



Reports of Cases

JUDGMENT OF THE COURT (Fifth Chamber)

7 September 2016*

(Reference for a preliminary ruling — Approximation of laws — Directive 2009/73/EC — Energy — Gas sector — Fixing of prices for supplying natural gas to final customers — Regulated tariffs — Obstacle — Compatibility — Criteria of assessment — Objectives of security of supply and territorial cohesion)

In Case C-121/15,

REQUEST for a preliminary ruling under Article 267 TFEU from the Conseil d'État (France), made by decision of 15 December 2014, received at the Court on 10 March 2015, in the proceedings

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,

THE COURT (Fifth Chamber),

composed of J.L. da Cruz Vilaça, President of the Chamber, F. Biltgen, A. Borg Barthet (Rapporteur), E. Levits and M. Berger, Judges,

Advocate General: P. Mengozzi,

Registrar: A. Calot Escobar,

after considering the observations submitted on behalf of:

- Association nationale des opérateurs détaillants en énergie (ANODE), by O. Fréget and R. Lazerges, avocats,
- ENGIE, by C. Barthélemy, avocat,
- the French Government, by G. de Bergues, D. Colas and J. Bousin, acting as Agents,
- the Hungarian Government, by M. Fehér, acting as Agent,

* Language of the case: French.

— the Polish Government, by B. Majczyna, acting as Agent,
— the European Commission, by C. Giolito and O. Beynet, acting as Agents,
after hearing the Opinion of the Advocate General at the sitting on 12 April 2016,
gives the following

Judgment

- 1 This reference for a preliminary ruling concerns the interpretation of Article 3(1) and (2) 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 (OJ 2009 L 211, p. 94).
- 2 The reference has been made in proceedings between the Association nationale des opérateurs détaillants en énergie (National Association of Energy Retailers) (ANODE) and the Premier ministre (Prime Minister), the Ministre de l'Économie, de l'Industrie et du Numérique (Minister for Economic Affairs, Industry and the Digital Economy), the Commission de régulation de l'énergie (Energy Regulatory Commission) (France) and ENGIE, formerly GDF Suez, concerning regulated tariffs for the sale of natural gas.

Legal context

EU law

- 3 According to recitals 44 and 47 of Directive 2009/73:
(44) 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 common protection, security of supply, 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.
...
(47) The public service requirements and the common minimum standards that follow from them need to be further strengthened to make sure that all consumers, especially vulnerable ones, can 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 Article 3(1) and (2) of Directive 2009/73 states:
'1. Member States shall ensure, on the basis of their institutional organisation and with due regard to the principle of subsidiarity, that, without prejudice to paragraph 2, 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.

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

5 Article 2(28) of Directive 2009/73 defines 'eligible customer' as a customer who is free to purchase gas from the supplier of his choice, within the meaning of Article 37 of the directive.

6 Article 37(1) of Directive 2009/73 provides:

'Member States shall ensure that the eligible customers comprise:

(a) until 1 July 2004, eligible customers as specified in Article 18 of Directive 98/30/EC of the European Parliament and of the Council of 22 June 1998 concerning common rules for the internal market in natural gas [(OJ 1998 L 204, p. 1)]. Member States shall publish, by 31 January each year, the criteria for the definition of those eligible customers;

(b) from 1 July 2004, all non-household customers;

(c) from 1 July 2007, all customers.'

French law

7 In accordance with Article L. 100-1 of the Code de l'énergie (Energy Code):

'Energy policy shall ensure the strategic independence of the nation and promote its economic competitiveness. That policy shall seek to:

— ensure security of supply;

— maintain a competitive energy price; ...

— guarantee social and territorial cohesion by ensuring universal access to energy.'

8 Article L. 121-32 of that code provides that public service obligations are to be assigned to natural gas suppliers and are to relate inter alia to security of supply and the quality and price of the goods and services supplied.

9 Article L. 121-46 of that code provides:

'I. — The objectives and detailed rules for ensuring implementation of the public service missions defined in sections 1 and 2 of this Chapter shall be laid down in contracts between the State of the one part and ... GDF-Suez ... of the other part ... on the basis of the public service missions assigned to the latter ...

II. — The contracts provided for in point I shall relate inter alia to:

- (1) The public service requirements regarding security of supply and the regularity and quality of service to consumers;
- (2) Ways of ensuring access to the public service;
- ...
- (4) The multiannual development of the regulated tariffs for the sale ... of gas;
- ...'

10 Article L. 410-2 of the Code de commerce (Commercial Code) states:

'Except in cases where the law specifies otherwise, the prices of goods, products and services ... shall be determined by the free play of competition.

However, in sectors or areas in which price competition is limited by monopoly situations or long-term supply problems, or by laws or regulations, a decree after consultation of the Conseil d'État may regulate the prices after the Autorité de la concurrence (Competition Authority) has been consulted.'

11 Articles L. 445-1 to L. 445-4 of the Code de l'énergie, headed 'Regulated tariffs of sale', provide:

'Article L. 445-1

The provisions of the second paragraph of Article L. 410-2 of the Code de commerce shall apply to the regulated tariffs for the sale of natural gas referred to in Article L. 445-3.

Article L. 445-2

Decisions on the tariffs mentioned in Article L. 445-3 shall be taken jointly by the ministers responsible for economic affairs and energy, after obtaining the opinion of the Commission de régulation de l'énergie.

The Commission de régulation de l'énergie shall draw up its proposals and opinions, which must state reasons, after carrying out any consultations it considers useful of the actors in the energy market.

Article L. 445-3

The regulated tariffs for the sale of natural gas shall be defined in accordance with the intrinsic characteristics of the supply of gas and the costs linked to supply. They shall cover all of those costs other than subsidies for customers who have exercised their right under Article L. 441-1. ...

Article L. 445-4

A final consumer of natural gas may not benefit from the regulated tariffs for the sale of natural gas mentioned in Article L. 445-3 except in relation to a place of consumption which is still subject to those tariffs.

However, a final consumer of natural gas who consumes less than 30 000 kilowatt hours a year may benefit, at any place of consumption, from the regulated tariffs for the sale of natural gas mentioned in Article L. 445-3.'

12 Article L. 441-1 of the Code de l'énergie provides:

'Any customer who consumes the gas he purchases or who purchases gas with a view to reselling it has the right, as the case may be through his agent, to choose his natural gas supplier.'

13 The rules on how regulated tariffs are to be calculated are laid down by Décret No 2009-1603 relatif aux tarifs réglementés de vente de gaz naturel (Decree No 2009-1603 on regulated tariffs for the sale of natural gas) of 18 December 2009 (JORF, 22 December 2009, p. 22082), as amended by Decree No 2013-400 of 16 May 2013 (JORF, 17 May 2013, p. 8189) ('Decree No 2009-1603').

14 Decree No 2009-1603 provides that regulated prices for the sale of gas are to be fixed by the ministers responsible for economic affairs and energy, after obtaining the opinion of the Commission de régulation de l'énergie. In the first place, a decision is taken by those two ministers, who determine a price formula for each supplier, reflecting the entire costs of supplying natural gas and the methodology for evaluating costs other than those of supply. In the second place, a decree adopted by those ministers, after the Commission de régulation de l'énergie has made an analysis and issued an opinion, fixes the regulated prices for the sale of natural gas. Those prices are reviewed at least once a year and revised if need be, according to the development of the price formula. A supplier offering prices lower than the regulated prices can propose a change to the regulated price to the Commission de régulation de l'énergie, which must make sure that the change sought does indeed follow from the application of the price formula. Those provisions were amended with effect from 1 January 2016, a larger role being given to the Commission de régulation de l'énergie, which proposes regulated prices to the ministers responsible for economic affairs and energy. Those proposals are deemed to be accepted if the ministers do not object within a period of three months.

15 As regards the costs covered by the regulated prices, Decree No 2009-1603 requires the supplier's costs to be completely covered by the regulated prices. Articles 3 and 4 of the decree thus provide:

'Article 3

Regulated tariffs for the sale of natural gas shall cover the costs of supplying natural gas and the costs other than those of supply.

They shall consist of a variable portion linked to actual consumption and a flat-rate portion calculated from the fixed costs of supply of natural gas, which may also take account of the quantity consumed, subscribed or reserved by the customer and the circumstances of use, including the division of the quantities asked for over the year.

Article 4

For each supplier a tariff formula shall be defined which reflects the entire cost of supplying natural gas. The tariff formula and the costs other than those of supply shall make it possible to determine the average cost of supplying natural gas, on the basis of which the regulated tariffs for the sale of gas are fixed, according to the detailed conditions of serving the customers concerned.

Costs other than those of supply shall include in particular:

- the costs of using networks for the transmission of natural gas and, as the case may be, public distribution networks for natural gas, resulting from the application of the tariffs fixed by the Commission de régulation de l'énergie for the use of gas infrastructure;
- the costs of using storage facilities for natural gas, if appropriate;
- the costs of marketing the services supplied, including a reasonable commercial margin.

...'

- 16 The costs other than those of supply thus cover elements corresponding to transmission, storage, distribution, charges and profits, and the supply costs reflect the costs of supplying and are based mainly on long-term contracts between the supplier and foreign producers, since nearly all consumption in France comes from imports. Those long-term contracts are as a rule indexed to oil prices.

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

- 17 By application submitted on 17 July 2013, ANODE brought an action before the Conseil d'État (France) seeking for Decree No 2013-400 to be annulled as ultra vires.
- 18 In its action ANODE submits inter alia that Articles L. 445-1 to L. 445-4 of the Code de l'énergie, implemented by that decree, disregard the objectives of Directive 2009/73.
- 19 ANODE argues in particular that the provisions in question of national law are not in accordance with the principle of application stated in the judgment of 20 April 2010 in *Federutility and Others* (C-265/08, EU:C:2010:205).
- 20 The Conseil d'État is uncertain, first, whether State intervention in prices such as that provided for by the French legislation must be regarded as leading to determining the level of prices for the supply of natural gas to the final consumer independently of the free play of the market, thus constituting 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.
- 21 Should that be the case, the Conseil d'État is uncertain, secondly, as to the criteria by which the compatibility of such legislation with Directive 2009/73 should be assessed, in particular whether Article 106(2) TFEU in conjunction with Article 3(2) of that directive allows the Member States, by establishing regulated prices, to pursue objectives such as security of supply and territorial cohesion. The Conseil d'État also raises the questions of the possibility of State intervention in the setting of the price on the basis of the principle of covering all the costs of the incumbent supplier, and of the cost components which may be taken into consideration in determining the regulated tariffs.
- 22 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?
- (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 final 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?

Consideration of the questions referred

- 23 By its questions the referring court essentially asks whether a system of regulated tariffs for the sale of natural gas such as that at issue in the main proceedings is compatible with Directive 2009/73 and Article 106(2) TFEU.
- 24 As a preliminary point, it should be noted that the Court has previously had occasion, in its judgment of 20 April 2010 in *Federutility and Others* (C-265/08, EU:C:2010:205), to outline a framework for analysis enabling the relevant national court to assess the compatibility with EU law of State intervention in prices, specifically in the natural gas sector. In that judgment and the subsequent case-law the Court gave some guidance as to the criteria on which such an assessment must be based, and it is in line with that case-law that the questions raised by the referring court should be examined (see judgments of 21 December 2011, *Enel Produzione*, C-242/10, EU:C:2011:861, and 10 September 2015, *Commission v Poland*, C-36/14, not published, EU:C:2015:570).

Question 1

- 25 By its first question the referring court essentially asks whether Article 3(1) of Directive 2009/73 must be interpreted as meaning that intervention by a Member State consisting in requiring certain suppliers, including the incumbent supplier, to offer to supply natural gas to final consumers at regulated tariffs, but not precluding competing offers from being made at lower prices than those tariffs by any supplier in the market, constitutes by its very nature an obstacle to the achievement of a competitive market in natural gas as provided for in that provision.
- 26 Although it does not follow from any provision of Directive 2009/73 that the price of supply of natural gas must be fixed exclusively by the play of supply and demand, that requirement follows from the very purpose and general scheme of the directive, the aim of which is to pursue the achievement of an internal market in natural gas that is entirely and effectually open and competitive and in which all consumers can freely choose their suppliers and all suppliers can freely supply their products to their customers (see, to that effect, judgment of 10 September 2015, *Commission v Poland*, C-36/14, not published, EU:C:2015:570, paragraph 45).
- 27 It should be recalled here that a public measure of intervention in sale prices of natural gas is a measure which by its very nature constitutes an obstacle to the achievement of an operational internal market in gas (see judgment of 20 April 2010, *Federutility and Others*, C-265/08, EU:C:2010:205, paragraph 35).
- 28 In the present case, the French legislation at issue in the main proceedings provides for State intervention consisting in requiring certain undertakings to offer natural gas in the market, to certain categories of customers, at prices that derive from a calculation performed in accordance with criteria and with the use of tables drawn up by the public authorities.
- 29 The tariffs established pursuant to that legislation are regulated prices which are not in any way the result of a free determination deriving from the play of supply and demand in the market. Quite the contrary, those tariffs are the result of a determination made on the basis of criteria imposed by the public authorities, which is thus outside the dynamics of market forces.

- 30 As the Advocate General observes in point 31 of his Opinion, a measure which requires a product or service to be offered on the market at a determined price necessarily influences the freedom of the undertakings concerned to act in the market in question and hence the process of competition in that market. Such a measure is by its very nature contrary to the objective of achieving an open and competitive market.
- 31 It follows that a determination of tariffs resulting from intervention by the public authorities necessarily affects the play of competition and that legislation such as that at issue in the main proceedings is therefore contrary to the achievement of an open, competitive market in natural gas as provided for in Article 3(1) of Directive 2009/73.
- 32 Moreover, as the Advocate General observes in point 35 of his Opinion, the fact that the undertakings concerned by the regulated tariffs can also freely determine what they offer in the market cannot call into question the finding that the State intervention at issue in the main proceedings affects the play of competition. The mere existence of two segments of the market, namely the segment in which prices are established outside the play of competition and the segment in which their determination is left to market forces, is incompatible with the creation of an internal market in natural gas that is open and competitive. It should be added that the French Government's argument that the regulated tariffs play the part of a reference ceiling for fixing the prices of the other suppliers who are not concerned by the legislation at issue in the main proceedings supports the view that those tariffs actually affect the free determination of prices in the whole of the French natural gas market.
- 33 In the light of the foregoing, the answer to Question 1 is that Article 3(1) of Directive 2009/73 must be interpreted as meaning that intervention by a Member State consisting in requiring certain suppliers, including the incumbent supplier, to offer to supply natural gas to final consumers at regulated tariffs constitutes by its very nature an obstacle to the achievement of a competitive market in natural gas as provided for in that provision, and that obstacle exists even though the intervention does not preclude competing offers from being made at lower prices than those tariffs by any supplier in the market.

Question 2

- 34 By its second question the referring court essentially seeks clarification of the criteria to be taken into account for assessing whether the legislation at issue in the main proceedings is compatible with Article 3(2) of Directive 2009/73.
- 35 It should be noted, as a preliminary point, that the guidelines on the permissibility of State intervention consisting in the regulation of prices, set out in the judgment of 20 April 2010 in *Federutility and Others* (C-265/08, EU:C:2010:205), with respect to Article 3(2) of 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), are also valid with respect to Article 3(2) of Directive 2009/73, as that provision has not been amended in so far as it applies to the main proceedings (see judgment of 10 September 2015, *Commission v Poland*, C-36/14, not published, EU:C:2015:570, paragraph 53).
- 36 Thus although State intervention in the fixing of the price of supply of natural gas to the final consumer constitutes an obstacle to the achievement of a competitive natural gas market, that intervention may none the less be accepted within the framework of Directive 2009/73 if three conditions are satisfied. First, the intervention must pursue an objective of general economic interest, secondly, it must comply with the principle of proportionality, and, thirdly, it must lay down public service obligations that are clearly defined, transparent, non-discriminatory and verifiable, and guarantee equal access of EU gas undertakings to consumers (see, to that effect, judgments of

20 April 2010, *Federutility and Others*, C-265/08, EU:C:2010:205, paragraphs 20 to 22 and 47, and 10 September 2015, *Commission v Poland*, C-36/14, not published, EU:C:2015:570, paragraphs 51 to 53).

- 37 As regards the first condition, the existence of a general economic interest, the referring court asks to what extent and on what conditions a Member State may pursue objectives of general economic interest other than that of maintaining the price of supply at a reasonable level, accepted by the Court in the judgment of 20 April 2010 in *Federutility and Others* (C-265/08, EU:C:2010:205).
- 38 Directive 2009/73 gives no definition of the condition relating to general economic interest, but the reference in Article 3(2) of that directive both to that condition and to Article 106 TFEU, which concerns undertakings entrusted with the management of a service of general economic interest, means that that condition should be interpreted in the light of that provision of the Treaty (see, to that effect, judgment of 20 April 2010, *Federutility and Others*, C-265/08, EU:C:2010:205, paragraph 26).
- 39 The Court has pointed out that Article 106(2) TFEU provides, first, that undertakings entrusted with the operation of services of general economic interest are subject to 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, and, secondly, that the development of trade must not be affected to an extent contrary to the interests of the Union (judgment of 20 April 2010 in *Federutility and Others*, C-265/08, EU:C:2010:205, paragraph 27).
- 40 As the Advocate General observes in point 44 of his Opinion, the interpretation of the condition relating to general economic interest must be set in the new context following from the entry into force of the Treaty of Lisbon, which includes, as well as Article 106 TFEU, Article 14 TFEU, Protocol (No 26) on services of general interest, annexed to the EU Treaty, as amended by the Treaty of Lisbon, and the FEU Treaty ('Protocol No 26'), and the Charter of Fundamental Rights of the European Union, which has acquired the same legal value as the Treaties, in particular Article 36 of the Charter on access to services of general economic interest.
- 41 In particular, Protocol No 26 expressly recognises the essential role and the wide discretion of the authorities of the Member States in providing, commissioning and organising services of general economic interest.
- 42 With respect specifically to the natural gas sector, the second sentence of recital 47 of Directive 2009/73 states that public service obligations should be defined at national level, taking into account national circumstances, while EU law must, however, be respected by the Member States.
- 43 In that context, Article 106(2) TFEU aims 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 preserving the unity of the internal market (see, to that effect, judgments of 21 September 1999, *Albany*, C-67/96, EU:C:1999:430, paragraph 103, and 20 April 2010, *Federutility and Others*, C-265/08, EU:C:2010:205, paragraph 28).
- 44 The Court has explained that the Member States are entitled, while complying with EU law, to define the scope and organisation of their services of general economic interest. They may in particular take account of objectives pertaining to their national policy (see, to that effect, judgments of 21 September 1999, *Albany*, C-67/96, EU:C:1999:430, paragraph 104, and 20 April 2010, *Federutility and Others*, C-265/08, EU:C:2010:205, paragraph 29).
- 45 In this respect, the Court has stated that, in the assessment which the Member States must carry out, in accordance with Directive 2009/73, to determine whether, in the general economic interest, public service obligations should be imposed 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 the directive (see, to that effect, judgment of 20 April 2010, *Federutility and Others*, C-265/08, EU:C:2010:205, paragraph 32).

- 46 In the present case, the referring court specifically mentions the objectives of security of supply and territorial cohesion, as relied on by the French Government, as objectives of general economic interest pursued by the legislation at issue in the main proceedings.
- 47 As regards security of supply, that objective is expressly envisaged at the level of primary EU law and by Directive 2009/73.
- 48 As the Advocate General observes in point 56 of his Opinion, Article 194(1)(b) TFEU identifies security of energy supply in the EU as one of the fundamental objectives of EU policy in the field of energy. As regards specifically the field of natural gas, it may be seen from several recitals and articles of Directive 2009/73 that the directive expressly envisages security of energy supply as one of its basic purposes.
- 49 By contrast, territorial cohesion is not expressly envisaged by Directive 2009/73 as an objective of general economic interest which could justify imposing public service obligations in the field of natural gas.
- 50 However, it should be noted, first, as the Advocate General states in points 52 to 54 of his Opinion, that Article 3(2) of Directive 2009/73 contains a non-exhaustive list of things which may be the subject of public service obligations, and that the Member States remain free, in compliance with EU law, to define which objectives of general economic interest they wish to pursue by imposing public service obligations. Those obligations must, however, always be aimed at attaining one or more objectives of general economic interest.
- 51 Secondly, as the Advocate General states in point 57 of his Opinion, Article 14 TFEU expressly recognises the role of services of general economic interest in promoting the territorial cohesion of the EU. Moreover, 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.
- 52 It follows that EU law, in particular Article 3(2) of Directive 2009/73, read in the light of Articles 14 TFEU and 106 TFEU, allows the Member States to assess whether, in the general economic interest, public service obligations relating to the price of supply of natural gas should be imposed on undertakings operating in the gas sector, in particular in order to ensure security of supply and territorial cohesion, provided that the other conditions laid down by that directive are satisfied.
- 53 As regards the second condition mentioned in paragraph 36 above, compliance with the principle of proportionality, it follows from the very wording of Article 106 TFEU that the public service obligations which Article 3(2) of Directive 2009/73 allows to be imposed on undertakings must comply with the principle of proportionality and, therefore, that those obligations may, from 1 July 2007, compromise the freedom to determine the price of supply of natural gas only in so far as is necessary to achieve the objective of general economic interest which they pursue and, consequently, for a period that is necessarily limited in time (see, to that effect, judgment of 20 April 2010, *Federutility and Others*, C-265/08, EU:C:2010:205, paragraph 33).
- 54 While it is for the referring court to assess in the main proceedings whether that requirement of proportionality is satisfied, it is, however, for the Court to provide that court, on the basis of the information available, with all the necessary indications for that purpose from the point of view of EU law (see, to that effect, judgment of 20 April 2010, *Federutility and Others*, C-265/08, EU:C:2010:205, paragraph 34).

- 55 Compliance with the principle of proportionality means, first, that the measure in question must be appropriate for securing the objective of general economic interest which it pursues (judgment of 21 December 2011, *Enel Produzione*, C-242/10, EU:C:2011:861, paragraph 55).
- 56 On this point, the referring court provides very little information for assessing why the imposition of gas prices should be necessary for the achievement of very general objectives such as those relied on by the French Government.
- 57 In particular, as regards the objective of security of supply, the referring court essentially refers to the French Government's argument that the incumbent supplier's supply contracts, which are long-term contracts indexed to prices of oil products, ensure greater security of supply than the alternative suppliers' contracts, which are affected by the instability of the price of gas on the wholesale market.
- 58 While it cannot be ruled out that legislation introducing an obligation to offer and supply natural gas at a determined price may be regarded as capable of ensuring security of supply, it is for the referring court, in the absence of precise elements of analysis put before the Court, to determine whether that is the case with respect to the legislation at issue in the main proceedings.
- 59 As regards the objective of territorial cohesion, while it does not appear to be ruled out that such an objective may be pursued by the imposition of regulated tariffs throughout national territory, it will be for the referring court to assess, in its analysis of whether the measure at issue in the main proceedings is capable of ensuring that objective, whether measures exist that also enable the objective to be attained but are less of a hindrance to the establishment of an open internal market in natural gas, such as the imposition of a price that applies only to certain categories of customers in remote areas identified according to objective geographical criteria.
- 60 Secondly, the Court has held that the duration of State intervention in prices must be limited to what is strictly necessary for achieving the objective pursued (judgment of 20 April 2010, *Federutility and Others*, C-265/08, EU:C:2010:205, paragraphs 33 and 35).
- 61 According to the information available to the Court, the legislation at issue in the main proceedings does not lay down any limit on the duration of the obligation to offer final customers a supply of natural gas at regulated prices, which makes that obligation a permanent one.
- 62 Fixing a maximum duration for the tariffs adopted cannot constitute such a limit, in so far as that mechanism relates only to a periodical review of the level of those tariffs and does not concern the need for and terms of the public intervention in prices according to developments in the gas market.
- 63 In any event, it is for the referring court to assess, in the light of the precise elements available to it, whether the imposition of an obligation such as that laid down in Article L. 410-2 of the Code du commerce, which is essentially permanent, satisfies the requirement referred to in paragraph 55 above.
- 64 Thirdly, the method of intervention used must not go beyond what is necessary to achieve the objective of general economic interest being pursued (judgment of 20 April 2010, *Federutility and Others*, C-265/08, EU:C:2010:205, paragraph 36).
- 65 According to the order for reference, the intervention at issue in the main proceedings is based on the principle of covering all the costs of the incumbent supplier by applying a formula representing its costs of supply and a methodology for assessing its costs other than those of supply, drawn up following an annual analysis of the development of costs by the regulatory authority.

- 66 In this connection, the requirement of necessity means in principle that the component of the gas price must be identified in which intervention is necessary in order to achieve the objective pursued by the State intervention (see, by analogy, judgment of 20 April 2010, *Federutility and Others*, C-265/08, EU:C:2010:205, paragraphs 36 and 38). It is for the referring court to assess whether the method of intervention in prices used does not go beyond what is necessary for achieving the objectives of general economic interest pursued and whether there are no appropriate measures that are less restrictive.
- 67 Fourthly, the requirement of necessity must also be assessed with regard to the scope *ratione personae* of the measure in question and, more particularly, its beneficiaries (judgment of 20 April 2010, *Federutility and Others*, C-265/08, EU:C:2010:205, paragraph 39).
- 68 In this respect, it must be examined to what extent the State intervention at issue in the main proceedings benefits individuals and undertakings respectively as final consumers of gas.
- 69 In the present case, the legislation at issue in the main proceedings provides that from 1 January 2016 the beneficiaries of supplies at regulated prices are to be households and undertakings consuming less than 30 000 kWh/year. It is for the referring court to ascertain whether such a system, which appears to benefit domestic customers and small- and medium-sized undertakings in the same way, complies with the requirement of proportionality with respect to the scope *ratione personae* of the measure, having regard to the objectives of security of supply and territorial cohesion.
- 70 As regards, finally, the third condition mentioned in paragraph 36 above, namely that the State intervention must lay down public service obligations that are clearly defined, transparent, non-discriminatory and verifiable, and guarantee equal access of EU gas undertakings to consumers, the referring court has provided no elements of analysis in this respect.
- 71 With respect in particular to whether the legislation at issue in the main proceedings is non-discriminatory, as the Advocate General observes in point 82 of his Opinion, Article 3(2) of Directive 2009/73 allows public service obligations to be imposed generally ‘on undertakings operating in the gas sector’, not on certain undertakings specifically. Moreover, Article 3(1) of the directive provides that the Member States ‘shall not discriminate’ between natural gas undertakings ‘as regards their rights or obligations’. In this framework, the system of designating undertakings responsible for public service obligations may not exclude a priori any of the undertakings operating in the gas distribution sector (see, to that effect, judgment of 19 June 2008 in *Commission v France*, C-220/07, not published, EU:C:2008:354, paragraph 31).
- 72 It is for the referring court to assess whether that requirement and the other conditions mentioned in paragraph 66 above are satisfied by the application of the system of tariffs at issue in the main proceedings.
- 73 The answer to Question 2 is therefore that:
- Article 3(2) of Directive 2009/73, read in the light of Articles 14 TFEU and 106 TFEU and Protocol No 26, must be interpreted as allowing the Member States to assess whether, in the general economic interest, public service obligations relating to the price of supply of natural gas should be imposed on undertakings operating in the gas sector, in order in particular to ensure security of supply and territorial cohesion, provided that, first, all the conditions set out in Article 3(2) of the directive are satisfied, specifically the non-discriminatory nature of such obligations, and, secondly, that the imposition of those obligations complies with the principle of proportionality.

— Article 3(2) of Directive 2009/73 must be interpreted as not precluding a method of determination of prices based on taking costs into consideration, provided that the application of the method does not have the consequence that the State intervention goes beyond what is necessary for achieving the objectives of general economic interest pursued.

Costs

⁷⁴ Since these proceedings are, for the parties to the main proceedings, a step in the action pending before the national court, the decision on costs is a matter for that court. Costs incurred in submitting observations to the Court, other than the costs of those parties, are not recoverable.

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

- 1. Article 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 must be interpreted as meaning that intervention by a Member State consisting in requiring certain suppliers, including the incumbent supplier, to offer to supply natural gas to final consumers at regulated tariffs constitutes by its very nature an obstacle to the achievement of a competitive market in natural gas as provided for in that provision, and that obstacle exists even though the intervention does not preclude competing offers from being made at lower prices than those tariffs by any supplier in the market.**
- 2. Article 3(2) of Directive 2009/73, read in the light of Articles 14 TFEU and 106 TFEU and Protocol (No 26) on services of general interest, annexed to the EU Treaty, as amended by the Treaty of Lisbon, and the FEU Treaty, must be interpreted as allowing the Member States to assess whether, in the general economic interest, public service obligations relating to the price of supply of natural gas should be imposed on undertakings operating in the gas sector, in order in particular to ensure security of supply and territorial cohesion, provided that, first, all the conditions set out in Article 3(2) of the directive are satisfied, specifically the non-discriminatory nature of such obligations, and, secondly, that the imposition of those obligations complies with the principle of proportionality.**

Article 3(2) of Directive 2009/73 must be interpreted as not precluding a method of determination of prices based on taking costs into consideration, provided that the application of the method does not have the consequence that the State intervention goes beyond what is necessary for achieving the objectives of general economic interest pursued.

[Signatures]