Case C-683/19

Summary of the request for a preliminary ruling under Article 98(1) of the Rules of Procedure of the Court of Justice

Date lodged:

16 September 2019

Referring court:

Tribunal Supremo (Supreme Court, Spain)

Date of the decision to refer:

9 July 2019

Applicant:

Viesgo Infraestructuras Energéticas, S.A.

Defendants:

Administración del Estado

Iberdrola, S.A.

Gas Natural SDG, S.A.

CIDE, Asociación de Distribuidores de Energía Eléctrica

Hidroeléctrica del Cantábrico, S.A.

Subject matter of the main proceedings

Administrative-law proceedings brought against Real Decreto 968/2014, de 21 de noviembre, por el que se desarrolla la metodología para la fijación de los porcentajes de reparto de las cantidades a financiar relativas al bono social (Royal Decree No 968 of 21 November 2014 laying down the methodology for setting the percentages for apportionment of the sums to be financed for the '*bono social*' [regulated discount for electricity for certain vulnerable consumers, 'the regulated discount'] ('Royal Decree No 968/2014').

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

This request for a preliminary ruling concerns the interpretation of 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 ('Directive 2009/72'). It seeks to determine whether the national legislation governing the regulated discount is compatible with EU law as regards the public service obligations of electricity undertakings.

Questions referred for a preliminary ruling

(1) In accordance with the case-law established by the Court of Justice, in its judgments of 20 April 2010 (Case C-265/08, *Federutility*) and of 7 September 2016 (Case C-121/15, *ANODE*) amongst others, is national legislation — such as that established in Article 45(4) of Ley 24/2013, de 26 de diciembre (Law No 24 of 26 December 2013) and subsequently implemented by Articles 2 and 3 of Real Decreto 968/2014, de 21 de noviembre (Royal Decree No 968 of 21 November 2014) – under which the financing of the '*bono social*' [regulated discount for electricity for certain vulnerable consumers; 'the regulated discount'] falls on certain actors in the electricity system, namely the parent companies of company groups or, where applicable, companies that simultaneously carry on electricity production, distribution and retail activities, compatible with the requirements laid down in Article 3(2) of Directive 2009/72/EC, where some of those actors carry very little weight in the sector as a whole, and where, by contrast, other entities or company groups that may be in a better position to bear that cost, either due to their turnover, relative size in a business sector or because they carry on two of those activities simultaneously on an integrated basis, are exempted from that burden?

(2) Is national legislation according to which the obligation to finance the regulated discount is not established on an exceptional basis or limited in time, but indefinitely and with no refund or compensatory measure whatsoever, compatible with the requirement of proportionality established in Article 3(2) of Directive 2009/72/EC?

Provisions of EU law relied upon

Article 3(2) of Directive 2009/72.

Provisions of national law relied upon

Article 45(4) of Ley 24/2013, de 26 de diciembre, del Sector Eléctrico (Law No 24 of 26 December 2013 on the Electricity Sector, 'Law No 24/2013').

Articles 2 and 3 of Royal Decree No 968/2014, which implement the arrangements for financing the regulated discount laid down by Law No 24/2013.

Orden IET/350/2014, de 7 de marzo, por la que se fijan los porcentajes de reparto de las cantidades a financiar relativas al bono social correspondientes a 2014 (Order No IET/350 of 7 March 2014 setting the percentages for apportionment of the sums to be financed for the regulated discount for 2014).

Orden IET/1451/2016, de 8 de septiembre, por la que se aprueban los porcentajes de reparto de las cantidades a financiar relativas al bono social correspondientes a 2016 (Order No IET/1451 of 8 September 2016 approving the percentages for apportionment of the sums to be financed for the regulated discount for 2016).

Brief description of the facts and the main proceedings

1 Viesgo Infraestructuras Energéticas, S.A. (formerly known as E.ON España, S.L.U.) brought administrative-law proceedings before the referring court against Royal Decree No 968/2014, understanding that the legal arrangements for financing the regulated discount are incompatible with Directive 2009/72.

2 By judgment of 24 October 2016, the referring court upheld the action, declaring the arrangements for financing the regulated discount under Article 45(4) of Law No 24/2013 to be inapplicable and annulled Articles 2 and 3 of Royal Decree No 968/2014, on the ground that the national legislation in question is incompatible with Directive 2009/72.

3 The Administración del Estado (Spanish Administration), as defendant, brought a *recurso de amparo* (appeal for the protection of fundamental rights) before the Tribunal Constitucional (Constitutional Court, Spain) against that judgment, understanding that, by declaring the national legislation to be inapplicable without referring a question to the Court of Justice of the European Union ('the Court of Justice') for a preliminary ruling, the referring court had infringed the fundamental right to a public trial with all the safeguards.

4 By judgment of 26 March 2019, the Tribunal Constitucional (Constitutional Court) held that the right to a public trial with all the safeguards had been infringed and, accordingly, allowed the appeal for the protection of fundamental rights and set aside the judgment under appeal, ordering that the situation should revert to that existing prior to delivery of the judgment, and the referring court therefore gave the parties a new time limit in which to make submissions and made the present request for a preliminary ruling.

Fundamental arguments of the parties in the main proceedings

5 The applicant submits that the national legislation governing the financing of the regulated discount for vulnerable consumers is incompatible with Directive

2009/72 in so far as, in addition to exempting electricity transmission, it causes the cost of the regulated discount to fall entirely on entities or company groups that simultaneously carry on the other three activities in the electricity system – generation, distribution and retail – and that are vertically integrated groups, and, furthermore, that it infringes the principle of proportionality. In the applicant's view, it is not necessary to refer a question for a preliminary ruling.

6 In order to contest the action, the Spanish Administration contends that the reason why financing of the regulated discount has been made to fall on vertically integrated groups is not because of their greater economic capacity and solvency, but the vertical integration itself; this is because vertical integration enables the burden to be placed on those undertakings which, because they carry on retail activity, which is directly related to the subject matter of the measure, are on account of that vertical integration in a better position to neutralise and minimise its impact. A company group that carries on various activities simultaneously in the electricity sector has, amongst other matters, more in-depth insight into the sector, certain economies of scale and the opportunity for intragroup contracts that might mitigate the impact of price fluctuations. The Spanish Administration applies for a question to be referred for a preliminary ruling on whether Article 45(4) of Law No 24/2013 and its implementing regulations are compatible with Article 3(2) of Directive 2009/72.

Brief description of the grounds for the request for a preliminary ruling

7 Since its origins, the regulated discount has been conceived as a distinctly social benefit (a public service obligation) intended to protect certain electricity consumers who are on the tariff of last resort and have particular social, consumption and purchasing power characteristics, in relation to the cost of electricity for their habitual residence.

8 It is governed by Law No 24/2013, Article 45 of which, entitled 'Vulnerable consumers', provides, in particular, that electricity consumers having the social, consumption and purchasing power characteristics laid down by regulation will be regarded as vulnerable consumers in relation to their habitual residence. The regulated discount will be applied to vulnerable consumers as so defined, who are in all cases natural persons, on the corresponding invoices. Article 45(4) reads as follows:

'The "regulated discount" will be treated as a public service obligation in accordance with [Directive 2009/72] and will be borne by the parent companies of company groups or, where applicable, companies that simultaneously carry on electricity production, distribution and retail activities.

The apportionment percentage of the sums to be financed will be calculated, for each company group, as the relation between, on the one hand, the total of the annual average number of supplies connected to the distribution companies' distribution networks and the number of customers of the retailers held by the

group, and, on the other, the total of all the average annual supply and customer values of all the company groups that are to be taken into account for the purposes of that apportionment.

That apportionment percentage will be calculated annually in accordance with the procedure and conditions established by regulation. For that purpose, the information relating to the previous annual period for the annual averages of the number of supplies connected to the distribution companies' distribution networks and of the number of the retailers' customers, and a list of the company groups or, as applicable, companies, that satisfy the requirements laid down in the first subparagraph of this paragraph, will be published [online] in November each year.

... before 1 December each year the proposed financing percentages to be set for each of the parent companies [will be sent], and the Ministry of Industry, Energy and Tourism will be responsible for approving those percentages by order to be published in the *Boletín Oficial del Estado* [Gazette].

…'.

9 Law No 24/2013 contains no list of the undertakings or company groups that must bear the cost of financing the regulated discount. Those undertakings have been identified by successive ministerial orders (Order No IET/350 of 7 March 2014 and Order No IET/1451 of 8 September 2016), issued under the aforementioned Law and Royal Decree No 968/2014, which set the apportionment percentages in such a way that significant percentages were allocated only to four entities or company groups, which had to bear in total nearly 96.64 % of the cost, whilst the remaining 23 undertakings on the list were allocated a total of only around 3.36 %. In order to justify choosing those arrangements for financing the regulated discount, that is to say, making the cost of the regulated discount fall on the parent companies of companies or company groups that carry on electricity production, distribution and retail activities and are vertically integrated groups, the legislature explained that imposing that obligation on those parent companies makes it possible, even if only indirectly, to share that burden among the main business activities involved in the electricity sector, and that exempting electricity transmission was justified because it is an activity carried on under statutory monopoly arrangements that prevent the carrier from recovering from the market any cost arising from the regulated discount.

10 However, it is uncertain whether those provisions governing the financing of the regulated discount contained in Article 45(4) of Law No 24/2013 and implemented in Articles 2 and 3 of Royal Decree No 968/2014, comply with Article 3(2) of Directive 2009/72, according to which public service obligations, which include the regulated discount, 'shall be clearly defined, transparent, non-discriminatory, verifiable and shall guarantee equality of access for electricity undertakings of the Community to national consumers.' The referring court is of the view that neither the national legislation under analysis nor the arguments advanced by the Spanish Administration have properly justified why the financing

of the regulated discount is made to fall on particular actors in the electricity system, some of which carry very little weight in the sector as a whole, whilst in contrast exempting from that burden other entities or company groups that may be in a better position to bear that cost, either due to their turnover or their relative size in any of the business sectors or because they simultaneously carry on two of those activities on an integrated basis. As regards the principle of proportionality, the referring court finds that the obligation in question to finance the regulated discount is established not on an exceptional basis or limited in time, but indefinitely and with no refund or compensatory measure whatsoever.

11 Furthermore, even though the Spanish Administration itself concedes that integrating two of the activities in the electricity sector — retail and electricity generation — fosters synergies and economies of scale that benefit the undertakings in question, the arrangements established do not require entities or company groups to finance the regulated discount where they simultaneously carry on those two activities, but only where they also carry on distribution activity.

12 For the reasons set out, the referring court found initially that the national legislation at issue is incompatible with Directive 2009/72 and that the national law should be disapplied, in view of the primacy of EU law. It held that it was not necessary to refer a question to the Court of Justice for a preliminary ruling, in accordance with that Court's *acte clair* doctrine (see judgments of 27 March 1963, *Da Costa and Others*, 28/62 to 30/62, EU:C:1963:6; of 6 October 1982, *Cilfit and Others*, 283/81, EU:C:1982:335; of 19 November 1991, *Francovich and Others*, C-6 and C-9/90, EU:C:1991:428; and of 19 January 2010, *Kücükdeveci*, C-555/07, EU:C:2010:21) in the light of the judgments of 20 April 2010, *Federutility*, C-265/08, EU:C:2010:205, and, in particular, of 7 September 2016, *ANODE*, C-121/15, EU:C:2016:637. The case-law that the Court of Justice laid down in those judgments can indeed be fully transposed to the present case, bearing in mind that it concerns requirements to impose public service obligations in a regulated sector, rather than the substantive regulation of electricity or gas. It is, therefore, irrelevant that the directives at issue are different, in particular since on the point in question their wording is identical.

13 The primacy of Community law encompasses not only the wording of the Community provision, but any interpretation of it by the Court of Justice, since that interpretation prevails over any other that may be given to the national provisions intended to implement a directive.

14 The Tribunal Supremo finds that, as a supreme court, it is incumbent upon it to interpret at last instance both the national law on the electricity system and EU law in the same field, as an area of the ordinary law unrelated to the sphere of constitutional safeguards that is reserved to the Tribunal Constitucional (Constitutional Court), and that, therefore, it is for the Tribunal Supremo (Supreme Court) to determine whether the Spanish legislation is contrary to the aforementioned directive and whether under the case-law of the Court of Justice it

is relieved from the requirement to refer a question for a preliminary ruling in the case at issue. It therefore delivered a judgment upholding the action brought by Viesgo Infraestructuras Energéticas, S.A. and declaring the arrangements at issue for financing the regulated discount inapplicable.

15 The Spanish Administration brought an appeal for the protection of fundamental rights before the Tribunal Constitucional (Constitutional Court), arguing that fundamental procedural rights had been infringed because the national provision had been disapplied without a question having been referred to the Court of Justice for a preliminary ruling. The Tribunal Constitucional (Constitutional Court) allowed the appeal, annulled the referring court's judgment of 24 October 2016 and ordered that the situation should revert to that existing prior to delivery of the judgment, so that the referring court could 'make a new decision compliant with the fundamental right that had been infringed'.

16 In its judgment, the Tribunal Constitucional (Constitutional Court) addresses whether or not the judgments put before it amounted to *acte clair*, thereby, in relation to the present case, allowing a reference for a preliminary ruling to be dispensed with. It asserts, accordingly, that the cases that the Court of Justice decided in *Federutility* and *ANODE* can be distinguished from the case examined in the judgment of the Tribunal Supremo (Supreme Court) since, first, the provisions of the European legislation taken into account are to be found in different directives: the judgment in *Federutility* interprets Directive 2003/55/EC of 26 June 2003 concerning common rules for the internal market in natural gas, and the judgment in *ANODE* interprets Directive 2009/73/EC of 13 July 2009 concerning common rules for the internal market in natural gas.

17 The Tribunal Constitucional (Constitutional Court) held that 'even if the provision interpreted by the Court of Justice of the European Union had the same content both in the electricity sector directive and in the gas sector directive, the cases concerned neither the same directives nor the same sector, and nor were the issues addressed by the *Federutility* and *ANODE* judgments respectively and by the judgment under appeal exactly the same'. The Tribunal Constitucional (Constitutional Court) is therefore of the view that there is no identical question raised in a case similar to the present case, and that there is therefore no *acte clair* relieving the Tribunal Supremo (Supreme Court) of the requirement to refer the question for a preliminary ruling. It therefore finds that the right to a trial with all the safeguards has been infringed, since a national provision was disapplied because it was found to be incompatible with Directive 2009/72, without a preliminary ruling having previously been sought from the Court of Justice.

18 Ultimately, having stated in its judgment that it was not for it to decide whether or not the [national] legislation that had been disapplied was at variance with the directive in question, the Tribunal Constitucional (Constitutional Court) considered the matter of whether or not there was *acte clair* and ruled on the meaning and rationale of the directives at issue in comparison with the national legislation that had been disapplied.

19 The Tribunal Constitucional (Constitutional Court) harbours a concern that by virtue of the principle of the primacy of EU law a system of decentralised review is being set up in which the courts can disapply a national law without going to the Tribunal Constitucional (Constitutional Court) or referring a question to the Court of Justice for a preliminary ruling, and it therefore elects to review the work of interpreting and applying EU law, which is the task of the national courts, differently and more intensely where the national court disapplies a national law on the ground that it is contrary to EU law, than in cases where the national provision is found to be in conformity with EU law.

20 As can likewise be seen, in particular, from the Tribunal Constitucional's judgments No 78 of 20 October 2010, No 232 of 5 November 2015 and No 37 of 26 March 2019, where the Tribunal Supremo (Supreme Court) ha[d] reached the conclusion that the national provision should be disapplied under the principle of primacy and that no referral for a preliminary ruling was required, the Tribunal Constitucional (Constitutional Court) has accordingly revised the interpretation of Community provisions by the Tribunal Supremo (Supreme Court) and its assessment of whether the situations are similar in the national case and in the case resolved by the Court of Justice.

21 In any event, by judgment of 7 February 2012, the referring court had already found the earlier legislation governing the same area to be inapplicable, because it was contrary to Community law, and the Tribunal Constitucional (Constitutional Court) ruled that the appeal for the protection of fundamental rights brought against that judgment was inadmissible. On that occasion, the referring court relied on the judgment in *Federutility* (C-265/08).

22 For all the reasons set out above, the referring court — finding itself bound by the judgment of the Tribunal Constitucional (Constitutional Court) and in the light of the parties' right to effective judicial protection and a procedure without undue delays — as the highest national court with jurisdiction over the substantive issue of whether or not there is *acte clair* in the regulated field of the electricity sector, now disregards its earlier view and decides to refer a question to the Court of Justice for a preliminary ruling. It is, therefore, necessary to enquire whether the arrangements for financing the regulated discount established in Law No 24/2013 and subsequently implemented in Articles 2 and 3 of Royal Decree No 968/2014 are compatible with the requirement laid down in Article 3(2) of Directive 2009/72, according to which public service obligations must be clearly defined, transparent, non-discriminatory and verifiable and must guarantee equality of access for electricity undertakings of the Community to national consumers.