

Case C-378/19**Request for a preliminary ruling****Date lodged:**

14 May 2019

Referring court:

Ústavný súd Slovenskej republiky (Slovakia)

Date of the decision to refer:

23 January 2019

Applicant:

Prezident Slovenskej republiky

SLOVAK REPUBLIC**ORDER**

of the Ústavný súd Slovenskej republiky (Constitutional Court of the Slovak Republic)

[...]

The Ústavný súd Slovenskej republiky (Constitutional Court of the Slovak Republic), meeting *in camera* [...] in plenary session [...] in the proceedings relating to the application by the President of the Slovak Republic for the initiation of proceedings under Article 125(1)(a) of the Ústava Slovenskej republiky (Constitution of the Slovak Republic) concerning the conformity of the first sentence of Article 5(1) and the third sentence of Article 14(3) of Zákon n. 250/2012 Z.z., o regulácii v sieťových odvetviach v znení neskorších predpisov (Law No 250/2012 on regulation in the network industries, as subsequently amended) with Article 1(1) and (2) of the Constitution of the Slovak Republic, read in conjunction with Article 4(3) of the Treaty on European Union and Article 288 of the Treaty on the Functioning of the European Union,

hereby decides:

1. The following questions are referred to the Court of Justice of the European Union for a preliminary ruling:

I. Can Article 35(4) 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 be interpreted, in particular in the light of recital 33 thereof, as precluding, in a Member State, in the context of the amendment of a national measure transposing that directive, the power to nominate and dismiss the chairman of the Regulatory Authority from being withdrawn from the President of the Republic, who is directly elected by the citizens, and conferred instead on the Government, with the result that the legal situation which existed prior to the transposition of the directive is restored? **[Or. 2]**

II. Is it possible to interpret Article 35(5) of Directive 2009/72/EC ..., in particular in the light of recital 34 thereof, as precluding a rule of national law which, in order to ensure defence of the public interest, permits ministers to take part in the tariff regulation procedure at the Regulatory Authority?

[...] [stay of proceedings] [...]

Grounds:

I.

Proceedings before the Constitutional Court of the Slovak Republic

The application by the President of the Slovak Republic ('the President') for the initiation of proceedings under Article 125(1)(a) of the Constitution of the Slovak Republic ('the 'Constitution') concerning the conformity of the first sentence of Article 5(1) and of the third sentence of Article 14(3) of Zákon n. 250/2012 Z.z., o regulácii v sieťových odvetviach v znení neskorších predpisov (Law No 250/2012 on regulation in the network industries, as subsequently amended; 'the Law on regulation in the network industries') with Article 1(1) and (2) of the Constitution of the Slovak Republic, read in conjunction with Article 4(3) of the Treaty on European Union and Article 288 of the Treaty on the Functioning of the European Union, was lodged with the Constitutional Court of the Slovak Republic ('the Constitutional Court') on 16 October 2017.

The application by the President is based on the assumption that the contested provisions of the Law on regulation in the network industries constitute an incorrect transposition 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 ('Directive 2009/72') and of Directive 2009/73/EC of the European Parliament and of the Council of 13 July 2009 concerning common rules for the internal market in natural gas and repealing Directive 2003/55/EC ('Directive 2009/73'), with the result that they are contrary to Article 4(3) of the Treaty on European Union and to Article 288 of the Treaty on the Functioning of the European Union and, therefore, in parallel, also with Article 1(1) and (2) of the Constitution. **[Or. 3]**

II.

The contested provisions of national law

The Law on regulation in the network industries is the law which transposes Directives 2009/72 and 2009/73 into national law.

The Law on regulation in the network industries was amended by Zákon n. 164/2017 Z.z., ktorým sa mení a dopĺňa zákon č. 250/2012 Z. z. o regulácii v sieťových odvetviach v znení neskorších predpisov (Law No 164/2017 amending and supplementing Law No 250/2012 on regulation in the network industries; ‘Law No 164/2017’).

The contested provision of the first sentence of Article 5(1) of the Law on regulation in the network industries, prior to amendment by Law No 164/2017, was worded as follows:

‘The Regulatory Authority [also ‘the ‘Authority’] shall be headed by the chairman, appointed and dismissed by the President of the Slovak Republic on a proposal from the Government of the Slovak Republic (‘the ‘Government’).’

Following the amendment by Law No 164/2017 the contested provision of the first sentence of Article 5(1) of the Law on regulation in the network industries reads as follows:

‘The Regulatory Authority shall be headed by the chairman, appointed and dismissed by the Government of the Slovak Republic (‘the ‘Government’).’

The explanatory memorandum to Law No 164/2017 concerning the amendment of the wording of the first sentence of Article 5(1) of the Law on regulation in the network industries states as follows:

‘The manner in which the position of chairperson of the Regulatory Authority is conferred is to be changed. Under current law, the chairman is appointed and dismissed by the President of the Slovak Republic on a proposal from the Government of the Slovak Republic. It is proposed that the chairperson be appointed by the Government of the Slovak Republic. This step reflects the actual responsibility of the Government of the Slovak Republic in the energy regulation sector, without prejudice to the independence of the Authority in the context of further changes. The Government of the Slovak Republic bears full responsibility for energy policy in the Slovak Republic and the powers of the President of the Republic in this sector are very limited. Therefore, it is appropriate [**Or. 4**] and logical that the power to appoint and dismiss the chairman of the Authority should be vested in the Government of the Slovak Republic’.

The contested provision of Article 14(3) of the Law on regulation in the network industries, prior to amendment by Law No 164/2017, was worded as follows:

‘The regulated person who has presented a tariff proposal shall be a party to the tariff regulation procedure. If the tariff regulation procedure is initiated of the Authority’s own motion, the regulated person whose tariffs the Authority intends to regulate shall be a party to the procedure.’

Following the amendment by Law No 164/2017 the contested provision of Article 14(3) of the Law on regulation in the network industries is worded as follows:

‘The regulated person who has presented a tariff proposal shall be a party to the tariff regulation procedure. If the tariff regulation procedure is initiated of the Authority’s own motion, the regulated person whose tariffs the Authority intends to regulate shall be a party to the procedure. The Ministry [of the Economy of the Slovak Republic] shall also be a party to the tariff regulation procedure where there is a tariff regulation procedure pursuant to Article 11(1)(d) and Article 11(1)(e) for regional distribution system operators, and Article 11(2)(c) and Article 11(2)(d) for regional distribution system operators to which more than 100 000 delivery points are connected, or the Ministry of the Environment of the Slovak Republic shall also be a party thereto where there is a tariff regulation procedure pursuant to Article 11(4)(a) to (c)’.

The explanatory memorandum to Law No 164/2017 concerning the amendment to Article 14(3) of the Law on regulation in the network industries states as follows:

‘The Ministry of the Economy of the Slovak Republic and the Ministry of the Environment of the Slovak Republic shall be granted, in certain tariff procedures, the procedural status of a party to the procedure, thereby providing them, in those tariff procedures, with the procedural arrangements which they require for consistent protection of the public interest’. [Or. 5]

III

The need for a reply to the questions referred

The reason for the alleged inconsistency of the contested national law with the Treaty on European Union and the Treaty on the Functioning of the European Union is the failure to fulfil the obligation correctly to transpose Directives 2009/72 and 2009/73 as regards the need to ensure the independence of the regulatory authority laid down in Article 35(4) of Directive 2009/72 (or Article 39(4) of Directive 2009/73) and Article 35(5) of Directive 2009/72 (or Article 39(5) of Directive 2009/73).

Thus, an essential requirement for the decision of the Constitutional Court on the application by the President is the assessment as to whether the Law on regulation in the network industries, in the version resulting from amending Law No 164/2017, correctly transposes Directives 2009/72 and 2009/73. In order to make a proper assessment of that matter, the Constitutional Court requires an

answer to the questions referred for a preliminary ruling, seeking an interpretation of the notion of ‘independence’ of the regulatory authority.

In order to simplify matters, the wording of the questions refers only to the interpretation of Directive 2009/72. Given the identical rules on independence in Directives 2009/72 and 2009/73, the replies of the Court of Justice of the European Union (‘the Court of Justice’) should also apply to Directive 2009/73.

As regards the notion of ‘independence’, the Court of Justice has already ruled in its case-law that, in relation to a public body, that term normally means a status which ensures that the body concerned can act completely freely, without taking any instructions or being put under any pressure (judgment of the Court of 9 March 2010, *Commission v Germany*, C-518/07, EU:C:2010:125, paragraph 18).

In his application the President has identified two instances of interference with the independence of the Regulatory Authority attributable to Law No 164/2017. The first arises from the amendment of the authority to appoint and dismiss the chairman of the Regulatory Authority, which is transferred from the President, who is [Or. 6] directly elected by the citizens, to the Government. The second lies in the inclusion, in the list of parties to the tariff procedure before the Regulatory Authority, of ministers who, in that procedure, are to defend the public interest.

The Government of the Slovak Republic states in its observations, submitted to the Constitutional Court in the proceedings, that the transfer from the President to the Government of the authority to appoint and dismiss the chairman of the Regulatory Authority cannot undermine the independence of that Authority since the Law on regulation in the network industries contains a whole set of other guarantees safeguarding the independence of the Regulatory Authority which were unaffected by the amendment resulting from Law No 164/2017.

Nonetheless, as a consequence of the amendment to the Law on regulation in the network industries by Law No 164/2017 there are doubts as to whether Directive 2009/72 has been transposed correctly. These doubts relate to the objective pursued by the directive, which is (as recital 33 thereof makes clear) to contribute to strengthening the independence of the regulatory authority, in particular on the part of the government of the Member State. From this point of view, it does not seem possible to consider the amendments introduced by Law No 164/2017 to be measures designed to strengthen the independence of the regulatory authority on the part the Government. In that regard, there is no doubt that the approval of the original wording of the Law on regulation in the network industries strengthened the independence of the Regulatory Authority in comparison with the previous legislation in the form of *Zákon č 276/2001 Z.z. o regulácii v sieťových odvetviach a o zmene a doplnení niektorých zákonov* (Law No 276/2001 on regulation in the network industries and amending and supplementing other laws) since the approval of the original wording of the Law on regulation in the network industries resulted in the power to appoint and dismiss the chairman of the

Regulatory Authority being transferred from the Government to the President. However, as a result of the contested amendment to the Law on regulation in the network industries by Law No 164/2017, the legal situation relating to the appointment and dismissal of the chairman of the Regulation Authority has returned to what it was prior to the transposition of Directive 2009/72 in that that power is conferred once again on the Government.

Similar conclusions obtain as regards providing for the possibility of certain ministers to be party to the tariff procedure before the Regulatory Authority. The law of the period preceding the transposition of Directive 2009/72, in the form of abovementioned Law [Or. 7] No 276/2001 on regulation in the network industries and amending and supplementing certain other laws, provided for that possibility in Article 14. However, as part of the transposition of Directive 2009/72, effected through the Law on regulation in the network industries, that possibility was excluded, but after the amendment of the latter law by Law No 164/2017 ministers are once again permitted to be party to the tariff procedure before the Regulatory Authority. From this point of view, too, the amendment to the Law on regulation in the network industries by Law No 164/2017 does not appear to contribute to strengthening the Regulatory Authority's independence in relation to the legal situation which existed at the time when Directive 2009/72 was transposed (by the approval of the original wording of the Law on regulation in the network industries), as is required however, in the light of its objective, by Directive 2009/72.

The Court of Justice of the European Union has jurisdiction to give a preliminary ruling under Article 267 of the Treaty on the Functioning of the European Union on:

- (a) the interpretation of the Treaties;
- (b) the validity and interpretation of acts of the institutions, bodies, offices or agencies of the European Union.

Where any such question is raised in a case pending before a court or tribunal of a Member State against whose decisions there is no judicial remedy under national law, that court or tribunal is required to bring the matter before the Court of Justice.

In the light of the grounds set out above, the Constitutional Court has decided to refer to the Court of Justice questions for a preliminary ruling under Article 267 of the Treaty on the Functioning of the European Union (set out in paragraph 1 of the operative part of the present order).

[...] [Or. 8] [citing of the rules of procedure regarding the staying of proceedings before the Constitutional Court] [...]