislation at issue. That court will therefore have to evaluate whether the method of State intervention in prices implemented by the legislation at issue, in the form it takes, goes beyond what is necessary for attaining the objectives of general economic interest pursued and whether there are less onerous appropriate measures.

53 — Regulation (EU) No 994/2010 of the European Parliament and of the Council of 20 October 2010 concerning measures to safeguard security of gas supply and repealing Council Directive 2004/67/EC (OJ 2010 L 295, p. 1).

54 — The French Government observes that the CRE carries out each year a detailed analysis of all the costs of supplying natural gas and the costs other than supply costs, that, on the basis of the CRE analysis, the ministers responsible for the economy and energy fix the tariff formula and the methods for calculating the costs other than supply costs at least once a year, and that each supplier alters his tariff rates as frequently as stipulated by ministerial order (see points 14 to 18 of this Opinion).

55 — See, in that regard, judgments in *Federutility and Others* (C-265/08, EU:C:2010:205, paragraph 35) and *Commission v Poland* (C-36/14, EU:C:2015:570, paragraphs 57 and 58).

71. In that regard, in the judgment in *Federutility* (C-265/08, EU:C:2010:205) the Court stated that, if it were shown that State intervention in the prices for the supply of natural gas was capable of being justified, the requirement of proportionality would imply in particular that it should be limited in principle to the price component directly influenced upwards by those specific circumstances which the State intervention is intended to limit.⁵⁶

72. In that context, in part (b) of the second question referred for a preliminary ruling, the referring court is uncertain whether, in the light *inter alia* of the two stated objectives, State intervention in the price of natural gas may be based on the principle that the incumbent supplier's costs be covered in full. It also asks, in essence, which components of the costs may be covered by the regulated tariffs.

73. As regards, first of all, the admissibility, within the meaning of Directive 2009/73, of a determination of the regulated tariffs based on the principle that the costs must be covered, it should be pointed out that that directive gives no guidance as to the methods for calculating those tariffs, nor as to the costs which may be covered. As the Commission rightly points out, that directive takes as its basis the idea that, in principle, the price of supplying natural gas must be the result of the free play of competition. In those circumstances, provided that all the conditions for State intervention in pricing are met, there is nothing, in principle to preclude the application of a method for determining the regulated tariffs based on consideration of costs. The question is, however, which costs, in the light of the principle of proportionality, may be taken into consideration in that determination.

74. In that respect, regarding the reference to costs covered 'in full', I would point out, first of all, that the requirement laid down by the Court in paragraphs 36 and 38 of the judgment in *Federutility* (C-265/08, EU:C:2010:205) that State intervention in pricing must be limited to what is necessary for obtaining the objective pursued seems to involve the need to identify, as far as possible, the component of the price in which it is necessary to intervene in order to obtain the objective pursued by the planned intervention.

75. Accordingly, in the present case, if it were established that it is really necessary to lay down regulated tariffs to attain the objective of security of supply and that of territorial cohesion, as defined in point 57 of this Opinion, then compliance with the principle of proportionality would require the intervention, in principle, to be limited to the price components which might be influenced upwards by the pursuit of those objectives.

76. However, as has been pointed out in points 42 to 58 of this Opinion, the Member States have a wide discretion in the definition, execution and organisation of the public service obligations which they intend to impose on natural gas companies in the general economic interest, so that they must be afforded organisational independence with regard to the definition *in concreto* of the manner of fulfilling those obligations. Although that independence is to enable them to organise those public service obligations to ensure their effectiveness, it nevertheless seems to me that a method of determining the regulated tariffs based on the principle that costs must be covered in full necessarily requires account to be taken of the costs — which constitute, under such a method, components of the tariff⁵⁷ — which cannot be influenced upwards by the pursuit of the stated objective of general economic interest. In those circumstances, I doubt that a method of determining the regulated tariffs based on the principle that costs must be covered in full is compatible with the aforementioned requirement, stated by the Court in the judgment in *Federutility* (C-265/08, EU:C:2010:205), that State intervention must not go beyond what is necessary for obtaining the objective in the general economic interest which it pursues.

⁵⁶ — See judgment in *Federutility and Others* (C-265/08, EU:C:2010:205, paragraphs 37 and 38).

⁵⁷ — In a method for determining the regulated price in which that price is determined on the basis of the full costs, each cost component necessarily constitutes a component of the regulated price.

77. Also, with regard to the reference to coverage of the costs ‘of the incumbent supplier’, it should be pointed out that Article 3(2) of Directive 2009/73 requires public service obligations to be non-discriminatory. Regarding this aspect, I refer however to points 81 and 83 of this Opinion.

d) Scope *ratione personae*

78. In the fourth place, the requirement of proportionality must also be assessed with regard to the scope *ratione personae* of the measure, and, more particularly, to its beneficiaries. In the judgment in *Federutility* (C-265/08, EU:C:2010:205) the Court considered this aspect of the proportionality of the measure concerned in the light of the stated objective, namely to maintain the price of supplying natural gas at a reasonable level in order to protect the final consumer. It held that the requirement of proportionality would not, in principle, be complied with if the legislation were to benefit individuals and undertakings in an identical manner, in their capacity as final consumers of gas.⁵⁸

79. In the present case, the legislation at issue provides that from 1 January 2016 the beneficiaries of supply at regulated prices are households and undertakings which consume less than 30 000 kWh per year. It is for the referring court to ascertain whether such a system, which seems to give the same benefit to domestic customers and to small and medium-sized undertakings, complies with the requirement of proportionality so far as concerns the scope *ratione personae* of the measure, in the light of the objectives of security of supply and territorial cohesion.

3. The clearly defined, transparent, non-discriminatory and verifiable nature of public service obligations and the need for equality of access for gas undertakings of the Union to consumers

80. Finally, the measure at issue must satisfy the other conditions referred to in Article 3(2) of Directive 2009/73, relating to the clearly defined, transparent, non-discriminatory and verifiable nature of public service obligations, and to the need for equality of access for gas undertakings of the Union to consumers. It is for the referring court to ascertain if that is the situation in the present case.

81. As regards, in particular, the non-discriminatory nature, the following points must be made.

82. I note to begin with that Article 3(2) of Directive 2009/73 provides for the possibility of imposing public service obligations ‘on undertakings operating in the gas sector’ in general and not just on certain undertakings. Furthermore, it is apparent from Article 3(1) of that directive that the Member States ‘shall not discriminate between [natural gas undertakings] as regards their rights or obligations’. The objective of the condition that the obligations at issue should be non-discriminatory is that they should bind all of the undertakings operating in the sector equally, in order not adversely to affect competition.⁵⁹ In those circumstances, a mechanism for designating which undertakings will have public service obligations should not exclude a priori any of the undertakings operating in the gas sector.⁶⁰

83. In the present case, the regulated tariff scheme at issue clearly applies only to certain gas undertakings and there is no indication in the documents before the Court that its application is not limited to certain operators who, over a given period, are eligible without distinction only on the basis of pre-established objective criteria.⁶¹

58 — See judgments in *Federutility and Others* (C-265/08, EU:C:2010:205, paragraphs 39 to 43) and *Commission v Poland* (C-36/14, EU:C:2015:570, paragraph 60).

59 — See, to that effect, Opinion of Advocate General Ruiz-Jarabo Colomer in *Federutility and Others* (C-265/08, EU:C:2009:640, point 81).

60 — See, in that regard, judgment in *Commission v France* (C-220/07, EU:C:2008:354, paragraph 31) as regards the mechanism for designating the undertakings responsible for providing the universal service under Directive 2002/22/EC of the European Parliament and of the Council of 7 March 2002 on universal service and users’ rights relating to electronic communications networks and services (‘Universal Service Directive’) (OJ 2002 L 108, p. 51).

61 — See, to that effect, judgment in *Enel Produzione* (C-242/10, EU:C:2011:861, paragraph 86).

V – Conclusion

84. On the basis of the foregoing considerations, I propose that the Court reply to the questions referred for a preliminary ruling by the Conseil d'État as follows:

Intervention by a Member State consisting in requiring certain suppliers, including the incumbent supplier, to offer to supply final consumers with natural gas at regulated tariffs, but not precluding competing offers at prices lower than those tariffs from all the suppliers in the market, constitutes by its very nature an obstacle to the achievement of a competitive market in natural gas, as referred to in Article 3(1) of 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.

Directive 2009/73, in particular Article 3(2), interpreted in the light of Articles 14 TFEU and 106 TFEU and Protocol No 26 on services of general interest, allows Member States to assess whether, in the general economic interest, it is necessary to impose on undertakings operating in the gas sector public service obligations relating to the price of supplying natural gas in order inter alia to ensure security of supply and territorial cohesion, provided that all the conditions which Article 3(2) of that directive lays down, and specifically the non-discriminatory nature of those obligations, are met, and that the measure at issue complies with the principle of proportionality.

In such a case, Article 3(2) of Directive 2009/73 does not, in principle, preclude a method for determining prices which takes costs into consideration, provided that the application of that method does not have the consequence that the State intervention goes beyond what is necessary for attaining the objectives which it pursues in the general economic interest.