

Case C-366/19**Summary of the request for a preliminary ruling pursuant to Article 98(1) of the Rules of Procedure of the Court of Justice****Date lodged:**

8 May 2019

Referring court:

Sofiyski rayonen sad (Bulgaria)

Date of the decision to refer:

19 April 2019

Applicant:

‘BOSOLAR’ EOOD

Defendant:

‘CHEZ ELEKTRO BULGARIA’ AD

Subject matter of the main proceedings

Legal dispute regarding non-performance of an agreement for the purchase of electricity from renewable sources.

Subject-matter and legal basis of the request for a preliminary ruling

The request for a preliminary ruling is based on Article 267(2) of the Treaty on the Functioning of the European Union (‘the TFEU’) and relates to the compatibility with EU law of a provision of Bulgarian law which significantly changes the requirements for purchasing electricity from renewable sources for long-term power purchase agreements that have already been entered into.

Questions referred

1. Is Article 16 of the Charter of Fundamental Rights of the European Union, which governs the right to have the freedom to conduct a business in the EU legal order, to be interpreted as meaning that it precludes a national

provision such as Paragraph 18 of the Prehodni i zaklyuchitelni razporedbi na Zakona za izmenenie i dopalnenie na zakona za energetikata (Transitional and final provisions of the Law amending and supplementing the Law on energy, ‘the PZR ZIDZE’), pursuant to which, despite the fact that an agreement has been entered into and a contractual relationship exists — aspects that are subject to special provisions of the applicable law — one of the fundamental elements of the agreement (the price) is changed in favour of one of the contracting parties by legislative act?

2. Is the principle of legal certainty to be interpreted as meaning that it precludes the redefinition of legal relationships that have already been established between private legal entities or between the State and private legal entities on the basis of special provisions if such redefinition has an adverse effect on the legitimate expectations of the legal entities governed by private law and rights already acquired by them?
3. Having regard to the judgment of the Court of Justice of 10 September 2009, *Plantanol* (C-201/08, EU:C:2009:539), is the principle of the protection of legitimate expectations, as a fundamental principle of EU law, to be interpreted as meaning that it precludes a Member State from changing the applicable legal regime for the generation of electricity from renewable sources without a sufficient guarantee of predictability by prematurely withdrawing measures provided for by law which are aimed at promoting the generation of electricity from renewable sources and are linked to long-term power purchase agreements, contrary to the conditions under which private actors have made investments in the generation of electricity from renewable sources and entered into long-term power purchase agreements with State-regulated electricity suppliers?
4. Having regard to recitals 8 and 14 in the preamble to the directive, are Articles 3 and 4 of Directive 2009/28/EC on the promotion of the use of energy from renewable sources to be interpreted as meaning that they oblige Member States to guarantee legal certainty for investors in the area of generation of electricity from renewable sources, including solar energy, by means of national measures for implementing the directive?

If that question is answered in the affirmative: Is a national provision such as Paragraph 18 PZR ZIDZE, which significantly changes the preferential conditions for the purchase of electricity from renewable sources, even for long-term agreements which have already been entered into for the purchase of electricity from such sources in accordance with the originally adopted national measures for implementing the directive, permissible pursuant to Articles 3 and 4 in conjunction with recitals 8 and 14 of Directive 2009/28?

5. How is the term ‘Member State’ to be interpreted for the purposes of applying EU law at a national level? Having regard to the judgment of the Court of Justice of 12 July 1990, *Foster and Others* (C-188/89,

EU:C:1990:313) and the subsequent judgments of the Court of Justice in that area of case-law, does this term also cover the providers of a service of general economic interest (electricity supply), such as the defendant company in the pending court proceedings, which have been made responsible for providing that service under conditions governed by law pursuant to a measure adopted by a State authority and under the supervision of that authority?

Legislation and case-law of the European Union

Articles 16 and 20 of the Charter of Fundamental Rights of the European Union; recitals 8 and [14] and Articles 3 and 4 of Directive 2009/28/EC of the European Parliament and of the Council of 23 April 2009 on the promotion of the use of energy from renewable sources and amending and subsequently repealing Directives 2001/77/EC and 2003/30/EC (OJ 2009 L 140, p. 16); judgments of the Court of Justice of 10 September 2009, *Plantanol* (C-201/08, EU:C:2009:539), and of 12 July 1990, *Foster and Others* (C-188/89, EU:C:1990:313).

National provisions

Zakon za energijata ot vazobnovyaemi iztochnitsi (Law on energy from renewable sources, 'the ZEVI'):

Article 31. (1) Electricity from renewable sources shall be purchased from the public supplier or by the end suppliers at a preferential price set by the KEVR [Komisia za energiyno i vodno regulirane (Energy and Water Regulatory Commission)] and applicable at the time the energy plant for generating electricity was commissioned within the meaning of the Zakon za ustroystvo na teritoriata [(Law on spatial planning)] ...

(2) The electricity from renewable sources under paragraph 1 shall be acquired on the basis of long-term purchase agreements ...

...

(4) The price for electricity from renewable sources shall remain unchanged during the term of the purchase agreement under paragraph 2, except in the cases pursuant to Article 32(4). After the end of that term, no preferences shall be granted with regard to the prices.

(5) The public supplier or the end suppliers shall acquire the electricity generated from renewable sources under the following conditions:

1. at a preferential price for volumes of electricity up to the specific net electricity generation on the basis of which preferential prices were set in the relevant decisions of the KEVR.

...

(8) In the cases in which the investment for the construction of an energy plant for generating electricity from renewable sources is supported by funds from a national or EU support scheme, the public supplier or the respective end supplier shall purchase the electricity at the prices set by the KEVR for the individual groups, under the conditions and according to the procedure laid down in the relevant regulation pursuant to Article 36(3) of the *Zakon za energetikata* [(Law on energy)].

Article 32. (1) The KEVR shall set preferential prices for the purchase of electricity from renewable sources ...:

1. annually, by 30 June;
2. if, after conducting an analysis of the pricing elements pursuant to paragraph 2, it establishes a significant change in one of the elements.

(2) The preferential prices referred to in paragraph 1 shall be set according to the procedure in the relevant regulation under Article 36(3) of the Law on energy, whereby the nature of the renewable source, the nature of the technology, the installed capacity of the plant, the location and the manner in which the facilities are installed must be taken into account.

(3) The preferential price for electricity from renewable sources shall be set for the entire term of the purchase agreement pursuant to Article 31(2). After the end of that term, no preferences shall be granted with regard to the prices.

(4) The KEVR shall update the preferential price for electricity generated from biomass annually, by 30 June, by means of a coefficient that takes account of the evolution of the value of the pricing elements referred to in points 6, 7 and 8 of paragraph 2.

Zakon za izmenenie i dopalnenie na Zakona za energetikata (Law amending and supplementing the Law on energy, ‘the ZIDZE’)

Paragraph 18. (1) For producers of electricity generated from renewable sources by means of energy plants which were constructed using funds from a national or EU support scheme and for which applications for funds were received before the entry into force of the Law on energy from renewable sources, the prices pursuant to Article 31(8) of that law last set by a decision of the KEVR when that law entered into force shall apply.

(2) The producers under subparagraph 1 must bring the power purchase agreements that they entered into with the public supplier or the respective end supplier into conformity with the requirements of subparagraph 1 by 31 July 2015.

(3) After the expiry of the period referred to in subparagraph 2, the public supplier or the respective end supplier shall purchase the generated electricity at the prices provided for in subparagraph 1.

(4) Subparagraph 3 shall also apply in cases in which the obligation under subparagraph 2 has not been fulfilled.

(5) Article 31(4) and Article 32(3) of the Law on energy from renewable sources shall not apply to producers of electricity generated from renewable sources under subparagraph 1. No preferential prices shall be granted after the end of the term of the purchase agreement under Article 31(2) of the Law on energy from renewable sources.

Summary of the facts

- 1 The single-member company 'BOSOLAR' EOOD ('the applicant') had entered into an agreement with the public limited liability company 'CHEZ ELEKTRO BULGARIA' AD ('the defendant') on the basis of which the applicant sold electricity generated from renewable sources in a photovoltaic plant and the defendant purchased from it the entire volume of electricity generated and fed into the grid. The term of the agreement was 20 years. Pursuant to Clause 11(4) of the agreement, the electricity generated and fed into the grid was to be purchased at a preferential price that was set by the KEVR pursuant to the provisions of the ZEVI. Pursuant to Article 31(4) and Article 32(3) ZEVI, the preferential price for the electricity purchased on the basis of the agreement was to remain unchanged for the entire term of the agreement.
- 2 In accordance with the contractual provisions, the applicant generated electricity, supplied it to the defendant and issued invoices for a total sum of BGN 9 386.52. As the defendant did not pay the invoiced sum, the applicant sent it a notarially attested request for payment in respect of that sum. The defendant challenged this claim for payment by claiming that the invoices issued were not in conformity with the agreement entered into as they did not show the price at which it had to purchase the electricity generated. In so doing, the defendant cited Paragraph 18 of the Prehodni i zaklyuchitelni razporedbi na Zakona za izmenenie i dopalnenie na zakona za energetikata (Transitional and final provisions of the Law amending and supplementing the Law on energy, 'the PZR ZIDZE'), which had reduced the price at which electricity generated from renewable photovoltaic sources was to be purchased.
- 3 The applicant takes the view that Paragraph 18 PZR ZIDZE was not applicable to the contractual relationship between it and the defendant as it breached provisions of the ZEVI and EU law. It therefore brought an action before the referring court.

Principal arguments of the parties in the main proceedings

- 4 The applicant firstly asserts that Paragraph 18 PZR ZIDZE is not compatible with fundamental principles of EU law that are enshrined in the Charter of Fundamental Rights of the European Union ('the Charter'), in particular the principles under Article 16 of the Charter in relation to freedom to conduct a business and under Article 20 of the Charter in relation to equality before the law.
- 5 The applicant takes the view that, having regard to the freedom to conduct a business, the authorities entrusted with the implementation of EU law must ensure that the legitimate interests of legal entities governed by private law are safeguarded when introducing mandatory conditions under which they can exercise their activities (judgment of the Court of Justice of 27 September 1979, *SpA Eridania*, 230/78, EU:C:1979:216, paragraph 31). The applicant also points out that the freedom to conduct a business includes the freedom to choose with whom to do business (judgment of the Court of Justice of 10 July 1991, *Neu and Others*, C-90/90 and C-91/90, EU:C:1991:303, paragraph 13) and the freedom to determine the price for a specific service rendered in return for that price (judgment of the Court of Justice of 22 March 2007, *Commission v Belgium*, C-437/04, EU:C:2007:178, paragraph 51). It takes the view that freedom of contract was impaired in the present case. After the State had initially established the conditions under which legal entities governed by private law could decide to make long-term investments and establish contractual relationships with companies that provided regulated public services, it subsequently changed the legislation relating to a fundamental element of contractual relationships already in existence and therefore unilaterally changed significant conditions of the existing agreements.
- 6 The applicant asserts that the principle of equality before the law for legal entities governed by private law has also been infringed; according to that principle, comparable situations must not be treated differently and different cases must not be treated in the same way unless the difference in treatment is objectively justified. Although, in principle, the preferential price that applied at the time the energy plant for generating electricity was commissioned was applicable in relation to producers of electricity generated from renewable sources, the price that had been determined on the basis of the last decision of the KEVR before the change introduced by Paragraph 18 PZR ZIDZE was applicable in relation to producers of electricity generated from renewable sources that fell within the scope of Paragraph 18. In addition, Paragraph 18 had the effect that, for electricity generated from photovoltaic plants that engaged in an analogous economic activity, had the same installed capacity and were constructed with public funds to the same amount from the 'Zemedelie' State Agriculture Fund, different prices applied depending on whether or not those plants fell within the scope of Paragraph 18. The applicant takes the view that this difference in treatment is not justified by any objective reason and therefore infringes Article 20 of the Charter.

- 7 Furthermore, the applicant cites case-law of the Court of Justice according to which, when adopting measures to implement EU legislation, Member States must exercise their discretion in compliance with the general principles of EU law, which include the principles of legal certainty, the protection of legitimate expectations, proportionality and non-discrimination (judgment of the Court of Justice of 5 May 2011, *Kurt and Thomas Etling and Others*, C-230/09 and C-231/09, EU:C:2011:271, paragraph 74). It also points out that, according to settled case-law on the principle of legal certainty, the corollary of which was the principle of the protection of legitimate expectations, it requires that national rules involving negative consequences for individuals should be clear and precise and that their application should be predictable for those individuals (judgment of the Court of Justice of 12 December 2013, *Test Claimants in the Franked Investment Income Group Litigation*, C-362/12, EU:C:2013:834, paragraph 44).
- 8 The applicant takes the view that the wording of Paragraph 18 PZR ZIDZE does not allow for a clear picture of its precise content without a systematic consideration of several legal provisions. The applicant also asserts that the requirement of predictability of the consequences of legal provisions has not been met. The retroactive entry into force of a legal provision whereby contractual relationships already in existence were regulated differently clearly did not take account of the protection of the legitimate expectations of legal entities and could not be regarded as predictable from their perspective. The applicant also points out that, according to the case-law of the Court of Justice, the requirement of legal certainty and the principle of the protection of legitimate expectations must be observed all the more strictly in the case of rules liable to entail financial consequences, in order that those concerned may know precisely the extent of the obligations which they impose on them (see judgment of the Court of Justice of 29 April 2004, *Sudholz*, C-17/01, EU:C:2004:242, paragraph 34).
- 9 The applicant focuses in particular on the judgment of the Court of Justice of 10 September 2009, *Plantanol* (C-201/08, EU:C:2009:539), in which the Court of Justice found that the premature withdrawal of a current preferential regime for the tax treatment of biofuels and renewable fuels in deviation from the pre-announced temporal scope of that regime could constitute a breach of the principle of the protection of legitimate expectations. The applicant takes the view that it follows from this judgment that traders who commenced their activities under the originally established tax exemption scheme in favour of biofuels, and who, to that end, made costly investments, could see their interests considerably affected by the premature withdrawal of that scheme, all the more so if that withdrawal takes place suddenly and unforeseeably, without giving them the opportunity to adapt to the new legal situation.
- 10 Moreover, the applicant asserts that, for the purposes of applying EU law, the defendant company is to be equated with the State, that is to say it is to be regarded as a manifestation of the State, as, although it takes the legal form of a commercial company, it does not engage in free commercial activity in accordance with general principles, but rather provides a service of general

economic interest, for which it has been made responsible by the State within the framework of a special procedure pursuant to a measure adopted by an authority (in this case a measure adopted by the KEVR) and under the supervision of the authorities. In support of this line of argument, the applicant cites the judgment of the Court of Justice of 12 July 1990, *Foster and Others* (C-188/89, EU:C:1990:313, paragraph 20). The applicant takes the view that the defendant company therefore enjoys exceptional powers as compared with the rules applicable to relations between individuals, meaning that it is an entity against which the provisions of a directive capable of having direct effects may be enforced (judgment of the Court of Justice of 29 June 2012, *GDF Suez v Commission* (T-370/09, EU:T:2012:333, paragraph 314).

- 11 Finally, the applicant points out that the national provisions in question do not meet the fundamental requirements imposed on the Member States by Directive 2009/28, in particular in Articles 3 and 4 in conjunction with recitals 8 and 14. The applicant takes the view that, in view of the objectives of that directive, which consist in providing economic operators with the long-term stability they need to make rational, sustainable investments in the renewable energy sector and providing certainty for investors, Paragraph 18 PZR ZIDZE is not consistent with the obligations arising from Articles 3 and 4 in conjunction with recitals 8 and 14 of the aforementioned directive.
- 12 The defendant does not concur with the applicant's arguments.

Brief summary of the basis for the reference

- 13 Having regard to the facts set out above and the applicant's arguments, the referring court takes the view that it is of fundamental importance for the resolution of the case to assess whether Paragraph 18 PZR ZIDZE is compatible with EU law.