



Reports of Cases

JUDGMENT OF THE COURT (Fifth Chamber)

19 December 2019*

(Reference for a preliminary ruling — Internal market in electricity — Common rules — Directive 2003/54/EC — Article 3(2) — Directive 2009/72/EC — Article 3(2) — Public service obligations — Meaning — National rules — Financing of energy efficiency plans — Designation of electricity generating undertakings — Mandatory contribution)

In Case C-523/18,

REQUEST for a preliminary ruling under Article 267 TFEU from the Audiencia Nacional (National High Court, Spain), made by decision of 9 July 2018, received at the Court on 8 August 2018, in the proceedings

Engie Cartagena SL

v

Ministerio para la Transición Ecológica, formerly Ministerio de Industria, Energía y Turismo,

interveners:

Endesa Generación, SA,

EDP España SAU,

Bizkaia Energía, SL,

Iberdrola Generación SAU,

Tarragona Power SL,

Bahia de Bizkaia Electricidad SL,

Viesgo Generación SL,

THE COURT (Fifth Chamber),

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

Advocate General: G. Hogan,

Registrar: R. Schiano, Administrator,

* Language of the case: Spanish.

having regard to the written procedure and further to the hearing on 13 June 2019,

after considering the observations submitted on behalf of:

- Engie Cartagena SL, by G. Martínez-Villaseñor and G. Rubio Hernández-Sampelayo, abogados, and A. Cano Lantero, procuradora,
- Endesa Generación SA, by J.J. Lavilla Rubira, abogado,
- EDP España SAU, by J. Expósito Blanco, abogada,
- Bizkaia Energía SL, by J. Abril Martínez, abogado, and J. Briones Méndez, procurador,
- Iberdrola Generación SAU and Tarragona Power SL, by J. Giménez Cervantes and F. Löwhagen, abogados,
- Bahía de Bizkaia Electricidad SL, by F. González Ruiz, procuradora and by J. García Sanz and D. Sarmiento Ramírez-Escudero, abogados,
- the Spanish Government, by A. Rubio González, acting as Agent,
- the European Commission, by O. Beynet, I. Galindo Martín and E. Sanfrutos Cano, acting as Agents,

after hearing the Opinion of the Advocate General at the sitting on 19 September 2019,

gives the following

Judgment

- ¹ This request for a preliminary ruling concerns the interpretation of Article 3(2) of 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 Article 3(2) of Directive 2009/72/EC of the European Parliament and of the Council of 13 July 2009 concerning common rules for the internal market in electricity and repealing Directive 2003/54/EC (OJ 2009 L 211, p. 55).
- ² The request has been made in proceedings between Engie Cartagena SL and the Ministerio para la Transición Ecológica, formerly Ministerio de Industria, Energía y Turismo (Ministry of Ecological Transition, formerly Ministry of Industry, Energy and Tourism, Spain) concerning the lawfulness of the contribution which the electricity generating undertakings are required to pay for the purpose of financing the national energy efficiency action plan ('the mandatory contribution').

Legal context

EU law

Regulation (EEC) No 1191/69

- 3 Article 2(1) of Regulation (EEC) No 1191/69 of the Council of 26 June 1969 on action by Member States concerning the obligations inherent in the concept of a public service in transport by rail, road and inland waterway (OJ, English Special Edition 1969(I), p. 276) provided that public service obligations means ‘obligations which the transport undertaking in question, if it were considering its own commercial interests, would not assume or would not assume to the same extent or under the same conditions’.

Regulation (EEC) No 3577/92

- 4 Article 2(4) of Council Regulation (EEC) No 3577/92 of 7 December 1992 applying the principle of freedom to provide services to maritime transport within Member States (maritime cabotage) (OJ 1992 L 364, p. 7) provides:

‘For the purposes of this Regulation:

...

4. “public service obligations” shall mean obligations which the [EU] shipowner in question, if he were considering his own commercial interest, would not assume or would not assume to the same extent or under the same conditions;

...’

Directives on the internal market for electricity

- 5 Article 3(2) of Directive 2003/54 provided:

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

- 6 Directive 2009/72 repealed Directive 2003/54 with effect from 3 March 2011.

- 7 Recital 50 of Directive 2009/72 states:

‘The public service requirements, including as regards the universal service, and the common minimum standards that follow from them need to be further strengthened to make sure that all consumers, especially vulnerable ones, are able to benefit from competition and fair prices. The public

service requirements should be defined at national level, taking into account national circumstances; [EU] law should, however, be respected by the Member States. The citizens of the Union and, where Member States deem it appropriate, small enterprises, should be able to enjoy public service obligations, in particular with regard to security of supply, and reasonable prices. ...'

- 8 Article 3(2) of Directive 2009/72, which, in essence, repeats Article 3(2) of Directive 2003/54, is worded as follows:

'Having full regard to the relevant provisions of the Treaty, in particular Article 86 thereof, Member States may impose on undertakings operating in the electricity sector, in the general economic interest, public service obligations which may relate to security, including security of supply, regularity, quality and price of supplies and environmental protection, including energy efficiency, energy from renewable sources and climate protection. Such obligations shall be clearly defined, transparent, non-discriminatory, verifiable and shall guarantee equality of access for electricity undertakings of the [European 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.'

Regulation (EC) No 1370/2007

- 9 Article 1(1) of Regulation (EC) No 1370/2007 of the European Parliament and of the Council of 23 October 2007 on public passenger transport services by rail and by road and repealing Council Regulations (EEC) Nos 1191/69 and 1107/70 (OJ 2007 L 315, p. 1) provides:

'The purpose of this Regulation is to define how, in accordance with the rules of [EU] law, competent authorities may act in the field of public passenger transport to guarantee the provision of services of general interest which are among other things more numerous, safer, of a higher quality or provided at lower cost than those that market forces alone would have allowed.

To this end, this Regulation lays down the conditions under which competent authorities, when imposing or contracting for public service obligations, compensate public service operators for costs incurred and/or grant exclusive rights in return for the discharge of public service obligations.'

- 10 Under the heading 'Definitions', Article 2(e) of that regulation states:

'For the purposes of this Regulation:

...

- (e) "public service obligation" means a requirement defined or determined by a competent authority in order to ensure public passenger transport services in the general interest that an operator, if it were considering its own commercial interests, would not assume or would not assume to the same extent or under the same conditions without reward.'

Regulation (EU) 2017/352

- 11 Article 2(14) of Regulation (EU) 2017/352 of the European Parliament and of the Council of 15 February 2017 establishing a framework for the provision of port services and common rules on the financial transparency of ports (OJ 2017 L 57, p. 1) defines 'public service obligations' for the purposes of that regulation as 'a requirement defined or determined in order to ensure the provision

of those port services or activities of general interest that an operator, if it were considering its own commercial interests, would not assume or would not assume to the same extent or under the same conditions’.

Spanish law

Decree-Law 14/2010

- 12 The fourth recital of Real Decreto-ley 14/2010, por el que se establecen medidas urgentes para la corrección del déficit tarifario del sector eléctrico (Royal Decree-Law 14/2010 laying down urgent measures for correction of the tariff deficit in the electricity sector) of 23 December 2010 (‘Decree-Law 14/2010’) (BOE No 312, of 24 December 2010, p. 106386) provides:

‘Secondly, in order to reduce the costs attributable to the tariff, it is expected that the producing companies under the ordinary regime will finance the 2008-2012 Action Plan, adopted by Decision of the Council of Ministers on 8 July 2005, which implements the measures provided for in the document “Savings and Energy Efficiency Strategy in Spain, 2004-2012”. Moreover, the percentages of each company’s contribution to its financing are fixed, and the provisions of the Ley de Presupuestos Generales del Estado de 2011 [General State Budget Act for 2011] shall be amended accordingly.’

- 13 According to the third additional provision of Decree-Law 14/2010 entitled ‘Financing of energy saving and efficiency plans for the years 2011, 2012 and 2013’:

‘1. The amounts payable from the electricity system for the purpose of funding the 2008-2012 Action Plan, adopted by Decision of the Council of Ministers of 8 July 2005 giving concrete expression to the measures referred to in the document entitled “Savings and Energy Efficiency Strategy in Spain, 2004-2012”, adopted by Decision of the Council of Ministers of 28 November 2003, forecast for the years 2011 and 2012 as EUR 270 million and EUR 250 million respectively, shall be financed through a contribution from each generating undertaking in the proportions set out in the following table:

Undertaking	Percentage
Endesa Generación SA	34.66
Iberdrola Generación SA	32.71
GAS Natural SDG SA	16.37
Hidroeléctrica del Cantábrico SA	4.38
E.ON Generación SL	2.96
AES Cartagena SRL	2.07
Bizkaia Energía SL	1.42
Castelnou Energía SL	1.58
Nueva Generadora del Sur SA	1.62
Bahía de Bizkaia Electricidad SL	1.42
Tarragona Power SL	0.81
Total	100.00

2. The amounts payable from the electricity system for the Plan adopted by the Council of Ministers, on the basis referred to in paragraph 1, shall be financed in 2013 by contributions from the producing companies, in accordance with the percentages provided for in paragraph 1, up to a maximum amount of EUR 150 million.'

The 2008-2012 Action Plan

- 14 The summary of the 2008-2012 Action Plan, adopted by decision of the Council of Ministers on 8 July 2005, provides:

'Savings and energy efficiency policies are a vehicle for the progress of society, because they contribute to social welfare; they constitute a factor of social responsibility; they direct human activities towards sustainable development; they establish a new framework for the development of corporate competitiveness, and, in short, they respond to the principle of solidarity between citizens and peoples.

Those guiding principles must take the form of plans, such as those set out in this document, the guidelines of which are intended to achieve the following strategic objectives:

1. See savings and energy efficiency as an instrument for economic growth and social welfare.
 2. Put in place appropriate conditions to ensure that savings and energy efficiency expertise expands and develops in society.
 3. Ensure that savings and energy efficiency are taken into account in all national strategies and in particular in Spain's climate change strategy.
 4. Encourage competition in the market according to the guiding principle of savings and energy efficiency.
 5. Consolidate Spain's position at the forefront of savings and energy efficiency.'
- 15 It is apparent from that summary that, alongside such national strategies, 'the [Union] has put in place policies to the same effect. That applies to Directive [2006/32/EC of the European Parliament and of the Council of 5 April 2006 on energy end-use efficiency and energy services and repealing Council Directive 93/76/EEC (OJ 2006 L 114, p. 64)]'.
 - 16 It is also stated in that summary that, from an economic point of view, the 2008-2012 Action Plan requires very substantial financial resources if the incentive for savings and energy efficiency is to create a genuine boost from private investment, which in most cases is economically profitable, but which requires a decision to invest funds the availability of which is always limited. The public funds necessary to implement the plan come from three sources: (i) the funds allocated to the plan by the Spanish administration, through the Instituto para la Diversificación y Ahorro de la Energía (IDAE) (Institute for Energy Diversification and Saving, 'IDAE'), which succeeded the Centro de Estudios de la Energía (Centre for Energy Studies), and equivalent bodies in the Autonomous Communities; (ii) resources from structural funds such as the European Regional Development Fund (ERDF); and (iii) funds reinvested in the electricity and gas sectors 'with a view to promoting efficiency improvements in those sectors'.

The contested order and the IDAE

- 17 Pursuant to the third additional provision of Decree-Law 14/2010, the national legislature adopted Orden IET/75/2014, por la que se regulan las transferencias de fondos, con cargo a las empresas productoras de energía eléctrica, de la cuenta específica de la Comisión Nacional de los Mercados y la Competencia al Instituto para la Diversificación y Ahorro de la Energía, en el año 2013, para la ejecución de las medidas del Plan de Acción de Ahorro y Eficiencia Energética 2011-2020, y los criterios para la ejecución de las medidas contempladas en dicho plan (Ministerial Order IET/75/2014 governing transfers of funds, payable by electricity generating undertakings, from the specific account of the National Markets and Competition Commission to the Institute for Diversification and Energy Saving in 2013 for the implementation of measures under the Savings and Energy Efficiency Action Plan 2011-2020, and criteria for the implementation of the measures set out in that plan) of 27 January 2014 (BOE No 25, of 29 January 2014, p. 5875, ‘the contested order’).
- 18 Article 1(1) of the contested order states that its purpose is to define the transfer procedure from the specific account of the Comisión Nacional de los Mercados y la Competencia (National Markets and Competition Commission) and the IDAE in respect of the funds referred to in the third additional provision of Decree-Law 14/2010.
- 19 The IDAE is financed, inter alia, by economic contributions made by the undertakings subject to the latter provision, and it is in the context of that institute that the government’s action and efficiency plans are implemented in part. The IDAE was established by the 21st additional provision of Ley 46/1985, de Presupuestos Generales del Estado para 1986 (Law 46/1985 on the general State budget) of 27 December 1985 (BOE No 311, of 28 December 1985, p. 40637), as an entity governed by public law, for the purpose of managing and developing the energy saving, conservation and diversification policy.

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

- 20 On 31 January 2014, GDF Suez Cartagena Energía SL, now Engie Cartagena, brought an action before the Audiencia Nacional (National High Court, Spain) seeking annulment of the contested order on the ground of unlawfulness, and for compensation corresponding to the sums paid under that order. Engie Cartagena challenges, in particular, the amount that it must bear in the context of financing the 2008-2012 Action Plan determined on the basis of Decree-Law 14/2010.
- 21 Engie Cartagena submits, in particular, that the criteria and principles established by the judgments of 20 April 2010, *Federutility and Others* (C-265/08, EU:C:2010:205), and of 7 September 2016, *ANODE* (C-121/15, EU:C:2016:637), which govern the imposition of a public service obligation, are not fulfilled by the national legislation at issue.
- 22 The Audiencia Nacional (National High Court) notes that, by introducing the mandatory contribution provided for in the third additional provision of Decree-Law 14/2010, pursuant to which the contested order was adopted, the national legislature wished to reduce the tariff deficit in the electricity sector, without the financing of that cost being borne by the entire electricity system. According to its recitals, ‘the aim of this decree-law is the urgent reduction of the tariff deficit in the electricity sector’. Decree-Law 14/2010 and, more specifically, its third additional provision are among the numerous provisions that the national legislature has adopted with regard to the correction of the tariff deficit in the electricity sector.
- 23 The referring court has doubts as to whether that mandatory contribution complies with the principles laid down in Article 3(2) of Directive 2009/72 and questions, in particular, whether the mandatory contribution constitutes a public service obligation imposed by the State in a transparent, non-discriminatory manner and which guarantees equality of access for companies to consumers.

- 24 According to that court, it follows from Article 3(2) that, in the general economic interest, Member States may introduce public service obligations which may relate to, inter alia, environmental protection, including energy efficiency, energy from renewable energy sources and climate protection, in accordance with Directive 2004/8/EC of the European Parliament and of the Council of 11 February 2004 on the promotion of cogeneration based on a useful heat demand in the internal energy market and amending Directive 92/42/EEC (OJ 2004 L 52, p. 50), and Directive 2006/32, in the context of which the savings and energy efficiency plans for the years 2011 to 2013 and Decree-Law 14/2010 were adopted.
- 25 In Spain, those measures are found in the Savings and Energy Efficiency Action Plan 2011-2020, the management of which is centralised by IDAE, a public body. For the purposes of that action plan, the allocation and economic transfer provided for in the third additional provision of Decree-Law 14/2010 were introduced, with the requirement of a financial obligation incumbent on the 11 undertakings referred to in the law that introduced the mandatory contribution. The purpose of that economic transfer is to meet the objectives of the IDAE.
- 26 That court states that the third additional provision of Decree-Law 14/2010 requires the financing now to be borne only by certain undertakings in the sector, rather than being a general allocation to be borne by the system or financed from budgetary resources, which would imply that the Member State concerned requires of and imposes on those undertakings a public service obligation, for the purposes of Directives 2003/54 and 2009/72. Thus, according to that court, where the financing of efficiency plans changes from general financing at the expense of the system to financing at the expense of specific energy producers, imposed in a binding manner by law, that financing requirement constitutes a public service obligation, in so far as it is an economic and financial decision, the objective and direct purpose of which are, however, to take measures all of which are related to environmental protection, including energy efficiency and climate protection.
- 27 However, the Audiencia Nacional (National High Court) states that, contrary to the requirements arising from Article 3(2) of Directive 2009/72, Decree-Law 14/2010 does not provide any clarification either on the criterion applied for fixing the amounts of the mandatory contribution, or on the reasoning behind the distribution of the percentages, or on whether the size and importance of those undertakings in the sector were decisive and, if so, on the nature of the criteria used to determine that importance.
- 28 Thus, the third additional provision of Decree-Law 14/2010 establishes a public service obligation without providing any indication or justification other than that relating to the legitimate reduction of the tariff deficit, which may be contrary to the principles arising from Directives 2003/54 and 2009/72 as regards public service requirements in the electricity sector. Therefore, if that measure constituted a public service obligation, it could, in the form in which it was introduced, lead to discrimination between undertakings as regards their rights and obligations, which would not be adequately justified and which, moreover, would not respect the principles that apply to such obligations in the electricity sector.
- 29 In those circumstances, the Audiencia Nacional (National High Court) decided to stay the proceedings and to refer the following questions to the Court of Justice for a preliminary ruling:
- ‘(1) Does the statutory provision laid down in the third additional provision of Royal Decree-Law 14/2010 [entitled “Funding of savings and efficiency plans for the years 2011, 2012 and 2013”] constitute a public service obligation for the purposes of Article 3(2) of Directives [2003/54] and [2009/72]:
- “1. The amounts payable from the electricity system for the purpose of funding the 2008-2012 Action Plan, adopted [by] ... Decision of the Council of Ministers of 8 July 2005 giving concrete expression to the measures referred to in the document entitled ‘Savings and Energy Efficiency

Strategy in Spain, 2004-2012', adopted by Decision of the Council of Ministers of 28 November 2003, forecast for the years 2011 and 2012 as EUR 270 million and EUR 250 million respectively, shall be financed through a contribution from each [electricity] generating undertaking in the proportions set out in the following table:

Undertaking Percentage

...

[Engie] Cartagena 2.07

..."

- (2) If that provision does actually constitute a public service obligation, is that obligation clearly defined, transparent, non-discriminatory and verifiable?

Consideration of the questions referred

- 30 By its first question, the referring court asks, in essence, whether Article 3(2) of Directive 2009/72 must be interpreted as meaning that a financial contribution imposed on certain electricity generating undertakings for the purpose of financing savings and energy efficiency plans managed by a public authority constitutes a public service obligation falling within that provision.
- 31 As a preliminary point, it must be observed, in the first place, that in the context of that question the referring court also refers to Article 3(2) of Directive 2003/54. That being said, in so far as, first, it is apparent from the request for a preliminary ruling that, on the date on which Engie Cartagena brought the action before the referring court against the contested order, Directive 2009/72 was applicable and, secondly, that provision has not undergone significant amendments following the adoption of that directive, the Court's answer to that question will only concern Article 3(2) of Directive 2009/72.
- 32 In the second place, in view of the discussions at the hearing on the possible fiscal nature of the mandatory contribution, it should be noted that the information contained in the reference for a preliminary ruling does not enable the Court to determine with certainty whether that mandatory contribution has such a nature. It must, however, be noted that although the referring court maintains, having regard to the interpretation of relevant national law, that that is essentially the case, Directive 2009/72, including Article 3(2) thereof, does not apply to national legislation establishing that mandatory contribution (see, to that effect, judgment of 7 November 2019, *UNESA and Others*, C-80/18 to C-83/18, EU:C:2019:934, paragraph 56).
- 33 Those preliminary remarks having been made, it should be noted that, in accordance with Article 3(2) of Directive 2009/72, having full regard to the relevant provisions of the EC Treaty, in particular Article 86 EC (now Article 106 TFEU), Member States may impose on undertakings operating in the electricity sector, in the general economic interest, public service obligations which may relate to security, including security of supply, regularity, quality and price of supplies, and environmental protection. Those obligations must be clearly defined, transparent, non-discriminatory, verifiable and must guarantee equality of access for electricity undertakings of the European Union to national consumers.
- 34 As regards the concept of 'public service obligations', it should be noted that since Article 3(2) of Directive 2009/72 does not make any reference to national laws concerning the meaning to be given to that concept, that provision must be regarded, for the purposes of the application of that directive, as containing an autonomous concept of EU law which must be interpreted in a uniform manner

throughout the territory of the European Union (see, to that effect, judgments of 21 February 2008, *Tele2 Telecommunication*, C-426/05, EU:C:2008:103, paragraph 26, and of 9 November 2016, *Wathelet*, C-149/15, EU:C:2016:840, paragraph 29).

- 35 Admittedly, recital 50 of Directive 2009/72 states that public service obligations should be defined at national level, taking into account national circumstances, but that EU law must be respected by the Member States. However, that wording refers only to the possibility for Member States to decide, on the basis of their national law, whether or not to impose public service obligations on certain undertakings, and to determine the content of such obligations, provided that they are compatible with EU law.
- 36 Thus, the reference to the laws of the Member States in that recital concerns solely the application of the concept of ‘public service obligations’.
- 37 For the purposes of interpreting that concept, it should be noted, in the first place, that although neither Article 3(2) of Directive 2009/72 nor any other provision of that directive contains a definition of the concept of ‘public service obligations’, it is, nevertheless, possible to extract from the wording of that provision the constituent elements of that concept, for the purposes of that directive.
- 38 First, it can be deduced from the fact that, according to the first sentence of Article 3(2) of Directive 2009/72, Member States may impose, in the general economic interest, public service obligations ‘on undertakings operating in the electricity sector’, that those obligations must be such that they result in those undertakings themselves contributing to the achievement of the objective of general economic interest determined by the Member State concerned.
- 39 Secondly, Article 3(2) of Directive 2009/72 makes specific reference to Article 86 EC (now Article 106 TFEU), in that Member States must, in particular, take full account of that provision of the Treaty when imposing public service obligations, for the purposes of that provision of Directive 2009/72.
- 40 The Court has held that Article 106(2) TFEU, which concerns undertakings entrusted with the operation of services of general economic interest, aims to reconcile the Member States’ interest in using certain undertakings as an instrument of economic or social policy with the European Union’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 of 7 September 2016, *ANODE*, C-121/15, EU:C:2016:637, paragraph 43).
- 41 That case-law therefore confirms that the undertakings concerned must be under an obligation to act themselves in order to achieve the objective of the general economic interest pursued.
- 42 Moreover, it is apparent from the reference to Article 106 TFEU in Article 3(2) of Directive 2009/72 that the public service obligations, which the latter provision authorises, derogate from the competition rules. It thus appears, as the European Commission indicates in its written observations, that a public service obligation, for the purposes of that provision, constitutes public intervention in the functioning of the market, in order to achieve an objective of general economic interest, which obliges undertakings operating in the electricity sector to act on the market on the basis of criteria imposed by the public authorities.
- 43 That interpretation of the concept of a ‘public service obligation’ is supported by the definitions of that concept which appear in other acts of EU law. In the absence of a definition of that concept in Directive 2009/72, and since it is a concept used by the EU legislature in many acts of secondary legislation, in particular, in the areas of competence referred to in Article 4 TFEU, such as energy or transport, such acts, other than Directive 2009/72, constitute useful references in order to achieve an interpretation of the same concept, for the purposes of that directive.

- 44 In that regard, as the Advocate General noted in point 42 of his Opinion, it is apparent, in particular, from Article 2(e) of Regulation No 1370/2007, which repealed Regulation No 1191/69, and from Article 2(4) of Regulation No 3577/92 as regards transport, and Article 2(14) of Regulation 2017/352 on the provision of port services, that the concept of ‘public service obligations’ adopted by the EU legislature for the purposes of the application of those regulations relates, in essence, to obligations imposed by public authorities on an operator who would not assume such obligations or who would not assume them to the same extent or under the same conditions if it had taken into account its own commercial interest alone.
- 45 It follows that, with regard both to the wording of Article 3(2) of Directive 2009/72 and the definition of the concept of ‘public service obligations’ as given in a convergent way in the context of those acts adopted by the EU legislature in areas other than that of the electricity market, that concept, for the purposes of Article 3(2) of Directive 2009/72, corresponds to public intervention measures in the functioning of that market, which require undertakings operating in the electricity sector, for the purpose of pursuing a general economic interest, to act on that market on the basis of criteria imposed by the public authorities. The freedom of those undertakings to act on the electricity market is thus limited, in that, solely having regard to their own commercial interest, they would not have supplied certain goods or services, or would not have supplied them to the same extent or under the same conditions.
- 46 In the second place, it should be noted that that definition of the concept of ‘public service obligations’ is consistent with the system established by Directive 2009/72.
- 47 It follows from the general structure of that directive that its purpose is to pursue the achievement of an internal market in electricity that is entirely and effectively open and competitive in which all consumers may freely choose their suppliers and in which all suppliers may freely supply their products to their customers (see, to that effect, judgments of 28 November 2018, *Solvay Chimica Italia and Others*, C-262/17, C-263/17 and C-273/17, EU:C:2018:961, paragraphs 36 and 55, and of 17 October 2019, *Elektrozpredelenie Yug*, C-31/18, EU:C:2019:868, paragraph 39).
- 48 In that context, however, Directive 2009/72 allows Member States, subject to the conditions which it specifies, to impose, in the general economic interest, public service obligations which affect the freedom of the operators concerned to act on the relevant market and thus affect the open competitive process on that market. It is precisely because public service obligations are capable of constituting restrictions on the achievement of a fully and effectively open and competitive internal electricity market that the EU legislature has imposed conditions on Member States that they must comply with when subjecting those operators to such obligations. As set out in Article 3(2) of that directive, the obligations in question must be clearly defined, transparent, non-discriminatory, verifiable and must guarantee equality of access for EU electricity undertakings to national consumers.
- 49 It is in the light of those considerations that it is necessary to examine whether the mandatory contribution falls within the concept of ‘public service obligations’ for the purposes of Article 3(2) of Directive 2009/72.
- 50 In this respect, it should be noted that, according to the referring court, by introducing the mandatory contribution provided for in the third additional provision of Decree-Law No 14/2010, pursuant to which the contested order was adopted, the national legislature wished to reduce the tariff deficit in the electricity sector, without the financing of that reduction being borne by the entire electricity system and, therefore, consumers. That court states that the revenue resulting from that contribution is used to fund the action plans managed by IDAE, which, according to Engie Cartagena and the companies intervening in the main proceedings, confirms that the objective pursued by the mandatory contribution is to protect the environment and achieve energy savings.

- 51 It should, however, be noted that, since that mandatory contribution does not impose any requirement on the undertakings concerned which would restrict their freedom to act on the electricity market, such a contribution cannot come within the concept of ‘public service obligations’ for the purposes of Article 3(2) of Directive 2009/72. In particular, by the imposition of that contribution, those undertakings are in no way required to supply certain goods or services which they would not have supplied, or which they would not have supplied to the same extent or under the same conditions, if they were considering only their own commercial interest.
- 52 It should be noted, in that regard, that the mere fact that the revenue from the mandatory contribution is transferred to a fund managed by the IDAE, which is responsible for implementing the measures of the action plan on savings and energy efficiency, does not imply that the operators subject to the obligation to pay that contribution are subject to a ‘public service obligation’ for the purposes of that provision.
- 53 That circumstance concerns only the final destination of the revenue from the mandatory contribution, which is not sufficient to find that the payment of that contribution constitutes a public service obligation for the purposes of that provision, as defined in paragraph 45 of the present judgment. The fact that the IDAE may pursue an objective of general economic interest is not in itself relevant, since the request for a preliminary ruling relates to the question whether a public service obligation is imposed on electricity generating undertakings rather than on that institute.
- 54 Moreover, acceptance of the position taken by Engie Cartagena and the companies intervening in the main proceedings would presuppose that any obligation to make a financial contribution, provided for in national legislation, imposed on operators in the electricity market would constitute, with regard only to the destination of the end product of that contribution, a ‘public service obligation’ for the purposes of Article 3(2) of Directive 2009/72, which would clearly exceed the scope of that concept as used by the EU legislature in the context of that provision.
- 55 Similarly, the finding in paragraph 51 of the present judgment cannot be called into question by the circumstance, raised by the referring court, that the action plans relating to savings and energy efficiency were previously financed by being considered as a cost borne by the entire electricity system and therefore, ultimately, by end consumers, and not, as at present, by some electricity producers. That circumstance concerns persons subject to an obligation to contribute to the financing of those plans, which, as the Commission argued in its written observations, does not appear, in principle, to be capable of affecting the nature of that obligation.
- 56 Lastly, it must be noted that, contrary to the submissions of Engie Cartagena and the companies intervening in the main proceedings, the mandatory contribution is different from the national obligations at issue in the cases giving rise to the judgments of 20 April 2010, *Federutility and Others* (C-265/08, EU:C:2010:205), of 21 December 2011, *ENEL* (C-242/10, EU:C:2011:861), and of 7 September 2016, *ANODE* (C-121/15, EU:C:2016:637). The cases which gave rise to those judgments concerned national measures imposing, respectively, requirements on the ‘reference prices’ for the supply of natural gas, the submission of tenders for the supply of electricity and the regulated tariffs for the sale of natural gas. All those measures thus determined the arrangements for the supply of goods or services by the undertakings concerned.
- 57 It follows from the foregoing considerations that Article 3(2) of Directive 2009/72 must be interpreted as meaning that a financial contribution imposed on certain electricity generating undertakings for the purpose of financing savings and energy efficiency plans managed by a public authority does not constitute a public service obligation falling within that provision.
- 58 In the light of the answer given to the first question, there is no need to answer the second question.

Costs

- 59 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:

Article 3(2) of Directive 2009/72/EC of the European Parliament and of the Council of 13 July 2009 concerning common rules for the internal market in electricity and repealing Directive 2003/54/EC must be interpreted as meaning that a financial contribution imposed on certain electricity generating undertakings for the purpose of financing savings and energy efficiency plans managed by a public authority does not constitute a public service obligation falling within that provision.

[Signatures]