



Reports of Cases

JUDGMENT OF THE COURT (Ninth Chamber)

16 July 2020*

(Failure of a Member State to fulfil obligations – Internal markets in electricity and natural gas – Electricity and natural gas transmission networks – Conditions of access – Regulation (EC) No 714/2009 – Article 14(1) – Regulation (EC) No 715/2009 – Article 13(1) – Costs – Determination of network access charges – Directive 2009/72/EC – Article 37(17) – Directive 2009/73/EC – Article 41(17) – National causes of action – Principle of effective judicial protection)

In Case C-771/18,

ACTION for failure to fulfil obligations under Article 258 TFEU, brought on 7 December 2018,

European Commission, represented by O. Beynet and K. Talabér-Ritz, acting as Agents,

applicant,

v

Hungary, represented initially by M.Z. Fehér and Z. Wagner, and subsequently by M.Z. Fehér, acting as Agents,

defendant,

THE COURT (Ninth Chamber),

composed of S. Rodin, President of the Chamber, D. Šváby and N. Piçarra (Rapporteur), Judges,

Advocate General: E. Tanchev,

Registrar: A. Calot Escobar,

having regard to the written procedure,

having decided, after hearing the Advocate General, to proceed to judgment without an Opinion,

gives the following

* Language of the case: Hungarian.

Judgment

- 1 By its application, the European Commission asks the Court to declare that:
 - by failing to take account of the costs actually incurred by network operators setting the charges for network access, Hungary has failed to fulfil its obligations under Article 14(1) of 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), as amended by Regulation (EU) No 347/2013 of the European Parliament and of the Council of 17 April 2013 (OJ 2013 L 115, p. 39) ('Regulation No 714/2009'), and Article 13(1) of 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), as amended by Regulation No 347/2013 ('Regulation No 715/2009'), and that,
 - by failing to establish a suitable mechanism guaranteeing the right to appeal against the decisions of the national regulatory authority, as provided for under Article 37(17) 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) and Article 41(17) 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), Hungary has failed to fulfil its obligations under those provisions of Directives 2009/72 and 2009/73.

Legal background

European Union law

Regulation No 714/2009

- 2 Recitals 3, 14 and 16 of Regulation No 714/2009 state:
 - '(3) ... At present, there are obstacles to the sale of electricity on equal terms, without discrimination or disadvantage in the Community. In particular, non-discriminatory network access and an equally effective level of regulatory supervision do not yet exist in each Member State, and isolated markets persist.
 - ...
 - (14) A proper system of long-term locational signals is necessary, based on the principle that the level of the network access charges should reflect the balance between generation and consumption of the region concerned, on the basis of a differentiation of the network access charges on producers and/or consumers.
 - ...

(16) The precondition for effective competition in the internal market in electricity is non-discriminatory and transparent charges for network use including interconnecting lines in the transmission system. The available capacity of those lines should be set at the maximum levels consistent with the safety standards of secure network operation.'

3 Article 11 of that regulation provides:

'The costs related to the activities of the [European Network of Transmission System Operators (ENTSO)] for Electricity referred to in Articles 4 to 12 of this Regulation, and in Article 11 of Regulation (EU) No 347/2013 shall be borne by the transmission system operators and shall be taken into account in the calculation of tariffs. Regulatory authorities shall approve those costs only if they are reasonable and proportionate.'

4 Article 14 of that regulation provides:

'1. Charges applied by network operators for access to networks shall be transparent, take into account the need for network security and reflect actual costs incurred in so far as they correspond to those of an efficient and structurally comparable network operator and are applied in a non-discriminatory manner. Those charges shall not be distance-related.

2. Where appropriate, the level of the tariffs applied to producers and/or consumers shall provide locational signals at Community level, and take into account the amount of network losses and congestion caused, and investment costs for infrastructure.

3. When setting the charges for network access, the following shall be taken into account:

- (a) payments and receipts resulting from the inter-transmission system operator compensation mechanism;
- (b) actual payments made and received as well as payments expected for future periods of time, estimated on the basis of past periods.

...'

Regulation No 715/2009

5 Recitals 7 and 8 of Regulation No 715/2009 state:

'(7) It is necessary to specify the criteria according to which tariffs for access to the network are determined, in order to ensure that they fully comply with the principle of non-discrimination and the needs of a well-functioning internal market and take fully into account the need for system integrity and reflect the actual costs incurred, in so far as such costs correspond to those of an efficient and structurally comparable network operator and are transparent, whilst including appropriate return on investments, and, where appropriate, taking account of the benchmarking of tariffs by the regulatory authorities.

(8) In calculating tariffs for access to networks, it is important to take account of the actual costs incurred, in so far as such costs correspond to those of an efficient and structurally comparable network operator, and are transparent, as well as of the need to provide appropriate return on investments and incentives to construct new infrastructure, including

special regulatory treatment for new investments as provided for in Directive 2009/73/EC. In that respect, and in particular if effective pipeline-to-pipeline competition exists, the benchmarking of tariffs by the regulatory authorities will be a relevant consideration.’

6 Article 11 of that regulation provides:

‘The costs related to the activities of the ENTSO for Gas referred to in Articles 4 to 12 of this Regulation, and in Article 11 of Regulation (EU) No 347/2013 shall be borne by the transmission system operators and shall be taken into account in the calculation of tariffs. Regulatory authorities shall approve those costs only if they are reasonable and appropriate.’

7 Article 13(1) of that regulation provides:

‘Tariffs, or the methodologies used to calculate them, applied by the transmission system operators and approved by the regulatory authorities pursuant to Article 41(6) of Directive 2009/73/EC, as well as tariffs published pursuant to Article 32(1) of that Directive, shall be transparent, take into account the need for system integrity and its improvement and reflect the actual costs incurred, in so far as such costs correspond to those of an efficient and structurally comparable network operator and are transparent, whilst including an appropriate return on investments, and, where appropriate, taking account of the benchmarking of tariffs by the regulatory authorities. Tariffs, or the methodologies used to calculate them, shall be applied in a non-discriminatory manner.

...’

Directive 2009/72

8 Article 1 of Directive 2009/72 reads as follows:

‘This Directive establishes common rules for the generation, transmission, distribution and supply of electricity, together with consumer protection provisions, with a view to improving and integrating competitive electricity markets in the Community. It lays down the rules relating to the organisation and functioning of the electricity sector, open access to the market, the criteria and procedures applicable to calls for tenders and the granting of authorisations and the operation of systems. It also lays down universal service obligations and the rights of electricity consumers and clarifies competition requirements.’

9 Article 37 of that directive provides:

‘1. The regulatory authority shall have the following duties:

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

...

6. The regulatory authorities shall be responsible for fixing or approving sufficiently in advance of their entry into force at least the methodologies used to calculate or establish the terms and conditions for:

- (a) connection and access to national networks, including transmission and distribution tariffs or their methodologies. Those tariffs or methodologies shall allow the necessary investments in the networks to be carried out in a manner allowing those investments to ensure the viability of the networks;

...

8. In fixing or approving the tariffs or methodologies and the balancing services, the regulatory authorities shall ensure that transmission and distribution system operators are granted appropriate incentive, over both the short and long term, to increase efficiencies, foster market integration and security of supply and support the related research activities.

...

17. Member States shall ensure that suitable mechanisms exist at national level under which a party affected by a decision of a regulatory authority has a right of appeal to a body independent of the parties involved and of any government.'

Directive 2009/73

10 Article 1(1) of Directive 2009/73 provides:

'This Directive establishes common rules for the transmission, distribution, supply and storage of natural gas. It lays down the rules relating to the organisation and functioning of the natural gas sector, access to the market, the criteria and procedures applicable to the granting of authorisations for transmission, distribution, supply and storage of natural gas and the operation of systems.'

11 Article 41 of that directive provides:

'1. The regulatory authority shall have the following duties:

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

...

6. The regulatory authorities shall be responsible for fixing or approving sufficiently in advance of their entry into force at least the methodologies used to calculate or establish the terms and conditions for:

- (a) connection and access to national networks, including transmission and distribution tariffs, and terms, conditions and tariffs for access to [liquefied natural gas (LNG)] facilities. Those tariffs or methodologies shall allow the necessary investments in the networks and LNG facilities to be carried out in a manner allowing those investments to ensure the viability of the networks and LNG facilities;

...

8. In fixing or approving the tariffs or methodologies and the balancing services, the regulatory authorities shall ensure that transmission and distribution system operators are granted appropriate incentive, over both the short and long term, to increase efficiencies, foster market integration and security of supply and support the related research activities.

...

17. Member States shall ensure that suitable mechanisms exist at national level under which a party affected by a decision of a regulatory authority has a right of appeal to a body independent of the parties involved and of any government.'

Hungarian law

The Law on Electricity

12 Article 178SZ of Law LXXXVI of 2007 on Electricity ('the Law on Electricity') provides:

'1. In managing their invoicing, holders of authorisations under this Law and holders of private line authorisations may not pass on to their contractual customers the costs relating to the tax on financial transactions ("transaction costs") to which they are subject under Law CXVI of 2012 on a Tax on Financial Transactions. Accordingly, transaction costs may not be directly or indirectly integrated into the price of the goods or services supplied by the holders of such authorisations, and may not be separately invoiced, but must be borne by the holders themselves.

2. Holders of authorisations under this Law may not pass on to their contractual customers the special income tax or the tax on public utility network services (together, "the special taxes") to which they are subject under Law LXVII of 2008 on Competitiveness in Urban Heating and Law CLXVIII of 2012 on the Tax on Public Utility Network Services (together, "the laws on the special taxes"). Accordingly, the special taxes may not be directly or indirectly integrated into the price of the goods or services supplied by the holders of such authorisations, and may not be separately invoiced. The tax burden must be borne by the taxpayers designated as such by the laws on the special taxes.'

The Law on the Supply of Natural Gas

13 Under Article 103 of Law XL of 2008 on the Supply of Natural Gas ('the Law on the supply of natural gas'):

'...

4. Producers and holders of authorisations under this Law may not pass on to their contractual customers the special income tax or the tax on public utility network services (together, "the special taxes") to which they are subject under Law LXVII of 2008 on Competitiveness in Urban Heating and Law CLXVIII of 2012 on the Tax on Public Utility Network Services (together, "the laws on the special taxes"). Accordingly, the special taxes may not be directly or indirectly integrated into the price of the goods or services supplied by producers or holders of such

authorisations, and may not be separately invoiced. The tax burden must be borne by the taxpayers designated as such by the laws on the special taxes.

4a. In managing their invoicing, producers and holders of authorisations under this Law may not pass on to their contractual customers the costs relating to the tax on financial transactions (“transaction costs”) to which they are subject under Law CXVI of 2012 on a Tax on Financial Transactions. Accordingly, transaction costs may not be directly or indirectly integrated into the price of the goods or services supplied by producers or holders of such authorisations, and may not be separately invoiced, but must be borne by the producers and holders themselves.

...’

The Law Amending the Laws Governing the Energy Sector in the interests of Harmonisation

- 14 Article 7 of Law LIX of 2016 Amending the Laws Governing the Energy Sector in the interests of Harmonisation (“the Law amending the laws governing the energy sector in the interests of harmonisation”) provides:

‘In the part of the Law on Electricity entitled “General Rules of Procedure of the Authority”, after Article 168, Article 168A is inserted in the following terms:

“Article 168A

1. For the purposes of the arrangements for determining usage charges, remuneration for services provided by a distributor under a special tariff and connection fees, only the holder of the authorisation for the relevant network shall be regarded as the customer.

2. Within 15 days of notification of a decision of the Authority determining usage charges, remuneration for services provided by a distributor under a special tariff or connection fees, the relevant customer may, by bringing an action against the Authority, put that decision before the administrative court for judicial review of its legality.

3. Applications for judicial review of a decision determining usage charges, remuneration for services provided by a distributor under a special tariff or connection fees are extraordinary proceedings, and the court before which such a matter is brought shall give a ruling no later than 30 days after filing of the application.

...”

- 15 Article 23 of the Law amending the laws governing the energy sector in the interests of harmonisation provides:

‘In the Law on the supply of natural gas, before the heading “International Cooperation and relations with European Union Institutions”, Article 129A is inserted in the following terms:

“Article 129A

...

4. Within 15 days of notification of a decision of the Authority determining usage charges, remuneration for services provided by a system operator under a special tariff or connection fees, the relevant customer may, by bringing an action against the Authority, put that decision before the administrative court for judicial review of its legality.

5. Applications for judicial review of a decision determining usage charges, remuneration for services provided by a system operator under a special tariff or connection fees are extraordinary proceedings, and the court before which such a matter is brought shall give a ruling no later than 30 days after filing of the application.

...”

- 16 Article 29(2) of the Law amending the laws governing the energy sector in the interests of harmonisation provides:

‘In Article 12 of Law XXII of 2013 establishing the Hungarian Regulation Authority for the Energy Sector and Public Utilities, points (n) and (o) are inserted in the following terms:

“[The President of the Authority]

- (n) shall adopt a decision determining, in respect of the electricity network, the usage charges and connection fees, as well as the remuneration payable for services provided by a distributor under a special tariff based on the requirements of the authorisation holder or the user, and the remuneration for services provided by a distributor under a special tariff applicable in the event of breach of contract by the customer;
- (o) shall adopt a decision determining, in respect of the natural gas network, the usage charges and connection fees, as well as the remuneration payable for services provided by system operators under a special tariff based on the requirements of the authorisation holder or the user, and the remuneration payable for services provided by system operators under a special tariff applicable in the event of breach of contract by the customer.”

The Law Amending certain Laws Governing the Energy Sector for the purposes of Regulating Prices

- 17 Law CLXXXIII of 2016 Amending certain Laws Governing the Energy Sector for the purposes of Regulating Prices (‘the Law amending certain laws governing the energy sector for the purposes of regulating prices’) repeals, by Article 6(4), Article 168A of the Law on Electricity and, by Article 12(3), paragraphs 2 to 7 of Article 129A of the Law on the supply of natural gas.
- 18 Article 4 of the Law amending certain laws governing the energy sector for the purposes of regulating prices provides:

‘In the [Law on Electricity]’, before the heading “Provisions concerning entry into force”, Article 178U is inserted in the following terms:

“Article 178U

1. The regulations provided for in Article 143(5) to Article 146(4) and in Article 146A(3) of this Law, as amended by the [Law amending certain laws governing the energy sector for the purposes of regulating prices], shall be applied for the first time for the purposes of determining the fees and charges due with effect from 1 January 2017.

2. The decisions made public pursuant to Article 143(5), Article 146(4) and Article 146A(3) of this Law, as amended by the [Law amending the laws governing the energy sector in the interests of harmonisation], shall not enter into force.

3. In the event that a decision made public pursuant to Article 143(5), Article 146(4) or Article 146A(3) of this law, as amended by the [Law amending the laws governing the energy sector in the interests of harmonisation], is, upon the coming into force of the [Law amending certain laws governing the energy sector for the purposes of regulating prices], the subject of judicial review proceedings, the court hearing the matter shall extinguish those proceedings.

4. Furthermore, the provisions of this law, as amended by the [Law amending certain laws governing the energy sector for the purposes of regulating prices] shall apply to pending administrative and judicial proceedings.”

- 19 Article 10 of the Law amending certain laws governing the energy sector for the purposes of regulating prices provides:

‘In Chapter XVIII of the Law on the supply of natural gas, Article 146M is inserted in the following terms:

“Article 146M

1. The regulations provided for in Article 104B(4) to Article 106(3) and in Article 108(2) of this Law, as amended by the [Law amending certain laws governing the energy sector for the purposes of regulating prices], shall be applied for the first time for the purposes of determining the tariffs applicable with effect from 1 January 2017.

2. The decisions made public pursuant to Article 104B(4), Article 106(3) and Article 108(2) of this Law, as amended by the [Law amending the laws governing the energy sector in the interests of harmonisation], shall not enter into force.

3. In the event that a decision made public pursuant to Article 104B(4), Article 106(3) or Article 108(2) of this law, as amended by the [Law amending the laws governing the energy sector in the interests of harmonisation], is, upon the coming into force of the [Law amending certain laws governing the energy sector for the purposes of regulating prices], the subject of judicial review proceedings, the court hearing the matter shall extinguish those proceedings.

4. Furthermore, the provisions of this law, as amended by the [Law amending certain laws governing the energy sector for the purposes of regulating prices] shall apply to pending administrative and judicial proceedings.”

- 20 Article 13 of the Law amending certain laws governing the energy sector for the purposes of regulating prices provides:

‘In Article 12(n) and (o) of Law XXII of 2013 establishing the Hungarian Regulation Authority for the Energy Sector and Public Utilities, the words “adopts a decision” are replaced by the words “adopts a regulation”.’

Pre-litigation procedure

- 21 On 15 July 2013, in ‘EU Pilot’ case 5366/13/ENER, the Commission addressed a number of questions to Hungary in relation to the transposition of Directives 2009/72 and 2009/73 and the application of Regulations No 714/2009 and No 715/2009. Those questions concerned, amongst other things, non-discriminatory third party access to the network, the independence, powers and operation of the national regulatory authorities, the rules on network access charges, and cross-border access to network infrastructure.
- 22 The national authorities responded to those questions by letters of 23 October and 11 December 2013.
- 23 On 27 February 2015, the Commission, which did consider Hungary’s response to have assuaged its doubts as to the conformity of the Hungarian legislation with EU law, and regarded that legislation as being non-compliant, in numerous respects, with the directives and regulations referred to above, sent a letter of formal notice to that Member State.
- 24 Hungary responded to the letter of formal notice by letters of 8 May and 7 July 2015, providing further information in letters of 23 November and 17 December 2015, and of 13 and 20 May 2016. The Member State attached the wording of the Law amending the laws governing the energy sector in the interests of harmonisation to its supplementary response of 19 July 2016.
- 25 On 9 December 2016, the Commission, which did not consider that the measures notified by the Hungarian authorities, in response to the letter of formal notice, had resolved all of the issues raised in that letter, sent Hungary a reasoned opinion particularising the failure of that Member State to comply with its obligations under Article 41(6) of Directive 2009/73, Article 14(1) of Regulation No 714/2009 and Article 13(1) of Regulation No 715/2009.
- 26 Hungary responded to the reasoned opinion by letter of 8 February 2017.
- 27 After considering that response, the Commission concluded that the issues which had been identified had been resolved. However, having regard to the amendments to the relevant legislation which had been made in the meantime, by the Law amending certain laws governing the energy sector for the purposes of regulating prices, the Commission formed the view that Hungary had failed to fulfil its obligations by not establishing a suitable mechanism to ensure a right of appeal against decisions of the national regulatory authority, within the meaning of Article 37(17) of Directive 2009/72 and Article 41(17) of Directive 2009/73. On 28 April 2017, the Commission sent a supplementary reasoned opinion to the Member State.
- 28 By letter of 28 June 2017, Hungary responded to the supplementary reasoned opinion, referring to its response to the earlier reasoned opinion in which it had stated that, in the meantime, it had amended the Law on the Supply of Natural Gas in the light of the requirements of the ‘third

energy package’, which had taken effect on 1 October and 22 December 2016, and had thus brought the powers of the national regulatory authority into conformity with Article 41(6) of Directive 2009/73.

- 29 The Commission did not consider that Hungary had fulfilled either the obligations arising from Article 14(1) of Regulation No 714/2009 and Article 13(1) of Regulation No 715/2009, or those arising from Article 37(17) of Directive 2009/72 and Article 41(17) of Directive 2009/73, and brought the present action.

The action

The first plea, alleging infringement of Article 14(1) of Regulation No 714/2009 and Article 13(1) of Regulation No 715/2009

Arguments of the parties

- 30 The Commission argues, in the first place, that Article 14(1) of Regulation No 714/2009 and Article 13(1) of Regulation 715/2009 lay down the guiding principle that network access pricing is to be determined by reference to the costs borne by the network operators and do not restrict the costs to be taken into account in determining network access charges. It submits that those provisions require such charges to reflect all costs borne by the operators, in so far as those costs are transparent and correspond to those of an efficient and structurally comparable network operator, but that Article 178SZ(1) and (2) of the Law on Electricity and Article 103(4) and (4a) of the Law on the supply of natural gas, under which network operators cannot pass on to consumers the special tax on energy transmission networks or the tax on financial transactions, prevent the national regulatory authority, when it determines the network access charges, from taking account of the costs relating to those taxes.
- 31 In the second place, the Commission argues that there is no objective reason justifying the fact that the national regulatory authority cannot take account of the costs at issue. It submits that the reason given by Hungary in its response to the Commission’s request for information, which was that the provisions at issue were designed to bring about a reduction in the prices paid for gas and electricity by the end resident customer, is not relevant.
- 32 In that regard, it acknowledges that Article 3(8) of Directive 2009/72 and Article 3(4) of Directive 2009/73 enable Member States to adopt consumer protection measures, particularly with a view to combating energy poverty. It submits however that this is subject to the proviso that such measures do not impede the proper functioning of the market, which, amongst other things, requires compliance with the ‘guiding principle for network access pricing’.
- 33 In the third place, as regards Hungary’s argument that it follows from Regulations No 714/2009 and No 715/2009, and from Directives 2009/72 and 2009/73, that it is for the national legislature, when it adopts rules concerning the determination of network access charges, to strike an appropriate balance between the conflicting interests of network operators and consumers, the Commission argues that the ‘third energy package’, which was adopted on 13 July 2009 and includes, amongst other things, Directives 2009/72 and 2009/73 and Regulations No 714/2009 and No 715/2009, does not leave the Member States any margin of appreciation. It submits that the interests of network operators and those of consumers have been fully taken into account by the

EU legislature, in Article 14(1) of Regulation No 714/2009 and Article 13(1) of Regulation No 715/2009. Thus, if the network access charges do not reflect all of the costs borne by the operators, they have not been set at a reasonable level.

- 34 In the fourth place, the Commission considers that, regardless of the economic effects of the measure at issue, it has been established that Hungary has failed to fulfil its obligations under Article 14(1) of Regulation No 714/2009 and Article 13(1) of Regulation No 715/2009. On that basis it submits that there is no need for the Commission to demonstrate the effect of the legislation at issue.
- 35 Hungary argues, referring to the judgment of 29 November 1983, *Roussel Laboratoria and Others* (181/82, EU:C:1983:352, paragraph 25), that the national legislation at issue was enacted in the exercise of the fiscal autonomy enjoyed by the Member States in direct tax matters and that it applies in a general and non-discriminatory manner to all network operators, in conformity with the case-law of the Court on non-discrimination between taxpayers. Hungary considers that the tax on transactions and the tax on the income of energy suppliers are irrelevant to the determination of network access charges.
- 36 It argues that the Commission is misinterpreting Article 14(1) of Regulation No 714/2009 and Article 13(1) of Regulation No 715/2009 by failing to take account of the particularities of the market or the objective and scope of price regulation.
- 37 In that regard, Hungary argues, in the first place, that the operation of networks is a special area of the energy market in which a natural monopoly exists, namely the electricity transmission system and the natural gas transmission system. Article 14(1) of Regulation No 714/2009 and Article 13(1) of Regulation No 715/2009 are thus intended to keep charges for access to those systems at a low, fair level, and to reduce the risk of those monopoly operators engaging in abuse of their dominant position, including abuse in the form of overpricing.
- 38 In the second place, Hungary argues that Article 14(1) of Regulation No 714/2009 and Article 13(1) of Regulation No 715/2009 do not contain detailed rules or methodologies for identifying the costs to be taken into account when the charges are determined. It submits that the logic of the system established by those regulations, and by Directives 2009/72 and 2009/73, dictates that it is for the national legislature to assess, within the limits laid down by those regulations and directives, the interests of all actors on the energy market, including consumers, as well as the public interest – particularly the public interest in security of supply and protection of the environment – and, on the basis of that assessment, to adopt detailed national rules in conformity with EU law.
- 39 It states that the national legislation at issue pursues the public interest in keeping the electricity and natural gas prices paid by final consumers at a reasonable level, by means of a balance, which it is for the Member States to strike, between the interests of network operators in having network access charges which incorporate all the costs and expenses they bear, and the interests of consumers and other network users in having network access charges which are kept at a reasonable level.

- 40 In the third place, Hungary argues that the network access charges must appropriately reflect the costs borne by system operators, in accordance with Article 14(1) of Regulation No 714/2009 and Article 13(1) of Regulation No 715/2009. It states that the Commission is not alleging that, as a result of the national legislation at issue, network access charges are being set at a level which undermines the system operators' activities or the proper maintenance of the networks.
- 41 Finally, Hungary observes that, under settled case-law of the Court, it is for the Commission to prove the alleged failure to fulfil obligations. It submits that the Commission has not given reasons explaining why the profits achieved by system operators in Hungary cannot be regarded as appropriate.

Assessment of the Court

- 42 In order to determine whether, as the Commission submits, Article 14(1) of Regulation No 714/2009 and Article 13(1) of Regulation No 715/2009 require that all the costs, within the meaning of those provisions – including costs relating to the special tax on energy transmission networks and the tax on financial transactions at issue – must necessarily be taken into account by the national regulatory authority when it determines network access charges, it is necessary to consider not only the wording of those provisions but also the context in which they occur and the objectives pursued by the rules of which they form part (see, by analogy, judgment of 3 March 2020, *X (European arrest warrant – Double criminality)*, C-717/18, EU:C:2020:142, paragraph 21 and the case-law cited).
- 43 As regards, in the first place, the wording of Article 14(1) of Regulation No 714/2009 and that of Article 13(1) of Regulation No 715/2009, it must be observed that in both cases it is limited to a general statement of the costs to be taken into account in determining network access charges, and does not specify whether 'all' such costs are required to be taken into account by the national regulatory authority.
- 44 Turning, in the second place, to the context of Article 14(1) of Regulation No 714/2009 and Article 13(1) of Regulation No 715/2009, it must be observed that those regulations only identify a few categories of costs that must be taken into account in calculating network access charges. These include the costs related to the activities of the European Network of Transmission System Operators for electricity, which must be reasonable and appropriate (Article 11 of Regulation No 714/2009 and Article 11 of Regulation No 715/2009), and investment costs for infrastructure (Article 14(2) of Regulation No 714/2009).
- 45 In the third place, in connection with the objectives pursued by the rules to which the relevant provisions belong, it is apparent from Article 1 of Regulation No 714/2009 and Article 1 of Regulation No 715/2009 that those regulations seek to establish non-discriminatory rules for access to electricity and natural gas transmission systems and to facilitate the emergence of well-functioning and transparent wholesale markets with high levels of security of supply.
- 46 Those objectives can be efficaciously achieved without requiring network access charges to reflect all costs actually incurred by the system operators. Such charges contribute to the achievement of those objectives in so far as they must be non-discriminatory and transparent (recital 16 and Article 14(1) of Regulation No 714/2009 and recital 7 and Article 13(1) of Regulation No 715/2009), and must ensure an appropriate return on investment, enabling system operators

to make the investments which are necessary to ensure the viability of the electricity and natural gas transmission systems (Article 14(1) and (2) of Regulation No 714/2009 and recital 8 and Article 13 of Regulation No 715/2009).

- 47 It follows from the foregoing that the Commission's interpretation, according to which Article 14(1) of Regulation No 714/2009 and Article 13(1) of Regulation No 715/2009 require that all the costs, within the meaning of those provisions – including costs relating to the special tax on energy transmission networks and the tax on financial transactions at issue – must necessarily be taken into account by the national regulatory authority when it determines network access charges, cannot be upheld.
- 48 That conclusion is not undermined by the Commission's argument that, if system operators are unable to pass on the costs relating to the special tax on energy transmission networks and the tax on financial transactions, they will not achieve a reasonable level of profit. The level of network access charges is not determined solely on the basis of the costs borne by the system operators.
- 49 Thus, first, it is apparent from Article 14(1) of Regulation No 714/2009, read together with Article 37(6)(a) of Directive 2009/72, as well as from Article 13(1) of Regulation No 715/2009 and Article 41(6)(a) of Directive 2009/73, that the level of those charges must also be determined by reference to the investments necessary to ensure the viability of the electricity and natural gas transmission networks.
- 50 Secondly, under Article 37(8) of Directive 2009/72 and Article 41(8) of Directive 2009/73, in determining network access charges, the national regulatory authorities may provide appropriate incentives, over both the short and long term, to increase efficiencies, foster market integration and security of supply and support the related research activities.
- 51 Thirdly, it is apparent from recital 14 and Article 14(2) and (3) of Regulation No 714/2009, read together, that the level of electricity network access charges must reflect investment costs for infrastructure and the balance between generation and consumption of the region concerned. To that end, the amount of network losses and congestion caused must also be taken into account, as must the payments resulting from the inter-transmission system operator compensation mechanism and actual payments made, estimated on the basis of past periods.
- 52 Finally, it is apparent from Article 13(1) and recitals 7 and 8 of Regulation No 715/2009, read together, that the level of natural gas network access charges must include an appropriate return on investment and incentives to construct new infrastructure and must take account, where appropriate, of the benchmarking of tariffs by the regulatory authorities.
- 53 In the light of all the foregoing considerations, the Commission's first plea must be dismissed as unfounded.

The second plea, alleging infringement of Article 37(17) of Directive 2009/72 and Article 41(17) of Directive 2009/73

Arguments of the parties

- 54 The Commission maintains that Hungary has failed to fulfil the obligations incumbent on it under Article 37(17) of Directive 2009/72 and Article 41(17) of Directive 2009/73 in that it has not established a suitable mechanism to ensure a right of appeal against decisions of the national regulatory authority, within the meaning of those provisions. According to the Commission, such a right of appeal is a corollary of the principle of effective judicial protection, which is a general principle of EU law enshrined in Article 47 of the Charter of Fundamental Rights of the European Union ('the Charter').
- 55 The Commission observes, in the first place, that the right to bring an appeal before an administrative court in respect of decisions of the national administrative regulatory authority, referred to in Article 168(10) of the national Law on Electricity and Article 129 of the Law on the supply of natural gas, does not extend to the regulations by which that authority determines network access charges. Those regulations can only be challenged, it states, before the Alkotmánybíróság (Constitutional Court, Hungary), by means of an action for unconstitutionality brought pursuant to Article 26 of Law CLI of 2011 on the Constitutional Court; there is no provision for any other cause of action enabling them to be challenged. Moreover, the Commission submits, under Article 29 of that law, the Alkotmánybíróság (Constitutional Court) only has jurisdiction to hear actions for unconstitutionality 'relating to a fundamental constitutional issue'.
- 56 Furthermore, the Commission observes that Directives 2009/72 and 2009/73 have strengthened the role of the national regulatory authorities, by laying down stricter requirements of independence from public and private entities and by granting them new powers enabling them to take legally binding decisions in some fields. It submits that those directives counterbalanced the greater independence and powers of those authorities by means of rules addressing their responsibilities, and that Article 37(17) of Directive 2009/72 and Article 41(17) of Directive 2009/73 are central to those rules.
- 57 In the second place, the Commission argues, referring to the judgment of 22 May 2003, *Connect Austria* (C-462/99, EU:C:2003:297, paragraph 37), that the Court has already held, in a case concerning a provision analogous to Article 37(17) of Directive 2009/72 and Article 41(17) of Directive 2009/73, namely Article 5a(3) of Council Directive 90/387/EEC of 28 June 1990 on the establishment of the internal market for telecommunications services through the implementation of open network provision (OJ 1990 L 192, p. 1), that a right of appeal available before a constitutional court, limited to cases of infringement of constitutional law or of an international treaty, cannot be said to constitute a suitable mechanism within the meaning of that provision.
- 58 Finally, the Commission states that, in its response to the letter of formal notice, Hungary acknowledged that it was necessary to correct this situation and that subsequently, in the course of 2016, it adopted the Law amending the laws governing the energy sector in the interests of harmonisation. Under that law, the national regulatory authority only defined the principles and framework for the determination of charges by means of regulations, with the charges themselves being determined by individual decisions. The Commission submits that this made full and complete judicial review of those decisions possible. However, under a subsequent law,

which was also enacted in 2016 and amended certain laws governing the energy sector for the purposes of regulating prices, the charges themselves are now determined by regulations of the national regulatory authority, and consequently can only be challenged in an action before the Alkotmánybíróság (Constitutional Court).

- 59 Hungary argues that the national legislation in force, in so far as it provides for regulations of the national regulatory authority to be challenged before the Alkotmánybíróság (Constitutional Court), complies with Article 37(17) of Directive 2009/72 and Article 41(17) of Directive 2009/73. It acknowledges that the determination of network access charges requires the adoption of a regulation rather than an individual administrative act.
- 60 It states that the examination carried out by the Alkotmánybíróság (Constitutional Court) is limited to constitutional issues brought before that court and issues which, in certain circumstances, it may examine of its own motion.

Assessment of the Court

- 61 It should be observed, first of all, that Article 37(17) of Directive 2009/72 and Article 41(17) of Directive 2009/73 require Member States to ensure that suitable mechanisms exist at national level under which a party affected by a decision of a regulatory authority has a right of appeal to a body independent of the parties involved and of the government. That requirement is a corollary of the principle of effective judicial protection, which is a general principle of EU law deriving from the shared constitutional traditions of the Member States and enshrined in Article 47 of the Charter (see, to that effect, judgment of 8 December 2011, *Chalkor v Commission*, C-386/10 P, EU:C:2011:815, paragraph 52).
- 62 In the absence of EU legislation in the field, it is for the legal system of each Member State to designate the courts and tribunals having jurisdiction and to lay down the detailed procedural rules governing actions for safeguarding rights which individuals derive from EU law (see, to that effect, judgments of 16 December 1976, *Rewe-Zentralfinanz and Rewe-Zentral*, 33/76, EU:C:1976:188, paragraph 5, and of 13 March 2007, *Unibet*, C-432/05, EU:C:2007:163, paragraph 39). This must, however, be done without infringing the right to effective judicial protection (see, to that effect, judgments of 19 March 2015, *E.ON Földgáz Trade*, C-510/13, EU:C:2015:189, paragraph 50, and of 19 November 2019, *A. K. and Others. (Independence of the Disciplinary Chamber of the Supreme Court)*, C-585/18, C-624/18 and C-625/18, EU:C:2019:982, paragraph 115).
- 63 It is true that the Hungarian legislation has introduced, in Article 168(10) of the Law on Electricity and Article 129 of the Law on the supply of natural gas, a general right to bring an appeal against decisions of the national regulatory authority before an administrative court. However, as regards the determination, by means of a regulation, of the amount of network access charges, which is required to be covered by the guarantee in Article 37(17) of Directive 2009/72 and Article 41(17) of Directive 2009/73, it must be observed that such a determination, being in the form of a regulation, can only be challenged in proceedings before the Alkotmánybíróság (Constitutional Court), and that those proceedings must, under Article 29 of Law CLI of 2011 on the Constitutional Court, '[relate] to a fundamental constitutional issue'.

- 64 It is settled case-law, however, with regard to the right of access to a tribunal, that in order for such a body to be able to determine a dispute concerning rights and obligations arising under EU law in accordance with Article 47 of the Charter, it must have power to consider all the questions of fact and law that are relevant to the resolution of the matter before it (see, to that effect, judgment of 6 November 2012, *Otis and Others*, C-199/11, EU:C:2012:684, paragraphs 48 and 49).
- 65 In the light of the foregoing, the action before the Alkotmánybíróság (Constitutional Court) for which the Hungarian legislation provides, as a means of challenging regulations of the national regulatory authority determining network access charges, cannot, inasmuch as it is limited to a review of compliance with certain aspects of constitutional law, be regarded as a suitable mechanism within the meaning of Article 37(17) of Directive 2009/72 and Article 41(17) of Directive 2009/73.
- 66 Accordingly, the Commission's second plea must be upheld in so far as it relates to the limited possibility of challenging, before a court or tribunal, regulations of the national regulatory authority determining network access charges.
- 67 Having regard to all of the foregoing considerations, it is appropriate:
- to declare that, in failing to provide for an effective right of appeal against regulations of the national regulatory authority determining network access charges, Hungary has failed to fulfil the obligations incumbent on it pursuant to Article 37(17) of Directive 2009/72 and Article 41(17) of Directive 2009/73, and
 - to dismiss the action as to the remainder.

Costs

- 68 Under Article 138(3) of the Rules of Procedure of the Court, where each party succeeds on some and fails on other heads, the parties are to bear their own costs. In this case, since each party has succeeded on one and failed on another head, it is appropriate to order that they must each bear their own costs.

On those grounds, the Court (Ninth Chamber) hereby:

- 1. Declares that, in failing to provide for an effective right of appeal against regulations of the national regulatory authority determining network access charges, Hungary has failed to fulfil the obligations incumbent on it pursuant to Article 37(17) 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 and Article 41(17) 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;**
- 2. Dismisses the action as to the remainder;**
- 3. Orders that the European Commission and Hungary shall bear their own costs.**

[Signatures]